

**EXHIBITS AND DOCUMENTS SUBMITTED BY
NICARAGUA AND THE UNITED STATES OF
AMERICA IN CONNECTION WITH THE ORAL
PROCEDURE ON JURISDICTION AND
ADMISSIBILITY**

**DOCUMENTS DÉPOSÉS PAR LE NICARAGUA
ET LES ÉTATS-UNIS D'AMÉRIQUE
AUX FINS DE LA PROCÉDURE ORALE
RELATIVE À LA COMPÉTENCE
ET À LA RECEVABILITÉ**

EXHIBITS SUBMITTED BY NICARAGUA IN
CONNECTION WITH THE ORAL PROCEDURE ON
QUESTIONS OF JURISDICTION AND
ADMISSIBILITY

Exhibit A

REPORTS OF NICARAGUA'S ACCEPTANCE OF CONTADORA TREATY AND THE UNITED
STATES REACTION

1. "NICARAGUANS SAY THEY WOULD SIGN PROPOSED TREATY", *NEW YORK TIMES*,
23 SEPTEMBER 1984
2. "US OFFICIAL DISCOUNTS PLEDGE BY NICARAGUA", *NEW YORK TIMES*, 24 SEP-
TEMBER 1984
3. "US URGES ALLIES TO REJECT CONTADORA PLAN", *WASHINGTON POST*, 30 SEP-
TEMBER 1984
4. "W. EUROPEANS TO AID CENTRAL AMERICANS", *WASHINGTON POST*, 30 SEPTEMBER
1984
5. "LATIN PEACE PLAN : WHY THE US BALKS", *NEW YORK TIMES*, 3 OCTOBER 1984
6. "US VERSION OF CONTADORA DRAFT DISPUTED", *WASHINGTON POST*, 3 OCTOBER
1984

[Not reproduced]

Exhibit B

DOCUMENTS FROM THE PAPERS OF MANLEY O. HUDSON, LANGDELL LAW LIBRARY,
HARVARD LAW SCHOOL, REGARDING *KING OF SPAIN* CASE

1. LETTER TO ESTEBAN MENDOZA, MINISTER OF FOREIGN RELATIONS, HONDURAS, FROM MANLEY O. HUDSON, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS, DATED 12 AUGUST 1955

Law School of Harvard University, Cambridge 38, Massachusetts

August 18, 1955.

Your Excellency :

1. I am confronted with a difficulty in connection with the opinion which I am writing for you on the Honduras-Nicaragua question. Will you please let me explain it to you, and if you can send me anything on it, I believe it might make it possible for us to complete the work.

2. On 24 September 1929, Nicaragua accepted the Article 36, paragraph 2, by making the following declaration :

On behalf of the Republic of Nicaragua, I recognise as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, September 24, 1929.

(Signed) T. F. MEDINA.

At this date, Nicaragua had not signed the Protocol of Signature of the Permanent Court of International Justice, and the action of 24 September 1929 was not immediately effective because Nicaragua had not ratified the Protocol of Signature.

3. It did not take this action until on 29 November 1939, when the Nicaraguan Government notified the Secretary-General of the League of Nations by telegraph of Nicaragua's ratification of the Protocol of Signature: the telegram does not seem to have mentioned the acceptance of compulsory jurisdiction, though I am not certain of this. Of course, Nicaragua should have sent a ratification of the Protocol and the Statute of the Court. I can't find that they did so.

4. Nicaragua is still listed as a State which is one of those which has signed the Protocol of compulsory jurisdiction. *Sed quaere*.

5. I must confess that the problem has interest. A telegraph by Nicaragua would not be a way for them to add to the legal consequences of the action of 1929. So that from September 1929 to the signature of the Charter of the United Nations, I doubt whether Nicaragua did anything to remedy the situation. She certainly was not a signatory.

6. However, on 26 June 1945, Nicaragua signed the Charter of the United Nations, and ratified it on 6 September 1945: it became effective on 24 October 1945. This did not, in any way, affect the compulsory jurisdiction.

7. The problem that worries me is, can Nicaragua be bound by the clause today? Can you send me any documents which would enlighten this action?

Warmly yours,

(Signed) Manley O. HUDSON.

2. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA OF 4 JANUARY 1956
(DATED 4 JANUARY 1955)

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., 4 de Enero de 1955.

Dear Judge Hudson :

Dr. Dávila and I have read very carefully your opinion on our boundary question with Nicaragua. Even though this opinion is not entirely favorable to the interests of Honduras, as this Government would wish, we consider it highly valuable as it comes from one of the most prominent world authorities on International Law, and due to the fact that said opinion, clear and final, has led us to seek a new solution to the problem.

I wish to inform you, very confidentially, that while in Washington I talked for two hours with Mr. Holland, to whom I acquainted in detail with our boundary problem and our intention to submit same, if necessary, to the Organization of American States. Mr. Holland showed a great deal of interest and promised, that although in an informal way, he would advise Nicaragua to accept the jurisdiction of the International Court of Justice. I learned later that the Nicaraguan Ambassador in Washington had been called by Mr. Holland and that he had left shortly after for Nicaragua, presumably to report to his Government. I am waiting for results of said move and on learning definite news I shall be glad to communicate same to you.

On behalf of the Honduran Government I hereby express to you our deepest gratitude for your cooperation and endeavors in this highly important matter, in which we trust you will continue to render us the assistance of your experience and knowledge.

Very truly yours,

(Signed) Esteban MENDOZA.

3. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 9 MAY 1956

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 9, 1956.

Honorable Dr. Hudson :

Yesterday I received some news which I deem of great interest for requesting the execution of the *Award of King of Spain*; before the International Court of Justice. As you will see, it is something which bears relation with report you sent me.

The Honduran Ambassador to Managua has sent me copies of *La Gaceta*, Nicaraguan official daily, corresponding to various dates of the year 1935, bearing publication of minutes of the Nicaraguan Senate and of the Nicaraguan Chamber of Deputies, ratifying Protocol of Signature and Statute of the Permanent Court of International Justice. I have ordered translation of these documents and will forward same to you as soon as possible.

Up to this moment we have been unable to find the Ratification Decree of said Protocol. However, in view of the fact that Minutes of the Senate and of the Chamber of Deputies were published in the Nicaraguan official daily, I consider that this alone constitutes sufficient evidence to establish that Nicaragua ratified the Protocol and the Statute and therefore declaration made by Mr. Medina in 1929 acknowledging the Court's compulsory jurisdiction, is at present in full force.

The finding of these documents makes me feel more optimistic and I trust that we will soon find the Ratification Decree. At any rate, I would like to have your opinion in this matter after you have read the above mentioned ratification minutes.

I take pleasure in expressing to you once more my deep appreciation for your valuable cooperation and beg to remain

Very truly yours,

(Signed) Esteban MENDOZA.

4. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 9 MAY 1956

Law School of Harvard University, Cambridge 38, Massachusetts.

9 May 1956.

My dear Mr. Minister:

I have another thought on the letter of 2 May 1956.

1. I am not too much put off by the fact that the Nicaraguan proposal would mean that we hold up the Application for seven months plus. That is not very long.

2. The Nicaraguan Government makes the proposal of postponement. There is no onus falling on you as a consequence of acceding to that postponement.

3. I think it is possible that we could get up the Case by that time. It would then be possible to file the Application and the Case together.

With warm regards, I am

Sincerely yours,

(Signed) Manley O. HUDSON.

P.S. The above is independent of the condition that you would attach to Nicaragua's action, namely, that she recognizes the declaration of September 24, 1929. I think it is possible for you to say that the declaration of 1929 was put into force as a consequence of the ratification of the Protocol and Statute of November 29, 1939.

5. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 15 MAY 1956

Law School of Harvard University, Cambridge 38, Massachusetts.

15 May 1956.

My dear Mr. Minister:

.....
 1. I am much interested in the news sent to you by the Honduran Ambassador

to Managua. According to him, the Nicaraguan *La Gaceta* has published minutes of the Nicaraguan Senate and Chamber of Deputies ratification of the Protocol of Signature and the Statute of the Permanent Court of International Justice. I shall await most eagerly the receipt of the documents which you are forwarding to me.

2. I am a bit upset by the mention of 1935. I had not before known of that date as being material. We shall, however, get out the *La Gaceta* here, and shall see what is available on that. Please send me the translation of the documents, and the original, as soon as possible.

3. I note that you have been unable to find the Nicaraguan Ratification Decree of the Protocol. The situation was as follows: On September 24, 1929, Nicaragua accepted the jurisdiction of the Court; Nicaragua was not at the time a Member of the Court. It depended upon Nicaragua's becoming a Member of the Court. On November 29, 1939, I have argued that Nicaragua became a Member of the Court, and consequently that she became bound by the jurisdiction of the Court. I explained the lack of an instrument of ratification by saying that it may have been due to lack of international communications in 1939.

4. You ask me as to whether finding the minutes of the Senate and Chamber of Deputies "alone constitutes sufficient evidence to establish that Nicaragua ratified the Protocol and the Statute and therefore declaration made by Mr. Medina in 1929 acknowledging the Court's compulsory jurisdiction". This seems to me to take an optimistic and hopeful view. I should dislike presenting that as evidence of that fact, but this would depend on what is in *La Gaceta*. I shall have to see that first. We are sending for the *La Gaceta* today, and I will write you further.

With deep expression of my warm regard for your valuable cooperation, I remain

Very sincerely yours,

(Signed) Manley O. HUDSON.

6. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 18 MAY 1956

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 18, 1956.

Distinguished Doctor Hudson:

In fulfillment of the promise made in my previous letter, I am pleased to enclose English translations of the Minutes of the Senate and Chamber of Deputies of Nicaragua, in which appear the ratification made in the year 1935 to the Protocol of Signature and Statutes of the Permanent Court of International Justice. Dr. Dávila, who is temporarily in this city, and I, are of the opinion that with these documents we have a sure basis on which to establish the jurisdiction and competency of the International Court of Justice to resolve the petition which Honduras is to present against Nicaragua.

In the very near future I will also send to you the translation of the Minutes of the Senate and Chamber of Deputies of Nicaragua, ratifying the Treaty which was entered in 1928 into between Nicaragua and Colombia, under the terms

of which recognition is made that the sovereignty and complete dominion of Nicaragua extend to the Cape of Gracias a Dios. You will see that in such official Minutes, not even a slight allusion or reservation is made on the part of Nicaragua with respect to any other territory beyond the Cape of Gracias a Dios. These documents will also serve for the purpose of proving, that even though indirectly, Nicaragua recognized in said Treaty the validity of the *Award of the King of Spain*.

I am concluding the preparation of a list of comments to the draft that you sent me with respect to the Application which is to be presented to the Court.

I have received your letters of the 7th and 9th of this month, the contents of which I have noted.

When I suggested that the Chancery of Nicaragua make a formal declaration confirming the validity of the Declaration made by Mr. Medina in 1929, I did not then have available the Minutes, translation whereof I now send to you. In view of the lack of reliability on the part of the Government of Nicaragua with respect to the execution of the *Award of the King of Spain*, we have no confidence in a simple promise of such Government to appear before the Court, when the petition for the execution of the Award is presented. On the other hand, if the Nicaraguan Chancery makes the declaration in the general form suggested by us, that is to say, without making any allusion to the Nicaragua-Honduras boundary question, two results would be obtained:

(a) Assuring the competence of the Court for the purpose of resolving the petition; and

(b) Assuring that the Nicaraguan people have no knowledge of the matter, in view of the fact that for political reasons, General Somoza does not deem it convenient that the Nicaraguan people know what he expects to do, prior to his election.

Manifesting my greatest consideration, I beg to remain
Respectfully yours,

(Signed) Esteban MENDOZA.

7. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 23 MAY 1956

23 May 1956.

My dear Mr. Minister:

1. I thank you very much for having sent me the English translation of the Minutes of the Senate and Chamber of Deputies of Nicaragua in 1935.

2. Since you called to our attention the year 1935, we have been examining *La Gaceta* of Nicaragua, and our search has yielded about the same results as yours. We have the records of the legislative proceedings, including those of February 14, 1935 and July 11, 1935 (*La Gaceta*, Vol. 39, No. 130, p. 1033; and No. 207, p. 1674), showing the approval of the Protocol of Signature and Statute of the Permanent Court.

3. I wish I could share the view which you and Dr. Dávila have that the documents supply a "sure basis on which to establish the jurisdiction and competency of the International Court of Justice". I am inclined to think that this is going a little too fast. We have not discovered any document by which

the President has ratified the Protocol of Signature, or any document which he signed and which he sent forward to the Secretary-General of the League of Nations as required by the Protocol of Signature of December 16, 1920: the Protocol says that "Each Power shall send its ratification to the Secretary-General of the League of Nations: the latter shall take the necessary steps to notify such ratification to the other signatory Powers". It would be normal for such texts to be printed in *La Gaceta*. The Secretariat of the defunct League of Nations has no record of ever receiving the instrument of ratification, but I shall verify this.

4. I shall be glad to have the translation of the Minutes of the Senate and Chamber, approving the Treaty between Nicaragua and Colombia of 1928. We already know it was ratified, for it was published in the *League of Nations Treaty Series* (Vol. 105, p. 337 ff.), which requires ratification.

With assurances of high esteem,

Very sincerely yours,

(Signed) Manley O. HUDSON.

8. LETTER TO ESTEBAN MENDOZA FROM MANLEY O. HUDSON, DATED 1 JUNE 1956

Law School of Harvard University, Cambridge 38, Massachusetts.

1 June 1956.

My dear Mr. Minister :

1. I have this morning your letter of May 26, 1956, and I want to thank you very much for your criticism of my draft. It has been a terrific job to me, and I appreciate it all the more that you could take the time to review it. I shall review your points one by one.

2. You will note in my revised draft that there are many changes made. Some of these changes bear upon the points that you have made, but perhaps they do not do so sufficiently.

3. I do not think that it is "according to international law and current practice" that there should be any indication of previous difficulty. At any rate, it will sufficiently appear from my Application that there is a serious disagreement. In this connection, I am surprised to hear that Honduras has sent communications on July 11, 1955, and January 12, 1956, to Nicaragua. I don't know what these communications involve, but I urge you very much to hurry up the copies for me. If, on September 29, 1955, Nicaragua used the same words as in 1912, it is not necessary that we should review that; but if they used different words it may be necessary for us to pay attention to it.

4. Your point about the Nicaraguan Senate and Chamber of Deputies having ratified the Protocol of Signature and the Statute of the Court seems to me entirely superfluous. They have *consented* to the ratification, at the most. I wish it were true, but it cannot be true according to the Nicaraguan Constitution. I wrote you a letter yesterday which explains my stand on this.

5. I am glad to get your point about the location of Danlí. I knew that Danlí was in Honduras, but somehow it slipped me.

6. I do not agree that we should ask for indemnity for the expense of Honduras in opposition to what Nicaragua has done. It has been too many years, and too

much has been done. However, I think that we might ask for the expense of this Court action. I think so for the time, at any rate, and I shall think further on it.

With assurance of my high esteem, I am

Faithfully yours,

(Signed) Manley O. HUDSON.

9. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 4 JUNE 1956

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., 4 de Junio de 1956.

Honorable Judge Hudson :

I have the honor to refer to your letters of May 23rd and 31st of 1956.

I note that you are not of the opinion that ratification by the Nicaraguan Senate and Chamber of Deputies to Protocol and Statute of the Permanent Court of International Justice is sufficient for establishing the jurisdiction of present International Court of Justice, due to the fact that the Nicaraguan President has not taken any steps to "ratify" said Protocol and send same to the Secretary of the League of Nations, as he was supposed to do in accordance with stipulations of said Protocol.

In this regard allow me to state that in Honduras and Nicaragua, as well as in most Latin American countries, procedure for ratifying international treaties is different from that applied in the United States. In Honduras and Nicaragua, once a treaty or convention has been subscribed, the President of the Republic approves it through a special decree and submits same to the Legislative Chambers for ratification. Therefore, it is the Legislative Chambers and not the President, properly speaking, who ratify treaties and once same are ratified the only requirement to be fulfilled is that the President should effect exchange or deposit of ratification, whether it be a bilateral or multilateral treaty. On the other hand, in the United States the Senate with a two-thirds majority of votes present, merely gives its advice and consent for the President to ratify treaty, should the latter deem it convenient to do so. Therefore, in the United States — contrary to procedure in force in our countries — the President and not the Senate has the power to ratify treaties. In this respect, Prof. Julius W. Pratt in his book entitled *A History of United States Foreign Policy*, on page 17, states :

"It is to be emphasized here that, popular opinion and phraseology to the contrary notwithstanding, the Senate does not 'ratify' treaties. It merely gives its advice and consent in favor of the treaty. Ratification is an executive act, performed by the President after the Senate has consented. The President, however, is not required to ratify a treaty that the Senate has approved."

In view of the fact that the Nicaraguan Legislative Chambers have ratified the Signature and Statute Protocol, it is to be expected that Ratification Decree was also issued and we are anxiously searching for same, even in the publications of the Congress Library in Washington. If, as we hope, this decree is finally located, the only missing requirement would be to forward such ratification instrument to present Secretary of the United Nations, thus fulfilling, although late, offer

made by the Nicaraguan Chancery by special cable, in 1939, to the Secretary-General of the League of Nations.

On the above expressed reasons both Dr. Dávila and I have based our opinion. Nevertheless, neither of us pretend that our opinion be conclusive.

Herewith enclosed you will find translation of notes exchanged between Honduras and Nicaragua regarding the execution of the *Award of His Majesty the King of Spain*.

Allow me to offer you once more, most Honorable Judge, my deep esteem and consideration.

Very truly yours,

(Signed) Esteban MENDOZA.

10. LETTER TO MANLEY O. HUDSON FROM ESTEBAN MENDOZA, DATED 6 JUNE 1956

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., June 6, 1956.

Distinguished Dr. Hudson:

Due to the existing dissenting opinions of Honduras and Nicaragua regarding the validity or invalidity of the King of Spain's Award, we do not believe that it is possible to submit question, through a Special Agreement, to the decision of the International Court of Justice, and in such a case we would have to start proceedings through an Application.

Yesterday I had the pleasure to receive the draft of Application by Honduras against Nicaragua, which I consider a juridic work of great merit for initiating the defense of the rights of Honduras. However, please allow me to make a few remarks thereon:

- (a) It appears on page 6, referring to the Nicaragua Situation, that the Protocol of Signature and the Statute of the Permanent Court of International Justice was signed on September 14, 1929, but that the Protocol was not ratified until about ten years had passed. It seems to me that this statement is not in accord with the facts, as ratification of the Statute and Protocol by the Nicaraguan Senate took place on February 14, 1935, and by the Chamber of Deputies on July 11, 1935, such as appears on page 7, numeral 12 of Application.
- (b) I wish to make it clear that the Nicaraguan Legislative Chambers did ratify, in fact, the Statute and Protocol, and that they not just *consented* to ratification of same.
- (c) Don't you think it is necessary to mention the last notes exchanged between the Honduras and Nicaragua Foreign Offices, trying to obtain execution of the Award of Spanish King through a direct agreement between both countries?

I deem it an honor to remain, Honorable Judge Hudson,

Very truly Yours,

(Signed) Esteban MENDOZA.

11. LETTER TO MANLEY O. HUDSON FROM JUDGE JORGE FIDEL DURÓN,
DATED 24 AUGUST 1957

Tegucigalpa, D.C.,
August 24, 1957.

Dear Dr. Hudson:

The following are some of the ideas suggested by Dr. Ramón E. Cruz in connection with both the Application and Memorial on which you are now working. As time is running fast kindly examine his projected additions as follows:

1. A chapter should be added to the present Application advancing the expressed recognition of the rights of Honduras by the Louisiana-Nicaragua Lumber Company in a concession which said American company obtained in Nicaragua in 1906 in which the territory of Honduras was affected. We have records proving that said Company began its payments into the Honduran Treasury in 1911 until 1926. We are investigating whether said payments continued after 1926 as it may be that the concession lapsed or the company disappeared. We shall endeavor also to find out if any other company is in an analogous position.

2. Both in the Application and in the Memorial we should be careful not to say that the date of ratification of the Bonilla-Gamez Treaty was ratified on January 3, 1895, because such is the date of the approval of this instrument by the Nicaraguan Executive Power and it is not in fact the date of ratification by the Nicaraguan Congress. In this respect it is important to mention that the Nicaraguan Constitution in force in 1895 was the 1893 Constitution which entered into force on July 11, 1894. Ordinarily the Nicaraguan Congress convened on August 1 and it met in January only when a new president was sworn in. President Zelaya was in power in his first term in 1895 and the Constitution was amended on December 15, 1896, that was the time when the bicameral system was adopted.

3. We believe and recommend that your arguments about the jurisdiction of the Court should be maintained as stated in the Application and in the Memorial because, regardless of the Act of July 21, 1957, legally both States were subject to the competency of the Court and your sound arguments fortify our position. You are right in saying that this Act takes care of the question of jurisdiction but we submit that your allegations be kept in both documents only to be reinforced by the Act. We suppose that such Act signed by the Nicaraguan Foreign Minister and myself in Washington will be added as an Annex together with a brief statement to the effect that both States agreed solemnly to submit the matter to the decision of the Court. We already have your fine translation of the Act.

4. A summary narrative of the acts of the Organization of American States beginning with our first claim denouncing Nicaragua as an Aggressor should appear in the Memorial. The narrative would start with our first denunciation after the protest on account of the invasion and attack on Mocoron up to and including the Washington Act of July 21, 1957. Mention will be made of the creation of the Department of Gracias a Dios and following events. Dr. Cruz is now working on the Spanish text.

5. Finally, we are of the opinion, as agreed during our conversations in Boston, that the Application as well as the Memorial, should include in the plea the nomination and designation of a Mixed Commission for the fixing of the landmarks in the section comprised between the Portillo de Teotecacinte and the

confluence of the Poteca or Bodega river with the Guineo or Namasli river. As you well remember, our settlement plan with Nicaragua started thus, more recently we also agreed and now maintain such similar Mixed Commission to renew or fix anew the landmarks from the Pacific to the Teotecacinte Pass and we believe that we should ask the Court such a procedure as the most expedient way for the execution of the King's Award. You have already submitted the text of such a plea in the Application.

.....

The appointments made by the Military Junta include Dr. Cruz as Agent and Doctors Julian Lopez Pineda and Celeo Davilá as Honduran Counsellors. The first one is a lawyer, formerly our Delegate to the League of Nations, Minister in Paris and Managua. Dr. Davilá did not accept the appointment. In addition to the above we have our Minister Plenipotentiary in The Hague, Dr. Humberto Lopez Villamil, former Delegate to the UN General Assembly and as Secretaries young lawyers Robert Perdomo, now in Madrid, Roberto Reina, now in London and Enrique Ortez, now in Paris serving in our regular diplomatic missions. The picture is completed by lawyer Roberto Palma Galvez, who will serve as General Secretary when the Special Mission leaves and by you, Richard Young and Maurice Bourquin, in case he accepts. Otherwise we shall appoint Dr. Henri Rolin at your indication.

Please let me have your reactions to the above points and, with kindest regards, believe me, as ever,

Your friend sincerely,

(Signed) Jorge Fidel DURÓN.

12. LETTER TO MANLEY O. HUDSON FROM JORGE FIDEL DURÓN,
DATED 13 SEPTEMBER 1957

Tegucigalpa, Honduras,
September 13, 1957.

Dear Mr. Hudson:

In view of the fact that your last letter from Geneva reported that you would leave on the 11th for Cambridge, this letter and further ones will be addressed to you there.

