

CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT AND PROTOCOL ON MATTERS SPECIFIC TO
AIRCRAFT EQUIPMENT

JULY 16, 2004.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 108-10]

The Committee on Foreign Relations, to which was referred the Convention on International Interests in Mobile Equipment and Protocol on Matters Specific to Aircraft Equipment (Treaty Doc. 108-10) (hereafter “Convention” and “Protocol”), signed at Cape Town on November 16, 2001, having considered the same, reports favorably thereon and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

The Convention and accompanying Protocol establish an international legal framework for the creation, priority, and enforcement of security and leasing interests in mobile equipment—specifically high value aircraft equipment (airframes, aircraft engines, and helicopters)—and create a worldwide international registry where such interests can be registered.

II. BACKGROUND

The Convention and Protocol were negotiated over a five-year period under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (ICAO). Work on the Convention was completed in November 2001, and the documents were opened for signature at a Diplomatic Conference held at Cape Town, South Africa, on November 16, 2001. The United States signed the Convention in Rome on May 9, 2003.

The Convention is designed to promote the use modern financing practices in international transactions for the sale and lease of high-value mobile equipment. The Convention contains rules for establishing recognized rights associated with international financing and leasing transactions that are similar to the rules and rights commonly used in the United States under certain articles of the Uniform Commercial Code. The Convention also provides for a central, international registry through which various rights and priorities in covered property may be determined. Provisions with respect to remedies and procedures for enforcing rights further add to the predictability of international transactions and to the autonomy of the parties to them. The Convention does not affect U.S. export and technology controls or regulatory procedures relating to national security that may apply to items at issue in such transactions.

While the Convention creates a framework for transactions in three categories of equipment—aircraft equipment, railway rolling stock, and space assets—the Convention does not come into force with respect to any specific category absent a separate protocol dealing with that category. To this end, the Convention is accompanied by the Aircraft Protocol, which contains rules particular to financing practice for airframes, aircraft engines, and helicopters.

By facilitating international transactions in modern equipment, the Convention is expected to lead to broad and mutual economic benefits for all interested parties and to the expanded use of newer, safer technologies.

III. SUMMARY OF KEY PROVISIONS OF THE CONVENTION AND PROTOCOL

A detailed article-by-article discussion of the Convention and Protocol may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 108–10. A summary of the key provisions of the Convention and Protocol is set forth below.

Creation and Registration of Interests

The Convention establishes rules that would apply to transactions for the financing of large mobile equipment between creditors and debtors in countries that are party to the Convention. Articles 2 and 7 provide for the creation of an international interest held by a creditor in an item of large mobile equipment. Such interests are used to provide security to creditors lending money to finance the purchase or lease of equipment. Article 16 establishes an International Registry where such interests, and transactions related to such interests (such as assignments or subordinations), may be registered. Chapter V of the Convention addresses other issues related to the registration system, including requirements for registration of international interests, validity of registrations, and provisions for the public to search information relating to registered interests.

Creditors' Remedies for Default

The Convention establishes remedies available to creditors in the event of a default on an agreement covered by the Convention. Under Article 8, subject to any agreement between the parties to the transaction, these remedies may include taking possession of the item in which the creditor has an interest, selling or granting a lease of the item, and collecting or receiving any income or profits arising from the management or use of the object. Such remedies must be exercised in a commercially reasonable manner. Article 13 provides for additional remedies to preserve the interests of a creditor who adduces evidence of a default by a debtor, pending a final determination of the creditor's claim.

Priority and Assignment

Article 29 of the Convention contains rules to establish priorities among multiple interests in the same item. Articles 31 and 32 establish requirements for the assignment of interests under the Convention and the effect of such assignments.

Aircraft Protocol

The Aircraft Protocol provides for the Convention's application to transactions related to airframes, aircraft engines, and helicopters. It provides additional remedies to creditors in the event of default beyond those contained in the Convention, including the right to procure de-registration of an aircraft by relevant aviation regulation authorities, and the right to procure the physical transfer of an aircraft from the territory in which it is situated. It also contains additional provisions for remedies in the event of a debtor's insolvency.

VI. IMPLEMENTING LEGISLATION

No implementing legislation is required for the Convention or Protocol, except for technical amendments to certain authorities of the Federal Aviation Administration relating to the filing of interests in registries through the FAA. The Administration submitted proposed legislation on November 18, 2003, and this legislation is

currently under consideration in both the Senate and the House of Representatives.

As noted in the Administration's response to a question for the record from Senator Biden, the Convention and Protocol provide for private rights of action based on their provisions in the courts of States parties to them.

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the Convention and Protocol on April 1, 2004 at which it heard testimony from the Departments of State and Transportation (a transcript of this hearing and questions and answers for the record may be found in the appendix to this report). On June 22, 2004, the Committee considered the Convention and Protocol and ordered them favorably reported by a voice vote, with the recommendation that the Senate give its advice and consent to their ratification, subject to declarations contained in the resolution of advice and consent.

VI. COMMITTEE RECOMMENDATION AND COMMENTS

On balance, the Committee on Foreign Relations believes that the proposed Convention and Protocol are in the interest of the United States and urges that the Senate act promptly to give advice and consent to their ratification, subject to the declarations contained in the resolution of advice and consent to ratification. The Committee notes the support for the Convention and Protocol expressed by the U.S. aircraft manufacturing industry, financial services entities involved in aircraft financing, the American Bar Association, and the Air Transport Association.

The proposed declarations to the Convention are designed to preserve current U.S. practices with respect to priority of non-consensual rights arising by law, to preserve the ability of the U.S. Government and other specified entities to detain aircraft in order to secure amounts owing in connection with the provision of certain public services, and to permit the exercise of certain remedies without the leave of the court, consistent with U.S. law. The first three proposed declarations to the Protocol provide that the United States will apply provisions of the Protocol addressing contractual choice of law, insolvency case assistance, and requests for the deregistration and export of aircraft. The fourth declaration provides for the designation of the Federal Aviation Administration as the exclusive entry point in the United States entitled to authorize electronic registrations under the Protocol relating to airframes pertaining to U.S. registered aircraft and helicopters, and as the non-exclusive point authorizing electronic registrations relating to engines.

VII. TEXT OF RESOLUTION OF RATIFICATION

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

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO DECLARATIONS.

The Senate advises and consents to the ratification of the Convention on International Interests in Mobile Equipment (hereafter in this resolution referred to as the “Convention”) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (hereafter in this resolution referred to as the “Protocol”), concluded at Cape Town, South Africa, November 16, 2001 (T. Doc. 108– 10), subject to the declarations of section 2 and section 3.

SEC. 2. DECLARATIONS RELATIVE TO THE CONVENTION.

The advice and consent of the Senate under section 1 is subject to the following declarations relative to the Convention:

(1) Pursuant to Article 39 of the Convention—

(A) all categories of non-consensual rights or interests which under United States law have and will in the future have priority over an interest in an object equivalent to that of the holder of a registered international interest shall to that extent have priority over a registered international interest, whether in or outside insolvency proceedings; and

(B) nothing in the Convention shall affect the right of the United States or that of any entity thereof, any inter-governmental organization in which the United States is a member State, or other private provider of public services in the United States to arrest or detain an aircraft object under United States law for payment of amounts owed to any such entity, organization, or provider directly relating to the services provided by it in respect of that object or another object.

(2) Pursuant to Article 54 of the Convention, all remedies available to the creditor under the Convention or Protocol which are not expressed under the relevant provision thereof to require application to the court may be exercised, in accordance with United States law, without leave of the court.

SEC. 3. DECLARATIONS RELATIVE TO THE PROTOCOL.

The advice and consent of the Senate under section 1 is subject to the following declarations relative to the Protocol:

(1) Pursuant to Article XXX of the Protocol—

(A) the United States will apply Article VIII of the Protocol;

(B) the United States will apply Article XII of the Protocol; and

(C) the United States will apply Article XIII of the Protocol.

(2)(A) Pursuant to Article XIX of the Protocol—

(i) the Federal Aviation Administration, acting through its Aircraft Registry, FAA Aeronautical Center, 6400 South

MacArthur Boulevard, Oklahoma City, Oklahoma 73125, shall be the entry point at which information required for registration in respect of airframes or helicopters pertaining to civil aircraft of the United States or aircraft to become a civil aircraft of the United States shall be transmitted, and in respect of aircraft engines may be transmitted, to the International Registry; and

(ii) the requirements of chapter 441 of title 49, United States Code, and part 49 of title 14, Code of Federal Regulations, shall be fully complied with before such information is transmitted at the Federal Aviation Administration to the International Registry.

(B) For purposes of the designation in subparagraph (A)(i) and the requirements in subparagraph (A)(ii), information is transmitted at the Federal Aviation Administration in accordance with procedures established under United States law.

(C) In this paragraph, the term “civil aircraft of the United States” has the meaning given that term in section 40102(17) of title 49, United States Code.

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ECONOMIC TREATIES

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THURSDAY, APRIL 1, 2004

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

The committee met, pursuant to notice, at 9:30 a.m. in Room 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. Today, the Foreign Relations Committee will review various economic treaties, including the Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment. These agreements are better known as the Cape Town Convention, because they were negotiated in Cape Town, South Africa in 2001.

In addition, we will address protocols amending United States Bilateral Investment Treaties with eight Eastern European nations. All of the agreements pending before us today are significant in that they promote trade and economic cooperation.

Economic treaties and investment agreements are important tools in generating new commercial opportunities for United States businesses and in advancing United States foreign policy. Cooperation on the commercial front enhances our ability to work with other nations on security and political matters. Our committee is

committed to reviewing expeditiously the economic agreements negotiated by the administration.

The Cape Town Convention will facilitate purchasing and leasing of large commercial aircraft and aircraft engines by foreign entities that otherwise might be unable to arrange sufficient financing. Aircraft customers in foreign countries that implement the Convention will be eligible for lower cost loans from the United States Export-Import Bank when they seek to buy or to lease United States commercial aircraft. These incentives to foreign customers will help open new markets to United States aircraft manufacturers.

Simultaneously, the Convention creates internationally recognized finance rights and enforceable remedies that will improve the security of aircraft financing. This is essential in many developing markets where conducting large commercial transactions is risky, and where obtaining adequate security for United States financiers is otherwise difficult.