1. With Dr. Cruz we have reviewed your last and recent suggestions. After careful examination we have come to the conclusion that for the best interest of Honduras we must include in the Memorial the matter connected with the Louisiana-Nicaragua Lumber Company. We have pondered and decided that it is essential to do so because we are thereby reaffirming the jurisdiction and sovereignty of Honduras up to the left bank of the Segovia river. The inclusion in writing, instead of orally, to the Court in the Memorial will serve as a precedent in the future not only for our own present case but for any other that may present itself in the future. Please bear this in mind and kindly see that the reference is made expressly in the Memorial.

2. We also are coming back to the matter of the Bonilla-Gamez treaty ratification. The only date we can prove with documentary evidence to this moment is the date of approval by the Nicaraguan executive on January 3, 1895, while José Santos Zelaya was President and F. Vaca Foreign Minister. We should avoid mentioning the ratification date, by the Nicaraguan Congress — at that

time a single Chamber — and rely on the date of the Exchange of Ratifications in San Salvador on December 24, 1896. Note that in my last letter to you, by mistake, October was copied instead of December, which is the exact month.

3. Dr. Cruz and I want to insist that the Solemn Agreement of July 21, 1957, only reinforces and fortifies the arguments contained in your Memorial to establish the jurisdiction of the Court. Both the Agreement signed by the two Foreign Ministers and the Agreements signed also with the OAS do not modify in any way our position except reaffirming and recognizing said jurisdiction. Time and again our Delegation before the Organization of American States reiterated that the two countries had submitted to the jurisdiction of the International Court and that Honduras without prior agreement could bring Nicaragua into the Court to force her to comply with her international obligations. The Special Agreement was signed at the insistence of Dr. Luis Quintanilla who stated that such a pact gave it more force in guaranteeing the execution of the Court's decision by virtue of the intervention of the Organization. He even went so far as to insinuate that we could find difficulties at the Security Council in view of possible political pressure and, without mentioning, intimated the possibility of a veto even.

4. We understood from the same Organization of American States *Ad Hoc* Commission that the ratification of the Solemn Agreement of July 21, 1957, was unnecessary. For Honduras the problem is easily solved as the Junta Militar de Gobierno could draft a Decree of ratification and that would suffice according to our present set-up. However, in the case of Nicaragua this would complicate matters as they have two Legislative Chambers and in either one the text might hit snags, either refusing the approval or modifying the context of the Agreement. We have antecedents to expect such a course from Nicaragua. Therefore, we must move cautiously and in view of your latter reaction after consulting Dr. Julio Lopez Olivan perhaps it will be better to leave things alone. We are, anyway, obtaining the registration at the United Nations Secretariat and shall have the document ready. At any rate, we rely implicitly on your able and strong arguments in the Memorial to establish the competency of the Court and the allegation with regard to this Solemn Agreement may even be invoked orally as you have suggested in your letter of September 2.

5. Finally, please recall that we agreed as to the insertion of our petition, both in the Application and in the Memorial, for the fixing of the landmarks in the section comprising between the Portillo de Teotecacinte and the confluence of the rivers Poteca and Guineo. The reason, as you clearly must see, is that the compliance and execution of the Award is precisely that: the setting up of said landmarks to mark the boundary between the two countries. We do not agree that a mere oral argument would suffice in this case. Not only do we run the risk of overlooking such petition but also we need emphatically that such a record in writing remain permanently in our arguments in writing. We approve your text as agreed during our visit with you last July. Please note that in this we cannot deviate for otherwise we are leaving the rights of Honduras in jeopardy. We know that you fully appreciate our firm position on this.

It will be of interest for you to know that yesterday the Nicaraguan Government filed a new protest with us on account of our Decree of the Military Junta No. 124-A of August 5, 1957, creating two Departmental Districts in the Department of Gracias a Dios, that of Puerto Lempira and the one of Brus Laguna with jurisdiction which rightfully reaches up to the left bank of the Segovia river. We are now studying the protest in order to answer same because Nicaragua claims that such apportionment violates No. 3 of a Resolution of the OAS of July 5 asking both governments to maintain the present *statu quo* until the matter

is solved. This article plainly covers our rights because it adds "without, for that, constituting an alteration of the legitimate rights of both parties". Our rights, of course, are clearly established over the region, this is a natural act of internal jurisdiction and the Royal Award confirms such rights and we have never accepted any other *statu quo*. I presume we must now add the new facts of the protest in our exposition.

Let me trust that your stay in Europe was a pleasant one and that you had a happy voyage of return home. Most sincerely yours,

(Signed) Jorge Fidel DURÓN.

13. MEMORANDUM ON STATIONERY OF THE HONDURAN EMBASSY, DATED 4 JUNE 1958

Embajada de Honduras, Washington DC

MEMORANDUM

1. According to the Agreement of the Ministers of Foreign Relations of Honduras and Nicaragua — July 21st, 1957, both countries accepted in the most ample terms the jurisdiction of the International Court of Justice to decide the — "Diferendo" — around the *Award of the King of Spain*, of December 24, 1906.

2. Nicaragua according to the declaration made by her Representative T. F. Medina, on September 24, 1929, came under the jurisdiction of that Court unconditionally.

3. The Agent of Honduras, Dr. Ramón E. Cruz, is of the opinion that in our Memorial it should be argued that Nicaragua is under the jurisdiction of the International Court according to the Agreement and the Declaration referred in Numbers 1 and 2 above.

4. One of the advisers of Honduras, Dr. Charles de Visscher, considers that it should only be mentioned the Agreement of the 21st of July, 1957, to support the jurisdiction of the Court and that it is unnecessary to mention the Declaration made by Medina with all the arguments that you expressed in the Memorandum you prepared for the Honduran Government.

5. The Minister of Foreign Affairs of Honduras wishes that you write a letter to Dr. Visscher, expressing your opinion about this matter. You could address the letter to the care of The Legation of Honduras, 82 Van Alkemadelaan, The Hague, Holland.

14. LETTER TO CHARLES DE VISSCHER FROM MANLEY O. HUDSON, DATED 4 JUNE 1958

Dear de Visscher:

1. Dr. Celio Davilá, the Ambassador of Honduras at Washington, has brought me today a memorandum from his Government in which it is said that you have had some discussion with Dr. Ramón E. Cruz, the Agent of Honduras, about the subject of jurisdiction in the Honduras-Nicaragua case. I understand this related to the question whether the jurisdiction of the Court should be rested solely on the Agreement of 21 July 1957, or on both the Agreement and the prior declarations by the two Governments' accepting the Court's jurisdiction generally.

2. The two bases for jurisdiction seem to me important because they reinforce and complement each other. With both of them laid in full before the Court, there can be no possible doubt about the jurisdiction of the Court in the case.

Warmly yours,

(Signed) Manley O. HUDSON.

15. LETTER TO RAMÓN CRUZ FROM MANLEY O. HUDSON, DATED 4 JUNE 1958

4 June 1958.

Dear Dr. Cruz :

1. I strongly advise that the jurisdictional provisions of the brief that you carried with you be kept.

2. There is some doubt in my mind about the Agreement of 21 July 1957. I wish this doubt to be expiated by the text as we have it.

Warmly yours,

(Signed) Manley O. HUDSON.

16. LETTER TO MANLEY O. HUDSON FROM RAMÓN CRUZ, DATED 11 JUNE 1958

The Hague, June 11, 1958.

Dear Dr. Hudson :

I am very pleased to refer to your letter of June 4th addressed to Dr. de Visscher, copy of which you were so kind as to send to me.

(1) I have been very pleased to note that your points of view concerning the recognition by Nicaragua of the Court's jurisdiction were entirely correct and that the Application and Memorial will be supported by the Declaration of Medina made in 1929 and by the Agreement of Washington of July 21, 1957.

(2) In my note No. 1 of May 26th ult., addressed to the Minister of Foreign Relations of Honduras, I said :

"I would like to make it very clear that there have been no differences in opinion between Dr. Hudson and the European Counselors and that the disagreement was probably due to misinformation. On reading the paragraphs concerning the jurisdiction and the request for judgement, Dr. de Visscher found that there were no differences of great importance regarding the presentation of our affair."

I would appreciate it very much if you would kindly send me by airmail two photostatic copies of the *Gacetas* of Nicaragua containing the ratification of the Statute and Protocol of the Permanent Court of International Justice. (*Gaceta*, 39th Year, No. 130, page 1033, and No. 207, page 1674.) The bill for these services should be sent to the Ministry of Foreign Relations at Tegucigalpa for payment.

With kindest personal regards to Mrs. Hudson and to your son, I am
Sincerely yours

(Signed) Ramón E. CRUZ.

Exhibit C

EXCERPTS FROM LEGAL OPINIONS OF SUZANNE BASTID, DATED 3 AUGUST 1956,
AND CHARLES ROUSSEAU, DATED 21 JUNE 1956, ON THE MATTER OF THE BOUNDARY
BETWEEN NICARAGUA AND HONDURAS

Attached hereto are excerpts of the portions of legal opinions prepared by Professors Suzanne Bastid and Charles Rousseau concerning Nicaragua's acceptance of the compulsory jurisdiction of the International Court of Justice. The excerpt from Professor Bastid's opinion is the original French and verified by Mme Bastid.

The excerpt from Professor Rousseau's opinion is an English translation of the Spanish version in the archives of the Government of Nicaragua; the original French version has not been located. The complete archive copies will be deposited with the Registry of the Court pursuant to Article 50, paragraph 2, of the Rules of Court.

EXCERPT FROM LEGAL OPINION OF SUZANNE BASTID, DATED 3 AUGUST 1956

Consultation sur la validité de la sentence arbitrale rendue par S. M. le roi d'Espagne, Alphonse XIII, le 23 décembre 1906, dans l'affaire des limites entre le Nicaragua et le Honduras et sur les voies de recours qui peuvent exister contre cette sentence

Je soussignée, Suzanne Bastid, professeur à la faculté de droit de Paris, membre de l'Institut de droit international, consultée par le Gouvernement du Nicaragua sur la validité de la sentence arbitrale rendue par S. M. le roi d'Espagne, Alphonse XIII, le 23 décembre 1906 dans l'affaire des limites entre le Nicaragua et le Honduras et sur les voies de recours qui peuvent exister contre cette sentence, ai émis, sur la base des documents qui m'ont été communiqués, l'avis suivant :

FAITS

I. A la suite de la proclamation au Guatemala le 15 septembre 1821 de l'indépendance de l'Amérique centrale, le Nicaragua et le [Honduras]...

...
que l'illégalité du protocole d'arbitrage constituant S. M. le roi d'Espagne comme arbitre unique a été couverte par le comportement ultérieur du Nicaragua, il n'en reste pas moins que la sentence est entachée d'excès de pouvoir pour ne pas respecter les dispositions du traité Gamez-Bonilla de 1894 sur les règles à appliquer par l'arbitre pour rendre sa décision. En outre, il pourrait être sérieusement soutenu que la sentence contient des erreurs manifestes affectant sa validité.

XLII. DEUXIÈME QUESTION

Dans la négative, c'est-à-dire si l'on trouve que ladite sentence arbitrale est nulle et non obligatoire parce qu'elle n'est pas conforme au compromis d'arbitrage et aux règles du droit international, le conseil juridique devra indiquer :

- a) *quelles seraient les actions ou les exceptions que le Nicaragua pourrait faire valoir pour obtenir la déclaration de nullité ;*
- b) *l'organisme ou tribunal auquel une telle demande pourrait être soumise ;*
- c) *la façon de présenter la demande ou la contre-demande.*

XLIII. La présente question est relative à la possibilité d'une « déclaration de nullité » de la sentence arbitrale. Une « déclaration de nullité » ne peut être que le fait d'une autorité ayant un pouvoir de décision dans le domaine juridique entre Etats souverains. Ce pouvoir appartient exclusivement à la Cour internationale de Justice, à un arbitre, aux deux Etats souverains agissant de concert. On recherchera successivement comment ces trois voies pourraient être suivies et dans quelles conditions le problème de la déclaration de nullité de la sentence arbitrale pourrait être posé.

XLIV. *Recours à la Cour internationale de Justice :*

Avant d'examiner quelle question pourrait être posée à la juridiction internationale, il convient d'examiner à quelles conditions elle peut être saisie.

Il faut relever tout d'abord que le Honduras a renouvelé pour six ans, le 24 mai 1954, une acceptation de la juridiction obligatoire de la Cour qui datait du 10 février 1942, sous réserve de réciprocité pour tous différends d'ordre juridique énumérés dans l'article 36 du Statut.

Quant au Nicaragua, l'*Annuaire* de la Cour internationale (*Annuaire 1954-1955*, p. 189) mentionne sa déclaration du 24 septembre 1929, acceptant comme obligatoire et sans condition la juridiction de la Cour permanente de Justice internationale. Ce faisant est appliqué l'article 36, alinéa 5, du Statut de la Cour qui dispose que :

« Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes. »

Toutefois une difficulté surgit à raison des conditions mêmes dans lesquelles la déclaration du Nicaragua a été faite en 1929.

Le Statut de la Cour permanente était annexé à un protocole de signature du 16 décembre 1920 qui disposait qu'il devait être ratifié et que chaque puissance adresserait sa ratification au Secrétariat général de la Société des Nations par les soins duquel il en serait donné avis à toutes les autres puissances signataires. Le Nicaragua a signé le protocole le 14 septembre 1929.

Le protocole pour la révision du Statut du 14 septembre 1929 a prévu sa ratification et le dépôt des instruments de ratification entre les mains du Secrétaire général qui en informera les membres de la Société et les Etats mentionnés dans l'annexe du pacte. Ce protocole a été signé par le Nicaragua le 16 septembre 1929, mais ce n'est que le 30 novembre 1939 que le Secrétariat de la Société des Nations a reçu un télégramme déclarant que la ratification du Statut et du protocole était intervenue, mais l'instrument annoncé n'a pas été envoyé à Genève. Le « dépôt de cet instrument n'a pas été notifié au Greffe », signale l'*Annuaire 1946-1947* de la Cour (p. 206, note 2). Dans ces conditions l'avis de ratification n'a pu être donné aux Etats visés par le protocole.

Cette situation permet de douter que le Nicaragua ait été partie au Statut de la Cour permanente.

En effet, la ratification est un acte interne. Quand le traité prévoit l'échange des ratifications c'est à ce moment seulement, sauf disposition contraire, qu'il devient obligatoire.

Quand le traité prévoit le dépôt des instruments de ratification «le procès-verbal de dépôt a la même importance juridique que le protocole d'échange des ratifications» (Bittnar, *Die Lehre von den Völkerrechtlichen Vertragsurkunden*, par. 32, p. 272 et suiv.; Basdevant, «Conclusion et rédaction des traités», *Recueil des cours de l'Académie de droit international de La Haye*, t. 15, 1926, p. 52). Ainsi, faute de dépôt de l'instrument de ratification, l'Etat n'est pas lié juridiquement.

Le Nicaragua n'ayant pas été partie au Statut de la Cour permanente, la déclaration faite le 24 septembre 1929 peut-elle produire ses effets depuis que cette puissance est devenue, comme membre des Nations Unies, partie au Statut de la Cour internationale?

La question pourrait être discutée, en faisant valoir qu'une acceptation de la juridiction obligatoire privée d'effet sous l'empire du Statut de la Cour permanente ne pourrait en recevoir en application du Statut de la Cour internationale.

Toutefois un examen attentif des textes semble écarter cette interprétation. L'article 36 du Statut de la Cour permanente prévoit que les membres de la Société des Nations pourront reconnaître dès à présent comme obligatoire la juridiction de la Cour «lors de la signature» du protocole. Cette déclaration n'est pas soumise à ratification.

Par ailleurs, le paragraphe 5 de l'article 36 du Statut de la Cour internationale parle des déclarations faites en application de l'article 36 du Statut de la Cour permanente sans exiger qu'elles aient été faites par un Etat partie à ce dernier Statut à la différence de ce qui est prévu au paragraphe 2 de l'article 36 actuel.

Dans ces conditions on peut soutenir que la déclaration faite par le Nicaragua rentre bien dans le cadre prévu par le paragraphe 5 de l'article 36 actuel. Telle est d'ailleurs la solution qui résulte de l'*Annuaire de la Cour* (voir *Annuaire 1954-1955*, p. 189). Sans doute n'engage-t-elle pas la Cour, mais elle n'a pu manquer de faire l'objet d'un examen attentif du Greffe.

En conclusion, la compétence obligatoire de la Cour existe pour tous les différends énumérés à l'article 36, alinéa 2, dans les rapports entre le Honduras et le Nicaragua.

XLV. Il faut par ailleurs examiner l'engagement relatif à la juridiction de la Cour résultant pour ces deux Etats du traité américain de règlement pacifique, dit pacte de Bogotá, du 30 avril 1948. D'après les informations qui ont été fournies ce traité a été ratifié par le Honduras et le Nicaragua et les ratifications ont été déposées. Il est donc en vigueur entre ces deux Etats.

.....

En conclusion on peut relever dans la sentence des erreurs sérieuses qui n'en affectent pas toutefois la validité. Celles-ci ne pourraient être invoquées que devant une juridiction arbitrale ou judiciaire ayant reçu des deux parties en cause une compétence d'appel.

Fait à Paris, le 3 août 1956.

(Signé) S. BASTID.

EXCERPT FROM LEGAL OPINION OF CHARLES ROUSSEAU, DATED 21 JUNE 1956 (SPANISH VERSION FROM NICARAGUA'S ARCHIVES, AND ENGLISH TRANSLATION)

[Spanish text not reproduced]

4. *Search for a Judicial Solution*

32. Taking into account this situation, the undersigned has been asked to examine "what actions or exceptions could Nicaragua undertake to obtain revision of the Award". The most adequate procedure being of a jurisdictional kind, one is led immediately to examine whether recourse before the International Court of Justice would be capable of providing the Parties a satisfactory solution for their present difficulties. The effectiveness of said solution, however, depends upon considerations of two orders, at once of form and of substance, that it is appropriate to preview.

33. Taking into account the fundamental divergence of the two States with respect to the Award of 1906 and the significant failure of the procedure proposed in 1931 when the Protocol Irias-Ulloa was signed, one must exclude the possibility that the Government of Honduras would agree to submit the question of the validity of the referred Award to the International Court of Justice by means of an arbitration agreement. In this case the only way to bring this matter to the Court would be a unilateral application. Still, in this respect there exists a difficulty that should be indicated.

With respect to Honduras, it is completely beyond doubt that this Government is bound by the optional clause of compulsory jurisdiction. On May 24, 1954, it renewed the effect of the declaration, signed previously by it, accepting the clause, in conformity with Article 36, paragraph 4, of the Statute of the Court.

With respect to Nicaragua, the situation is more complicated. The Government of Nicaragua accepted "unconditionally" on September 24, 1929, the optional clause of compulsory jurisdiction of the Statute of the Permanent Court of International Justice although, on that date, it was not a party to the Statute of the Court. Ten years later, that is on November 30, 1939, the Government of Nicaragua announced officially to the Office of the Permanent Court that it sent its two instruments of ratification, of the Statute as well as of the Protocol of acceptance of the optional clause. But, for reasons that have not been explained, this declaration of intention appears not to have been followed with any effect, since neither of the indicated instruments of ratification arrived at the Office of the Permanent Court neither on the indicated date nor afterwards. Thus the *Yearbook* of the Permanent Court of International Justice never indicated that Nicaragua figured on the list of States bound by Article 36, paragraph 2, of the Statute. Likewise, in his work on *The Permanent Court of International Justice* (French translation, Paris, 1936, p. 138, n. 111 *in fine*), Professor Manley O. Hudson expressly places Nicaragua among the States that had not ratified the Statute of the Permanent Court.

According to the terms of Article 36, paragraph 5, of the Statute of the International Court of Justice,

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force are deemed, as between the Parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

Taking into account the conditions in which Nicaragua signed the aforementioned declaration of acceptance and the absence of transmittal of its instrument

of ratification to the Secretary of the Permanent Court, it could appear that it does not figure among the States presently bound by the optional clause of compulsory jurisdiction. Still, the *Yearbook* of the International Court of Justice, in the successive editions published since its creation (see, for example: *Yearbook 1954-1955*, p. 35), expressly places Nicaragua among the States whose declaration of acceptance of the compulsory jurisdiction of the Court is presently in force,

“these declarations were made in accordance with the terms of the Statute of the Permanent Court of International Justice, the remainder in accordance with the terms of the Statute of the International Court of Justice”.

It is not possible, however, to give an absolute value to an indication of this nature taking into account that according to the terms of reference that appear in the preface of each *Yearbook*, prepared by the Registrar himself, “The *Yearbook* is prepared by the Registry, and in no way involves the responsibility of the Court” (see, for example: *Yearbook 1954-1955*, p. 7).

In these circumstances, it is to be feared that in case Nicaragua presented to the Court, by means of unilateral application, the problem of the validity of the Award of December 23, 1906, Honduras could oppose with prejudice the question of the validity of the declaration of compulsory jurisdiction of the International Court of Justice, since this declaration has not been accompanied by the transmittal of the instrument of ratification to the Registrar, which should have occurred normally 27 years ago. A prudent precaution on the part of Nicaragua would consist, in these circumstances, of repairing as quickly as possible the omission of 1939 to eliminate a new source of possible difficulties with Honduras in the hypothesis that the International Court of Justice could be called upon to know the controversy. Without doubt, by the sole fact of having signed and ratified the Charter of the United Nations, Nicaragua forms part “*ipso facto*” of the Statute of the International Court of Justice, by application of Article 93, paragraph 1, of the Charter and its absence of participation in the aforementioned jurisdictional organ could not be objected to now, as before 1940. But its quality as a State bound by the optional clause is more doubtful, by the fact that it is bound by Article 36, paragraph 2, of the new Statute only in the same conditions in which it was in relation to Article 36, paragraph 2, of the Statute of 1920. In any case there is an ambiguity that it is convenient to remove as soon as possible.

Exhibit D

LIST OF UNITED STATES FEDERAL COURT DECISIONS CITING TREATIES IN FORCE

The following federal court decisions cite *Treaties in Force* as authoritative evidence for the status of or parties to treaties to which the United States is a party.

DECISIONS OF UNITED STATES CIRCUIT COURTS OF APPEALS

1. *Salome Bara Arnbjornsdottir-Mendler v. United States*, 721 F. 2d 679, 682 (9th Cir. 1983). The court found that the 1902 and 1905 treaties between the United States and Iceland "have both been incorporated into US domestic law . . . and are included in *Treaties in Force* . . .".

2. *United States v. Montroy*, 614 F. 2d 61, 64 (5th Cir. 1980). The court cited *Treaties in Force* as sole authority that neither Colombia nor Panama has ratified the Convention on the High Seas.

3. *International Controls Corp. v. Vesco*, 593 F. 2d 166, 179 (2d Cir. 1979). The court noted that counsel for Vesco could not rebut evidence of "the 1978 list of *Treaties in Force*, issued annually by the Office of the Legal Adviser, Department of State, which states that the treaty was extended [to enumerated countries]".

4. *United States v. Cadena*, 585 F. 2d 1252, 1261 (5th Cir. 1978). The court cited *Treaties in Force* as evidence that Canada and Colombia have signed but not ratified the Convention on the High Seas.

5. *Hooker v. Klein*, 573 F. 2d 1360, 1363 & n. 1 (9th Cir. 1978). The court cited *Treaties in Force* as sole authority that the United States and Canada are parties to an extradition treaty.

6. *SCM Corp. v. Langis Foods Ltd.*, 539 F. 2d 196, 201 n. 10 (D.C. Cir. 1976). The court cited *Treaties in Force* as authority that the International Convention for the Protection of Industrial Property was revised twice and that Canada "has not accepted the substantive provisions of those revised versions".

7. *Narlidis v. Sewell*, 524 F. 2d 371, 374-375 (2d Cir. 1975). Both the trial and the appellate courts found that "[t]he 1902 Convention between the United States and Greece is in force and effect . . . as evidenced by the volume, *Treaties in Force*, published by the United States Department of State, 1 January 1973 . . .".

8. *United States v. Toscanino*, 500 F. 2d 267, 277 (2d Cir. 1974). The court relied solely on *Treaties in Force* to identify parties to the Charter of the United Nations and to the Charter of the Organization of American States.

9. *United States v. Martinez-Angosto*, 344 F. 2d 673, 676 (2d Cir. 1965). The court cited *Treaties in Force* as sole authority that "the Treaty [of General Relations and Friendship with Spain] is presently binding on the United States".

10. *Lopez v. SS. Ocean Daphne*, 337 F. 2d 777, 780 & n. 6 (4th Cir. 1964). The court cited *Treaties in Force* as sole authority that the United States and Liberia are parties to the Convention on the High Seas.

DECISIONS OF UNITED STATES DISTRICT COURTS

11. *Jet Traders Investment Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 567 (D. Del. 1981). The court cited *Treaties in Force* as sole authority that Angola "is not a

signatory to and has never formally adhered to" the Convention on the International Recognition of Rights in Aircraft.

12. *National Association of Property Owners v. United States*, 499 F. Supp. 1223, 1268 (D. Minn. 1980). The court cited *Treaties in Force* as sole authority for language in the Root-Bryce Treaty Between the United States and Great Britain.

13. *Chapalain Compagnie v. Standard Oil Co. (Indiana)*, 467 F. Supp. 181, 187 (N.D. Ill. 1978). The court cited *Treaties in Force* as authority for the Convention on the International Regulations for Preventing Collisions at Sea.

14. *Sumaza v. Cooperative Association*, 297 F. Suppl. 345, 349 (D. Puerto Rico 1969). The court cited *Treaties in Force* as sole authority that "[s]aid Treaty [of Friendship, Commerce and Navigation Between the United States and Denmark] although not listed in the annotations of 9 U.S.C. [United States Code] § 2 is actually in force between these two nations".

15. *Aerovias Interamericanas de Panama, S.A. v. Board of City Commissioners*, 197 F. Supp. 230, 240 & n. 1 (S.D. Fla. 1961). The court cited *Treaties in Force* as sole authority that "while [the Bilateral Air Transport Service Agreement] was not individually ratified by the Senate as a treaty, it is classified as such by the State Department [cite to *Treaties in Force*] and it is considered to be a compact having equal dignity with formal treaties in every respect".

16. *United States v. Esperdy*, 187 F. Supp. 378, 380 & n. 1 (S.D.N.Y. 1960). The court cited *Treaties in Force* as sole authority that although one article was terminated, the Treaty of Friendship and General Relations Between the United States and Spain "otherwise remains in full force and effect".

Exhibit E

TREATY LISTS REFERRED TO IN THE SPEECH OF PROFESSOR BROWNLIE

1. LISTE DES TRAITÉS ET ACCORDS DE LA FRANCE EN VIGUEUR AU 1^{ER} JANVIER 1982 (PARIS, DIRECTION DES JOURNAUX OFFICIELS 1982), PP. 368-369.
 2. VERTRÄGE DER BUNDESREPUBLIC DEUTSCHLAND, ERGÄNZUNGSBAND, VERZEICHNIS UND STAND DER VERTRÄGE (AUGUST 1979), P. A600-41.
 3. SVERIGES ÖVERENSKOMMELSER MED FRÄMMANDE MAKTER (STOCKHOLM 1948), P. 200.
 4. TRACTATENBLAD VAN HET KONINKRIJK DER NEDERLANDEN (1956), P. 45.
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Exhibit F

CONGRESSIONAL RECORD, 1 AUGUST 1946 (p. 10618)

I was highly gratified, Mr. President, when I walked into the Senate Chamber this afternoon, after having been called away on important business, to find that the Senate was considering the resolution in executive session. In my opinion that entirely removes any question that may be raised in the future as to whether or not we have acted according to our Constitutional legislative processes, and in my opinion if the resolution is now adopted by a two-thirds majority in executive session, the question of the jurisdiction with which we vest the International Court of Justice cannot be questioned. That is why I took the position which I did last night. I get some satisfaction out of the fact that the position I took last evening on what was proper legislative procedure on this resolution may have had some influence in causing the Senate to go into executive session for the consideration thereof. I join with my colleague in expressing the hope that the resolution will be adopted.

Mr. Hill: obtained the floor.

Mr. Vandenberg: Mr President —

Mr. Hill: I understand the distinguished Senator from Michigan desires to ask a question of the Senator from Utah. I yield to him for that purpose.

Mr. Vandenberg: I thank the Senator. I call the attention of the Senator from Utah to the committee report at page 6, and I want to ask for a clarification of the language in what purports to be the reply of Hon. Charles Fahy, legal adviser of the State Department; to the suggestions which were made by Mr. John Foster Dulles. I call the Senator's attention to the fifth paragraph from the bottom of page 6, in which the legal adviser of the State Department is quoted as follows: "Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the court."

Does that mean that it is the attitude of the State Department that jurisdiction should be compulsory only when all other parties to the dispute have previously accepted the compulsory jurisdiction?

Mr. Thomas of Utah: That is my theory of reciprocity, and that is in keeping, I think, with the resolution itself.

Mr. Vandenberg: Yet the resolution itself says that we accept compulsory jurisdiction "without special agreement in relation to any other state accepting the same obligation". So I would think that the language of the resolution was directly contrary to the language of the recommendation by the State Department.

Mr. Thomas of Utah: The language of the legislation is in keeping with the charter and with the scheme.

Mr. Vandenberg: That was not my question. My question is whether or not it is in keeping with the recommendation of the State Department.

Mr. Thomas of Utah: I think it is. I think there is no inconsistency, as I read the English language. For instance, article 36, dealing with the jurisdiction of the Court, provides:

"1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning . . ."

And so forth. The same obligations of reciprocity, to my mind at least, I will say to the Senator from Michigan, stand out clearly in that language, and there is no question in my mind either as to the meaning of the language of the Charter or the meaning of the resolution in this particular.

Mr. Vandenberg: If the Senator will bear with me for a moment longer, I will say that I think we are all in agreement as to the objective we are seeking: but, of course, it is highly important that we should be sure we have reached the objective. Mr. Dulles, who certainly is one of the great friends of international jurisprudence, as the Senator knows, has raised a question whether the language of the resolution might not involve us in accepting jurisdiction in a multilateral dispute in which some one or more nations had not accepted jurisdiction. It is my understanding that it is the opinion of the Senator from Utah that if we confronted such a situation we would not be bound to submit to compulsory jurisdiction in a multilateral case if all of the other nations involved in the multilateral situation had not themselves accepted compulsory jurisdiction. Is that so?

Mr. Thomas of Utah: That is surely my understanding. I think reciprocity is complete. All the parties to the case must stand on exactly the same foundation, except that we may waive a right.

Mr. Vandenberg: I notice that the committee report, at the top of page 7, deals with this precise point. It says that Mr. Dulles' objection might be met by another subsection in the first proviso of the resolution, on page 2, after line 14, reading as follows:

"(c) Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction."

As I understand the Senator from Utah, he agrees with me that the situation defined in this suggested reservation is the situation which would exist without the reservation.

Mr. Thomas of Utah: That is true: and since the Senator has used the word "reservation" I think that word is one that can well be avoided and dispensed with in the resolution, because the resolution is initiated by the Senate. It is not a part of an agreement with another nation. So that which the Senator has called a reservation would be a simple amendment to the resolution. I think it is better for us to realize that we are dealing from the beginning with this question, and if the Senator wishes to be doubly assured on a point with respect to which the Senator from Utah is already completely assured, I see no objection to the addition of:

"(c) Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction."

The only thing the Senator from Utah is constantly thinking about is that it would be disastrous to the whole United Nations structure, after we have gone through the process of accepting the obligations of the United Nations and

making a treaty with other nations of the world to live up to the United Nations structure, for the United States Senate to pass any measure which would in any way affect the structure of the United Nations. That is my stand. I would guard against any such action.

Mr. Vandenberg: I quite agree with what the Senator from Utah has said regarding my inadvertent use of the word "reservation".

Mr. Thomas of Utah: I do not want anything which we do here to be labeled as a reservation.

Mr. Vandenberg: I quite agree with the Senator. That was merely a colloquialism so far as I was concerned.

I was thinking of the addition on page 2, after line 14, of the precise language suggested in the committee report itself namely:

“(c) Disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the court, or (2) the United States specially agrees to jurisdiction.”

It is my understanding that the able Senator from Utah would not object to the addition of that language in the pending resolution. I agree with him that it would not be a reservation. Surely we have the original authority without jeopardizing our objective at all, to add a third definition under the proviso in the resolution.

Mr. Thomas of Utah: Personally, I would be willing to go even further than does the Senator from Michigan on this single point. Under subclause (2) I would be willing to say, “The United States and other parties specially agree to jurisdiction”. I think that is exactly what reciprocity means.

Mr. Vandenberg: Mr. President, will the Senator further yield?

The Presiding Officer Mr. Tennell in the chair: Does the Senator from Utah yield to the Senator from Michigan?

Mr. Thomas of Utah: I yield.

Mr. Vandenberg: I agree with the Senator that that is what reciprocity means. In view of my very great respect for the judicial opinions of Mr. John Foster Dulles in this area of jurisprudence, I would be happier if we could spell it out, if the Senator agrees that that would be proper. At the appropriate time I shall offer such an amendment, and I understand that it will be with the approval of the Senator from Utah.

Mr. Morse: Mr. President, as the author of the resolution, I accept the suggestion of the Senator from Michigan.

ADDITIONAL DOCUMENTS SUBMITTED BY
NICARAGUA IN CONNECTION WITH THE ORAL
PROCEDURE ON QUESTIONS OF JURISDICTION
AND ADMISSIBILITY

LISTE DES TRAITÉS ET ACCORDS DE LA FRANCE, EN VIGUEUR AU 1^{ER} JANVIER 1982,
PAR MARCEL F. SURBIGUET ET DENYS WIBAUX, PARIS, DIRECTION DES JOURNAUX
OFFICIELS, 1982, PP. III-V AND 368-369

[Not reproduced]

VERTRÄGE DER BUNDESREPUBLIK DEUTSCHLAND, ERGÄNZUNGSBAND, VERZEICHNIS
UND STAND DER VERTRÄGE, I, HERANSGEGEBEN VOM AUSWÄRTIGEN AMT, CARL
HEYMANN'S VERLAG KG, BONN, KÖLN, BERLIN, PP. 41 AND 44

[Not reproduced]

SVERIGES ÖVERENSKOMMELSER MED FRÄMMANDE MAKTER, 1947, STOCKHOLM, 1948,
KUMGL. BOKTRYCKERIET. P. A. MORSTEDT & SÖNER, PP. 199-200

[Not reproduced]

TRACTATENBLAD VAN HET KONINKRIJK DER NEDERLANDEN, JAARGANG 1956 No. 1,
A. TITEL, OVEREENKOMST INZAKE DE OPRICHTING VAN EEN INTERNATIONALE
COMMISSIE VOOR DE INTERNATIONALE OPSPORINGSDIENST, MET BIJLAGE; BONN, 6
JUNI 1955, P. 45

[Not reproduced]

DOCUMENTS SUBMITTED BY THE UNITED STATES
OF AMERICA IN CONNECTION WITH THE ORAL
PROCEDURE ON QUESTIONS OF JURISDICTION
AND ADMISSIBILITY

1. 7 SEPTEMBER 1984 DRAFT "CONTADORA ACT FOR PEACE AND COOPERATION IN
CENTRAL AMERICA (REVISED)". UNOFFICIAL ENGLISH TRANSLATION OF SPANISH
ORIGINAL

CONTADORA ACT FOR PEACE AND COOPERATION IN CENTRAL AMERICA
(REVISED)

Preamble

The Governments of the Republics of Costa Rica, El Salvador, Guatemala,
Honduras and Nicaragua :

1. Aware of the urgent need to strengthen peace and cooperation among
the peoples of the region through the observance of principles and measures
that will permit greater understanding between the Central American govern-
ments;

2. Concerned by the situation in Central America, which is characterized by
a serious erosion of political trust, border incidents, the arms race, arms traf-
ficking, the presence of foreign advisers and foreign military presence in other
forms, and the use by irregular forces of the territory of certain States for acti-
vities aimed at destabilizing other States of the region ;

Convinced :

3. That the tensions and present conflicts could worsen and lead to a
generalized large-scale war ;

4. That the goal of restoring peace and confidence in the area can be achieved
only through unconditional respect for the principles of international law,
especially with regard to the right of peoples to choose, freely and without
outside interference, the model of political, economic, and social organization
best suited to their interests, through institutions that represent the freely
expressed will of the people ;

5. That it is important to create, develop, and strengthen democratic systems
in all countries of the region ;

6. That there is a need to create political conditions aimed at guaranteeing
the security, integrity and sovereignty of the States of the region ;

7. That genuine regional security can be achieved by means of agreements on
security and disarmament ;

8. That the national security interests of the States of the region must be taken
into account in the adoption of measures for halting the arms race ;

9. That military superiority as a political objective of the countries of the

region, the presence of foreign advisers and other foreign elements, and trafficking in arms endanger regional security and contribute to the destabilization of the area;

10. That agreements on regional security must be subject to an effective system of verification and control;

11. That destabilization of the governments of the area, reflected in general by the encouragement or support of activities of irregular groups or forces, acts of terrorism, subversion, or sabotage, and the use of the territory of a State for activities that affect the security of another State, violates the basic rules of international law and peaceful coexistence between States;

12. That the establishment of limits on military development based on stability and security needs in the region is highly advisable;

13. That the creation of instruments in order to implement a policy of détente must be based on the existence of a political trust between States that will effectively reduce political and military tensions between them;

14. *Recalling* the definition of aggression by the United Nations, particularly in *General Assembly resolution No. 3314 (XXIX)*, and as contained in the pertinent resolutions of the Organization of American States;

15. *Taking into account* the declaration on strengthening international security, adopted as resolution No. 2734 (XXV) by the United Nations General Assembly, as well as the corresponding and relevant legal instruments of the Inter-American system;

16. *Reaffirming* the need to promote, in those cases where the society has been deeply divided, actions leading to national reconciliation that will allow the people to participate, under the law, in democratic political processes;

Whereas:

17. Beginning with the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948, various international organizations and conferences have drafted and adopted declarations, pacts, protocols, conventions and rules to effectively protect human rights in general and certain of those rights specifically;

18. Not all the Central American countries have accepted all existing human rights instruments, and it would be desirable for them to do so in order to constitute a *more complete human rights régime that would result in the respect and guarantee of human, political, civil, economic, social, religious and cultural rights*;

19. In many cases, flawed and antiquated or inadequate domestic laws impair the validity of human rights as defined in declarations and other international instruments;

20. Each State must concern itself with modernizing and adapting its laws so that they will guarantee the effective enjoyment of human rights;

21. One of the most effective means of establishing the validity of the human rights enshrined in international instruments and in the constitutions and laws of individual States is for the judicial power to have the authority and the autonomy it needs to put an end to violations of those rights;

22. To that end, the absolute independence of the judicial branch must be guaranteed;

23. Such guarantee will be obtained only if the judicial authorities enjoy stability with respect to their responsibilities and the judicial branch is financially stable so that its independence from other branches of government is absolute and undisputed;

Convinced:

24. Of the need to establish just economic and social structures that will consolidate a genuine democratic system and allow their peoples full access to the right to work, education, health and culture;

25. Of the high degree of interdependence among the countries of Central America and of the potential offered to small countries by the process of economic integration;

26. That the magnitude of the economic and social crisis affecting the region has demonstrated the need for changes in the economic and social structure that will reduce the dependency and foster the regional self-sufficiency of the Central American countries, enabling them to reaffirm their own identity;

27. That the process of economic integration in Central America is an effective instrument of economic and social development based on the principles of justice, solidarity and mutual advantage;

28. That there is a need to reactivate, improve and restructure the process of economic integration in Central America with the active participation of all States and institutions of the region;

29. That Central American institutions and authorities are called upon to assume primary responsibility in modifying current economic and social structures and strengthening the process of regional integration;

30. Of the need and the advisability of engaging in joint economic and social development programs that will contribute to the process of economic integration in Central America as part of the development plans and priorities adopted independently by those countries;

31. That investments are vital for the development and economic recovery of the Central American countries, which have cooperated with each other to obtain financing for specific, priority projects, and considering the need to extend and strengthen international, regional and subregional financial institutions;

32. That the regional crisis has resulted in massive flows of refugees, a situation that merits urgent consideration;

33. *Concerned* by the constant worsening of social conditions and of the situation with respect to employment, education, health and housing in the countries of Central America;

34. *Reaffirming*, without prejudice to the right to appeal to appropriate international fora, their desire to resolve their conflicts within the framework of the negotiating process sponsored by the Contadora Group;

35. *Recalling* the support granted to the Contadora Group through United Nations Security Council resolution 530, United Nations General Assembly resolution 38/10, and OAS General Assembly resolution AG/RES 675 (XIII-0/83); and

36. *Prepared* to implement fully the Document of Objectives and the measures for carrying out the commitments made in that document, adopted by their Ministers for Foreign Affairs at Panama City, on 9 September 1983, and 8 January 1984, respectively, under the auspices of the Governments of Colombia, Mexico, Panama and Venezuela, which comprise the Contadora Group,

Have agreed as follows:

THE CONTADORA ACT
FOR PEACE AND COOPERATION IN CENTRAL AMERICA

PART I. COMMITMENTS

Chapter I. General Commitments

Single Section. Principles.

The Parties undertake, in accordance with the obligations they have assumed under international law, to:

1. Respect the following principles:

- (a) renunciation of the threat or use of force against the territorial integrity or political independence of States;
- (b) the peaceful settlement of disputes;
- (c) non-interference in the internal affairs of other States;
- (d) cooperation of States in resolving international problems;
- (e) equal rights, free determination of peoples and respect for human rights;
- (f) sovereign equality and respect for sovereign rights;
- (g) refraining from discriminatory practices in economic relations between the States, respecting their systems of political, economic, and social organization;
- (h) fulfillment in good faith of the obligations assumed in accordance with international law;

2. In application of these principles they will:

- (a) Abstain from any action inconsistent with the objectives and principles of the United Nations Charter and the Charter of the Organization of American States that impairs the territorial integrity, political independence or unity of any of the States and particularly any such action that constitutes a threat or use of force.
- (b) Solve their disputes by peaceful means, by observing the basic principles of international law contained in the United Nations Charter and the Charter of the Organization of American States.
- (c) Respect the existing international boundaries between States.
- (d) Abstain from military occupation of the territory of any of the other States in the region.
- (e) Abstain from any type of military, political, economic or other coercive act intended to subordinate to their own interest the exercise by other States of the rights inherent in their sovereignty.
- (f) Take the steps necessary to guarantee the inviolability of their borders against irregular groups or forces seeking to destabilize the governments of neighboring States from within their own territories.
- (g) Refuse to permit their territories to be used to take action contrary to the sovereign rights of other States and ensure that the prevailing conditions in their territories do not threaten international peace and security.
- (h) Respect the principle that no State or group of States has the right to intervene directly or indirectly, through arms or any other form of interference, in the internal or external affairs of another State.
- (i) Respect the peoples' right to self-determination, without external intervention or coercion, by avoiding the threat or direct or covert use of force to weaken the national unity and territorial integrity of any other State.

Chapter II. Commitments relating to Political Matters

Section 1. Commitments relating to a Reduction of Regional Tension and the Encouragement of Trust

The Parties undertake to :

3. Encourage mutual trust by all means at their disposal and avoid any action likely to threaten peace and security in the Central American area.

4. Abstain from issuing or fostering propaganda in favor of violence or war as well as hostile propaganda against any Central American government, and comply with and disseminate the principles of peaceful coexistence and friendly cooperation.

5. To this end, their respective governmental authorities shall :

(a) Avoid any spoken or written declaration that may aggravate the existing situation of conflict in the area.

(b) Urge the mass media to contribute to understanding and cooperation between the peoples of the region.

(c) Encourage more contact and understanding between their peoples through cooperation in all areas related to education, science, technology and culture.

(d) Jointly consider future actions and mechanisms that will contribute to the attainment and improvement of a climate of stable and lasting peace.

6. Jointly seek a comprehensive regional solution that will eliminate the causes of tension in Central America and ensure the inalienable rights of the people in the face of foreign pressures and interests.

Section 2. Commitments relating to National Reconciliation

Each of the Parties will recognize the commitment of each of the other Central American States to its own people to guarantee the preservation of domestic peace as a contribution to the peace of the region, and to that end resolves to :

7. Take measures to establish and, if appropriate, improve representative pluralistic democratic systems that ensure effective participation by the people, politically organized, in the decision-making process and ensure that various opinion groups have free access to honest and periodic electoral processes, based upon full observance of the rights of citizens.

8. In those cases where deep divisions have occurred within the society, strongly encourage national reconciliation activities that allow fully guaranteed participation by the people in authentic democratic political processes on the basis of justice, freedom and democracy, and, to this end, create mechanisms that will permit a dialogue with opposition groups, according to the law.

9. Issue and, if appropriate, ratify, expand, and improve laws and regulations that offer true amnesty and allow their citizens to become fully reincorporated in political, economic and social life. In like manner, guarantee the inviolability of life, liberty and personal security for those who accept amnesty.

Section 3. Commitments relating to Human Rights

The Parties undertake, in accordance with their respective domestic laws and with the obligations they have assumed under international law, to :

10. Guarantee full respect for human rights and, to this end, comply with the

obligations contained in international legal instruments and the constitutional provisions on the subject.

11. Initiate their respective constitutional procedures so that they may become parties to the following international instruments :

- (a) International Covenant on Economic, Social and Cultural Rights, 1966.
- (b) International Covenant on Civil and Political Rights, 1966.
- (c) Optional Protocol to the International Covenant on Civil and Political Rights, 1966.
- (d) International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
- (e) Convention relating to the Status of Refugees, 1951.
- (f) Optional Protocol relating to the Status of Refugees, 1967.
- (g) Convention on the Political Rights of Women, 1952. [1953]
- (h) Convention on the Elimination of All Forms of Discrimination Against Women, 1979.
- (i) Protocol Amending the Convention on the Abolition of Slavery, 1925.
- (j) Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956.
- (k) International Covenant on the Civil and Political Rights of Women, 1953.
- (l) American Convention on Human Rights, 1969, taking note of its Articles 45 and 62.

12. Draw up and submit the necessary legislation to their competent domestic bodies in order to accelerate the process of modernizing and updating their legislation so that it may more effectively promote and ensure due respect for human rights.

13. Draw up and submit legislation to their competent domestic bodies in order to :

- (a) Guarantee the stability of the judiciary so that its members may act without political pressures and themselves guarantee the stability of lower-level officials.
- (b) Guarantee the budgetary stability of the judicial branch itself so that its independence from the other branches is absolute and unquestionable.

Section 4. Commitments relating to Electoral Processes and Parliamentary Cooperation

Each of the Parties recognizes the commitment of each of the other Central American States to its own people to guarantee the preservation of domestic peace as a contribution to the peace of the region, and to that end resolves to :

14. Take the appropriate measures to guarantee, under equal conditions, the participation of the political parties in the electoral processes, ensuring their access to the mass media and their freedom of assembly and speech.

15. They also undertake to :

- (a) Implement the following measures :
 - (1) Promulgate or amend electoral laws so that elections may be held that guarantee effective participation by the people.
 - (2) Establish independent electoral bodies that will prepare a reliable voting list and ensure that the process is impartial and democratic.
 - (3) Establish or, if appropriate, update rules that guarantee the existence

and participation of political parties that are representative of the various opinion groups.