The Cape Town Convention was negotiated to be consistent with United States commercial and insolvency laws, and it reaffirms existing obligations under these bodies of United States law. Ratification of the Convention by the United States likely will stimulate other nations to ratify it, as well. Expanding the list of nations that participate in the Convention would provide a needed boost to our aircraft industry and to the broader goal of promoting commerce with developing nations.

In addition to the Cape Town Convention, today we will review protocols that amend existing Bilateral Investment Treaties, or BITs, with eight Eastern European countries. Six of the eight nations, the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic, are expected to join the European Union on May 1, 2004, a month from now. Bulgaria and Romania are expected to join the EU in 2007.

Each of the Protocols is based on a similar understanding reached between the United States, the European Commission, and the subject countries. The goal of these understandings is to preserve the effect and intent of existing Bilateral Investment Treaties between the United States and each of the subject countries after their accession to the European Union. The protocols create a legal framework and enhanced consultation for avoiding inconsistencies between the BIT obligations of the eight nations and their European Union membership.

The United States supports the enlargement of the European Union. At the same time, we believe that the continued existence of Bilateral Investment Treaties with countries poised to join that body will be mutually beneficial to investors on both sides of the Atlantic. We want to encourage economic growth in these nations, which is a key to solidifying their young democratic institutions.

We also want to encourage the growth of new capital markets that can provide United States firms with productive business partners. It is a pleasure to welcome our panel of witnesses. Shaun Donnelly is Acting Assistant Secretary of the State Department's Bureau of Economic and Business Affairs, and Jeff Rosen is General Counsel of the U.S. Department of Transportation. We look forward to your insights on these important economic treaties.

And gentlemen, I would just say parenthetically that the committee has been pleased to have success on the floor following similar hearings. Your labors today hopefully will be productive in the same way. We are very pleased that our colleagues have in fact passed on the Senate floor the United States-Japanese tax treaty, and likewise the tax treaty with Sri Lanka in recent days. The former of these treaties was especially important because of action that needed to be taken by the Japanese Diet in a timely way so that tax years coinciding in Japan and the United States made possible very substantial savings for a large number of American firms.

That is often the case with tax treaties, but this particular one was large in its impact because of the size of the Japanese economy, as well as the number of ties that we have. Furthermore, although this is not a tax or commercial treaty, I am pleased to announce for the benefit of members and staff that last night, fairly late last night, on the floor of the Senate, the IAEA protocol was passed. This is the International Atomic Energy Protocol, which the President specifically asked for in his speech on non-proliferation at the National Defense University, just a short time ago.

I was present for the speech, in the front row, and the President looked at me and indicated that the Senate ought to take action promptly. We had been taking action, but it prompted me to reply respectfully that within the President's administration people needed to get their act together and to find a common theme, which they did. And so all's well that end's well.

The process moved along swiftly, and it's very important that the IAEA deals, and is dealing, now with Iran, with Libya, and with other situations that are not hypotheticals, but that in the real world are extremely important. I mention these as successes, not just for the committee but also for the Senate, for the country. We are working with the administration, just as we seek to do with you gentlemen today.

We are very, very pleased that you are here, and I would like to call upon you, Mr. Donnelly to testify first, and then Mr. Rosen. Let me say at the onset that your full statement to the committee will be made a part of the record, in full. You may proceed in any way you wish.

STATEMENT OF HON. SHAUN E. DONNELLY, ACTING ASSISTANT SECRETARY OF STATE, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, U.S. DEPARTMENT OF STATE

Mr. DONNELLY. Thank you very much, Mr. Chairman, before I say anything about the business, I want to thank you on behalf of Secretary Powell and the administration for the leadership you've been showing on the efforts you just mentioned, the Japan and Sri Lanka tax treaties. I was the former U.S. Ambassador in Sri Lanka, so I have a particular interest in that one, but the timely action on the Japan treaty is very important and also on the IAEA Protocol.

Mr. Chairman, I very much appreciate the opportunity to appear here today to recommend on behalf of the administration favorable action on the Cape Town Convention on International Interests in Mobile Equipment, and the protocols amending eight Bilateral In-

vestment Treaties pending before the committee. I'd add parenthetically that as a fellow Hoosier, I particularly appreciate the opportunity to appear before you, Mr. Chairman.

The CHAIRMAN. Very nice to have you here.

Mr. DONNELLY. Well, thank you, sir. I'm accompanied by my college from the Department of Transportation, General Counsel Jeff Rosen, representatives from the Export-Import Bank, the Federal Aviation Administration, and industry representatives. We appreciate very much the committee's interest in these treaties as demonstrated by the prompt scheduling of this hearing.

As you know, Mr. Chairman, the administration is dedicated to facilitating trade and the expansion of commerce across all borders. And the treaties we're considering today will promote expanded trade and investment, support American companies, create American jobs, and advance our economic interests.

Mr. Chairman, the Cape Town Convention on International Interest in Mobile Equipment and the related protocol on Aircraft Equipment will extend modern commercial finance laws already in place in the U.S., to international transactions involving high value mobile equipment. This treaty will make available the benefits of these finance laws to our trading partners all over the world resulting in lower risks, and an expanded array of credit services, thereby increasing business transactions, manufacturing activity, and employment growth.

The Convention and Protocol are fully supported by the U.S. industry, and the key government agencies involved, and the negotiating process has really been a model of public, private partnership. All Federal agencies with interest in this treaty, the Departments of State, Transportation, Commerce, the FAA, and the U.S. Export-Import Bank worked very closely with the affected private sector to ensure that U.S. positions were in line with the needed results.

Mr. Chairman, we respectively request Senate ratification of this Convention and Protocol. These instruments represent a positive step forward in international commercial law and in our economic and commercial interests. Early Senate approval will reaffirm U.S. leadership in this key area.

Mr. Chairman, I'd now like to turn to the second item of business before the committee today, as you summarized, our Bilateral Investment Treaties with acceding and candidate countries to the European Union. Bilateral Investment Treaties or BITs are a key part of the framework for U.S. investment in eight of the countries that are now seeking membership in the EU, the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic, all of which will join the EU on May 1, as well as Bulgaria, and Romania which are candidates, as you said, for accession in 2007.

During the last 2 years BITs have afforded important protections to U.S. investors in these countries. U.S. investors in turn have played an important role in those countries' economic transformation. U.S. investment in the region will benefit even more once these countries accede to the EU, as enlargement fosters stronger regional economic integration and expanded economic opportunities.

However, certain aspects of the Bilateral Investment Treaties may conflict with obligations these countries will take on upon entry into the European Union. Under EU law member states are required to bring their commitments under preexisting international agreements into conformity with EU law. In addition, the acts of accession of these countries acceding on May 1 require that prior to that time they either eliminate any such incompatibilities or withdraw from such agreements.

Therefore, to the extent necessary to maintain compatibility with EU legal obligations, we were willing to make adjustments in certain provisions of these BITs in a form compatible with EU obligations in order to preserve the vital protections that these treaties otherwise provide for U.S. investors.

In addition, we also obtained important assurances from the European Commission about the protection of existing U.S. investors in these countries, and the right under the E.C. treaty of U.S. investors, once they are established in one EU member state, to invest onward without hindrance in other members of the EU. When viewed together with the benefits of enlargement, these steps actually represent a significant gain for U.S. investors.

Mr. Chairman, in closing, I would say again that the Protocols amending the Bilateral Investment Treaties and the Cape Town Convention under consideration today will help grow the American economy, produce new jobs, and strengthen economic relations with new and existing trading partners. We believe that expanding markets overseas is good for American entrepreneurs and American workers. The amendments to the BITs will support continued U.S. investment and growth in a large European Union. And the Cape Town Convention will facilitate financing the sale of major American products to the four corners of the globe, particularly in the developing world.

We urge your committee to take prompt and favorable action on these treaties. I thank the committee and you, Mr. Chairman, for its continuing interest in these matters. And the members and staff for devoting the time and attention to review these treaties so promptly. I'd be very happy to try and answer any questions that you may have. Thank you.

[The prepared statement of Mr. Donnelly follows:]

PREPARED STATEMENT OF HON. SHAUN E. DONNELLY

Mr. Chairman and distinguished Members of the Committee, I appreciate the opportunity to appear today at this hearing to recommend, on behalf of the Administration, favorable action on the Cape Town Convention on International Interests in Mobile Equipment and on the Protocols amending eight Bilateral Investment Treaties that are pending before this Committee. We appreciate the Committee's interest in these treaties as demonstrated by the scheduling of this hearing.

The Administration is dedicated to facilitating trade and the expansion of commerce across all borders. We seek to accomplish this through a number of means. We recently concluded negotiating free trade agreements with our neighbors in Central America and the Dominican Republic, as well as with Morocco and Australia and certainly hope these agreements will receive favorable consideration from the Congress. The treaties we are considering today will also promote expanded trade and investment, support American companies and advance our economic interests.

Mr. Chairman, the Cape Town Convention on International Interests in Mobile Equipment, and the related Protocol on Aircraft Equipment, will extend modern commercial finance laws, already in place in the U.S., to international transactions involving high value mobile equipment. This treaty will make available the benefits of these finance laws to our trading partners all over the world, resulting in lower

risks and making available an expanded array of credit services. This, in turn, will increase business transactions, manufacturing activity and growth in employment.

The eight Bilateral Investment Treaties, or BITS as they are frequently called, are a key part of the machinery that established a framework for U.S. investment in countries that are now seeking membership in the European Union. U.S. investors have played an important role in the economic transformation of the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic, which will join the European Union (EU) on May 1—as well as with Bulgaria and Romania, which are candidates for EU accession in 2007. During the last few years, these BITS have provided a stable framework for investment and afforded important protections to U.S. investors in these countries. U.S. investment in the region, in turn, will benefit even more once these countries accede to the EU, as enlargement fosters stronger regional economic integration and expanded economic opportunities. However, certain aspects of these treaties may conflict with obligations these countries will take on upon entry into the European Union. Following lengthy and productive negotiations with the European Commission and with the acceding and candidate countries, we are submitting for your consideration, Protocols to amend our BITS with these nations, which will preserve many of the benefits of the original treaties in a form compatible with their accession to the EU.