- (4) Establish a schedule of elections and take measures to ensure participation by political parties under equal conditions.
- (b) Propose to their respective legislative bodies that they :
- (1) Hold regular meetings in alternating venues in order to exchange experiences, contribute to the reduction of tensions, and encourage a feeling of closeness among the countries in the area.
 - (2) Take measures to establish relations with the Latin American Parliament and its working groups.
 - (3) Exchange information and experiences in their field, and compile, for purposes of comparative study, the election laws and related provisions in force in each country.
 - (4) Be present, as observers, at the various stages of the elections held in the region. For this purpose, an express invitation from the Central American country holding the election shall be required.
 - (5) Hold periodic technical meetings at the location and with the agenda agreed upon by consensus at each preceding meeting. The procedures for convening the first meeting shall be determined by means of consultations among the Central American foreign ministries.

Chapter III. Commitments relating to Security Matters

In accordance with the obligations they have assumed under international law, the Parties undertake the following :

Section I. Commitments relating to Military Maneuvers

16. Comply with the following provisions when conducting military maneuvers :

- (a) In the event that national or joint military maneuvers are being conducted in zones within a distance of thirty (30) kilometers from the border, the required prior notification referred to in Part II of this Act shall be given to the neighboring countries and to the Verification and Control Commission at least thirty (30) days in advance.
- (b) The notification shall contain the following information :
 - (1) Name
 - (2) Purpose
 - (3) Participating forces
 - (4) Geographical location
 - (5) Schedule
 - (6) Equipment and weapons to be used.

(c) *An invitation should be extended to observers from neighboring countries.*

17. Prohibit international military maneuvers in their respective territories. Any such maneuver being conducted must be suspended within 30 days, at the latest, from the signature of this Act.

Section 2. Commitments relating to Arms

18. Stop the arms race in all its forms and initiate negotiations immediately on the control and reduction of current armaments inventory and military strength.

19. Refrain from introducing new weapons systems that may bring about qualitative or quantitative changes in current war material inventories.

20. Refrain from using chemical, biological, radiological and other types of weapons that may be considered excessively harmful or indiscriminate.

21. Submit its present weapons and manpower inventories to the Verification and Control Commission within 30 days from the date of signature of this Act. Inventories shall be prepared in conformity with the basic definitions and criteria contained in the Annex and Point 22 of this Section. Upon receipt of the inventories, the Commission shall conduct, within a period of 30 days at most, such technical studies as may be necessary to set the limits of military development in the States of the region, taking into account their national security interests, and to stop the arms race.

Based on the above, the Parties agree upon the following stages of implementation :

First Stage: Once they have submitted their respective inventories, the Parties shall refrain from acquiring any military equipment. This moratorium shall remain in effect until the limits referred to in the following stage have been agreed upon.

Second Stage: The Parties shall establish, within no more than 30 days, limits on the following types of weapons: combat aircraft and helicopters; tanks and armored vehicles; artillery; rockets and short-, medium-, and long-range guided missiles and launching means; ships, military vessels or vessels that could be used for military purposes.

Third Stage: At the conclusion of the previous stage, the Parties shall establish, within no more than 30 days, limits on military strength and on military installations that could be used in military actions.

Fourth Stage: The Parties may open negotiations on those matters whose discussion they consider to be vital.

Notwithstanding the above, the Parties may modify, by mutual agreement, the time periods established for negotiations and the setting of limits.

22. The following basic criteria shall determine the levels of military strength of the Central American States, in accordance with the stability and security needs of the region :

- (a) No armed organization shall seek to establish a hegemony over other individual armed forces.
- (b) The definition of national security shall take into account the level of economic and social development prevailing at a given time and the level that is sought.
- (c) Formulation of the definition should be based on comprehensive studies of the following points:
 - (1) Perception of the internal and external security requirements of the State
 - (2) Area
 - (3) Population
 - (4) Distribution of economic resources, infrastructure and population within the national territory

- (5) Length and features of land and maritime boundaries
- (6) Ratio of military expenditures to the GDP
- (7) Ratio of military budget to government expenditures and comparison with other social indicators
- (8) Geographic features and situations and geopolitical conditions
- (9) Highest level of military technology appropriate for the region.

23. Initiate the necessary constitutional procedures to sign and ratify or accede to international disarmament treaties and agreements, if they have not already done so.

Section 3. Commitments relating to Foreign Military Bases

24. Refrain from authorizing the establishment of foreign military bases or military schools in their territories.

25. Close existing foreign military bases or training schools in their territories within six months of the signature of this Act.

Section 4. Commitments relating to Foreign Military Advisers

26. Submit to the Verification and Control Commission a report on foreign military advisers and other foreign elements participating in military and security activities in their territories within 60 days of the signature of this Act. The definitions contained in the Annex shall be taken into account in the preparation of the report.

27. Establish a schedule for the gradual withdrawal of foreign military advisers and other foreign elements that would include the immediate withdrawal of military advisers located in operations and training areas. In establishing the schedule, the studies and recommendations of the Verification and Control Commission shall be taken into account.

28. With respect to advisers performing technical duties relating to the installation and maintenance of military equipment, a control list shall be established in conformity with the terms set forth in their contracts or agreements. The Verification and Control Commission shall use the control list for the purpose of setting reasonable limits on the number of such advisers.

Section 5. Commitments relating to Arms Traffic

29. Eliminate internal and external regional arms traffic supplying arms to persons, organizations, irregular forces or armed groups attempting to destabilize the governments of the Parties.

30. To that end, establish internal control mechanisms at airports, on land, air, sea and river routes, and at any other points or areas likely to be used for arms traffic.

31. Report presumed or proven arms traffic violations to the Verification and Control Commission, providing the Commission with sufficient information to enable it to conduct the necessary investigations and to present such findings and recommendations as it may consider appropriate. When applicable, the following criteria shall be used, *inter alia*, for verification purposes:

- (a) origin of the arms traffic;
- (b) personnel involved;
- (c) type of armaments, ammunition, equipment or other categories of military supplies;

- (d) extraregional means of transportation ;
- (e) extraregional transportation routes ;
- (f) storage facilities for weapons, ammunition, equipment and other types of military supplies ;
- (g) intraregional traffic areas and routes ;
- (h) international means of transportation ;
- (i) receiving unit.

Section 6. Commitments relating to the Prohibition of Support for Irregular Forces

32. Refrain from lending any political, military, financial or other support to individuals, groups, irregular forces or armed groups advocating the overthrow or destabilization of other governments, and to prevent, using all means at their disposal, the use of their territory for attacks on or for organizing attacks, acts of sabotage, kidnappings, or criminal acts in the territory of another State.

33. Maintain strict vigilance along their borders to prevent their territory from being used for armed activities against a neighboring State.

34. Disarm and remove from border zones any group or irregular force identified as being responsible for acts against a neighboring State.

35. Dismantle and deny the use of logistical and operational support installations and facilities in their territories used to launch activities against neighboring governments.

Section 7. Commitments relating to Terrorism, Subversion or Sabotage

36. Refrain from lending political, military, financial or other support to subversive, terrorist or sabotage activities attempting to destabilize the governments of the region.

37. Refrain from organizing or urging participation in acts of terrorism, subversion or sabotage in another State or from permitting activities to be organized within their territories for the purpose of committing such acts.

38. Observe the following international treaties and agreements :

- (a) The Hague Convention for the Suppression of Unlawful Seizure of Aircraft.
- (b) Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes Against Persons, and Related Extortion that are of International Significance.
- (c) Convention for the Suppression of Unlawful Acts Against [the Safety of] Civil Aviation.
- (d) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.
- (e) International Convention Against the Taking of Hostages.

39. Initiate, if they have not already done so, constitutional procedures to sign and ratify or accede to the international treaties and agreements referred to in the preceding paragraph.

40. Respect the commitments enunciated in this section without prejudice to the execution of other treaties and international agreements on diplomatic and territorial asylum.

41. Prevent participation in criminal acts within their respective territories by persons belonging to foreign terrorist groups or organizations. To that end they shall strengthen cooperation among immigration and police authorities as well as among the appropriate civilian authorities.

Section 8. Commitments relating to Direct Communication Systems

42. With a view to preventing incidents, establish a regional communications system ensuring immediate and timely contact between competent governmental and military authorities.

43. Establish joint security commissions in order to prevent or resolve conflicts between neighboring States.

Chapter IV. Commitments on Economic and Social Matters

Section 1. Commitments in the Economic and Social Fields

In order to strengthen the process of Central American economic integration and the institutions comprising and supporting it, the Parties agree to:

44. Reactivate, improve and restructure the process of Central American economic integration, bringing it into harmony with the various forms of political, economic and social organization of the countries of the area.

45. Ratify resolution No. 1/84 of the Thirtieth Meeting of Ministers responsible for Central American integration of July 27, 1984, directed towards the institutional reestablishment of the process of Central American integration.

46. Support and encourage the adoption of agreements for strengthening intra-Central American trade within the legal framework and in the spirit of integration.

47. Not to adopt or support coercive or discriminatory measures harmful to the economy of any Central American country.

48. Adopt measures for strengthening the financial organizations of the area, including the Central American Bank for Economic Integration, supporting its efforts to obtain resources and to diversify its operations, and preserving the decision-making power and the interests of all Central American countries.

49. Strengthen the multilateral payment mechanisms within the Central American Common Market Fund, and reactivate those mechanisms that operate through the Central American Clearing House. Available international financial assistance may be requested in support of these objectives.

50. Undertake sectoral cooperative projects in the area, such as the electrical energy production and distribution system, the regional food security system, the plan of priority health needs of Central America and Panama and others that would contribute to Central American economic integration.

51. Jointly examine the problem of Central American foreign debt on the basis of an evaluation that takes into account the internal situation of each country, its ability to pay, the critical economic situation in the area, and the flow of additional resources needed to further its economic and social development.

52. Support the process of developing and subsequently implementing a new Central-American tariff and customs régime.

53. Adopt joint measures to protect and promote their exports, integrating the processing, marketing and transportation of their products in so far as possible.

54. Adopt the necessary measures to accord juridical personality to the Central American Monetary Council.

55. Support at the highest level the efforts by CADESCA, jointly and in coordination with subregional bodies, to obtain from the international community the financial resources necessary for Central America's economic reactivation.

56. With the cooperation of the ILO, apply international labor standards and

conform their domestic legislation thereto, particularly in those areas which contribute to the reconstruction of Central American Societies and economics. Likewise, with ILO's cooperation, implement programs for creation of new jobs, training of workers and use of appropriate technologies aimed at better utilization of the labor force and natural resources of each country.

57. Request the Pan American Health Organization and UNICEF, as well as other development agencies and the international financial community to support the financing of the "Plan of Priority Health Needs of Central America and Panama" approved by the Ministers of Health of the Central American Isthmus meeting in San José, on March 16, 1984.

Section 2. Commitments on Refugee Matters

The Parties agree to make the necessary efforts to:

58. If they have not already done so, follow the constitutional procedures for acceding to the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees.

59. Adopt the terminology established in the Convention and Protocol referred to in the preceding paragraph in order to differentiate between refugees and other categories of emigrants.

60. Establish the necessary internal mechanisms for implementing the provisions of the Convention and Protocol referred to in paragraph 58, when accession takes place.

61. That consultative machinery be established between Central American countries and representatives of the government offices in charge of the refugee problem in each State.

62. Support the work of the United Nations High Commissioner for Refugees in Central America, and establish direct means of coordination in order to facilitate its efforts to carry out its mandate.

63. That any repatriation of refugees be voluntary, on the basis of expressed individual wishes, and undertaken with the cooperation of the UNHCR.

64. That tripartite commissions composed of representatives of the sending State, the receiving State and the UNHCR be set up in order to facilitate repatriation of refugees.

65. Strengthen programs of assistance and protection for refugees, especially in the fields of health, education, employment and security.

66. That programs and projects be set up with a view to permitting the refugees to achieve self-sufficiency.

67. That the UNHCR or other international agencies be asked to help to train officials in each country responsible for providing protection and assistance to refugees.

68. That the international community be asked to provide immediate assistance to Central American refugees, both directly, through bilateral or multilateral agreements and through the UNHCR and other agencies.

69. With the assistance of the UNHCR, identify other possible receiving countries for Central American refugees. In no case shall a refugee be transferred to a third country against his will.

70. That the governments of the area make the necessary efforts to eradicate the causes of the refugee problem.

71. That once the bases for voluntary or individual repatriation have been agreed, with full guarantees for the refugees, the receiving countries allow official

delegations from the sending countries, accompanied by representatives of the UNHCR and the receiving country, to visit the refugee camps.

72. That receiving countries, in coordination with the UNHCR, facilitate the arrangements for the exit of refugees in cases of voluntary and individual repatriation.

73. Establish control measures in countries granting refuge in order to prevent refugees from participating in activities against the sending country, always with due respect for the human rights of refugees.

PART II. COMMITMENTS RELATING TO IMPLEMENTATION

The Parties shall establish the following mechanisms for the implementation of the commitments contained in this Act:

1. *Comite ad hoc para la Evaluacion y el Seguimiento de los Compromisos en Materia Politica y de Refugiados* [*Ad Hoc Committee for the Evaluation and Implementation of Commitments in Political and Refugee Matters*].

(a) Membership

The Committee shall be composed of five (5) prominent persons of recognized competence and impartiality, nominated by the States members of the Contadora Group and approved by the Parties by mutual agreement. The members of the Committee shall be nationals of States other than the Parties.

(b) Duties

The Committee shall receive and evaluate the reports that the Parties undertake to furnish concerning the manner in which they have proceeded to implement their commitments in the area of national reconciliation, human rights and the electoral and refugee process.

- Moreover, the Committee shall be open to papers on these topics sent to it for information by organizations or individuals, which may contribute useful information to the evaluation.
- Using the preceding information, the Committee shall periodically prepare a report which, in addition to containing the evaluation, shall include proposals and recommendations for improved implementation of the commitments. This report shall be sent to the Parties and to the governments of the Contadora Group.

(c) Bylaws

The Committee shall draw up its own bylaws and shall inform the Parties of them.

2. Verification and Control Commission on Security Matters.

(a) Membership

The Commission shall be composed of the following:

- Four commissioners representing States recognized to be impartial and to have a genuine interest in contributing to the solution of the Central American crisis. They shall be nominated by the Contadora Group and approved by the Parties entitled to speak and to vote on the decisions of the Commission. Coordination of the work of the Commission shall be rotated.

- A Latin American Executive Secretary appointed by the Contadora Group in agreement with the Parties entitled to speak and to vote on the decisions of the Commission. The Executive Secretary shall be responsible for the permanent operation of the Commission.
- A representative of the United Nations Secretary-General and a representative of the OAS Secretary General, acting as observers.

(b) Establishment

The Commission shall be established at the latest within thirty (30) days from the signature of this Act.

(c) Duties

- Receive the current arms, installations and manpower inventories from the Parties, prepared in accordance with the provisions of the Annex.
- Conduct technical studies to be used in establishing maximum military strength limits for the Parties of the region in accordance with the basic criteria established in Commitment 22 of this Act.
- Verify that no new arms are introduced that may qualitatively or quantitatively change present inventories and that no weapons banned by this Act are utilized.
- Establish a register of all commercial transfers of arms by the Parties, including donations and other transactions arranged under military assistance agreements with other governments.
- Verify the dismantling of foreign military installations as established in this Act.
- Receive the roster of foreign military advisers and verify their withdrawal according to the agreed timetable.
- Verify compliance with this Act concerning trafficking in arms and examine any reports of violations. To this end the following criteria should be considered:

(1) Origin of the trafficking in arms: This concept includes the port or airport of embarkation of the arms, munitions, equipment and other categories of military supplies intended for the Central American region.

(2) Persons involved: Persons, groups or organizations that have participated in the coordination and the commission of trafficking in arms, including participation by the government or its representatives.

(3) Type of arms, munitions, equipment and other categories of military supplies: Under this heading indicate the type of arms, caliber and country of manufacture, if the country of origin is not the same as the country of manufacture, and the number of each type of arms, munitions, equipment and other categories of military supplies.

(4) Means of transportation outside the region: Note the means of transportation by land, sea or air, including nationality.

(5) Extraregional transportation routes: Indicate what traffic routes were used before reaching Central American territory, including ports of call or intermediate destinations.

(6) Bases for storing arms, munitions, equipment and other types of military supplies.

(7) Intraregional traffic areas and routes: Describe the areas and routes and the participation or consent of the government or governmental and political sectors in arms trafficking. State how frequently these areas and routes are used.

(8) International means of transportation: Indicate the means of transportation used, their owners and the facilities provided by the government or governmental and political sectors, specifying whether they include clandestine flights to unload military equipment, dropping packages with parachutes, and using small launches loaded with supplies on the high seas.

(9) Recipient(s): Determine the persons, groups and organizations who are the recipients of the arms traffic:

- Verify compliance with this Act concerning irregular forces and non use of their own territories for destabilizing activities against any other State and examine any reports of violations.
- Verify compliance with the notification procedures for national or joint military maneuvers stipulated in this Act.

(d) Rules and Procedures

- The Commission shall receive any report of violations of the commitments relating to security undertaken in this Act, provided that it is duly founded. It shall inform the Parties involved of the report and shall initiate whatever investigations it deems appropriate.
- The Commission shall conduct its investigations through onsite inspection, compiling evidence, and any other procedure it considers necessary for the performance of its functions.
- In the event of a report of violation or nonfulfillment of the commitments of this Act relating to security, the Commission shall prepare a report containing recommendations for the Parties involved.
- The Commission shall send all its reports to the Central American Ministers of Foreign Relations.
- The Commission shall have access to all the facilities and receive the prompt and full cooperation of the Parties in the proper performance of its functions. It shall also ensure the confidentiality of any information collected or received during its investigations.

(e) Bylaws

Once established, the Commission shall draw up its own bylaws and shall inform the Parties of them.

3. *Comite ad hoc para la Evaluacion y el Seguimiento de los Compromisos en Materia Economica y Social* [Ad Hoc Committee for the Evaluation and Implementation of Commitments in Economic and Social Affairs]

(a) Membership

- For the purposes of this Act, the meeting of ministers responsible for Central American economic integration shall constitute the *Ad Hoc* Committee for the Evaluation and Implementation of Commitments in Economic and Social Affairs.

(b) Functions

- The Committee shall receive the reports by the Parties concerning their progress in complying with the economic and social commitments.
- Conduct periodic evaluation of advances in compliance with economic and social commitments, relying on the information furnished by the Parties and the competent international and regional organizations.

- The Committee shall present proposals in its periodic reports to strengthen regional cooperation and promote development plans, with particular emphasis on the aspects indicated in the commitments of this Act.

PART III. FINAL PROVISIONS

1. The commitments undertaken by the Parties in this Act shall be legal in nature and, therefore, binding.

2. This Act shall be ratified in conformity with the constitutional procedures established in each of the Central American States. The instruments of ratification shall be deposited with the governments of the States which compose the Contadora Group.

3. This Act shall enter into force when the five Central American signatory States have deposited their instruments of ratification.

4. The Parties, after the date of signature, shall abstain from acts designed to frustrate the purpose of this Act.

5. The mechanisms referred to in Part II shall become provisionally operational 30 days after the date of signature of this Act. The Parties shall take the necessary steps before the end of that period to ensure the aforesaid provisional operation.

6. Any dispute regarding the interpretation or application of this Act that cannot be resolved through the mechanisms provided in Part II shall be submitted to the Ministers for Foreign Relations of the Parties for their consideration and decision; the affirmative vote of all Parties shall be required for a decision.

7. In the event that the dispute persists, it shall be submitted to the Contadora Group Foreign Ministers, who shall meet at the request of any of the Parties.

8. The Ministers for Foreign Relations of the States composing the Contadora Group shall use their good offices so that the Parties concerned may resolve the specific situation submitted for their consideration. If that recourse fails, they may suggest another peaceful means of resolving the dispute in conformity with Article 33 of the United Nations Charter and Article 24 of the Charter of the Organization of American States.

9. There shall be no reservations to this Act.

10. This Act shall be registered by the Parties with the Secretary-General of the United Nations and the Secretary General of the Organization of American States in conformity with Article 102 of the United Nations Charter and Article 118 of the Charter of the Organization of American States.

Done in the Spanish language, in 9 originals, in the city of _____,
on _____, 1984.

Annex

The Parties agree on the following definitions of military terms:

1. Registry: Numerical or graphic data of military, paramilitary and security forces and military installations.
2. Inventory: Detailed list of weapons and military equipment, of national or foreign ownership, including as many specifications as possible.
3. Census: Numbers of foreign military or civilian personnel assigned as advisers on defense and/or security.

4. Military installation: Facility or infrastructure that includes airports, barracks, forts, camps, air or naval facilities or similar facilities under military jurisdiction, including their geographical location.

5. Organization and equipment plan: Document showing the mission, organization, equipment, capacity and limitations of a typical military unit at its various levels.

6. Military equipment: Matériel, individually or assembled, of national or foreign ownership, used by a military force in its day-to-day activities and operations, excluding weapons.

7. Classification of weapons:

(a) By their nature:

1. Conventional
2. Chemical
3. Biological
4. Radiological

(b) By their range:

1. Short-range: Individual and collective portable weapons.
2. Medium-range: Non-portable support weapons (mortars, howitzers and artillery)
3. Long-range: Rockets and guided missiles, classified in turn as:
 - (a) Short-range rockets: maximum range of less than twenty (20) kilometers
 - (b) Long-range rockets: range of twenty or more kilometers
 - (c) Short-range guided missile: maximum range up to one hundred (100) kilometers
 - (d) Medium-range guided missile: range between one hundred (100) to less than five hundred (500) kilometers

(c) By their caliber and weight:

1. Light: 120 mm or less
2. Medium: more than 120 mm and less than 160 mm
3. Heavy: more than 160 mm and less than 210 mm
4. Very heavy: more than 210 mm

(d) By their trajectory:

1. Straight-line fire weapons
2. Curved or arced line of fire
 - (a) mortars
 - (b) howitzers
 - (c) cannon
 - (d) rockets

(e) By their means of transport:

1. hand-carried
2. horse-drawn
3. towed or on threads
4. self-propelled
5. all weapons may be transported by road, railroad, sea or air
6. transportation by air is classified as:
 - (a) by helicopter
 - (b) by plane.

8. Characteristics to be considered regarding the various types of planes and helicopters :

- (a) Model
- (b) Quantity
- (c) Crew
- (d) Manufacture or make
- (e) Speed
- (f) Capacity
- (g) Propelling system
- (h) Armed or not
- (i) Type of armament
- (j) Radius of action
- (k) Navigation system
- (l) Communications system
- (m) Type of mission it accomplishes.

9. Characteristics to be considered regarding various ships or boats :

- (a) Type of ship
- (b) Shipyard and year built
- (c) Tonnage
- (d) Displacement capacity
- (e) Draft
- (f) Length
- (g) Propelling system
- (h) Type of armament and firing system
- (i) Crew.

10. Services: Organizations providing general support, logistical and administrative support to military, paramilitary and security forces.

11. Military training centers: Facilities used for the training and preparation of military personnel at their various levels and specialties.

12. Military base: land, sea and air space which includes military installations, personnel and equipment under military command. The definition of a foreign military base must take into account the following factors:

- Administration and control
- Sources of financing
- Ratio of local to foreign personnel
- Bilateral agreements
- Location and geographical area
- Leasing or ceding of territory to another State
- Number of military personnel.

13. Foreign military installations: Facilities built for the purpose of being used by foreign units for maneuvers, training or other military objectives according to bilateral conventions or agreements. These facilities may be temporary or permanent.

14. Foreign military advisers: Military and security advisers are understood to include military or civilian foreign personnel on technical training or advisory missions in the following areas of operations: tactical, logistics, strategy, organization and security with land, sea and air forces or security forces in the Central American States under agreements subscribed to by one or various governments.

15. Arms traffic: Arms traffic is understood to include all types of transfer by regional or extraregional governments, persons or groups, of weapons intended

for non-regular groups or forces or armed bands that seek to destabilize governments in the region. This also includes the passage of such traffic through a *third State, with or without its consent, intended for the above-mentioned groups in another State.*

16. National military maneuvers: Combat or war exercises or simulations carried out by military forces in peacetime for their training. These are carried out by the armed forces of the country in their own territory and may include land, sea and air units, for the purpose of increasing their operating effectiveness.

17. International military maneuvers: All operations carried out by the military forces of two or more countries in the territory of one of them or in an international area, including land, sea and air units, for the purpose of increasing their operational effectiveness and developing joint coordinating measures.

18. Inventories made in each State for each of its armed forces, taking into account the number of personnel, weapons and munitions, equipment and installations of the forces indicated below and in accordance with their own patterns of organization.

(a) Security forces:

1. Border guards
2. Urban and rural guards
3. Military forces assigned to other ministries
4. Public safety forces
5. Training centers
6. Other

(b) Naval forces:

1. Location
2. Type of base
3. Number and characteristics of the fleet; types of weapons
4. Defense systems; types of weapons
5. Communications systems
6. War matériel services
7. Ground or air transport services
8. Health services
9. Maintenance services
10. Supply services
11. Recruiting and active duty
12. Training centers
13. Other

(c) Air forces:

1. Location
2. Runway capacity
3. Number and characteristics of the air fleet; types of weapons
4. Defense systems; types of weapons
5. Communications systems
6. War matériel services
7. Health services
8. Ground transportation services
9. Training centers
10. Maintenance services
11. Supply services
12. Recruitment and active duty
13. Other

(d) Land forces :

1. Infantry
2. *Motorized infantry*
3. Airborne infantry
4. Cavalry
5. Artillery
6. Armor
7. Communications
8. Engineers
9. *Special forces*
10. Reconnaissance forces
11. Health services
12. Transportation services
13. War matériel services
14. Maintenance services
15. Quartermaster
16. Military police
17. Training centers
18. This document must include precise information on the system used for induction, and recruitment and active duty
19. Other

(e) Paramilitary forces :

[No listing follows]

(f) Information requirements for existing airports and airfields :

1. Detailed location and category
2. Location of facilities
3. Dimensions of the take off, taxiing and maintenance strips
4. Buildings, maintenance facilities, fueling installations, navigational aids and communications systems

(g) Information requirements for terminals (docks) and ports :

1. Location and general characteristics
2. Entrance and access channels
3. Breakwaters
4. Capacity of the terminal (docks).

(h) Personnel: Personnel is required to serve in the security forces and paramilitary organizations; information on advisers must include the number, immigration status, specialty, nationality and duration of stay in the country, as well as any applicable agreements or contracts.

(i) Regarding armaments, all types of munitions must be included: explosives, ammunition for light weapons, artillery, bombs and torpedoes, rockets, hand and rifle grenades, depth charges, land and sea mines, fuses, grenades for mortars and howitzers, etc.

(j) In the national and foreign military installations, include military hospitals and first aid stations, naval bases, airports and landing strips

ADDITIONAL PROTOCOL TO THE CONTADORA ACT FOR PEACE AND COOPERATION IN
CENTRAL AMERICA

The undersigned plenipotentiaries, vested with full powers by their respective governments;

Convinced that the full cooperation of the international community is needed to ensure the implementation, effectiveness and viability of the Contadora Act for Peace and Cooperation in Central America adopted by the countries of the region:

Have agreed as follows:

1. To abstain from any action which may thwart the purpose and objective of the Act.
2. To cooperate with the Central American States on the terms in which those States jointly request such cooperation in furtherance of the aims of the Act.
3. To give their full support to the Verification and Control Commission in the performance of its duties, when the Parties so require.
4. This Protocol shall be open for signature by all States wishing to contribute to peace and cooperation in Central America. It may be signed before any of the depositary governments of the Act.
5. This Protocol shall enter into force for each signatory State on the date of its signature by such State.
6. This Protocol shall be deposited with the governments of the member States of the Contadora Group.
7. This Protocol does not admit reservations.
8. This Protocol shall be registered with the General Secretariat of the United Nations in accordance with Article 102 of the United Nations Charter.

Done in the Spanish language, in four original copies, in the city of _____, on the _____ day of _____ of 1984.

For the Government of Colombia

For the Government of Mexico

For the Government of Venezuela

For the Government of Panama

2. JOINT COMMUNIQUÉ OF THE MINISTERIAL MEETING OF SAN JOSÉ, COSTA RICA,
29 SEPTEMBER 1984, AS CONTAINED IN CABLE SAN JOSÉ 7633

JOINT COMMUNIQUÉ OF THE MINISTERIAL MEETING OF SAN JOSÉ, COSTA RICA

1. A conference of Foreign Ministers was held in the City of San José, Costa Rica, on 28/29 September 1984 between the European Community and its Member States, Portugal and Spain, the States of Central America and the Contadora States.

2. The Conference was attended by (lists EC, Contadora, Central American, Portuguese and Spanish Foreign Ministers).

3. Inspired by a consciousness of their shared cultural heritage and of their common attachment to the ideals and values enshrined in the United Nations Charter, the participating countries have inaugurated through this conference a new structure of political and economic dialogue between Europe and Central America. They are convinced that this dialogue, and the increased practical cooperation that it will engender, will reinforce the efforts of the countries of Central America themselves, with the support of the Contadora States, to bring an end to violence and instability in Central America and to promote social justice, economic development and respect for human rights and democratic liberties in that region.

4. A comprehensive discussion took place between the Ministers of the Ten Member States of the European Community and those of the Central American countries on the political, economic and cultural relations between them and agreements were reached on the future development of those relations. They have agreed that further meetings in this dialogue should take place at regular intervals. The level of such meetings, whether at ministerial or official level, will be determined in the light of circumstances. The Foreign Ministers of Spain and Portugal associated themselves with these agreements.

5. The Foreign Ministers exchanged views on current regional and international problems and developments, and in particular the situation in Central America. They expressed their preoccupation at the conditions and acts which gravely disturb the peace and security of the Central American region, and agreed on the necessity for the governments of the area to intensify negotiations which lead to mutual understanding and permanent stability.

6. The Ministers reaffirmed their commitment to the objectives of peace, democracy, security and economic and social development, and political stability in Central America and were united in the view that the problems of that region cannot be solved by armed force, but only by political solutions springing from the region itself. In this conviction they affirmed their support for the pacification measures which are being developed in the Contadora process. They expressed their conviction that this process represents a genuinely regional initiative and the best opportunity to achieve a solution to the crisis through political undertakings aimed at the achievement of the aims set out in the "Document of Objectives" approved by all the governments of the region on 9 September 1983. They noted with satisfaction the progress achieved so far towards such a solution, and that the elaboration of the revised draft Contadora Act for Peace and Cooperation in Central America is a fundamental stage in the negotiating process for the attainment of peace in the region. They called on the States concerned

to continue to make every effort to bring the Contadora process rapidly to final fruition through the signature of a comprehensive agreement which would bring peace to the region. They were agreed on the necessity for a practical commitment to the implementation of any such agreement by all the States in the region and all other countries which have interests there, and on the necessity for the verification and control of that implementation.

7. The European countries expressed their willingness to support, within their capabilities and if requested, the efforts of those States to which it falls to implement the provisions of any agreement.

8. The Ministers discussed the international economic situation and, in particular, economic and trade relations and cooperation between the European Community and Central America.

9. The Ministers agreed that the current international economic situation should be regarded as particularly difficult. In this context, they underlined the problems concerning the external indebtedness of the developing countries and the wider economic, trade and social implications of continued indebtedness, for those countries. Within this framework, the Central American Ministers stressed that in present circumstances debt servicing by the countries of Central America is even more burdensome given increased interest rates and deteriorating prices for those products which make up the bulk of their exports. The Community Ministers and those of Portugal and Spain declared themselves ready to assist the countries of Central America, in the appropriate framework, in the pursuit of policies aimed at solving these problems.

10. The Ministers expressed their determination to cooperate in the appropriate international fora with a view to improving the present international economic situation.

11. An effective manner of contributing to the reduction of political tension in Central America would be to support the actions intended to preserve the degree of economic interdependence existing between the countries of the region.

The Community Ministers recognized that the Central American region has a definite development potential through the process of integration and reaffirmed their willingness to support this through the further development of relations between the two regions.

In this connection, the Ministers looked forward to the accession of Portugal and Spain to the European Community and welcomed the contribution which they will make to the further strengthening of cooperation between the two regions.

12. The European Ministers and those of the Central American Isthmus declared themselves satisfied with the results already produced by their relations and agreed on the need to broaden and deepen these relations. They concentrated more particularly on the areas in which cooperation with the European Community has proved useful for the economic development of the group of Central American countries and where mutual cooperation should be strengthened (specific development projects, particularly agricultural and rural projects with a regional basis, regional integration, trade promotion and generalized preferences).

13. The European and Central American Ministers, in looking ahead to the future, in the perspective of the development of mutual cooperation, recognized the existence of solid ground for cooperation activities, on the basis of equity, respect and mutual benefit, notably along the lines of the following paragraphs.

14. The Community and the group of Central American countries recognized the need to develop, extend and diversify their mutual trade to the fullest possible extent. In this connection the Ministers considered that the generalized system of preferences could be an appropriate means to encourage the growth of foreign

trade and industrialization of the countries concerned. They agreed that the use of the system should be simplified and its benefits be extended.

The Community reaffirmed the importance it attaches to the fundamental objectives of the generalized preferences system and announced its intention, where the development and the application of the system is concerned, of taking into account the interest that will be shown by the Central American countries.

15. Taking account of the importance of economic development for the countries of the Central American region, the Community will do everything possible, within the context of its present and future programmes in support of developing countries, towards the development of the region. These actions should be identified by common agreement, based on the priorities and objectives of the region and should be multilateral in character. The Community declared itself willing to exploit to the full the institutional infrastructure existing in the region.

In addition to aid given on a bilateral basis by Member States of the Community to the countries of the region, the Community will provide technical and financial assistance to Central America, in particular for agricultural, agro-industrial and rural projects. With the aim of promoting regional economic integration and the development of intra-regional trade, it is the intention of the Community to give priority assistance to projects of a regional nature and to help the countries of Central America and their regional institutions through sharing with them the Community's specific experience acquired in matters of integration.

For its part, the group of Central American countries declared itself ready to present specific projects in priority fields, which take into account *inter alia* social welfare aspects.

By way of illustration, mention was made, with regard to projects, of the demands which were presented jointly by the countries of Central America to the international financial community in Brussels in September 1983.

The Central American Ministers emphasized the importance they attach to the reactivation of production and particularly of the production of goods traded within the Central American Isthmus. For the purpose of the latter, financial support is required for the countries of the Central American Isthmus, preferably through the Banco Centroamericano de Integracion Economica (CABEI), so that the support will contribute to the reactivation of the industrial and agricultural sectors of the region.

It is the intention of the Community and of its Member States to give priority to the development of their assistance to regionally-oriented projects and to those of a social nature such as health programmes and those intended to relieve the situation of those who for one reason or another have been compelled to abandon their traditional homes.

16. The Ministers on the two sides considered that economic cooperation represented an area of interest for future relations between the Community and the group of Central American countries. In this context, they mentioned specifically the promotion of business contacts between the two regional groupings, cooperation between public and private national financing instruments in the two regions, as well as scientific, technical and basic training, especially in research fields. The Community Ministers took note of the possibility offered by the CABEI Board of Governors to open its membership to countries outside the region. In view of the important role assumed by foreign investments in the economic development of Central American countries, the Ministers agreed that the promotion and protection of European investments in Central America are in their mutual interest. In this connection, they stressed the need for an improved

climate for investments in the region by appropriate measures of encouraging private investments.

17. The Ministers of the European Community and those of Central America acknowledged the interest in strengthening and giving institutional form to their mutual relations. Acknowledging the importance of strengthening relations, they declared themselves ready to start discussions as soon as possible with a view to negotiating an inter-regional framework cooperation agreement. On the Community side, the agreement would be negotiated in accordance with its established procedures. Both sides considered that the conclusion of an agreement of this type would confirm the political will of both regions to extend and develop their relations and that it would also help to reinforce relations between the Community and Latin America as a whole.

18. The Central American Ministers expressed the view that the appropriate intergovernmental forum for approving the main lines of a regional position as a mechanism for negotiation and follow-up in the economic sphere is the Central American Economic Council, with the participation of a representative from the Government of Panama.

The negotiating body, under the aegis of the Central American Economic Council, will be an *ad hoc* group composed of delegates from every government. This body will act in coordination with the group of heads of mission of the countries of the Central American Isthmus (GRUCA), with headquarters in Brussels. The SIECA will support the mechanism for negotiation and follow-up and will seek the collaboration of other institutions connected with Central American integration and other regional and international bodies in accordance with the circumstances.

19. The Ministers expressed their conviction that this meeting constitutes a first step in a process which will effectively increase existing cooperation between Central America and Europe.

3. "EXPOSICION DEL SENOR MINISTRO DE RELACIONES EXTERIORES AL HONORABLE CONGRESO NACIONAL PIDIENDO LA APROBACION DE LA CARTA DE LAS NACIONES UNIDAS, EL ESTATUTO DE LA CORTE INTERNACIONAL DE JUSTICIA Y LOS ACUERDOS PROVISIONALES CONCERTADOS POR LOS GOBIERNOS PARTICIPANTES EN LA CONFERENCIA DE LAS NACIONES UNIDAS SOBRE ORGANIZACION INTERNACIONAL (MANAGUA, D.N., 2 DE JULIO DE 1945)", IN REPUBLICA DE NICARAGUA, *MEMORIA PRESENTADA AL HONORABLE CONGRESO NACIONAL POR EL SECRETARIO DE ESTADO EN EL DESPACHO DE RELACIONES EXTERIORES, 1945* ("STATEMENT OF THE MINISTER OF FOREIGN RELATIONS TO THE NATIONAL CONGRESS REQUESTING THE APPROVAL OF THE UNITED NATIONS CHARTER, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, AND THE PROVISIONAL AGREEMENTS CONCLUDED BY THE GOVERNMENTS PARTICIPATING IN THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION" (MANAGUA, 2 JULY 1945) IN REPUBLIC OF NICARAGUA, *MEMORIAL PRESENTED TO THE NATIONAL CONGRESS BY THE SECRETARY OF STATE IN THE OFFICE OF FOREIGN RELATIONS, 1945*) (ENGLISH TRANSLATION OF PAGES 139-142 PROVIDED)

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DEPARTMENT OF STATE, DIVISION OF LANGUAGE SERVICES

(Translation)

LS No. 113935
WD/MM
Spanish.

REPUBLIC OF NICARAGUA MEMORIAL PRESENTED TO THE
NATIONAL CONGRESS BY THE SECRETARY OF STATE
IN THE OFFICE OF FOREIGN RELATIONS

Dr. Victor Manuel Román y Reyes

Managua, 1945

STATEMENT OF THE MINISTER OF FOREIGN RELATIONS TO THE NATIONAL CONGRESS REQUESTING THE APPROVAL OF THE UNITED NATIONS CHARTER, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, AND THE PROVISIONAL AGREEMENTS CONCLUDED BY THE GOVERNMENTS PARTICIPATING IN THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION

Managua, July 2, 1945.

Gentlemen:

On the express instructions of the President of the Republic, I have the honor to submit for consideration by the National Congress, through you the Secretaries of that body, the United Nations Charter, the Statute of the International Court of Justice — which is annexed to the former as an integral part thereof — and the Provisional Agreements drawn up by the governments participating in the United Nations Conference on International Organization, in which is established

a Preparatory Commission of the United Nations charged with taking all necessary measures during the process of ratification and entry into force of the aforesaid Charter and Statute.

Given the importance and hoped-for results of the international accords which I am submitting to you, the President of the Republic desires that they be considered with all appropriate urgency. In the United States of America, President Truman personally recommended them to the Senate and asked for their swift ratification.

I shall be very brief in my statement about those clear, precise and well-known documents, which we signed without reservations at San Francisco, city of peace, confident that they close a cycle of injustice and suffering and open the way to a future in which human endeavor will follow new paths of conciliation and well-being.

The first of those documents, the United Nations Charter, finds its source and inspiration in the so-called Dumbarton Oaks proposals, drawn up by that great apostle of democracy Franklin Delano Roosevelt and the great statesmen Winston Churchill and Joseph Stalin, and in the additional Yalta agreements.

It was far from easy to arrive at an agreement amidst the multitude of opinions and interests encountered. Much good will was required to hammer out the understanding that was reached, as was the firm conviction that peace is the greatest good and any sacrifice made to keep it is worthwhile.

The fact that a formula reconciling all interests and opinions was achieved should strengthen our confidence that all differences can be resolved and all conflicts settled. We ought to nurture that conviction because it inspires the certainty that where there is a will to prevent war there is always a way.

The preparation of the United Nations Charter involved the participation of representatives of 50 nations, of different races, languages, religions and cultures, united by their determination to find a means of putting an end to wars.

The Charter is not a perfect instrument, as no human endeavor can be perfect. What nobody will deny is that it represents a step forward and a considerable advance towards the betterment of humanity and acknowledgement of the *fundamental rights of men and nations*. As President Truman said in his speech at the closing session of the San Francisco Conference, it is a solid structure on which to build a better world.

Nor can the Charter be considered capable, as a single isolated document, of bringing forth conciliation and harmony among nations. In my remarks to the Conference I called for an instrument designed to thwart aggression and eliminate justification for war through the collaboration of nations. Now we have that instrument, but the collaboration of nations will always be necessary.

The same unity, the same firm purpose, the same faith in peace as the best climate for understanding among peoples, are and will remain indispensable to maintain international harmony and the well-being of humanity. The eloquent French statesman Paul Boncour made the memorable comment at one point in the Conference that peace "depends on true unity of purpose among the large and small countries. In this hour of immense hope filling our hearts, let us swear to keep our faith in peace, in the unity that was our strength during the war."

Although I shall not embark on a detailed and comprehensive discussion of the Charter, with whose contents and scope this distinguished assembly is surely familiar, I do wish to mention two particular passages in it. One of them, specific in character, is relevant to our continental organization and its peace-loving traditions as embodied in our Hemispheric international law, while the other, general in character, addresses the needs and wishes of all the world's people.

The representatives of the countries of the Americas sought to include in the

Charter our entire international legal heritage as it is enshrined in treaties, conventions and other agreements, and as it lives and pulses in the consciousness of the New World. The diversity of traditions and perspectives prevented the realization of this Hemispheric ideal; nevertheless, the effort did result in recognition of the existence of regional arrangements and agencies, as reflected in the reference in Chapter VIII on Regional Arrangements to

“such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”.

Economic and social problems are considered in the Charter, and, inasmuch as their precedence over merely political ones is acknowledged, an Economic and Social Council is created and international cooperation is regulated with a view to solving them.

At both the Chapultepec and San Francisco Conferences, the Delegation of Nicaragua advocated the organization of a comprehensive peace that must be capable of bringing about the collective well-being of nations if it is to be not just a truce between conflicts but a permanent condition in which all men can live on this earth, free from fear and poverty. It was our view then as now that suffering and unmet needs can never be a propitious environment for a life of concord and harmony. As a famous orator remarked, war must be prevented not only by force but also by the achievement of social peace among peoples.

To conclude, I must refer to the Statute of the International Court of Justice which is based on the draft prepared in Washington by an international committee of jurists.

In the work of the Conference, the Latin American countries, in keeping with their advanced international law, took a stand in favor of the binding jurisdiction of the Court in the settlement of international disputes. They had to bow to the thesis of voluntary jurisdiction which prevails on the other continents, and consequently States were left free to decide whether they wanted to submit their disputes to the international legal organization that was created. However, the Charter left intact the right of States to subject themselves to the jurisdiction of the Court pursuant to earlier agreements or by virtue of future arrangements.

Such are the main outlines of the important documents which I hereby submit to you as the best security machinery it has proved humanly possible to devise against the horrors of war.

I avail myself of this opportunity to renew to you, Gentlemen, the assurances of my highest consideration.

(Signed) Mariano ARGÜELLO.

4. LETTER FROM MANLEY O. HUDSON, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS, TO ESTEBAN MENDOZA, MINISTER OF FOREIGN RELATIONS, HONDURAS, DATED 14 NOVEMBER 1955

14 November 1955.

My dear Mr. Secretary :

1. Some days have elapsed since I received your kind letter offering me the hospitality of the City of Tegucigalpa during my stay. You were most kind in saying that you would take care of my friends.

2. I regret to say that it will be impossible for me to come as soon as the 14th of December 1955. Can't you and Mr. Dávila come here in December, and go over the situation with me?

3. I think it is not too much to say that I have worn myself sick, thinking about this question of jurisdiction. I went to Geneva in the summer, and conferred at length with the officials of the United Nations and the officials of the International Court of Justice. The trip was very rewarding, in that I could discover all the facts which were in Geneva. I discovered several facts that were new.

4. It would take little of your time to come to Cambridge, and you would be doing a big thing for Honduras. I would suggest that you and Mr. Dávila try to spend the week of 5 December 1955, or of 12 December 1955, here.

5. In the hope that you can do this, I have prepared a rough sheet, which I shall propose as the subject of our discussion. You and Mr. Dávila can master what is in this sheet, and we could then discuss it. I hope very much that you can come.

6. I also have in mind definite answers to your questions, which I shall give at a later date. Some of them are on pretty slim ground, but I shall deal with all of them.

7. If you cannot come, I shall try to be on hand in Honduras by the latter part of January 1956.

With the pleasantest of greetings, I am
Very sincerely yours,

(Signed) Manley O. HUDSON.

5. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 16 DECEMBER 1955 WITH ATTACHED AIDE-MÉMOIRE

16 December 1955.

Dear Mr. Minister :

With great glory to you, I send you the revised copy of the Aide-Mémoire.
Warmly yours,

Manley O. HUDSON.

Signed for Judge Hudson in his absence. Laurence A. BROWN, Jr.

AIDE-MÉMOIRE

(1) In May 1955, the Government of the United States of America instructed the Ambassador of the United States in Honduras, and the Ambassador of the United States in Nicaragua, to make a suggestion to the respective Governments to which they were accredited that the best way to prevent friction between the two countries over the question of the boundary between Honduras and Nicaragua, would be for them to go to the International Court. This action by the Government of the United States followed the action which was taken by the Government of Honduras in April 1955 in order to expel from Honduran territory a detachment of Nicaraguan troops.

(2) The Honduras Government advised the Government of the United States through its Ambassador in Washington that it was thoroughly in accord with the principle embodied in the foregoing proposition.

(3) So far as we know, the Nicaraguan Government has not made a similar statement.

(4) The statement made to the Secretary-General of the League of Nations on November 29, 1939, was that Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice, and that the instrument of ratification would follow. The instrument of ratification of Nicaragua has not been found. Of course, the instrument of ratification of the Statute, which Nicaragua had signed on September 14, 1929, would have had the effect of bringing into force the declaration of September 24, 1929, by which Nicaragua "recognized as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice".

(5) Since the United States Government has shown very much interest in this question, inasmuch as it represents the maintenance of peace and security in this hemisphere, the Honduras Government respectfully requests that the Government of the United States ask the Nicaragua authorities what was meant by the action of November 29, 1939.

6. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 20 DECEMBER
1955 (WITHOUT ATTACHMENT)

December 20, 1955.

Dear Mr. Minister :

I enclose herewith the Opinion concluded. It is not as we would have wished it — you and I! Yet I cannot see any escape from the conclusions that are reached in this Opinion.