CAPE TOWN CONVENTION—WHAT IS IT?

Mr. Chairman, the President transmitted the Cape Town Convention and the related Protocol on Aircraft Equipment to the Senate on November 5, 2003. There is a detailed explanation of the Convention and Protocol as well as a chapter-by-chapter analysis in the Report by the Secretary of State, attached to the President's transmittal of the Convention. While it is not summarized here we will be happy to respond to any questions the Committee may have.

The Convention and Protocol will extend modern commercial finance laws, already in place in the United States, to international transactions in other countries. These laws are a proven quantity and have worked well in our capital markets and in international transactions involving high value mobile equipment—including aircraft and related equipment—the specific concern of this Protocol. This Convention will increase for many other countries the availability of credit and lower the risks of commercial credit, thereby expanding business activity in sectors affected by this treaty. This treaty will directly support increased manufacturing and employment in aircraft frame production, avionics, aircraft engines, aircraft parts, supplies and services. This treaty will have a marked impact on the markets for these products and services in developing and emerging countries, where the greatest expansion in sales is expected to occur over the next 10 to 20 years. This treaty will make asset-based financing available in these emerging countries where today such commercial law and the associated credit may not be adequate and where credit and country risk are obstacles.

The Cape Town Convention does this by adopting modern asset-based financing and assignment of payment rights financing concepts. These principles are reflected in the U.S. Uniform Commercial Code (UCC), which grants enhanced legal rights in the aircraft (or other mobile items) rather than relying on company or country risk. This permits the lender to compensate for other factors that would drive risk and credit cost up or sharply limit credit altogether and has fueled commercial finance in the United States, in particular aircraft finance. As a result the U.S. is the preferred finance market for aviation in the world.

The Convention and Protocol are fully supported by industry and the key government agencies involved. The negotiation process can be seen as a model for public-private sector partnership. All federal agencies concerned with this treaty: the Departments of State, Transportation, Commerce, and the Federal Aviation Administration (FAA) and U.S. Export-Import Bank, worked closely with the affected private sector. These included manufacturers, suppliers, secured lenders, financial lessors, aircraft leasing organizations, credit rating organizations, aircraft registry interests and others. This was done in order to be sure that U.S. positions were in line with needed results. Key associations such as the Air Transportation Association (ATA), the Aircraft Working Group (AWG), the Aircraft Title Lawyers Association (ATLA) and others have also supported this Convention.

The Convention will come into force April 1, 2004, (coincidentally the date of this Hearing) with three ratifying States. However, the Convention will not apply to aircraft until the Protocol also comes into force, which requires ratification by eight States. Currently, four countries have ratified the Convention and Protocol. We expect that four additional ratifications are likely to occur by the fall, and the Protocol is expected to come into force by the end of calendar year 2004.

WHY DO WE NEED IT?—THE IMPORTANCE OF U.S. COMMERCIAL LEADERSHIP

Mr. Chairman, the U.S. is widely recognized as the leader of this effort and the timing of Senate action and early U.S. ratification will be a powerful signal of our strong support for the Convention and Protocol. Early ratification will position the U.S. to fully protect the considerable interests our industries have in assuring that the early stages of implementation are handled correctly. U.S. manufacturing and financing interests have placed strong importance on early ratification in order to provide a boost in sales in aircraft frames and engines. With a sharp and severe downturn in aircraft and aircraft engine sales in the last several years, reviving this market has taken on much greater importance. The treaty will facilitate the acquisition of newer, safer aircraft and help developing countries without private capital. The prospect that this new treaty will be in place in the near future has already been reflected in the U.S. Export-Import Bank's preferential exposure fee terms for borrowers from countries that ratify and implement the Convention and Protocol. Several major sales of U.S. equipment have been made or will be made based on the expectation of other countries that the U.S. will ratify the treaty.

Mr. Chairman, there are other aspects to the Convention that should be noted. First the negotiation of this Convention was a part of a multi-year effort by the Department of State, with other agencies and the private sector, to conclude new agreements reflecting modern commercial law already in place in the U.S. The purpose is not to export our laws, but rather to export market-tested financing concepts, which can serve to increase economic capacity in States at all levels of development. We have been joined in that effort by a number of international financial institutions. This has led to the completion also in 2001 of the new United Nations Commission on International Trade Law (UNCITRAL) Convention on accounts receivable financing, negotiated in parallel with the Cape Town Convention and which the United States signed on December 30, 2003; the 2002 Organization of American States (OAS) new Model Inter-American Law on secured Finance, and the 2002 Hague Conference Convention on Securities Intermediaries. We believe that adoption of these instruments can significantly increase economic capacity, especially in developing countries.

Finally, Mr. Chairman there is the significance of holding the diplomatic conference itself in South Africa. As stated by South African officials at the outset of the Cape Town Conference in October 2001, "this marks the first time that a multilateral negotiation has taken place on complex commercial law in the sub-Saharan region." The decision to do that was taken by the cohosts of the Conference, UNIDROIT and the International Civil Aviation Organization (ICAO), with the support of the U.S. government. The State Department hopes this will be a precedent that will lead to more active participation by major developing countries in commercial law reform.

PROCEDURAL AND IMPLEMENTATION ISSUES

To obtain the full benefits of the Convention and Protocol, the U.S. needs to ratify both. To fully implement the Protocol, the U.S. must also enact technical amendments to FAA authority concerning registry functions under the Protocol. These amendments were transmitted last November to Congress by Secretary of Transportation Norm Mineta. They have been vetted through the Departments of Transportation, State, and Commerce and are supported by aircraft and engine manufacturers, air finance interests, and other key associates. We are hopeful for timely action on these amendments, but if they are not enacted by the time the Senate acts on the Treaty, the U.S. could deposit the instrument of ratification to the Convention itself, but postpone depositing the instrument for the Protocol until the amendments are enacted.

The financing provisions on secured interests do not require any implementing legislation, state or federal, since the basic concepts of the Convention and Protocol were drawn from the uniform state law in the U.S. (Uniform Commercial Code Article 9 on secure finance). To assure coordination, experts from the National Conference of Commissioners on Uniform State Laws and the American Bar Association's (ABA) Business Law Committee have been closely involved at all stages during the development of this legislation. The ABA's House of Delegates has endorsed early ratification of the new treaty system.

There are no budget implications or appropriations required. There is no cost to the government for implementation of the private transactional financing provisions and we anticipate only minor cost to set up the FAA interface to the new registry system, which will be absorbed in the FAA's regular operating budget for the Monroney Center at Oklahoma City.

The Convention and Protocol permit optional declarations; several are recommended for the United States upon ratification and are listed in the Report transmitted to Congress. These optional declarations preserve our existing financing system and designate the FAA as the entry point for the U.S. filings in a new international registry.

The Convention and Protocol have specific provisions that intersect with certain other conventions. But neither will have any effect on U.S. export and technology controls or regulatory procedures relating to national security that would otherwise apply to such a transaction.

Mr. Chairman, we respectfully request Senate ratification of the Convention and Protocol. These instruments represent a positive step forward in international commercial law and are in our economic and commercial interest. Early Senate approval will reaffirm U.S. leadership in this area.

U.S. BITS WITH EU ACCEDING AND CANDIDATE COUNTRIES

Mr. Chairman, I would like to now turn to the second item of business before the Committee today, our bilateral investment treaties with EU acceding and candidate countries. U.S. investors have played an important role in the economic transformation of Eastern Europe. U.S. bilateral investment treaties (or BITs) with six acceding countries, the Czech Republic, Estonia, Latvia, Lithuania, Poland, and the Slovak Republic, and two candidate countries, Bulgaria and Romania, have provided a stable framework for investment and afforded important protections to U.S. investors. It is for this reason we intend to preserve these treaties as these countries become new members of the European Union. U.S. investors in the region, in turn, will benefit from these countries' accession to the EU, as enlargement will foster regional economic integration and expand the markets for U.S.-owned firms.

Member States of the European Union, however, are required under EU law, including the Treaty Establishing the European Community (the EC Treaty), to take steps to bring their commitments under pre-existing international agreements into conformity with their obligations as members of the EU. In particular, the Acts of Accession of the countries that will become members of the EU on May 1 of this year require that, prior to that time, they either eliminate any incompatibilities between pre-existing international agreements and obligations of EU membership, or withdraw from such agreements.

As a result of discussions that began in early 2002, a political understanding was reached on September 22, 2003, among the United States, the European Commission and the six acceding and two EU candidate countries. It provides a roadmap for avoiding incompatibilities between these countries' obligations as EU Member States and their obligations under their BITs with the United States. The understanding not only sets forth how the BITs should be amended, but, as described later in this testimony, it also secures in the context of future EU measures acknowledgments from the European Commission regarding continued consultations and the protection of existing investments, which could be of significant importance to the United States and to U.S. investors.

The specific aspects of the U.S. BITs that raised issues of compatibility are:

- first, the non-discrimination provisions (national treatment, most-favored-nation treatment, and the exception to nondiscrimination obligations for benefits accorded investors of other countries under obligations arising from a BIT party's membership in a customs unions or free trade area);
- second, the disciplines on the use of performance requirements; and
- third, the obligation not to restrict capital movements.

By our willingness to make certain adjustments and political commitments in these areas, we can preserve the vital protections that these treaties otherwise provide for U.S. investors (for example, protections regarding expropriation, fair and equitable treatment and full protection and security, temporary entry of key personnel, and binding international arbitration). Moreover, we also obtained important assurances from the European Commission about the protection of U.S. investors in these countries in two key contexts: first, where U.S. investors seek to invest onward throughout the rest of Europe, and second, with regard to the Commission's readiness to consult with us when the Commission is considering proposals that might affect the rights of U.S. investors not only in these countries but throughout Europe.

THE BITS' NON-DISCRIMINATION PROVISIONS

U.S. BITs include a broad commitment to afford covered investments the better of national treatment and most-favored-nation (MFN) treatment. However, they per-

mit the Parties to take exceptions to these obligations in specific sectors, and with respect to specific matters, provided the Parties identify them in an annex to the treaty. In these particular BITs, the United States took annex exceptions to national treatment, and in some cases to MFN, for such sectors as air transport; ocean and coastal shipping; energy and power production; radio, television and communications; satellite ownership; ownership of real property; provision of telephone and telegraph services; mining on the public domain; maritime and maritime-related services; and primary dealership in U.S. Government securities.

In contrast, however, these acceding and candidate countries for EU membership typically listed few, if any, sectors or matters as excepted from national treatment or MFN treatment in their respective annexes. For example, the Czech and Slovak BITs only list ownership of real property and insurance as sectors where measures that do not conform with the national treatment obligation may be taken by these countries. They list no sectors as excepted from the MFN obligation.

Our discussions with the European Commission, and the acceding and candidate countries, revealed a number of areas where EU requirements could conflict with the BITs' national treatment and/or MFN obligations. Thus, the amendments to these BITs identify additional sectors or matters with respect to which exceptions will be allowed for the new EU Member States. However, they are explicit in stating that exceptions are allowed only to the extent necessary to meet EU legal obligations. The sectors in which these new exceptions are allowed are, with regard to national treatment: agriculture, audio-visual, securities, insurance and other financial services, fisheries, hydrocarbons, subsidies, air transport, inland waterways transport, and maritime transport. New exceptions are also allowed with regard to MFN for agriculture, audio-visual and hydrocarbons.

Another important aspect of the amendments is that they carve out from these new exceptions *existing* investments of U.S. firms for a period of either ten years from the date of the relevant measure, or twenty years after the entry into force of the BIT, whichever is later. In addition, the amendments provide that no exception applies to the extent that it would require, in whole or in part, divestment of an existing investment.

In addition to concerns in these areas, the European Commission was concerned about measures that might create advantages for firms established in EU and non-EU countries as a result of liberalization within the EU or between the EU and other countries that might not be available to U.S.-owned investments. In particular, the Commission was concerned that the acceding and candidate countries—once they become Member States—may be obligated under EU law to accord preferential treatment to investors from other EU members or from non-EU countries that have a special relationship with the EU, but not to U.S.-owned enterprises. Moreover, the Commission thought additional uncertainty arose because Article 48 of the EC Treaty operates to entitle any firm, once established in accordance with the law of a Member State, to be treated in other EU members as a national of a Member State for purposes of the EU Treaty's guarantees on the right of establishment in any EU Member State.

Thus, because of the Commission's concerns and its desire to avoid uncertainty in this area, we also agreed to address the BIT provision called the "free trade area/customs union exception." This provision provides that the BITs' non-discrimination obligations do not apply to advantages accorded by a BIT party to third countries by virtue of that party's obligations deriving from membership in a free trade area or customs union. We thus included in the Protocols an acknowledgement that the exception applies to obligations that derive from an economic integration agreement that includes a free trade area or customs union, such as the European Union, and also that it applies to advantages accorded to nationals or companies of any third country by virtue of such obligations.

By acknowledging this, we also created the opportunity to obtain from the European Commission, as part of our political understanding, a clarification of its understanding of the meaning of Article 48 of the EC Treaty: a clarification of the application of Article 48 to foreign-owned companies that will be beneficial to any U.S. firm that meets its conditions and wishes to use an investment in one EU Member State as a platform for investment onward in other EU Member States. The Commission's clarification of this provision affirms that such firms will be free of restrictions on establishment elsewhere in the EU.

THE BITS' PERFORMANCE REQUIREMENTS PROVISIONS

The U.S. BITs with these countries contain a provision that prohibits the imposition of performance requirements upon an investor as a condition to establish, expand, or maintain an investment. Performance requirements typically take the form

of requirements that goods be exported, or that goods or services be purchased locally, but similar requirements would also be prohibited. Because EU law includes certain requirements in the agriculture or audio-visual sectors that might be construed to be prohibited performance requirements, the amendments provide that the relevant provision of each BIT will not limit the ability of our BIT partners to impose performance requirements in these sectors, to the extent they are necessary to comply with EU law.

TREATMENT OF CAPITAL MOVEMENTS

Each of the BITs with the acceding and candidate countries obligates the BIT parties to allow capital and other investment-related transfers to be made freely, and without delay, into and out of their respective territories. The EC Treaty, however, provides authority for the EU Council of Ministers to restrict capital movements either by adopting temporary safeguards in exceptional circumstances involving serious difficulties in the operation of the economic or monetary union, or by imposing financial sanctions as a result of a common position or joint action in relation to a common foreign or security policy. The European Commission was thus concerned that the obligations in the BITs would impinge on EU authorities in this regard and create complications should it ever become necessary to exercise this authority. Because the EU has never exercised this authority, we were unwilling to make any amendments to our BITs to address this concern. However, we acknowledged in the political understanding that the general exception addressing essential security interests in our BITs preserves the right of a party to apply measures that it considers necessary to protect its own essential security interests, and that good faith reliance on it would afford the BIT parties protection. We also acknowledged that essential security interests may include those deriving from membership in the EU.

Finally, given the sensitivity of this issue for the European Commission, we expressed our willingness in the political understanding to continue consultations on this issue in the context of ongoing discussions between the Commission and Member States that have international agreements with other third countries that include provisions similar to those contained in these U.S. BITs.

FUTURE DEVELOPMENTS IN EU LAW

Finally, the European Commission was concerned that, as the process of harmonization within the EU continues and extends to other sectors, EU measures might be enacted in the future that raise questions of compatibility with respect to obligations of our BITs. In response to this concern, we agreed on an amendment to the BITs that provides that the BIT parties agree to consult promptly whenever either party believes that steps are necessary to ensure compatibility between the BIT and the EC Treaty. In addition, in the context of the political understanding, the United States and the Commission expressed their willingness to consult through established means when new EU measures affecting foreign investment are under consideration and raise questions of compatibility with pre-existing international agreements between the United States and EU Member States.

The understanding also acknowledges the importance of protecting existing investment in this context and expresses the intent that, whenever the accession of new Member States raises questions regarding the implementation or application of EU measures that would affect U.S. investments, or the imposition of new measures restricting foreign investment within the EU generally raises questions with respect to the impact on existing investments, consultations would be undertaken with the objective of protecting existing investment.

To sum up, as a result of our willingness to address European Commission concerns by making these few but important amendments to our BITs, we have preserved the broader benefits these treaties afford U.S. investors. The amendments do not go beyond what, upon accession, will be legally required of our BIT partners under EU law. In addition, we have exempted existing U.S. investments from the application of new exceptions to national treatment and MFN under these BITs for at least ten years, and proscribed the application of any measure that would require divestiture in whole or part of a U.S. investment. We have secured Commission acknowledgment of the principle of protecting existing U.S. investments generally when new EU measures are under consideration, and established a basis for consultations when new EU measures are under consideration that may affect U.S. investors. And finally, we have obtained an important clarification from the European Commission on the EC Treaty's protection of the right of U.S. investors, once they are established in one EU Member State, to invest onward without hindrance in other members of the EU. When viewed in combination with the benefits U.S. investors will realize when these countries become members of the EU, and being mind-

ful that the Commission initially sought termination of our BITs, the steps we have taken actually represent a significant gain for U.S. investors.

CONCLUSION

Mr. Chairman, in closing, I end my testimony much as I opened it. The Protocols for the eight Bilateral Investment Treaties under consideration today and the Cape Town Convention support the Administration's policy to expand trade and investment globally. We believe that expanding markets overseas is good for America and American workers. The amendments to our BITs will support continued U.S. investment and growth in an expanding Europe. The Cape Town Convention will facilitate financing the sales of major American products to the four corners of the globe, particularly in developing countries, which are looking to the U.S. for leadership.

We urge the Committee to take prompt and favorable action on the treaties before you today. Such action will help grow the American economy and produce new jobs, and strengthen economic relations with new and existing trading partners. I thank the Committee for its continuing interest in these matters and the Members and staff for devoting the time and attention to the review of these treaties. I would be happy to try and answer any questions the Members may have.

The CHAIRMAN. Mr. Rosen.

STATEMENT OF HON. JEFFREY ROSEN, GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION

Mr. ROSEN. I have provided a written statement and I thank you for accepting that in the record of today's hearing. In my oral remarks, I would like to highlight two aspects of the Cape Town Convention and the process that brought it to fruition. The first of these is the broad array of benefits that this Convention will produce, both here at home, and abroad.

For countries such as the United States, which manufacture airframes, aircraft engines, and helicopters, there will be increased exports as the number of orders for this equipment increases. Increased exports will boost the economy and translate into more jobs. This job stimulus will be felt not just by the major manufacturers, such as Boeing, GE, and United Technologies, but also by smaller companies that make the parts and provide services for these companies.

In addition, the Convention and Aircraft Protocol will benefit the companies that provide the capital that finance the sale of such equipment around the world. U.S. financial institutions are of course major players in aircraft financing. The creditor protections provided for by the Convention and Protocol will benefit them by significantly reducing the risk they now incur when financing aircraft into countries whose laws do not meaningfully protect creditors in the event of default or insolvency.

It is this risk reduction in turn which will bring significant benefits to many countries and airlines in the world. These benefits take the form of lower financing charges, and are fresh sources of capital for aircraft financing. And this is particularly of benefit to developing countries whose carriers have had to pay high interest rates, or who have not been able to access the commercial credit markets at all because of their risk.

In addition, in terms of the benefits, the world's skies will become safer and cleaner as newer equipment is acquired and brought into service. Many countries' airlines are operating older, less sophisticated aircraft. The full implementation of this Convention and Protocol should hasten the replacement of this equipment with state-of-the-art aircraft.

Now, the second item that I want to highlight is the extraordinary collaborative nature of this project since its inception. It is an example of what a government industry partnership can produce when done well. At each step of the negotiations, the State Department, the Transportation Department, the U.S. Export-Import Bank, along with U.S. commercial law financing experts, worked closely with representatives from industry, financiers, and aircraft registry interests.

In addition, at all major stages of the process, the U.S. position on issues was coordinated through the interagency group on international aviation, whose membership in addition to those agencies I mentioned includes the Departments of Commerce and Defense, as well as airport, general aviation, and commercial aviation trade associations.