I very much regret that we have not reached other conclusions. I shall long think of you and Dr. Dávila, and shall as long remember your many kindnesses to me and your constant backing of me. It is a great thing that I will remember.

Faithfully yours,

(Signed) Manley O. HUDSON.

7. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 16 JANUARY 1956

16 January 1956.

My dear Mr. Minister :

(1) I have received your letter of 4 January, which pays attention to the work we have done. . . .

(2) I very much regret that Nicaragua has not ratified the Statute of the Permanent Court of International Justice in 1929. It is a bad thing from our point of view.

(3) I think your conversation with Mr. Holland did a great deal of good, and I very much await the result. I note that Mr. Holland will advise Nicaragua to accept the jurisdiction of the Court, but I think that it is almost hopeless.

(4) In your last paragraph, you refer to my continuing "to render us the assistance of your experience and knowledge". I should be only too happy to do this, and I am constantly on the alert for anything which you may need me to do.

(5) At the present time, I am at work, as you directed when you were in my office, on the statement of the Honduran case before the Court. I think a good case can be made for it, and I think that we can use it somehow. In any event, I think the job should be done.

.
With assurances of my great esteem, I am
Sincerely yours,

(Signed) Manley O. HUDSON.

8. LETTER FROM ESTEBAN MENDOZA TO MANLEY O. HUDSON OF 10 FEBRUARY 1956 (SPANISH WITH ENGLISH TRANSLATION OF 11 FEBRUARY 1956)

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., February 11, 1956.

Excellency :

I have the honor to acknowledge receipt of your letter dated January 18, 1956, which has remained unanswered due to my temporary absence from the country.

I have been authorised by the President of the Republic to accept your very important professional services in drafting the demand to be filed by Honduras before the International Court of Justice against Nicaragua, on our boundary question.

.
Up to this moment I have heard nothing definite about outcome of my representations before Mr. Holland. I know only that the Nicaragua Ambassador to Washington has now returned to that city after having consulted with his Government. As you, I feel it is highly improbable that Nicaragua should accept the obligatory jurisdiction of the Court.

In such a case, how would you suggest that we use the work you are preparing? Your letter states that it is your opinion that such a work should be done and therefore the Honduran Government would very much like to know if you have any idea or suggestion to make thereon.

Allow me to remain, my admired Doctor Hudson,

Very truly yours,

(Signed) Esteban MENDOZA.

9. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 17 FEBRUARY 1956

17 February 1956.

My dear Mr. Minister:

1. I have today received your letter of 11 February 1956, and I must at once thank you for taking the trouble to attend to it.

.....
6. I am not surprised that you have heard nothing from Mr. Holland. The kind of thing that he attempted requires a good deal of time, and it is not to be decided very quickly. While it seems improbable that obligatory jurisdiction of the Court will be accepted by Nicaragua, there is some chance of it left.

7. On this chance, there is a basis for you to go to the Court. The document that I shall prepare, subject to your changes, might be filed with the Court. Nicaragua could then be notified by the Court of the case. The motion would rest upon the Nicaraguan declaration of September 24, 1929, followed by the Nicaraguan telegram to the League of Nations of November 29, 1929. Nicaragua's obligation under the Statute of the International Court of Justice would depend upon Article 36 (5) of the Statute of the Court.

8. In case of this use of the document that we shall prepare, the document can be used in many capitals of the world, and especially in Tegucigalpa. I think this is a matter that is worthwhile, quite apart from the action which the Nicaraguans may take.

9. I am not yet sure whether I shall get to Honduras this year. I shall certainly let you know in lots of time for meeting my requirements.

Very sincerely yours,

(Signed) Manley O. HUDSON.



10. LETTER FROM ESTEBAN MENDOZA TO MANLEY O. HUDSON OF 2 MAY 1956
(SPANISH AND ENGLISH)

[Spanish text not reproduced]

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 2, 1956.

Honorable Doctor Hudson :

I am pleased to send you English translation of Minutes of Exchange of Ratifications to Gámez Bonilla Treaty, which took place in San Salvador, on December 24, 1896.

I am also sending you ratification instruments to Nicaragua and Colombia 1928 Treaty and Minutes of Exchange of said ratifications. In my judgment this constitutes one of the most effective and valuable proofs of the fact that Nicaragua, as late as 1930, implicitly recognized the validity of the Spanish King's Award.

I have lately learned from a reliable source that the Nicaragua Government would be willing to accept the compulsory jurisdiction of the International Court of Justice, when Honduras files demand for the execution of the King of Spain's Award. However, due to reasons of internal politics, as President Somoza, now in power, wishes to be re-elected, the Nicaraguan Government would like to have Honduras postpone filing Court proceedings until after February 3, 1957, date on which elections will be held in that country.

The Honduras Government would be willing to make a written and confidential declaration before the State Department, obligating itself to put off starting proceedings until after elections have taken place in Nicaragua, provided that the Nicaraguan Foreign Office should now issue a statement declaring that it accepts as legally valid, declaration made by Mr. T. F. Medina in Geneva, on September 24, 1929, recognizing on behalf of Nicaragua the compulsory jurisdiction of the Permanent Court of International Justice. This would give us time to prepare demand and all the necessary documents. I would appreciate your comments in this regard.

I have received preliminary study on the demand which you sent me. I am studying same thoroughly and I can already advance my opinion that it is an excellent work.

I take pleasure in offering you once more the tokens of my highest esteem and consideration, and remain

Very truly yours,

(Signed) Esteban MENDOZA.

11. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA
OF 7 MAY 1956

7 May 1956.

My dear Mr. Minister :

I am delighted today to have your letter of May 2, 1956.

1. I am pleased to have a translation of the exchange of ratifications of the Bonilla-Gómez Treaty at San Salvador, December 24, 1896. We have had Bonilla's Collection of Treaties for some time.

2. I thank you also for the exchange of ratifications of May 5, 1930, of the Colombian-Nicaraguan Treaty.

3. The news about Nicaragua is extremely good! It appears that Nicaragua would postpone the Court proceedings until after February 3, 1957. That date would be satisfactory to me. I shall have the Application properly drafted by the end of June. If I get your comment on time, it will be sent to you in the latter part of June.

4. Would the date be satisfactory to Honduras and to you? The Nicaraguan proposal would hold up the Application for seven months *plus*. In addition, it would seem that President Somoza's reelection is envisaged. This is a pretty large concession for you to make, but it may be worthwhile if you are satisfied with the results.

5. You envisage a written and confidential declaration to be made before the US Department of State; but this would be provided that Nicaragua made a statement concerning the declaration made by Mr. T. F. Medina at Geneva on September 24, 1929. In other words, you would ask Nicaragua to make a declaration reviving its declaration of about twenty-seven years ago.

6. On this point you ask for my comment, which is along lines as follows :

(a) Is it necessary that Nicaragua go back twenty-seven years and revive the declaration of 1929? It would be sufficient for Nicaragua to accept the jurisdiction in this case with reference to this matter.

(b) Is action needed by the legislature of Nicaragua? It can be contended that the Nicaraguan Congress has acted in 1939, and that this action is sufficient in that it made Nicaragua a Member of the Court. This would mean that only seventeen years must be envisaged since the date of the Congress' action.

(c) It may be possible for Nicaragua to act without that past story's being revived. Perhaps you should seek such action, and this possibility must occur to you.

(d) I am a bit doubtful of this. It seems that this might involve delay, and I don't want that to happen. I think it would be better if we could go in the state in which the thing now is. Perhaps this can't be done that way, and some modification of the proposal would seem to be necessary.

7. You say that acceptance of the jurisdiction would mean that you would have time to prepare "all the necessary documents". I think you mean the necessary documents including the *Case*, which would be a considerably longer

document than the document which I have undertaken to prepare for you. I should be prepared to undertake the preparation of a Case, if you wish it.

With extremely warm regards, I am

Yours sincerely,

(Signed) Manley O. HUDSON.

12. LETTER FROM ESTEBAN MENDOZA TO MANLEY O. HUDSON OF 26 MAY 1956
(SPANISH AND ENGLISH)

Secretaria de Relaciones Exteriores de la Republica de Honduras

Tegucigalpa, D.C., May 26, 1956.

Honorable Doctor Hudson :

I have read several times very carefully your proposed draft for Application by Honduras to the International Court of Justice. Taking into consideration that this is the fundamental and basic document for the move we are planning, it is necessary that this Application should be as perfect as possible.

I can make but a few observations thereon, as follows :

(a) According to international law and current practice, in order that a court should undertake trial of a case of any nature whatsoever, it is essential that parties interested in the controversy submit proof previously of their inability to settle dispute by direct agreement and that therefor they find themselves compelled to resort to a justice court.

(b) To fulfill this requirement, the Honduran Government has sent two notes to the Government of Nicaragua — one dated July 11, 1955, and the last one January 12, 1956. In both of these communications the Government of Honduras insists on the validity and compulsory nature of Award rendered by His Majesty the King of Spain, demanding the prompt execution of same. The Nicaraguan Government answered the first of said notes under date of September 29, 1955, claiming the Award's nullity, repeating the same arguments it has used since 1912. To date the Nicaraguan Chancery has not replied to communication sent over four months ago by the Government of Honduras, and in all certainty, if it ever does it will be continuing to reject our claims. This alone constitutes sufficient proof of the fact that it is impossible to settle this matter directly between both countries and therefor we are compelled to submit question for a final decision to the Court.

(c) In order you may be acquainted with contents of aforesaid notes and use same in the most advantageous way, I will soon forward to you an English translation of them.

In accordance with Minutes of the Sessions of the Nicaraguan Senate and Chamber of Deputies, which I suppose are in your possession, the ratification of the Signature and Statute Protocol of the Permanent Court of International Justice took place in 1935 and not in 1939, and based on this I consider that perhaps it would be advisable to make a correction at the end of No. 10, page 41 of your draft.

For reasons analogous to the ratification date of the Protocol and Statute, perhaps it would be convenient to make some clarification in paragraphs 12 and 13, page 15 of draft.

On page 101, paragraph 20, line 7, it reads that the Fifth Session was held in Danlí, "in the disputed territory". In view of the fact that Danlí has never been territory claimed by Nicaragua, I think it is convenient to suppress said phrase.

In the final part Honduras just requests that the International Court of Jus-

tice declare that the Nicaraguan Government is under the obligation to execute Award rendered by His Majesty the Spanish King on December 23, 1906.

As you well know, the Nicaraguan Government has granted on various dates, for several years, all kinds of lumber and mining concessions in the Honduran territory occupied by Nicaragua, which has caused considerable losses to the Honduran national economy. In addition, due to Nicaragua's refusal to execute the King of Spain Award, Honduras was compelled in 1918 and 1937 to resort to mediation, thus having to make large disbursements. And finally we would have to take into account the large expenditures to be made before obtaining a resolution from the International Court of Justice. Under such circumstances, do you think that Honduras is entitled also to request an indemnity?

Except for the above considerations I have nothing else to add for the moment regarding work prepared by you, which I consider of such a high quality that proves once more your excellent and highly appreciated qualifications as an internationalist of world-wide renown.

I have the honor to express to you once more my deepest appreciation and distinguished consideration, and remain,

Very truly yours,

(Signed) Esteban MENDOZA.

13. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 31 MAY 1956

31 May 1956.

My dear Mr. Minister:

1. You have been good enough to send me the Minutes of the Senate and Chamber of Deputies of Nicaragua, in which it appears that the two bodies consented to the ratification of the Protocol of Signature and Statute of the Permanent Court of International Justice in 1935. Acting on your letter of May 9, 1956, we had previously found the action of the Senate and of the Chamber of Deputies.

2. You and Dr. Dávila seem to think that this is a sure basis on which to establish the jurisdiction and competency of the International Court of Justice, to resolve the petition which Honduras will make against Nicaragua.

3. We have examined all of *La Gaceta* from January 1, 1935, down to January 1939, and the numbers which appeared from July of 1939 to the end of June 1940. We are continuing to examine *La Gaceta* to cover all of the numbers down to 1941. We have found nothing. As you know, it is a terrible job; we have no index, and no guide to *La Gaceta*.

4. I think your opinion is very optimistic that there is any basis on which to establish the jurisdiction of the International Court of Justice, or even the Permanent Court of International Justice. We have not found any action taken by the President of Nicaragua on the Protocol of Signature and the Statute of the Permanent Court of International Justice, as required by the text of paragraph 3 of the Protocol of Signature of December 16, 1920; I cannot find that this provision had been modified by the Protocol concerning the Revision of the Statute of the Permanent Court of International Justice of September 14, 1929. (I am sending you the Fourth Edition of the Statute and Rules of the Court.) The action by the President of Nicaragua would be necessary for your conclusion that there is a sure basis on which to establish the jurisdiction of the Permanent Court of International Justice and the International Court of Justice. A vote in favor of ratification by the two bodies of the National Congress merely means, to us, that the two bodies are giving consent to ratification by the President.

5. It is the ratification by Nicaragua of the Protocol of Signature and the Statute of the Permanent Court of International Justice, for which we are looking. The nearest indication we have of it is the telegram of November 29, 1939. It is not the ratification of the Statute and Protocol of the Permanent Court of International Justice, but it is a notice that they were sending the ratification *oportunamente*. The ratification was not received.

With warmest regards, I am
Sincerely yours,

(Signed) Manley O. HUDSON.

14. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA OF 26 JUNE 1956

June 26, 1956.

My dear Mr. Minister :

1. I refer to your letter of June 19, 1956, which I have received yesterday.

.....

5. It seems to me somewhat early to talk about what you call the Counter-Case. If you will notice Article 41 in the Rules of Court, you will see that much depends on whether the proceedings are initiated by Special Agreement, or whether they are initiated by Application. We don't know whether there is to be a Counter-Memorial or not, nor do we know whether we must have a Reply or not. We might be limited to a statement concerning the jurisdiction of the Court. If it is to be a Counter-Memorial, or a Reply, it probably would take some time. I suggest that, at the present time, you arrange for the payment of what you have agreed on for the draft of the Application, and what may be agreed on for the Memorial. There need be no special agreement made at this time for the Counter-Memorial, as that must be left for adjustment.

6. I am not sure what is in your mind when you refer to the "Findings" ("conclusiones"). If this refers to whatever final papers may be necessary, perhaps I can assume some or all of this expense.

.....

8. I have decided to leave for Geneva on July 4, leaving Cambridge on July 3; so that I shall be there July 5, 1956. Please address a reply *at once* to me at *Hotel d'Angleterre, Geneva, Switzerland*. My plan is to work on the Memorial as soon as I arrive there.

With warm regards, I am

Very sincerely yours,

(Signed) Manley O. HUDSON.

15. LETTER FROM MANLEY O. HUDSON TO ESTEBAN MENDOZA
OF 23 AUGUST 1956

Hotel d'Angleterre, Genève.

Aug. 23, 1956.

Dear Mr. Minister:

1. I thank you very much for your letter of July 14, 1956 (the Spanish is dated Aug. 17, 1956).

2. I am very glad to have the statement concerning the fee for the preparation of the Memorial.

3. I am not at all hopeful that the Court will decide the jurisdiction in our favour. I have stated the case in the Application. Men with whom I have talked generally seemed doubtful about the Court's upholding the jurisdiction. We have stated in the Application that the Court would bear down on the failure to send in the "Ratification". I think we can do no more as things now stand. I regret this very much.

4. I shall be glad to see Dr. Dávila in Sept. I plan to be back on Sept. 4.

With high esteem I am,

Most sincerely yours,

(Signed) Manley O. HUDSON.

Of course the Nicaraguans may not attack the jurisdiction.

16. LETTER FROM JORGE FIDEL DURÓN TO MANLEY O. HUDSON OF 30 APRIL 1957

Tegucigalpa, Honduras, April 30, 1957.

Dear Professor Hudson :

I have your two letters of March 29 and April 25, 1957, for which I wish to thank you.

First of all, allow me to excuse myself for not having answered sooner. However, it is needless for me to say that with two important cabinet portfolios, State and Education, now in my hands, my time is limited for writing personally personal letters.

The situation with Nicaragua has now become so acute that the Military Junta adopted the following course. Having the neighboring Government attacked us again and taken possession of Mocoron, some 22 kilometers from the bordering Segovia river, after exhausting the peaceful methods of protest and obtaining no satisfaction but instead a new daring declaration that Mocoron belongs to Nicaragua, there was no other course but to start a cleaning operation which involves not only the new territory invaded but also the one illegally occupied since 1937, while we were signing the Pact of Reciprocal Offerings of San José agreeing to withdraw all troops, pact which we did keep, but unilaterally.

Simultaneously, on April 28, my Office announced to the "OEA" that we were accusing the Nicaraguan Government as aggressor under the clauses of the Rio Pact of Reciprocal Assistance of 1947 and the Bogotá Pact of 1948, promise which we kept and at 6:pm today our allegation, as per enclosed copies, was filed with Dr. Fernando Lobo, President of the "OEA" in Washington by our Ambassador.

As this proceeding is unique in our history we are still unacquainted with the rules of procedure but we believe that at least, by notifying also the Foreign Offices of all member States, we have left clear that the Nicaraguan Government is an aggressor and expect to prove it as we are gathering all the necessary proof to be adduced by a Delegation composed of Dr. Ramón E. Cruz, Dr. Marco A. Batres, Dr. Humberto Lopez Villamil, Secretary Dr. Hidalgo and Engineer Ynestroza with you as our Counsel. Dr. Villamil shall call on you as he is leaving tomorrow in advance of the rest of the Delegation.

The terms proposed by you are acceptable and Dr. Villamil will talk to you more specifically on the subject. First of all, what we want to do is to create conscience around the justice of our case by proper divulgation and distribution of the opinion of the brief of John Bassett Moore.

With renewed admiration and esteem, believe me, Sir, your friend sincerely,

(Signed) Jorge Fidel DURÓN.

17. LETTER FROM RAMÓN E. CRUZ TO MANLEY O. HUDSON OF 25 JUNE 1957

June 25, 1957.

Dear Judge Dr. Hudson :

It is a great honor for me to refer to your letter of May 27. I should take this opportunity to tell you how much I enjoyed to have met you, and how great is the esteem you deserve of the Honduran people for the excellent advice you are giving to us.

At large I will give you a digest of the main activities carried out upon returning from Washington :

1. I attended the Conference of Foreign Affairs Ministers held in Antigua Guatemala, Guatemala. The purpose of the meeting was to discuss a way on how the Governments of Honduras and Nicaragua could reach, by direct agreement, a settlement of their differences. Unfortunately, nothing was carried out. The Nicaraguan Foreign Minister declared, however, that Nicaragua agrees to submit the case before the Court of International Justice.

2. This month we have been working on the same subject, but in a special manner studying three drafts of agreements proposed by the Commission *Ad-Hoc* of the Organization of American States. On the 20th, two members of said Commission arrived in town, Ambassadors Quintanilla and García. With them we discussed the drafts above mentioned, having accepted the third whose main articles read as follows :

(1) The Contracting Parties having recognized and accepted *ipso facto* the jurisdiction of the Court of International Justice in the "Pacto de Bogotá", now agreed to submit the present case to the Court, in order to settle their differences regarding the *Award of the King of Spain of December 23, 1906*.

(2) The award duly pronounced and notified to both parties will be final and shall be executed immediately.

(3) If any of the Contracting Parties refuses to carry out the obligation imposed on her by the judgment of the Court, the other, before demanding the good offices of the Security Council of the United Nations, shall promote a meeting of Foreign Affairs Ministers, this board will determine the necessary compulsory measures to be applied in order to carry into effect the Judicial Award. Perhaps, to give more effectiveness to the agreement, the Council of the Organization of American States shall make out a decree advising the parties to carry on to practice the terms of the agreement, and thus avoid that such instrument be ratified by the Congress of both countries.

The Minister of Foreign Affairs agrees with you on the elimination from the application the plea for compensation for injuries.

Because of the aggression of Nicaraguan soldiers to Mocerón, Honduras introduced before the Organization of American States formal protest against Nicaragua taking into account Article 70 of the "Tratado Interamericano de Asistencia Reciproca of Rio de Janeiro" of September 2, 1947. The procedure before the Organization will end with the recommendation to the parties to appear before the International Court of Justice. This situation prevailing between Honduras and Nicaragua is the result of Executive Decree of the Honduran

Government of February 21, 1957, creating the "Departamento de Gracias a Dios" at the Mosquito Territory as far as Rio Segovia.

I believe that it would be essential to add the above facts in the application and memorial as new facts, if you so agree.

I take this opportunity to extend to you my best and sincerest wishes for your health.

Very sincerely yours,

(Signed) Ramón E. CRUZ.

18. TELEGRAM FROM UNITED STATES EMBASSY TEGUCIGALPA TO SECRETARY OF
STATE OF 19 MARCH 1957

March 19, 1957.

Have confidential information that Manley Hudson of opinion that Honduras' assumption that Nicaragua is subject to the Court may not be valid since advice to Court of submission to jurisdiction was by Foreign Office cable promising to later forward written ratification which apparently never sent. Assume however in view advice from Managua and Washington of Nicaraguan willingness ICJ adjudication that every effort will be made to see that Nicaragua does not back out from this possibility peaceful settlement problem for all time.

WILLAUER.

19. LETTER FROM WHITING WILLAUER, UNITED STATES AMBASSADOR TO HONDURAS,
TO R. R. RUBOTTOM, ACTING ASSISTANT SECRETARY OF STATE FOR INTER-AMERICAN
AFFAIRS, OF 19 MARCH 1957

Tegucigalpa, Honduras,
March 19, 1957.

Dear Dick :

You will have now received the news that Honduras *has* publicly announced its decision to take the border dispute to the International Court. In view of my conversation with Jack Neal in which the Department seemed to be very pleased when I previously advised that Honduras intended this course of action, I assume that the actual taking of the action will go a long way towards calming any worries the Department might have as to Honduras' peaceful intentions, especially since in discussing and advocating this action with the Foreign Minister and the Junta I made the point that I felt that no nation that had a matter before the Court could use military self-help while the case was pending and still maintain stature in international eyes. I sincerely hope that Nicaragua will go along with the Court procedure as stated by the President to Tom Whelan and by Sevilla Sacassa through the Department, despite the fact, as per my cable No. 378, there appears to be some doubt as to whether Nicaragua has in fact already submitted itself to the Court's jurisdiction.

You will recall your cabled instructions which resulted in my pointing out to the Government of Honduras that in the absence of any public declaration of peaceful intention the climate for aid to Honduras, through Smathers Amendment loans, etc., would not be propitious. I hope that in view of Honduras' gesture of going to the Court that the climate is back to normal again and that the consideration of economic assistance can now receive a prompt decision on its merits. I would greatly appreciate your views on this as soon as convenient.

With warmest personal regards.

Sincerely yours,

(Signed) Whiting WILLAUER.

20. MEMORANDUM FROM THE DEPARTMENT OF STATE, OFFICE OF THE LEGAL ADVISER, 10 DECEMBER 1946, TRANSMITTING MEMORANDUM ENTITLED "REFERENCE TO INTERNATIONAL COURT OF JUSTICE OF DISPUTES UNDER TRUSTEESHIP AGREEMENT FOR JAPANESE MANDATED ISLANDS", 6 DECEMBER 1946

(Note: The only available copy of this memorandum is of poor quality and difficult to read, especially at page 4, which contains the material relevant to this case. Therefore, for the convenience of the Court, the United States has included a retyped version of that page)

[Pages 1-3 of Memorandum of 6 December 1946 not reproduced]

December 10, 1946.

To: SPA, Alger Hiss
AH, E. A. Gross
IS, H. F. Bancroft
DA, J. F. Green
JA, H. A. Borton

From: Le, J. B. Howard

I am attaching a memorandum on reference of disputes under the trusteeship agreement for the Japanese mandated islands to the International Court of Justice. I would appreciate your comments so that the memorandum may be prepared in final form for submission to New York.

Attachment

As stated above.

[Page 4]

alone were competent to enforce the agreement against the United States, no dispute could be adjudicated by the Court inasmuch as the Security Council may not be a party before the Court and the only legal remedy of the Security Council would be to request an advisory opinion from the Court.

If other members of the United Nations are permitted to enforce their rights against the United States under the trusteeship agreement directly in the Court, the agreement would in this respect resemble a multilateral agreement. In such case, it should be noted that the Senate resolution provides that the declaration of compulsory jurisdiction shall not apply to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction". Even though the trusteeship agreement may not be a "treaty", it is doubtful whether the principle in this proviso was intended by Congress to apply only to treaties and not to executive agreements, since breaches of obligations under both come equally within the compulsory jurisdiction accepted in the declaration. The acceptance of the New Zealand type provision would therefore appear to constitute an agreement to jurisdiction of the type excepted in the proviso in the absence of special agreement. The type of provision which

is recommended in this paper would permit as a limitation upon the agreement of the United States to jurisdiction of the Court over disputes arising under the trusteeship agreement, the requirement that all parties affected by the decision must also be parties to the case before the Court.

Le: JBHoward: jdr.
12/6/46.

21. "PRESIDENT'S POWER TO GIVE NOTICE OF TERMINATION OF US-ROC MUTUAL DEFENSE TREATY", MEMORANDUM FOR THE SECRETARY OF STATE FROM THE LEGAL ADVISER, DEPARTMENT OF STATE, 15 DECEMBER 1978, AS REPRODUCED IN TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979

December 15, 1978.

This memorandum confirms my advice to you that the President has the authority under the Constitution to decide whether the United States shall give the notice of termination provided for in Article X of the US-ROC Mutual Defense Treaty and to give that notice, without Congressional or Senate action.

While treaty termination may be, and sometimes has been, undertaken by the President following Congressional or Senate action, such action is not legally necessary and numerous authorities recognize the President's power to terminate treaties acting alone. Presidents have exercised that power on several occasions. The following sections of this memorandum note the views of a number of Constitutional and international law authorities, and identify previous Presidential treaty terminations undertaken without action by Congress. An Appendix to this memorandum contains detailed histories of past US treaty terminations.

VIEWS OF CONSTITUTIONAL AND INTERNATIONAL LAW AUTHORITIES

The *Restatement of the Foreign Relations Law of the United States*, by the American Law Institute, states in Section 163:

"Under the law of the United States, *the President* or a person acting under his authority, *has, with respect to an international agreement to which the United States is a party, the authority to . . . take the action necessary to accomplish* under the rule stated in section 155 *the termination of the agreement in accordance with provisions included in it for the purpose . . .*" (At p. 493).*

Section 155 of the Restatement provides that "An international agreement may be . . . terminated in accordance with provisions included for that purpose in the agreement" (at p. 477). The *Restatement* comment to Section 163 states:

"The rules stated in this Section are based on the authority of the President to conduct the foreign relations of the United States as part of the executive power vested in him by Article II, Section 1, of the Constitution . . . The great majority of cases in which the President suspends or *terminates, by acting alone, an international agreement to which the United States is a party,* are cases in which the agreement contains provisions for its suspension or termination."

Professor Louis Henkin, Hamilton Fish Professor of International Law at

* Emphasis supplied throughout.

Columbia University, states in his book *Foreign Affairs and the Constitution* (1972) that :

“Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it. Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; *nor has the Senate any authoritative voice in interpreting a treaty or in terminating it.*” (At p. 136.)

Dr. Elbert M. Byrd, Jr., of the University of Maryland, has written in his book *Treaties and Executive Agreements in the United States* (1960) that :

“. . . from a constitutional view, it is much easier to terminate treaties than to make them. A treaty, by definition in constitutional law, can come into existence only by positive action by the President and two-thirds of the Senate, but a simple majority of both Houses with the President’s approval can terminate them, and *they may be terminated by the President alone.*” (At p. 145.)

Professor Laurence H. Tribe, of the Harvard Law School, has written in his recently published *American Constitutional Law* (1978) as follows :

“Although influenced (often decisively) by congressional action or constitutional restraint, *the President . . . has exclusive responsibility* for announcing and implementing military policy, for negotiating, administering, and *terminating treaties* or executive agreements; for establishing and breaking relations with foreign governments; and generally for applying the foreign policy of the United States.” (At pp. 164-165.)

Mr. Wallace McClure, in his work entitled *International Executive Agreements* (1941), wrote :

“It is customary for treaties to carry provisions laying down the steps to be taken if one of the participating governments wishes to divest itself of the obligations which have been assumed; for instance, a year’s notice by one party to the other or others. But treaties do not specify the organ of the national government by which such notice is to be given. *In the United States the Executive gives the notice. Sometimes he has given it on his own initiative solely.*

In treaty making the Senate may be said to act merely as executive adviser and check against positive action; *negative action*, not being feared by the constitution makers, *was left to the repository of general executive power, that is, to the President.*” (At pp. 16, 306.)

Professor Myres S. McDougal, William K. Townsend Professor of Law at the Yale Law School, wrote as follows in his study with Asher Lans on “Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy”, 54 *Yale Law Journal* 336 (1945) :

“. . . termination [of treaties] may be effected by *executive denunciation*, with or without *prior Congressional authorization*” (at p. 336).

Professor Randall H. Nelson, of Southern Illinois University, in an article entitled “The Termination of Treaties and Executive Agreements by the United States: Theory and Practice”, 42 *Minnesota Law Review* (1958) wrote that :

“Diplomatic practice coupled with judicial opinion demonstrates that the President, as the chief organ of foreign relations, has the primary responsi-

bility with respect to the termination of treaties. *He may perform this function alone or in conjunction with the Congress or the Senate.*" (At p. 906.)

The late Professor Jesse S. Reeves, of the University of Michigan, in an article entitled "The Jones Act and the Denunciation of Treaties", *15 American Journal of International Law* (1921), stated that:

"It seems to be within the power of the President to terminate treaties by giving notice on his own motion without previous Congressional or Senatorial action. It would seem, on the other hand, that the President cannot be forced by Congress or by the Senate to perform the international act of giving notice." (At p. 38.)

Professor Westel Willoughby, late of Johns Hopkins University, wrote in his work *The Constitutional Law of the United States* (1929) that:

"It would seem indeed, that there is *no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress* for its approval and ratification although, as has been seen, this has been done several times." (Vol. I, at p. 585.)

PREVIOUS PRESIDENTIAL TREATY TERMINATIONS

The President has taken action in a number of instances to terminate treaties without prior or subsequent action by either house of Congress. Such Presidential action has included giving notice of termination of bilateral treaties and notice of withdrawal or denunciation of multilateral treaties, pursuant to provisions in the treaties, and in a few cases, execution of termination agreements with the other parties to bilateral treaties.

Following are instances of treaty terminations effected by the President without Congressional or Senate action:

In 1815, President Madison exchanged correspondence with the Netherlands which has been construed by the United States as establishing that the 1782 Treaty of Amity and Commerce between the two countries had been annulled.

In 1899, President McKinley gave notice to the Swiss Government of the United States intent "to arrest the operations" of certain articles of the 1850 Convention of Friendship, Commerce and Extradition with Switzerland.

In 1920, President Wilson by agreement terminated the 1891 Treaty of Amity, Commerce and Navigation with Belgium concerning the Congo.

In 1927, President Coolidge gave notice of termination of the 1925 Treaty with Mexico on the Prevention of Smuggling.

In 1933, President Roosevelt delivered to the League of Nations a declaration of the United States withdrawal from the 1927 multilateral Convention for the Abolition of Import and Export Prohibitions and Restrictions.

In 1933, President Roosevelt gave notice of termination (which was withdrawn subsequently) of the 1931 Treaty of Extradition with Greece.

In 1936, President Roosevelt approved a protocol (deemed to be notice of termination) terminating the 1871 Treaty of Commerce and Navigation with Italy.

In 1939, President Roosevelt gave notice of termination of the 1911 Treaty of Commerce and Navigation with Japan.

In 1944, President Roosevelt gave notice of denunciation of the 1929 Protocol to the Inter-American Convention for Trademark and Commercial Protection.

In 1954, President Eisenhower gave notice of withdrawal from the 1923 Con-

vention on Uniformity of Nomenclature for the Classification of Merchandise.

In 1962, President Kennedy gave notice of termination of the 1902 Convention on Commercial Relations with Cuba.

In 1965, President Johnson gave notice of denunciation, subsequently withdrawn, of the 1929 Warsaw Convention concerning international air travel.

In addition to the above-listed Presidential actions to terminate treaties without Congressional authorization, as indicated earlier in this memorandum Presidents also have terminated treaties following enactment of laws providing for the termination, or in two cases, adoption of a resolution by the Senate. There also have been two occasions on which Presidential action terminating a treaty was subsequently "adopted and ratified" by statutory enactment. These instances do not, however, individually or in the aggregate, detract from the President's authority to act alone.

CONSTITUTIONAL HISTORY AND THEORY

The Constitution does not specifically address the question of treaty termination. The subject was not discussed at the Constitutional Convention and seems not to have received much attention in the early years of the Republic, perhaps because provision for termination by notice first appeared in a United States treaty in 1822. 1 Malloy *Treaties* (1910) 373. Several of the constitutional framers, including Jefferson and Madison, recognized that Congress could, by enactment of legislation, annul or rescind a treaty. Alexander Hamilton, writing of President Washington's 1793 Neutrality Proclamation in respect of France and its effect on the continuing validity of United States treaties with France, said:

"The right of the executive to receive ambassadors and other public ministers . . . includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation . . .

This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive to decide upon the obligations of the country with regard to foreign nations.

Hence, in the instance stated, treaties can only be made by the president and senate jointly, but their activity may be continued or suspended by the president alone." (*Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793*, Gideon, Washington, 1845, pp. 12-13.)

A Presidential notice of termination pursuant to the terms of a notice provision does not constitute an abrogation or repeal of the law of the land, but rather is a termination in the manner prescribed by the terms of the treaty, as approved by the Senate. The President's constitutional power to give a notice of termination provided for by the terms of a treaty derives from the President's authority and responsibility as chief executive to conduct the nation's foreign affairs and execute the laws. When a treaty takes effect as an international agreement and law of the land, the President must see that its terms are carried out. The Senate's role in giving advice and consent to the making of the treaty is fulfilled when the treaty is made; thereafter execution and performance of its terms, including terms relating to its duration or termination, are delegated by the Constitution to the nation's Chief Executive. Where the treaty provides for its termination by

notice, the President, as the officer charged by the Constitution with the authority and responsibility for the conduct of the nation's foreign affairs and execution of the treaty, has the power to give such notice when he deems termination to be necessary or desirable for the best interests of the United States.

COURT DECISIONS

Three cases in which the Supreme Court has dealt with treaty terminations have reflected the principles that legislation may supersede the domestic legal effect of treaties and that whether a treaty should be deemed to be in effect for international law and foreign relations purposes generally will be determined by the position of the Executive.

Thus, in *Charlton v. Kelly*, 229 US 447 (1913), involving the question of whether non-performance by Italy of an extradition treaty justified refusal of performance by the United States, the Supreme Court held that it did not because:

"... the political branch of the Government recognizes the treaty obligation as still existing ... The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant ... " (At pp. 474-476.)

In *Terlinden v. Ames*, 184 US 270 (1902), also involving the continued validity of an extradition treaty the Supreme Court stated "... we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance"; and it refused to review the position of the German Empire that the treaty was still in force "especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly". (At pp. 285-288.)

In *Van Der Weyde v. Ocean Transport Co. Ltd.*, 297 US 114 (1936), in which the Supreme Court held that a treaty provision had properly been abrogated as provided by Statute, it declined to pass on the President's power to terminate a treaty without Congressional authorization:

"... we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the new law. It is not possible to say that his conclusion as to Articles XIII and XIV was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it." (At pp. 117-118.)

CONCLUSION

Accordingly, President Carter has authority to give the notice of termination provided for in Article X of the US-ROC Mutual Defense Treaty.

Appendix to Memorandum for the Secretary of State

HISTORY OF TREATY TERMINATIONS BY THE UNITED STATES

THE EARLY PRACTICE

1798 — Termination by Statute

The first treaties terminated by the United States were three US-French treaties of 1778, and these were terminated by a 1798 Act of Congress, whose validity was upheld by the US Court of Claims in 1887 in the case of *Hooper v. United States*, 22 Ct. Cl. 404 (1887). The Hooper case held that the treaties were terminated under both US domestic law and under international law. But with respect to the termination of the treaties as a matter of international law, the Court did not rely entirely upon the Act of 1798, but rather gave great weight to the actions of the Executive Branch. The Court held that the 1798 Act was "binding upon all subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers". As for international validity, the Court said:

"We fail to find that the Executive did, after the passage of the annulling statute, recognize the existing force of the treaties as an international obligation, whatever value may have been accorded to the claim of France that one party was without power to abrogate them." (Pp. 416, 423.)

For the Court of Claims, the Congress could terminate a treaty by statute for domestic law purposes, but apparently only the Executive Branch could terminate a treaty under international law.

1815 — Madison Agreement to Termination of 1782 Treaty with the Netherlands

The first Presidential action that appeared to terminate a treaty occurred in 1815 during the Administration of President James Madison. The case is not clear-cut, but scholars have viewed it as the first Presidential termination of a treaty. There was no notice provision involved.

After the Napoleonic wars in Europe, discussions were held between the United States and the Netherlands concerning the legal status of the 1782 commercial treaty between the two countries. (10 Bevens 6; *Foreign Relations of the United States*, 1873, Part 2, pp. 720-727.) In 1815, the Dutch Minister in Washington gave a note to Secretary of State James Monroe proposing a treaty of amity and commerce and proposing as a basis for the treaty the text of the 1782 treaty. The 1782 treaty had not been formally terminated by the parties, and a question remained whether it was still in force.

On April 15, 1815, Secretary Monroe replied, in part:

"The treaties between the United States and some of the powers of Europe having been annulled by causes proceeding from the state of Europe for some time past, and other treaties having expired, the United States have now to form their system of commercial intercourse with every power, as it were, at the same time. . . . You have proposed to form a new treaty. To this the President has readily agreed." (*Ibid.*, p. 722.)

It was also suggested by the Netherlands that the 1782 treaty could be renewed. To this Secretary Monroe responded that "It is presumed that the former treaty cannot be revived without being again ratified and exchanged in the form that

is usual in such cases, and in the manner prescribed by our Constitution." (*Foreign Relations of the United States*, 1873, Part 2, and Moore, *Digest of International Law*, Vol. V, p. 345.)

A few years later Secretary of State John Quincy Adams argued that the 1782 treaty nevertheless remained in force. He was then espousing certain claims of US citizens against the Netherlands on the basis of the 1782 treaty. The Netherlands denied the continuing force and validity of the 1782 treaty, and the United States agreed not to press the matter further. The claims were presented for payment by France.

The first negotiations in the 1820s between the United States and the Netherlands for a new commercial treaty failed, and it was not until 1839 that a new commercial treaty was agreed upon by the parties. It was followed by still another such treaty in 1852. (10 *Bevans* 22, 25.)

Several years later the issue of whether the 1782 treaty was still in force was raised once again, despite the 1839 and 1852 treaties, and on this occasion the Netherlands asserted that the 1782 treaty was still valid. In 1873 Secretary of State Hamilton Fish successfully argued that it had been agreed by the Netherlands Government and President Madison in 1815 to regard the treaty as terminated. Secretary Fish cited at length the correspondence between Monroe and the Dutch Minister, and concluded:

"In the opinion of the President, this correspondence between Mr. Monroe and [the Dutch Minister], taken in connection with the subsequent action of the Dutch government in denying that the treaty had any valid operative force during the long period of eighteen years when its existence would have been of advantage to the United States, and also in connection with the acquiescence of the Government of the United States in that action, and its submission of the rejected claims for compensation from France, places beyond doubt the fact that the treaty of 1782, for a period of over fifty years, has been mutually regarded as no longer in force." (1873 *Foreign Relations*, *op. cit.*, p. 724.)

While the case did not entail Presidential termination by notice pursuant to a notice provision, it was an apparent example of treaty termination through executive action. There was a difficult question regarding the status of the 1782 treaty and the effect of the Napoleonic wars upon its continuing validity. President Madison might have maintained, as his successor did, that the treaty remained in full force and effect. Instead he agreed with the Government of the Netherlands "to form a new treaty". On behalf of the United States he agreed that the 1782 treaty was no longer in force, and he did so without benefit of advice and consent from the Senate or approval of the Congress.

Professor McDougal, who wrote in 1945 that treaty termination "may be effected by executive denunciation, with or without prior Congressional authorization", lists this 1815 action by President Madison as the first example of such executive denunciation. ("Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy", 54 *Yale Law Journal* (March 1945), No. 2, p. 336.)

It should be noted further that there had been no violation of the treaty by the Netherlands, and there was no superseding treaty (until 1839) or statute. Nor was impossibility of performance a relevant factor in 1845.

1846 — Polk Notice of Termination of 1827 Treaty

The precise issue of termination pursuant to a notice provision was not debated in the United States until 1846. That year President Polk gave notice of

termination of the 1827 convention with Great Britain for the joint occupation of the Oregon territory. Congress enacted a joint resolution authorizing the President to give the one-year notice required under the treaty. This was the first case in the nation's history of termination pursuant to a notice provision.

President Polk himself recommended to the Congress in 1845 "that provision be made by law for giving" the notice. But it is not at all clear that the President believed such authorization to be legally necessary, and the Congress was itself unsure. There were several expressions of opinion that the President could give the notice without Congressional approval.

James Buchanan, who in March 1845 became Polk's Secretary of State and was himself to become President in 1856, said:

"It could not . . . be expected that the President would give the proposed notice on his own responsibility alone. On the question of his abstract power to do so, I express no opinion." (*Congressional Globe*, Vol. 13, 28th Cong., 1st Sess., Appendix, p. 345, March 12, 1844.)

In 1845, before the inauguration of President Polk, a bill to organize a territorial government over the Oregon territory was debated in the House. The Chairman of the Committee on Territories said that when his Committee reported the bill, which had no provision for notice to terminate the 1827 convention, "they were leaving the executive to act when and how it pleased with regard to giving the notice". He declared that the Committee "did not conceive it a proper question, nor did he think it a proper question now in this House to say anything at all whether this notice should be given. . . ." (*Ibid.*, Vol. XIV, 28th Cong., 2d Sess., pp. 202, 222, Jan. 27, 30, 1845.)

On January 5, 1846, the House Committee on Foreign Affairs reported a joint resolution that "The President . . . cause notice to be given . . ." (*Ibid.*, Vol. XV, 29th Cong., 1st Sess., p. 138.) On the same day, three members of that Committee submitted a minority report recommending that the question of giving notice was "not a matter for the decision of Congress". The report indicated that the question of notice of termination was for the President alone, or for the President and the Senate together. The report said, in part:

"The act of giving the notice is a high discretionary power, created not by the Constitution, but by the President in negotiating, and by the Senate in ratifying, a treaty with such a provision. . . . The House may be, and often is, required to exert appropriate legislative powers in the execution of treaties; but this notice is not one of that class. It has no property of a legislative power. It is executive in its essence, or it is, in our system, of the nature of, and incident to, the treaty-making power. It is a high discretion, pertaining not to our internal affairs, but to our relations with a foreign Government, created by this treaty-making power itself, resting with it, and depending upon its will alone for the exercise. . . .

If the notice be expedient and proper, it has become so without its [the House's] act. It is rendered so by the refusal of the President to arbitrate the controversy, and by his closing further negotiation. These were his own acts, about which this House had no constitutional right to interfere. The President asked not its advice or interposition in them, whether they be proper or not. He alone was competent to their performance, and he alone ought to be held responsible; . . . it is his business, not that of the House. In the present state of the question, without expressing an opinion whether the notice ought or ought not be given, and as the solution of that question is constitutionally for him, or for him acting with the Senate, the House

ought to be content to leave him to his proper judgment, discretion, and responsibility." (*Congressional Globe*, Vol. 13, pp. 138-139.)

One of the signers of the minority report, Mr. Caleb Smith, in debate on January 7, 1846, stated:

"To my view it is inexpedient to give the notice, or to instruct the President in regard to his duty on the subject. This is a duty that belongs to the President, and he is responsible to the people for his discharge of it . . ." (*Ibid.*, p. 159.)

1858 — Buchanan Notice of Termination of Treaty with Denmark

The next treaty termination by the United States was debated in 1855. A Senate resolution adopted that year by a two-thirds majority "authorized" President Pierce to give notice of termination of a commercial treaty with Denmark. In April 1856, the Senate Foreign Relations Committee issued a report which concluded that the Senate and President without the House could terminate the treaty. (*Cong. Recd.*, Vol. 48, Pt. 1, 62d Cong., 2d Sess., p. 501.) President Buchanan gave the notice in 1858, stating he had acted "in pursuance of the authority" of the Senate Resolution.

Once again, while a majority of those in the Senate who addressed the issue appeared to take the position that some legislative authority was required for the President to give a notice of termination, uncertainty seemed to be a central theme of the debates, and views were expressed supporting the right of the President to act alone pursuant to a notice provision. Thus, for example, Senator James Mason of Virginia, the Chairman of the Senate Committee on Foreign Relations, who had introduced the Senate resolution adopted in 1855, said that it was erroneous to treat the notification to Denmark "as an act abrogating or discontinuing a continuous and existing treaty, when, in truth, it is nothing more than causing a treaty to expire by the terms of its own limitation". Mr. Mason said:

"I am rather disposed to think, although I express no opinion on it, that the President might, under the terms of the treaty with Denmark, without consulting either House, give the notice required, and his act would be perfectly valid." (*Cong. Globe*, 34th Cong., 1st Sess., p. 601.)

Former Attorney General Crittenden observed that if the President could act with the Senate there was no reason why he could not act alone, since there was nothing in the Constitution requiring him to consult the Senate in the abrogation of treaties. (*Ibid.*, p. 605.)

1864 — Lincoln Notice of Termination of Rush-Bagot Agreement

The first instance of a notice of termination without any prior Congressional authorization came in 1864 under President Lincoln. He gave notice to Great Britain of US withdrawal from the Rush-Bagot Agreement in 1817 under which each nation had agreed to certain limitations on naval vessels on the Great Lakes. The Agreement, in the form of an exchange of notes, provided that it might be terminated by either party on six months notice. The notice was given on November 23, 1864. In his message of December 6, 1864, to Congress, President Lincoln noted that in view of the insecurity of life and property on the Canadian border it had "been thought proper" to give the notice in question. (James D. Richardson, *A Compilation of the Messages and Papers of the Presi-*

dents [New York: Bureau of National Literature, 1897], Vol. VI, p. 246.) A joint resolution was subsequently adopted by the Congress and approved by the President on February 9, 1865, which recited that the notice given was "adopted and ratified as if the same had been authorized by Congress". (13 Stat. 568.) The notice of termination was withdrawn by the United States on March 8, 1865, and the Rush-Bagot agreement has remained in force to the present day.

There is doubt as to the value of this case as a precedent since the Executive Branch has never considered the Rush-Bagot Agreement to be a treaty in the domestic law sense. It was concluded as a "pure" executive agreement without Congressional authorization. (For a detailed history of the agreement see letter of Secretary of State Foster to President Harrison, Dec. 7, 1892, published in Sen. Ex. Doc. 9, 52d Cong., 2d Sess.)

The next few cases of treaty termination by notice involved Congressional authorization or direction, without focus on the question of the President's power to give a notice without Congressional approval. On January 18, 1865, President Lincoln approved a joint resolution which charged the President with the communication of notice to terminate the 1854 treaty with Great Britain on fisheries, duties, and navigation. (1 Malloy, *Treaties*, 1910, 668, 672; 13 Stat. 566.)