Furthermore, the U.S. negotiators maintained an ongoing dialog with the state law commissioners, the Aircraft Title Lawyers Association, the Air Transport Association, and representatives of the American Bar Association section of business law. So it is easy to understand why the product of all this effort and coordination has produced a Convention and aircraft Protocol with so many benefits and with no apparent opposition to its ratification.

In sum we believe the merits of the Convention and Protocol are compelling and the process that brought it about was a model collaboration between U.S. Government agencies, international organizations, private sector stake holders, and sovereign governments worldwide. Prompt ratification by the United States will enable us to begin to achieve its benefits.

So I thank the committee for its interest and you personally, Mr. Chairman, for the attention that has been given to these matters and I would be pleased to answer any questions you may have.

[The prepared statement of Mr. Rosen follows:]

PREPARED STATEMENT OF HON. JEFFREY ROSEN

THE 2001 CAPE TOWN CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

Chairman Lugar and Members of the Committee:

It is with great pleasure that I appear before you today, along with Shaun Donnelly, Acting Assistant Secretary of State for Economic and Business Affairs, to urge, on behalf of the Administration, that this Committee recommend that the Senate give its advice and consent to ratification of the Cape Town Convention and the Protocol on Matters Specific to Aircraft Equipment.

CAPE TOWN CONVENTION OF 2001

The Cape Town Convention and Aircraft Protocol, when fully implemented, will bring great economic benefits to a variety of U.S. constituencies while helping to facilitate the modernization of airline fleets around the world. The benefits will be truly global. Developing countries and their airlines will be able to upgrade their fleets at reduced financing costs. The world's skies will be safer and cleaner as newer, state-of-the-art aircraft are acquired and brought into service. And for countries that manufacture aircraft there will be increased exports as the number of aircraft orders increases. Increased exports will also mean more jobs for exporter countries such as the United States.

The Cape Town Convention and Aircraft Protocol were negotiated under the auspices of the International Institute for the Unification of Private Law (UNIDROIT), an intergovernmental organization focused on harmonizing the commercial law of nations, and the International Civil Aviation Organization (ICAO), the United Nations body responsible for international aviation. It was concluded in November 2001 at a Diplomatic Conference at Cape Town, South Africa, and has been signed

by 28 states, including the United States. The Convention, coincidentally, enters into force today, April 1. We expect that the Aircraft Protocol will come into force late this year.

The Convention is designed flexibly so to be able to operate in conjunction with protocols covering different types of high value mobile equipment. The Convention itself sets out the basic terms and provisions that underlie the regime. However, it is not equipment specific and in fact needs a protocol particular to a given type of equipment in order to operate. The Protocol before you today applies to airframes, aircraft engines and helicopters above a minimum size or power threshold. In addition to this Aircraft protocol, the Convention specifically contemplates that there will also be protocols governing railway rolling stock and space assets. Negotiations are at an advanced stage with respect to a protocol on railroad equipment and it is anticipated that a diplomatic conference will be held in 2005 to adopt such a protocol. Negotiations are at an earlier stage with respect to space assets. Left open is the possibility that additional protocols covering other types of high value mobile equipment, may be negotiated in the future.

FEATURES OF THE CAPE TOWN CONVENTION

As a general matter, the Convention adopts the asset-based financing practices already widely used in the United States and weaves them into an international agreement. Specifically, the Convention establishes an "international interest", which is a secured credit or leasing interest with defined rights in a piece of equipment. These rights consist primarily of 1) the ability to repossess or sell or lease the equipment in case of default; and 2) the holding of a transparent finance priority in the equipment.

Priority will be established when a creditor files, on a first-in-time basis, a notice of its security interest, in a new high-technology international registry. Once an international interest has been filed by a creditor and becomes searchable at the international registry, that creditor's interest will have priority over all subsequent registered interests and all unregistered interests, with a few exceptions. The Federal Aviation Administration (FAA), which currently operates an aircraft registry, will serve as the authorized entry point into the International Registry. This will allow the aircraft financing practices in the United States, among the most efficient in the world, to continue undisturbed. The International Registry will be searchable on a 24 hour, 7 day a week basis. Fees will be charged for filing a security interest in the International Registry and for other services connected to use of the International Registry. Such fees are expected to be very small because of the electronic nature of the registry. Last fall, Secretary Mineta sent Congress a set of proposed technical amendments to the FAA's registration authority that are necessary for the FAA to implement its functions under the Convention and Protocol. That legislation is now pending before the House and Senate transportation authorizing committees.

The rights and enforceable remedies created by the Convention and Aircraft Protocol are designed to reduce the risk assumed by creditors in financing transactions in many parts of the world. In many countries, the risk factor is significant because local laws either do not protect lenders in the event of default or bankruptcy, or are highly unpredictable. With respect to aircraft, this uncertainty is compounded by the fact that aircraft can and do move readily between countries. It is this uncertainty that drives up the cost of aircraft financing in many countries, which is reflected in the interest rate the financier charges the debtor.

The Convention seeks to reduce this risk in a number of ways. For example, it provides financiers with a number of key rights with respect to an aircraft financed to an airline of a country that has ratified this Convention and Protocol. These include the right, upon default of a debtor, to deregister the aircraft and procure its export; to take possession or control of the aircraft, or sell or grant a lease in the aircraft; and to collect or receive income or profits arising from the management or use of the aircraft. The extent of these rights and the speed with which they can be exercised will be a function of the declarations a country files at the time it deposits its instrument of ratification. These declarations set out which remedies that state will allow and the means by which the remedies can be implemented. It can be expected that the greater the remedies a state chooses to recognize in its declarations, the greater will be its benefits.

These benefits will take the form of lower financing charges and fresh sources of capital for aircraft financing. This will particularly benefit developing countries whose carriers have had to pay high interest rates or who have not been able to access the commercial credit markets at all because of their credit risk. For those countries that have historically financed aircraft acquisitions through the use of sov-

foreign guarantees, the ability to make use of asset-based financing will allow such guarantees to instead be used for other national purposes.

ICAO will supervise the International Registry. A Preparatory Commission, established by the diplomatic conference and comprising 20 countries including the United States, has been doing the groundwork needed to get a registry system in place. In particular, working with ICAO, the Preparatory Commission prepared a request for proposals so to select an entity to administer the registry. The Request went out earlier this year and a selection by the Preparatory Commission will likely be made next month. It is expected that the International Registry will be operational in the latter part of 2004.

CONCLUSION

In conclusion, I would like to underscore the importance of prompt ratification. Ratification by the United States will spur other countries to ratify, thus accelerating the entry into force of the agreements and hasten the realization of benefits to our economy, our exporters, the economic recovery of international aviation, the developing world, and the safety of aviation. I thank the Committee for its interest and attention to these matters and would be pleased to answer any questions you may have.

The CHAIRMAN. I thank both of you for that testimony. I would just note, Mr. Donnelly, that in your testimony you point out that the Conventions are coming into force April 1, 2004, which you note coincidentally is the date of this hearing. With only three ratifying states aboard, however, you point out that the Convention will not apply to aircraft until the Protocol also comes into force, so both are necessary.

That requires ratification by eight states. Currently, four countries have ratified the Convention and the Protocol. We expect that the four additional ratifications are likely to occur by the fall, and that the Protocol is expected to come into force by the end of calendar year 2004.

I compliment both of you and your staffs, as well as our staff of the Foreign Relations Committee on both sides of the aisle for alertness to the possibilities of leadership. One reason for taking this action, or having this hearing now in the midst of everything else that is going on in the world, is that, as you have mentioned, by acting in a timely way, we encourage other countries to do so.

From the United States standpoint, we think that you and the administration have negotiated an excellent treaty that is a benefit to the aircraft industry and perhaps to others that you have noted. Yet all of that good work would come for naught if we fail to act. Our dragging our feet might make other countries drag their feet, or at least make them more reticent to step up to the plate. I thank you for the special efforts that have come about to prepare for this hearing, and for the body of work that you perform.

If we were in any forum other than this body, that is the U.S. Senate, or the House of Representatives, we would be talking about jobs. We would be talking about how to employ more Americans in good paying jobs, and in sophisticated industries in which we are very competitive.

Sometimes people ask, why in the Senate Foreign Relations Committee are you involved in such mundane matters as jobs, and American industry? Well, this is a major foreign policy issue. It's a major domestic issue. It's an issue for all Americans.

What we're talking about today is expediting the possibilities that, as you pointed out, Mr. Rosen, the skies will be safer if there are new aircraft with state-of-the-art safety mechanisms and abili-

ties to handle take-offs and landings at will. So that will be a safety factor for us and for the world.

To get to that point someone must produce these aircraft and this equipment. We're very hopeful that it will be American workers in American plants. We believe, because we are state-of-the-art and competitive, that there is a very good possibility that that will be the case.

Having said all that, let me ask these technical questions of you for the benefit of filling out our record today. First of all, Mr. Donnelly, will revision of the Bilateral Investment Treaty, as you and I have both called the BITs, affect obligations under any other agreements to which the United States, or the eight countries we're considering today, or the EU, are a party?

In other words, are there side effects, other effects that we should take into consideration in our action on these treaties?

Mr. DONNELLY. Thank you, Mr. Chairman. First let me just endorse all of the comments that you have just made about the importance of timing and U.S. leadership on this. We really think that as a major producer of aircraft and helicopters, the United States is going to be a major player in this, and it's very important that we be at the table from the very start. And we think that our being in a position to ratify early will help spur, as you said, Mr. Chairman, other countries joining it.

On your specific question about, if I can call it corollary effects of this, we do not believe that there will be any. There has been similar issues raised by a few of the Eastern European countries regarding other agreements totally separate, outside of this area, more in the trade agreements area, and whether their accession to the EU requires some adaptation in those agreements. And there's a separate process underway within the administration involving the State Department, the U.S. Trade Representatives Office. But as far as any directly related effects that would flow from these amendments, we do not believe there are any, and it's been very carefully reviewed by the interagency experts, sir.

The CHAIRMAN. Let me followup with a more specific question about the EU itself. Will these amendments to the BITs result in increased consultation requirements by the EU? If so, how would this benefit American industry doing business in the relevant countries? Has a formal consultation procedure been established at all at this point?

Mr. DONNELLY. Mr. Chairman, can I take that question and get an answer—

The CHAIRMAN. Yes.

Mr. DONNELLY [continuing]. For you for the record. I don't want to speak in an ad hoc way and mislead the committee.

The CHAIRMAN. It would be preferable to research the issue and come back to us.

Mr. DONNELLY. Yes, sir. We will get you a thorough answer to that question.

[The following response was subsequently supplied.]

As reflected in the understanding negotiated at the same time as the amendments, the United States and the European Commission made a political commitment to consult whenever new EU measures affecting foreign investment are under consideration and raise questions of compatibility between U.S. law and pre-existing

international agreements between a Member State and the U.S. We further acknowledged that such consultation would take place through existing channels, for example, through informal contacts between the Commission and U.S. officials responsible for investment, diplomatic channels, and the U.S.-EU Senior Level Coordinating Group. The political understanding reached by the U.S. and the Commission also calls for a mutual good-faith effort to take into account the views of countries with international agreements with the U.S.—they may be new candidates for accession or Member States—that may be affected by the contemplated measures.

We believe these consultations should have a salutary effect on U.S. business interests in the region, because they provide a means by which to head off any problems before they materialize.

Separately, in the Protocols amending the BITs that are before the committee, the United States and each of its BIT partners agree to consult promptly whenever either party to the BIT believes that steps are necessary to assure compatibility between the BITs and the EC Treaty. In such a case, traditional diplomatic channels would be utilized. Given that both the understanding and amendments contemplate only established channels for these new consultation commitments, we do not contemplate creating new ones to address related issues.

The CHAIRMAN. In addition to affecting the ability of United States firms to do business in the BIT countries, will the amendments to the BIT benefit their ability to do business throughout the region?

Mr. DONNELLY. Yes, sir. That is one of the important benefits that we see in this package that we have been able to negotiate. We have gotten a clear understanding in writing from the European Commission that U.S. businesses established in one of these six acceding countries will have the full benefits. Whether they are previously established or to be established companies, that they will be able to take the full benefit of being able to operate from that base and be able to carry forward into the broader European market, which as you know, Mr. Chairman, is a large and rapidly expanding effort.

That was a very important issue for our business community and one that we were able, we believe, to find a solution that represents a clear step forward for our companies.

The CHAIRMAN. Has there been a framework developed, Mr. Donnelly, for modifying existing agreements that we have with countries that are poised to join the EU?

Mr. DONNELLY. Mr. Chairman, we believe the process we have gone through in this effort provides a framework. As you pointed out, six of the countries are acceding in the very short term, two others are on a somewhat slower path to accede in 2007. But the European Union has broader plans to continue expansion as countries qualify and step forward to express their interest.

And we believe that the process that we've gone through, the model that we have developed here will provide a framework for us to use if this same issue should arise as other countries that we have Bilateral Investment Treaties with come forward in the accession process.

The CHAIRMAN. Presumably, we'll be closely following EU accession efforts. These go on for quite awhile, and so would not be a surprise. On the other hand, during some other Foreign Relations Committee hearing at some stage, other countries may come on the horizon. I raise the question simply as a matter of precedent. Having proceeded in this way with these eight countries almost in routine fashion we wish to move ahead with others as they come in line.

Mr. DONNELLY. You know, we obviously will have to deal with—Mr. Chairman, the EU does have an ambitious expansion plan in mind. The time table will obviously be worked out between those countries and Europe. The United States has long been on record as supporting the process of European integration, we believe it is in our political interest, it's in our economic interest, and we want to support it.

At the same time we want to make sure that our interests, particularly our economic interests are protected. So we will carry forward, I believe, a very similar process as the accession process moves forward, and I would think that you're quite correct that over the coming years you may see very similar packages coming back.

Obviously, we'll have to study carefully each individual Bilateral Investment Treaty and each individual country situation to make sure that we are finding the right package that fits each particular situation, but we believe that the general model that we have been able to work out here will work in similar situations.

Obviously, the European Commission will be a major player in that process, they have been the third party in this negotiation as we've negotiated with each of these eight acceding countries individually. We've also had the European Commission fully involved in that process, and they would be a major player as other accession candidates come forward. So I think we will be building on this model, sir.

The CHAIRMAN. Without being too confusing, let me skip back to the Cape Town Convention Protocol for just a moment and highlight a paragraph in your testimony that I thought was helpful for the understanding of our members.

You've pointed out that the treaty will facilitate the acquisition of newer, safer aircraft and help developing countries without private capital. The proposal that this new treaty will be in place in the near future has already been reflected in the United States Export-Import Bank preferential exposure fee terms for borrowers from countries that ratify and implement the Cape Town Convention and Protocol.

Several major sales of U.S. equipment have been made or will be made based on the expectation of other countries. The United States will ratify the treaty.

I point at the very practical basic dollars and cents issue frequently, even though the countries that we're talking about that might be interested in ratifying this and that may now come in because the United States is involved, may do so for these reasons. An entity such as our Export-Import Bank suddenly becomes available to them on very favorable terms to loan them money, if there happened to be capital shortages for these large investments in aircraft in the countries.

I mention that because frequently these treaties sort of float by. It's thought well and good that we were all visiting with each other, but in this case there is a very, very practical side to this, and it involves American institutions and specifically EX-IM Bank, and perhaps others as the case may be. As we've already pointed out, it doesn't come into force, at least in the second instance, until eight countries are aboard. As the United States comes aboard,

that might make number 4 and number 5, so the need for leadership here is once again evident.

Let me ask, Mr. Rosen, these technical questions of you. The Convention and Protocol specifically indicate consistency with the United States bankruptcy law. They are not intended to affect a state's existing insolvency system. There is no reference to the provisions of U.S. law, which specifically deals with aircraft equipment and vessels. How, if at all, do the Convention and the Protocol interact with those provisions? What are the potential effects of this interaction?

Mr. ROSEN. Well, thank you, Mr. Chairman, for giving me the opportunity to address that, because one of the real positives of this Convention is that it's so consistent with the existing Uniform Commercial Code that we have in the United States, in our various States. And so as a practical matter there will not really be inconsistencies, they'll be one new aspect in terms of the registration, that they'll be a single port of registration through the FAA into the international registry, but in terms of the basic terms, this is part of why the United States has so few declarations that will be needed.

The basic law is extremely similar to that that already exists under Article 9 of the Uniform Commercial Code, and so in some instances there's new terminology, let's say of international interest as opposed to security interest, but the concepts are fundamentally the same.

And so in terms of U.S. law while this would augment and supplement it, it really will not be a significant change in terms of what we're already doing, but it will produce efficiencies through the consistency that will be available in an international context to have the kinds of rights and remedies, and the transparent priorities available for people to identify what interests exist. And the ability to have prompt relief in the event of insolvencies that those efficiencies, from having a clear law akin to what already exists in the United States, will enable benefits to take place in an international sale context.

The CHAIRMAN. I appreciate your answer, which encompasses the Uniform Commercial Code. I also appreciate the fact that it has been adopted by all 50 of our States, and has fairly well developed case law background now. The coincidence of the treaties that we're discussing today with our own Uniform Commercial Code is especially important. I thank you for underlining that.

Let me ask this question. The Convention and Protocol provide that the FAA will have heightened responsibilities, with respect to these additional international obligations. Is the FAA presently equipped to handle this new responsibility. If not, what is required to provide it with the ability to take on these new tasks?

Mr. ROSEN. Well, Mr. Chairman, let me say that while there are some new tasks for the FAA, I don't think that they are major or substantial burdens, in terms of what will be required. Primarily, the most important aspect is the operation of the entry from the United States standpoint, of the notice filings of the interest in the registry. And for that the FAA will need to participate and we have asked for—the administration has asked for some amendments to

the—some technical amendments, really, to the FAA legislation or statutes, I should say, to enable that.

But I think that the FAA is prepared, and the FAA has been a participant at every phase of the process and the negotiations leading up to this and is quite ready to take on the responsibilities that would be entailed by ratification of the Convention and Protocol.

The CHAIRMAN. Let me ask now if there are any additional items that either of you would like to highlight for the benefit of the record. We have your testimony in full. You have summarized your comments. Hence, I have gone back, Mr. Donnelly, to some of your testimony, which I felt was especially pertinent in a practical way, in illustrating the relevance of the treaty.

For the sake of the record, do either one of you, or both, have some final comment that you would like to make about these affairs?

Mr. DONNELLY. Mr. Chairman, thank you. I would like to just pick up on the point that you raised about the practical effect on the Export-Import Bank. The Export-Import Bank at a very senior level, one of their vice presidents, Robert Morin who is here with us today has been a full member of the negotiating team and they have been intimately involved every step of the way.

So we think this is a case where, although this is a formal legal treaty, it is very much grounded in the practicalities of the business world and actual deals. And I believe the Export-Import Bank is on record as having said they are reducing their exposure fee by 33 percent, from 3 percent to 2 percent for airlines that purchase equipment through the EX-IM Bank in countries that have signed on to this treaty.

So I think it does have the effects that you were pointing out about really being able to provide an impetus of increased sales, newer aircraft, safer aircraft. This is really very much a treaty that can have very practical benefits for us and for all the countries of the world, and we appreciate the prompt efforts of the committee to look at it and try to help us move it forward. Thank you very much.

The CHAIRMAN. Mr. Morin, would you identify yourself? Thank you for attending the hearing. Mr. Donnelly, are there others who are here today who have been especially important in the formation of this work that should be recognized?

Mr. DONNELLY. Well, I believe—and perhaps my colleague could do a better job, but we do have two senior FAA representatives who have been full members of the delegation, Jeff Klang and I believe Joe Standell, one from headquarters and one from the Oklahoma City office which is the center of this aviation effort, and they have been key members.

We also have Jeffrey Wool and representatives of the aircraft group—aviation group in the private sector and members of some of the leading companies I see in the crowd as well here today. So I think we are—it's a very clear indication of the broad support and the collaboration that has been behind this effort and part of that has obviously been the consultation process with members of your staff, Mr. Chairman.

The CHAIRMAN. Well, we appreciate the attendance of each of these public and private officials today. Putting heavier credentials to work is what we are about.

Mr. Rosen.

Mr. ROSEN. Thank you, Mr. Chairman. I think the one additional thing that I would like to underscore is what a win, win proposition this particular Convention and Protocol are, because it has the benefits of—by virtue of being an efficiency enhancement of providing benefits simultaneously to the sellers and the workers of the companies who are making and selling the products and to the borrowers who are the purchasers of the equipment at issue.

And so it's truly one of these win, win situations, and I think it's in part for that reason that another important aspect of the Convention, that the aircraft Protocol is set up to be the first of what would be several available Protocols. So the Convention is an equipment Convention that can accommodate future Protocols, and in that regard there are already processes underway for potential Protocols in the future that might deal with railway rolling stock and drill equipment, possibility space equipment, and perhaps in the future high value mobile agricultural or construction equipment.

And so the structure of this particular Convention is one that, because it is a win, win kind of set up, an efficiency enhancing setup is one that I think is of great interest in a number of contexts. But this is a terrific place to begin and to demonstrate the benefits, and as you underscored the practical benefits that are already being realized through the reduction of exposure fees and credit costs.

And so I welcome you and your committee's readiness to take this up so promptly and with so much attention, and hope that what I've been able to provide here today provides some help to that.

The CHAIRMAN. Let me just say that the comment that you have made is especially interesting. You had mentioned some very important industries that might use the same framework, with, I suppose, slight modifications of language pertinent to those industries. Where in the grist of the mill process are these agreements? Are they well along? How could you describe administration efforts?

Mr. ROSEN. Well, I think it's fair to say that they're at different stages, that some of them are more inchoate than others, that the ones with regard to the rail stock and rail equipment is perhaps underway, but that these are, I think the subject of continuing negotiation processes and are something that will continue.

But in part, the success of the aircraft Protocol if countries are able to move ahead and ratify it and take advantage of its benefits will prove a model of how these things might be done.

The CHAIRMAN. I appreciate that. I'm sure that all Americans who are listening to this record will appreciate this, because each of these industries, for the same reasons we're discussing the aircraft industry, have vital employment opportunities. They offer new jobs for Americans, and new possibilities, utilizing our basic institutions.

We wish you and your colleagues well as you all help these procedures move ahead. Let me mention that we'll keep the record of

the hearing open for the rest of the day in the event that members who were not able to attend the hearing have questions that they may wish to submit. We hope that you would respond quickly to such questions, as well as to the one question that you reserved, Mr. Donnelly, earlier on, so that our record will be complete.

I want to consult closely with Ranking Member Senator Biden to put this on the agenda of our next mark up. It is problematic simply because of the schedule of the Senate. We want to make certain that we are all here, and that we have some reasonable chance of getting a quorum.

It is a high priority for our committee's activity. We would hope to get the treaty to the Senate floor so that our colleagues, all of them, could consider its merits. We thank both of you for coming, as well as your staffs, and those who have supported you. Likewise, we thank staff on both sides of the aisle here who have made this hearing very successful. Having said that, the hearing is adjourned.

Mr. DONNELLY. Thank you, sir.

Mr. ROSEN. Thank you, sir.

[Whereupon, at 10:23 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

RESPONSE OF HON. SHAUN DONNELLY TO AN ADDITIONAL QUESTION FOR THE RECORD
SUBMITTED BY SENATOR RICHARD G. LUGAR

Question. The testimony describes a process for consultations to take place between the U.S. and the European Commission to address certain issues that may arise in the future. Would such consultations be in addition to the procedures that already exist or would new channels need to be created for such consultations to take place?

What, if any, effect would such consultations have on U.S. business interests in the region?

Answer. As reflected in the understanding negotiated at the same time as the amendments, the United States and the European Commission made a political commitment to consult whenever new EU measures affecting foreign investment are under consideration and raise questions of compatibility between U.S. law and pre-existing international agreements between a Member State and the U.S. We further acknowledged that such consultation would take place through existing channels, for example, through informal contacts between the Commission and U.S. officials responsible for investment, diplomatic channels, and the U.S.-EU Senior Level Coordinating Group. The political understanding reached by the U.S. and the Commission also calls for a mutual good-faith effort to take into account the views of countries with international agreements with the U.S.—they may be new candidates for accession or Member States—that may be affected by the contemplated measures.

We believe these consultations should have a salutary effect on U.S. business interests in the region, because they provide a means by which to head off any problems before they materialize.

Separately, in the Protocols amending the BITs that are before the Committee, the United States and each of its BIT partners agree to consult promptly whenever either party to the BIT believes that steps are necessary to assure compatibility between the BITs and the EC Treaty. In such a case, traditional diplomatic channels would be utilized. Given that both the understanding and amendments contemplate only established channels for these new consultation commitments, we do not contemplate creating new ones to address related issues.

RESPONSES OF HON. SHAUN DONNELLY TO ADDITIONAL QUESTIONS FOR THE RECORD
SUBMITTED BY SENATOR JOSEPH R. BIDEN, JR.

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 and the Protocol, which would provide additional clarification of the meaning of the terms of the Convention and the Protocol? If so, please provide them.

Answer. There were no exchange of notes or official communications with regard to the meaning of the terms of the Convention and the Protocol. With regard to statements of the U.S. negotiating delegation, an official record of the deliberations of the Diplomatic Conference has not been issued, although we have requested an unofficial copy from the Secretariat and we will provide that to the committee when received. We believe that the record of the meetings will not contribute to the meaning of terms, beyond what has already been set forth in the Official Commentary.

Question 2. What is the view of the executive branch with regard to the authoritative nature of the Official Commentary issued by UNIDROIT?

Answer. The Official Commentary of the Convention and the Protocol, issued by UNIDROIT in September 2002, is an interpretive aid. The Commentary was authorized to be issued by a formal Resolution of the Diplomatic Conference. It was produced by the appointed Rapporteur, together with the chairs of each committee of the Conference and in close collaboration with key participating States. The United States delegation and U.S. industry representatives reviewed every provision of the Commentary, and are satisfied with its accuracy.

Question 3. Does the executive branch regard the Convention and the Protocol as self-executing? Are there any provisions of either which are not self-executing? Please be specific.

Answer. The financing and other basic provisions of the Convention and Protocol on secured interests, transactional remedies, etc., do not require any implementing legislation, state or federal, and to that extent are self-executing. The basic concepts of the Convention and Protocol were drawn from the uniform state law in the United States (Uniform Commercial Code, Article 9 on secured finance) and the transaction results are consistent with that law, so that there is no need for further legislation to have its provisions implemented by financing parties.

The exception to the above relates only to the Federal Aviation Administration's (FAA) role in the new finance-registry system. All key participants, government and industry, in the United States have agreed that, both for overall effectiveness of aircraft finance and maintaining the effectiveness of the FAA's current role in registrations for aircraft interests, the FAA should be the single point of entry for authorization for filings under the Convention for U.S. registered aircraft, which would occur at the FAA's main registry facility in Oklahoma City. In order for that to operate properly, technical amendments to the FAA's current authority have been submitted to Congress by the Department of Transportation.

The technical amendments essentially do three things: first, they update the FAA's statutes by adding references to the new Convention registry and provide that the FAA will be designated as the "entry point" for registration of U.S. aircraft and engines for filings under the new system. Secondly, they provide that deregistration and filing authorization follow the Convention's requirements as to consent of affected parties. Thirdly, they provide for filings of prospective interests, a modern approach followed by the Uniform Commercial Code and standard in such financings, but not included in FAA standards set in the 1950s. There is no known opposition to these amendments, they track modern aircraft finance, and they have been supported by all key participants in the air-finance sector.

The effect of the foregoing is that transacting parties may bring actions based on the provisions of the Convention and the aircraft finance Protocol in the courts of a State party to the Convention. As a general matter, the Convention establishes certain financing interests in covered transactions, and transacting parties can seek enforcement thereof without requiring prior approval or action of governmental authorities with regard to claims brought under the Convention or Protocol. The Convention and Protocol do not however supercede otherwise applicable law, except to the extent a matter is resolved by those treaty texts. Thus transacting parties in the U.S. could also cite grounds for action under the Uniform Commercial Code or other applicable law, but would not need to do so; in the case of conflict, the provisions of the Convention would prevail.

Question 4. Your testimony describes extensive consultation with other federal agencies and interested parties in the private sector. During the course of the negotiations, were there any consultations with this committee? If not, why not?

Answer. During the course of negotiations, the State Department did not brief the Senate Foreign Relations Committee (the SFRC), but rather relied upon aviation industry representatives who had contact with members of the SFRC from time to time. In briefings done by industry representatives, materials that were provided to staff, had been discussed with and approved by the federal agencies working on the Convention and the Protocol.

I understand this question as reflecting a desire by the SFRC to be kept better informed by the State Department during the course of negotiations. My colleagues and I take note of that desire and will certainly endeavor to be more proactive in the future.

Question 5. Article 5(3) of the Convention states that “[r]eferences to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.” The term “applicable law” is not defined in Article 1. Does the meaning of “applicable law” as set forth in Article 5(3) apply to the same term when used elsewhere in the Convention (e.g., the term “applicable law” is found in several other articles, such as Articles 12, 30(2) and 50(3))?

Answer. The definition provided in Article 5(3) is the commonly applied definition of that term in private international law conventions, such as the United Nations Convention on Contracts for the International Sale of Goods (Article 7) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Article 5). The common definition of “applicable law” set forth in article 5(3) is intended to apply whenever the term is used in the Convention.

Question 6. In the proposed declaration for Convention Article 39(1)(b), does the term “any entity thereof” include states and municipalities?

Answer. Yes, the term “any entity thereof” is intended to include states, municipalities and other political subdivisions.

Question 7. What is the purpose of Convention Article 40, in contrast to Article 39(1)(a)? That is, Article 39 does not require a non-consensual right to be registered, and Article 40 does. Why is this distinction made in the Convention?

Answer. Article 39 applies to certain non-consensual rights or liens, which by domestic law in a particular jurisdiction may have priority without registration. Article 40 permits a State to require that those non-consensual rights, as well as other non-consensual rights that may not have priority by virtue of their domestic law, will nevertheless acquire such priority pursuant to the Convention upon registration on a first to file basis. For developing countries that wish to enhance their credit capacity under this Convention system it will be important to maximize the application of Article 40 with respect to such rights or liens, rather than rely on Article 39, since the requirement to register such liens in order to obtain priority will have a significant effect on ensuring predictability for creditors. By way of contrast, since the United States already has a well functioning aircraft-finance market, declarations recommended for the United States in the Secretary of State’s Report transmitted to the Senate by the President, Senate Treaty Doc. 108–10, cover only Article 39, and would therefore preserve intact existing practices in the United States.

Question 8. Article XIII of the Protocol provides a procedure for a debtor to issue an irrevocable deregistration and export request authorization. The Secretary of State’s letter, and the Official Commentary, indicate that this process is subject to related aviation safety laws and regulations. Is the export of aircraft in this manner also subject to any applicable export control laws and regulations in the United States? Please elaborate.

Answer. Absent express provisions to the contrary, neither the Capetown Convention nor the Protocol would have any effect on export control laws or regulations. The only regulatory matter affected by an express provision in the Protocol relates to aviation safety procedures. Thus, the Convention and the Protocol will have no effect on export and national security law or regulations and will provide no limitation on the exercise of those constraints by the relevant governmental agencies.

ADDITIONAL PROTOCOLS WITH EU ACCEDING COUNTRIES OR CANDIDATE COUNTRIES

Question 1A. Each protocol contains an exchange of letters regarding the “essential security interests” clause in each of the underlying treaties.

Was the discussion with the European Commission and with the Acceding Countries and the Candidate Countries about the possible applicability of the “essential security interests” clause limited to the issue of possible restrictions on capital movements?

Answer. The issue of “essential security interests” arose in discussions with the European Commission and the Acceding and Candidate Countries only in the context of the existing EU authority under the EC treaty to impose restrictions on capital movements in limited circumstances and actions that Acceding and Candidate Countries might need to take to comply. However, the provision in our BITs is not limited to this context.

Question 1B. Do you envision that the countries might be compelled by their EU obligations to invoke the “essential security interests” clause in other contexts?

Answer. Although we are not aware of circumstances where the “essential security interests” clause has been invoked by a Party to a U.S. BIT to defend actions otherwise inconsistent with BIT obligations, the possibility that it might be invoked in the future in relation to EU obligations in contexts other than capital movements can not be excluded entirely. It is difficult to envision under what circumstances this might occur. Measures permitted by the provision on the protection of a Party’s essential security interests would include security-related actions taken in time of war or national emergency. Actions not arising from a state of war or national emergency must have a clear and direct relationship to the essential security interest of the Party involved. We view measures to protect a Party’s essential security interests as self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.

Question 1C. Was it understood that the “essential security interests” clause should only be invoked in extraordinary circumstances?

Answer. Yes. During our discussions with the European Commission and Acceding and Candidate Countries, we discussed the meaning and purpose of this clause.

Question 1D. Has the “essential security interests” clause been invoked under the current BITs with any of the Acceding Countries or Candidate Countries?

Answer. Although the United States has never been a party to an investor-State dispute under any of our Bilateral Investment Treaties, U.S. investors have invoked the dispute settlement provisions of our BITs against several of our treaty partners, including some of the Acceding and Candidate Countries. We are not aware, however, of any instance in which the “essential security interests” clause has been invoked in any of those cases.

Question 2. If the United States does not ratify these protocols, is it the view of the Department that the Acceding Countries and Candidate Countries would likely decide to terminate the Bilateral Investment Treaties?

Answer. Yes. Although we cannot be certain of the actions that individual countries would take, our assessment is that, if it became evident that the U.S. did not intend to ratify these protocols, the European Commission would renew its efforts to encourage these countries to terminate their BITs with the U.S. by, among other things, threatening infringement proceedings. We believe that given the Acceding Countries’ commitments in their Acts of Accession to address incompatibilities or withdraw from their international agreements with third countries, the Accession Countries would be likely to provide notice of termination of their BITs with the U.S. Candidate Countries would also be likely to do so, although the more distant date of their actual accession might affect the timing of their decision.

STATEMENTS SUBMITTED FOR THE RECORD

AVIATION WORKING GROUP,
March 29, 2004.

Senator RICHARD G. LUGAR, *Chairman*,
Senator JOSEPH R. BIDEN, *Ranking Member*,
Committee on Foreign Relations,
U.S. Senate.

Re: Cape Town Convention and the Aircraft Protocol

DEAR SENATORS LUGAR AND BIDEN,

I write to you as Secretary of the Aviation Working Group (AWG), a non-profit entity whose members are the major aerospace manufacturers and financial institutions set forth in annex 1 hereto.

I write to underscore the firm support of the AWG and its members for the Cape Town Convention and the Aircraft Protocol, and to express appreciation for the Committee's decision to take action on these instruments this term. We have also been authorized to pass to the Committee a letter of support from the Air Transport Association, and attach that letter as annex 2 hereto.

AWG has actively participated in the development and negotiation of the Cape Town instruments for a number of years, working in close coordination with the U.S. government negotiating team among others.

We believe that prompt and widespread ratification of the Cape Town instruments will significantly promote a wide range of aerospace interests, starting with increased aerospace exports and job creation. We also believe the texts will advance broader governmental interests, including adoption of commercially-oriented rules of law in cross-border trade.

Please do not hesitate to call on us to provide any assistance as advice and consent to ratification is considered over the coming period.

Sincerely yours,

JEFFREY WOOL,
Secretary.

[Attachments.]

ANNEX 1

AVIATION WORKING GROUP/AWG AWG STRUCTURE AND MEMBERSHIP

AWG is a not-for-profit legal entity whose members are:

Airbus S.A.S.
The Boeing Company
Bombardier Inc.
Boullioun Aviation Services, Inc.
Citibank, N.A.
debis Airfinance
DVB Bank Aktiengesellschaft.
EMBRAER—Empresa Brasileira de Aeronautica S.A.
GE Capital Aviation Services Inc.
General Electric Company
Indosuez Air Finance S.A.
International Lease Finance Corporation
JPMorgan Securities Inc.
KfW
Morgan Stanley & Co. Incorporated
Rolls-Royce PLC
Singapore Aircraft Leasing Enterprise Pte. Ltd.
SNECMA S.A.
United Technologies Corporation (Pratt & Whitney Division)

ANNEX 2

AIR TRANSPORT ASSOCIATION,
1301 PENNSYLVANIA AVE., SUITE 1100,
Washington, DC, June 13, 2004.

Mr. JEFFREY WOOL, *Secretary*
Aviation Working Group
c/o Perkins Coie
607 14th Street, 8th Fl.
Washington, DC, 20005

Re: Cape Town Convention and its Aircraft Protocol

DEAR JEFFREY,

As you know, ATA has followed the development of the Cape Town Convention and its Aircraft Protocol (the "Convention") including the recent U.S. signature thereof and efforts now underway to seek prompt ratification of these instruments.

We are also aware of the active role played by the Aviation Working Group within the framework of a broad U.S. effort to develop and promote these instruments.

While we have not felt it necessary to play an active role regarding the Convention, ATA does support its ratification. That support stems, in part, from the fact that the U.S., through its permitted declarations to the treaty, will ensure the continuation of current recordation procedures and priorities via use of the Federal Aviation Administration as the interface with the new international registry created under the Cape Town Convention.

Please feel at liberty to pass this letter to others involved in the ratification process. I would be happy to respond to any questions regarding this matter.

Sincerely,

JAMES L. CASEY,
President & Deputy General Counsel.

GENERAL ELECTRIC COMPANY,
ONE NEUMANN WAY,
Cincinnati, OH, March 29, 2004.

Honorable RICHARD G. LUGAR, *Chairman,*
U.S. Senate Committee on Foreign Relations,
Dirksen Senate Office Building,
Washington, DC.

Honorable JOSEPH R. BIDEN, *Ranking Member,*
U.S. Senate Committee on Foreign Relations,
Dirksen Senate Office Building,
Washington, DC.

Re: Cape Town Convention and its Aircraft Protocol

DEAR SENATORS LUGAR AND BIDEN,

I write to you to underscore our firm support for the Cape Town Convention and its Aircraft Protocol, and to express General Electric's sincere appreciation for the Committee's decision to take action on these instruments this term.

GE's Aircraft Engines component has actively supported the development of Cape Town for a number of years, working in close coordination with the U.S. government negotiating team.

The ability to protect the interests of U.S.-based manufacturers in cross-border transactions is vitally important to us. We believe that prompt ratification of the Cape Town Convention will help to promote a wide range of U.S. interests and should provide a much needed boost for aerospace exports and job creation. We also believe the Convention will advance broader U.S. interests, including adoption of commercially oriented rules of law in cross-border trade.

Please do not hesitate to call on us to provide any assistance as advise and consent to ratification is considered over the coming period.

Sincerely,

DAVID L. CALHOUN,
PRESIDENT AND CHIEF EXECUTIVE OFFICER,
GE Aircraft Engines.

PRATT & WHITNEY,
400 MAIN STREET,
East Hartford, CT, March 30, 2004.

The Honorable RICHARD G. LUGAR,
Chairman, Committee on Foreign Relations,
United States Senate,
Washington, DC.

DEAR MR. CHAIRMAN:

I write to reiterate the strong support of Pratt & Whitney and United Technologies Corporation for the Cape Town Convention and its Aircraft Protocol. Prompt ratification of Cape Town is crucial and we appreciate the Committee's decision to take action early this year.

We have actively worked to support the development, negotiation and now ratification of the Cape Town Convention for a number of years. This convention will significantly promote a wide range of U.S. interests, including the health of the aerospace industry and the creation of jobs. Moreover, Cape Town will promote the adoption of commercially oriented rules of law in cross-border trade, which benefits us all.

We hope that the Senate Foreign Relations Committee will continue to move expeditiously with its consideration of the Cape Town Convention. Prompt ratification by the United States will certainly serve as incentive for other countries to ratify, opening up additional markets for U.S. exports.

Please do not hesitate to call on us to provide any assistance that may be required as the Senate moves forward with advice and consent of the Cape Town Convention over the coming months.

Sincerely,

LOUIS R. CHÊNEVERT,
President.