In 1874 the Congress reverted to the use of the permissive joint resolution as in the case of the Oregon treaty. The 1874 resolution authorized notice for termination of the 1858 commercial treaty with Belgium. President Grant notified the Senate on March 9, 1875, that "pursuant to the authority" conferred on him by the joint resolution due notice had been given the Belgian Government. (18 Stat. 287; 1 Malloy, 1910, 69; *Cong. Recd.*, 43d Cong., 1st Sess., Part 5, Vol. 2, pp. 4507, 4704.) In 1882, Congress by a joint resolution approved by President Arthur on March 3, directed the termination of several articles of an 1871 treaty with Great Britain (1 Malloy, *Treaties*, 1910, 700; 22 Stat. 641.)

1879 — Hayes Veto

The issue of treaty termination was raised in 1879 when President Hayes vetoed a bill which directed him to give notice to China of the "abrogation" of two articles of an 1868 treaty with China. (*Cong. Recd.*, Vol. 8, Pt. 3, 45th Cong., 3d Sess., p. 2276.) In his veto message of March 1, 1879, President Hayes said:

"As the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution, its exercise is not competent for Congress, nor would the assent of China to this partial abrogation of the treaty make the action of Congress in thus procuring an amendment of a treaty a competent exercise of authority under the Constitution." (Richardson, Vol. VII, pp. 518-519.)

President Hayes also said that "the authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is . . . free from controversy under our Constitution." (*Ibid.*)

It is clear that President Hayes was not referring to termination by notice in this message, nor was there any discussion of termination by notice throughout the Congressional debate on the matter. The treaty in question in this case did not contain a provision for termination by notice. Willoughby says in regard to Hayes' message that "it is clear that when he spoke of Congress as competent to express the will of the nation he had reference to the expression in the form of legislative enactments". (Willoughby, *The Constitutional Law of the United States*, 2d ed., Vol. I, p. 584.)

1899 — McKinley Notice of Termination of 1850 Treaty with Switzerland

The second example in our history of the Executive acting alone in giving notice of termination occurred in President McKinley's administration in 1899. In this case, the notice may have been necessitated by the Tariff Act of 1897. The Convention of friendship, commerce and extradition with Switzerland of 1850 (11 Bevans 894; 11 Stat. 587) contained in Article XVII a provision for notification of intention "to arrest the operations" of the convention. After the United States, pursuant to a reciprocity agreement with France, had granted certain import benefits to that country under the Tariff Act of 1897, it was forced to grant Switzerland similar benefits pursuant to the most-favored-nation clauses contained in Articles VIII-XII of the 1850 treaty with Switzerland.

At the same time the United States notified the Swiss Government that if it was impossible to agree on some reciprocal arrangement with Switzerland, it might be necessary for the United States to arrest the operation of the convention or of certain articles thereof. It was contrary to US general policy and to the policy of the Tariff Act to make trade concessions in the absence of a reciprocal arrangement. On March 8, 1899, Secretary Hay instructed the American Minister to Switzerland to notify the Swiss Government of United States intent "to arrest the operations" of the 1850 convention so far as the operations of certain articles were concerned. (2 Malloy, *Treaties*, 1910, 1763.) The President, acting through the Secretary of State, took action in this case without consulting either the Senate or Congress.

In 1911, Senator Lodge, making no reference to any implied previous authorization by Congress, cited President McKinley's action in 1899 as a case in which the President "acted and did not ask to have his action approved". (*Cong. Recd.*, Vol. 48, Pt. 1, 62d Cong., 2d Sess., p. 479.)

1911 — Taft Notice of Termination of Treaty with Russia

The next case of Presidential notice to terminate a treaty came in 1911 during the administration of President Taft. The United States and Russia were in dispute regarding the application of the commercial treaty of 1832, particularly as it related to Russia's treatment of American Jews. Article 12 of the treaty provided that it should remain in force until the end of the calendar year beginning after the date of notification by either party of intent to terminate. (2 Malloy, *Treaties*, 1910, 1514.) A strongly worded joint resolution demanding termination of the treaty was introduced in the House in early December and passed on December 13 by a vote of 301 to 1. On December 15, before the matter was acted on in the Senate, President Taft instructed the US Ambassador to Russia to give notice of intent to terminate the treaty.

Secretary of State Knox wrote to the Ambassador explaining the President's action: "it was manifest that even the President's veto of the resolution could not defeat, but could only prolong and embitter the agitation against the Treaty", and it was therefore decided that "rather than permit the denunciation to be forced by the action of Congress . . . the President should himself, in advance of the anticipated action of the Senate . . . exercise the right to set a term to the Treaty in accordance with its provisions and upon grounds which should imply no offence to Russia". (Hackworth, *Digest of International Law*, Vol. V, pp. 319-320; Taft, *The Presidency* (1916), pp. 112-114; Secretary Knox to Ambassador Guild, No. 66, Feb. 6, 1912, file 711.612/100 A.)

On December 18, President Taft notified the Senate of what he had done and said that he communicated "this action to the Senate, as a part of the treaty-

making power of this Government, with a view to its ratification and approval". (*Cong. Recd.*, Vol. 48, Pt. 1, 62d Cong., 2d Sess., p. 453.) On December 21, the President signed a joint resolution declaring that the notice given by the President was thereby adopted and ratified.

While the Congress thus subsequently approved of Taft's notice of termination, it is not clear whether such approval was thought to be legally necessary. Mr. Knox commented again on the incident later as a Senator during the debate in the Senate in 1920 on withdrawal from the League of Nations:

"... while it is true that ... the Congress, by joint resolution, ratified and confirmed the act of the President, they recognized the validity of the act of the President in denouncing the treaty in accordance with its terms".

Senator Lenroot agreed with Mr. Knox, saying that it was his understanding that in the 1911 case the President

"proceeded upon the assumption that, as the Executive, there being nothing to the contrary in the treaty itself, he had the right to give the notice of the denunciation of the treaty". (*Cong. Recd.*, Vol. 58, Pt. 8, 66th Cong., 1st Sess., p. 8132.)

President Taft's own views on the matter seem somewhat conflicting. As noted, he communicated the fact of his notice to the Senate "as a part of the treaty-making power of this Government, with a view to its ratification and approval". Elsewhere, however, he said that his action was something "which, as President, I had the right to do by due notice". (Taft, *The Presidency*, 1916, p. 113.)

Seamen's Act of 1915

In the Seamen's Act of 1915 (38 Stat. 1164), President Wilson was "requested and directed" to give notice to the foreign governments concerned that all provisions in conflict with the Act would terminate on the expiration of such periods as might be required in the treaties. Pursuant to this legislation the Department of State gave the required notices.

Merchant Marine Act of 1920

Section 34 of the Merchant Marine Act of 1920 authorized and directed the President to notify the governments with whom the United States had commercial treaties of its intent to terminate so much of the treaties as restricted the right of the United States to impose discriminating customs duties and discriminatory tonnage dues. (41 Stat. 988, 1007.) President Wilson approved the Act but declined to carry out the provisions with regard to treaty termination.

A Department of State Press Release of September 24, 1920, stated that the Department had been informed by the President that he did "not deem the direction ... an exercise of any constitutional power possessed by the Congress". The Department pointed out that the treaties in question contained no provision for termination in the manner contemplated by Congress, and stated that the President therefore considered it misleading to speak of "termination", as the action sought to be imposed on the President amounted "to nothing less than the breach or violation of said treaties".

Secretary of State Hughes, in a memorandum to the President on October 8, 1921, said that while Congress had the power to violate treaties, an intention to do so was not to be imputed to it. For this reason, and because Congress had not seen fit to pass legislation in derogation of the treaties in question, Secretary

Hughes concluded that the fair construction of Section 34 would be that it authorized and directed the President to give notice for termination in cases where such notice could be given without violating the treaty. He further pointed out that Congress had not provided for the termination of the treaties in their entirety and said:

“Accordingly, if the President should undertake to abrogate or terminate any of the commercial treaties in question in its entirety, he would be acting on his own responsibility as the Executive charged with the duty of conducting our foreign relations, and he would be unable to find in the language of Section 34 that the Congress had offered to share with him the responsibility.” (Hackworth, *Digest of International Law*, Vol. V, p. 326.)

Senate Debate on Withdrawal from the League of Nations

The debates in the Senate on the possibility of withdrawal from the League of Nations also touched to some extent on the question of Presidential notice of termination. Article 1 of the League Covenant provided that any member of the League might, after two years notice of intention, withdraw from the League, provided its international obligations and its obligations under the Covenant had been fulfilled. When the treaty was before the Senate for its advice and consent to ratification, one of the reservations submitted by Senator Lodge provided that the United States should be the sole judge of whether its international obligations had been fulfilled and that notice of withdrawal might be given by a concurrent resolution of the Congress. There was considerable debate on the proposal.

Apart from the issue of notice by concurrent resolution, varying opinions were also expressed on the President's right to give a notice of termination without Congressional approval. Senator Spencer of Missouri, speaking in support of the Lodge proposal, said:

“I mean to say, Mr. President, that if the President of the United States saw fit to give notice of withdrawal, that notice of withdrawal would be effective. If it was in violation of or in contradiction to the wishes of the Congress at the time, there would be certain restrictive action, like a joint resolution of Congress, which would be persuasive upon the President, but it would not deprive him of his power.

Why, Mr. President, the case is precisely similar to that which confronts us now. If the Senate, by unanimous vote, should approve this treaty, that does not make the treaty. The President alone can send that treaty to the other signatory powers. His is the only voice which speaks for the United States in international relations; and if he pigeon-holes the treaty, though every Senator was in favor of ratification, the treaty would never come into effect. Such is the power of the Chief Executive of the Nation, and it illustrates the power of the President with regard to withdrawal.” (*Cong. Recd.*, Vol. 58, Pt. 8, 66th Cong., 1st Sess., Nov. 8, 1919, p. 8122.)

Senator Lenroot argued that if the Senate concluded at any time that the President had no unilateral power to terminate a treaty, impeachment could be resorted to, but he knew of no other way to control the action of the Executive. Mr. Lenroot said that the President is the final treaty-making power, since it lies within his power to refuse to complete the treaty after Senate action, and that therefore “he alone has the power, unless controlled in some way by the treaty

itself or by action of Congress abrogating the treaty, to denounce" a treaty containing provision for termination. (*Cong. Recd., op. cit.*, p. 8132.)

On February 16, 1920, Mr. Lodge introduced an amendment to the previously agreed reservation on withdrawal, the amendment providing that notice might be given "by the President or by Congress alone whenever a majority of both Houses may deem it necessary". Thus a specific proposal was made permitting the President to act alone as an alternative to action by concurrent resolution. (*Cong. Recd.*, Vol. 59, Pt. 3, 66th Cong., 2d Sess., p. 2944.)

To the question whether if the original reservation (notice by concurrent resolution) were adopted, the President could nevertheless give notice alone, Mr. Lodge replied that that would be in line with the two precedents of Presidential unilateral action which he had cited (McKinley and Taft cases) and which were not questioned at the time. He said he thought it "at least doubtful whether the President has not the power to do that". (*Ibid.*, Vol. 59, Pt. 4, Feb. 21, 1920, p. 3230.) Senator Lodge's amendment was rejected, as was an amendment permitting notice of withdrawal authorized by joint resolution. The reservation in its original form was adopted. (*Ibid.*, pp. 3236, 3241, 3242.) In the end, of course, the Senate failed to give its advice and consent to ratification of the treaty as a whole, even with several reservations previously adopted.

THE MODERN PRACTICE

While the early practice of the Republic indicated certain doubts and uncertainties whether the President alone might appropriately give notice of termination pursuant to a notice provision, the modern practice reveals no such doubts. The Congress may of course authorize the giving of notice, and has done so in the modern era. But the current rule, accepted by the Executive Branch, the Senate and Congress, and the great majority of modern writers, is that the President may also give a notice of termination without prior or subsequent Senate or Congressional approval.

1920 — Agreement (Wilson) Terminating 1891 Treaty with the Congo

The first significant case in the modern era was the termination of the 1891 commercial treaty with the independent State of the Congo, which contained no provision for termination. The treaty was regarded as still in force after the extension of Belgian sovereignty over the Congo. In the absence of a provision for termination, the agreement of both parties was required to terminate it.

In 1915 the United States, pursuant to the Seamen's Act of 1915, notified Belgium of its intention to terminate Article 5 of the 1891 treaty as of July 1, 1916. The Belgian Government, in its reply of June 29, 1916, proposed the termination of the entire treaty. The Secretary of State then suggested on November 11, 1916, that notice to that effect should come from Belgium. On December 31, 1916, the Belgian Foreign Minister replied that the Belgian note of June 29 was intended as such formal notice and that the 1891 treaty would be deemed to have been denounced on July 1, 1916. He expressed the understanding that Article 5 had ceased to be operative on July 1, 1916, the other articles remaining in force for the time being.

On December 13, 1920, the United States informed the Belgian Government that it acknowledged the notice (of denunciation of the entire treaty) as given and received on July 1, 1916, and that since the 1891 treaty contained no stipulation respecting termination, it assumed that the wishes of the Belgian Government might best be met by considering that the treaty terminated after

such a period of notice as was customarily provided for in treaties of amity and navigation. Accordingly, it was said, the United States regarded the treaty as having expired on July 1, 1917, one year after notification by the Belgian Government. (1 Malloy, *Treaties*, 1910, 328; Hackworth, *Digest of International Law*, Vol. V, pp. 317-318.)

The case is important, notwithstanding that there was no notice provision in the 1891 treaty. The negotiated agreement of the parties to terminate the treaty was made on the part of the United States by the Executive Branch acting without Congress by means of an Executive agreement. Yet there was no violation, no statute necessitating termination of more than one article, and impossibility of performance was not a relevant factor. In addition, this approach of termination by Executive agreement was apparently acceptable to the Senate, which did not question it at that time or subsequently. Previously, on March 27, 1919, the Acting Secretary of State, in informing the Senate of the requirements for abrogation of treaty provisions which might be affected by legislation, said that since the 1891 commercial treaty with the Congo had contained no provision for abrogation, "agreement by the parties thereto would seem to be necessary effectively to accomplish its abrogation as an international agreement". (Sen. Doc. No. 2, 66th Cong., 1st Sess., p. 14.)

At about the same time there occurred the last of the few instances of a President seeking authority to terminate a treaty. In May 1920 President Wilson sought the authorization of the Senate to the denunciation of the International Sanitary Convention of 1903. The *procès-verbal* of the deposit of ratification of the convention contained a declaration by the signatory powers reserving the right of denunciation. The Convention itself contained no provision for denunciation or notice of termination.

After President Harding's inauguration the Senate's advice and consent were given by a Senate Resolution of May 26, 1921, and notice of denunciation was subsequently given by the Executive. (Hackworth, *Digest of International Law*, Vol. V, p. 322; 2 Malloy, *Treaties*, 1910, pp. 2066, 2129, 2130; *Cong. Recd.*, Vol. 61, Pt. 2, 67th Cong., 1st Sess., p. 1793.)

1927 — Coolidge Notice of Termination of 1925 Treaty with Mexico

On March 21, 1927, during the Administration of President Coolidge, Secretary of State Kellogg directed the Ambassador to Mexico (Sheffield) to deliver to the Mexican Government a note giving the official notice of termination of a 1925 treaty with Mexico on the prevention of smuggling. (9 Bevans 949.) The action was taken pursuant to a provision for termination by notice, and the convention officially terminated on March 28, 1927. The notice was given without the direction of either the Senate or the Congress, and was not referred to either body for subsequent approval.

It has been argued that in view of the state of US-Mexican relations at that time, it might have been impossible to implement the Convention. However, there is no evidence to support that contention. There was a dispute in 1926 and 1927 over American-owned property in Mexico, but by a vote of 79 to 0 on January 25, 1927, the Senate passed a resolution urging arbitration of the dispute. On April 25, 1927, President Coolidge expressed hopes for an amicable settlement, and on September 21 he named a new Ambassador. On March 27, 1928, the State Department declared that because of steps taken by the Mexican Government, the differences had been resolved. (See Richard W. Leopold, *The Growth of American Foreign Policy*, 1962, pp. 464-465.)

The Secretary of State's instructions to Ambassador Sheffield in 1927 gave no indication that it was "impossible" to perform the 1925 treaty. His instructions included the following statement as to the US reasons for giving the notice:

"... the United States has no commercial treaty with Mexico, and ... in the circumstances it is not deemed advisable to continue in effect an arrangement which might in certain contingencies bind the United States to cooperation for the enforcement of laws or decrees relating to the importation of commodities of all sorts into another country with which this Government has no arrangement, by treaty or otherwise, safeguarding American commerce against possible discrimination." (US Archives, 74D431 ; Box 16678.)

In sum, impossibility of performance was not a factor, there had been no treaty violation, and no subsequent inconsistent statute or treaty. The case stands as a clear-cut instance of Presidential notice of termination without prior or subsequent approval by the Senate or Congress.

1933 — Roosevelt Denunciation of 1927 Multilateral Convention

In 1933 President Roosevelt, without prior or subsequent reference to the Senate or Congress, directed United States withdrawal from the 1927 multilateral convention for the abolition of import and export prohibitions and restrictions. (2 Bevans 651.) Article 6 of the protocol concerning the entry into force of the convention provided that any of the signatories to the protocol could be relieved of the obligations thereunder by forwarding a declaration to that effect to the Secretary-General of the League of Nations. (Hackworth, *Digest of International Law*, Vol. V, p. 329.)

It has been maintained that President Roosevelt terminated the 1927 Convention as having a restrictive effect on the National Industrial Recovery Act of 1933, and that the 1927 convention was inconsistent with prevailing legislation.

In fact there was nothing in the National Industrial Recovery Act of 1933 which required US withdrawal from the 1927 Convention. The real reason for US withdrawal was the failure of the Convention to gain wide acceptance by the nations of the world community. A convention on the abolition of import and export prohibitions and restrictions clearly needed widespread acceptance to be effective, and particularly during a time of world-wide economic depression.

The background to this US termination is as follows: The protocol concerning the entry into force of the Convention was signed at Paris on December 20, 1929, by the United States, Japan and several European countries: Austria, Belgium, Denmark, France, Germany, Great Britain, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Romania, Switzerland and Yugoslavia. The protocol provided that the Convention was to be ratified by Poland and Czechoslovakia before May 31, 1930, in order to become binding upon all the signatories. An extension of this time-limit until June 20, 1930, in respect of Poland, and until June 26, 1930, in respect of Czechoslovakia, was agreed to by the contracting parties.

Czechoslovakia deposited a conditional instrument of ratification on June 25, 1930, with a declaration that its willingness to become a party would depend upon the ratification of the Convention by Poland. Poland announced on June 19, 1930, that it was obliged to postpone its ratification. This caused the Governments of Austria, Belgium, Hungary, Italy, Luxembourg, Romania and Switzerland to announce that as from July 1, 1930, they would cease to consider themselves bound by the Convention, since the conditions on which they had been willing to accede to it had not been fulfilled. By the terms of the protocol,

the Governments of Denmark, France, Romania and Yugoslavia then ceased to be bound by the Convention, as from July 1, 1930. On June 30 Denmark waived the conditions which it had stipulated in regard to the ratification of Germany. Therefore the only countries remaining bound by the Convention on July 1, 1930, were the United States, Denmark, Great Britain, Japan, the Netherlands, Norway and Portugal.

Under the terms of Article 6 of the protocol, the United States, Denmark, Great Britain and Norway all announced their withdrawals as of June 30, 1933. Portugal had withdrawn as of June 30, 1931, and the Netherlands as of June 30, 1934.

The American Minister to Switzerland, Mr. Hugh R. Wilson, on June 20, 1933, presented the following note to the Secretary-General of the League of Nations:

"In accordance with Paragraph 6 of the Protocol of December 20, 1929, to the International Convention for the Abolition of Import and Export Prohibitions and Restrictions, the Acting Secretary of State of the United States of America hereby gives notice of the American Government's withdrawal from this convention effective June 30, 1933. It is with great reluctance that the American Government has been forced to take this action. It had been hoped that the principle embodied in this convention would be widely accepted by the nations of the world. The reverse of this has, however, been true, and the withdrawal from the convention of other nations which had adhered leads to the conclusion that the existing convention may not be fully adapted to present economic and commercial conditions. In taking this present course it is the American Government's hope that there may result from the labors of the Monetary and Economic Conference now sitting at London a convention of this nature which will be widely adopted and adhered to by the nations of the world." (Dept. of State Press Release, July 5, 1933; US Archives, 74D431, 59-78-28, Box 37.)

Once again, there was no violation of the treaty, no subsequent conflicting statute or treaty, and impossibility was not a factor.

1933 — Roosevelt Notice of Termination of 1931 Extradition Treaty with Greece

Later in the same year, 1933, the Executive without consultation with Congress or the Senate, gave notice of intent to terminate the extradition treaty with Greece signed on May 6, 1931, which contained provision for termination on one-year's notice after it had been in effect five years. (47 Stat. 2185.) The notice was occasioned by a dispute with Greece arising from the latter's refusal to surrender an individual accused of fraud. The United States believed that Greece was violating the treaty.

The notice was given on November 6, 1933, and the earliest possible termination date was November 1, 1937. The United States withdrew its notice of termination on September 29, 1937, after the United States and Greece signed a protocol of interpretation of the article of the treaty that had given rise to the dispute and the notice of termination.

It has been asserted that the notice was premised on the treaty already having been voided by Greece's violation. In fact the treaty was never voided, and remained in full force and effect between the parties throughout this period. The treaty remains in full force and effect to this day. (47 Stat. 2185; TS 855; 8 Bevans 353; 138 LNTS 293.)

It is true that the US notice of termination charges Greece with violating the 1931 treaty, and that the notice of termination was given for that reason. This

case stands as the only instance of notice of termination given because of violation.

But the question remains whether this case is an exception to a purported rule requiring Senate or Congressional approval for termination by notice, or simply an application of the rule permitting a Presidential termination notice without Congressional approval. Under customary international law, as embodied in the Vienna Convention on the Law of Treaties, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty in whole or in part. Under customary law, there was no precise time prescribed for the notice of termination in such cases. Under the Vienna Convention rule, a notice of three months is required. (Vienna Convention, Articles 60 and 65.) If the United States had been operating in 1933 under the customary material breach rule, it could have terminated the extradition treaty with Greece at once by invoking the alleged breach and without having to give a notice which would keep the treaty in force for almost four years. Even the Vienna Convention rule, as noted, would have required only three months' notice.

It is generally accepted that the President may act unilaterally in giving a notice of termination if the other party breaches the treaty. Yet the Senate or the Congress could be requested to approve a notice given in such cases. It might be thought that pursuant to an approach requiring legislative approval, violation would make no legal difference. The President could make a finding of violation, but still require approval to give the notice.

On the other hand, if the argument is simply that practice has created an exception to the rule contended for, then practice must be a legally relevant consideration. If that is so, however the bulk of modern practice clearly establishes the right of the President to terminate by notice pursuant to a notice provision without legislative approval, whether or not there has been a violation. In only one of the 12 cases of such termination has the United States alleged violation by the other party.

In our judgment, the 1933 notice was not an exception to a rule under which legislative approval is required for notice even under a notice provision, but rather was an application of the rule that a President may give such notice on his own initiative.

1936 — Roosevelt Termination of the 1871 Commercial Treaty with Italy

In 1936 President Roosevelt approved the proposal of the Department of State to give notice to Italy of intent to terminate the 1871 commercial treaty with Italy (9 Bevans 82) without seeking the prior or subsequent approval of the Senate or the Congress. Article XXV of the treaty contained a provision for notification of intent to terminate. On December 15, 1936, the American Ambassador to Italy and the Italian Minister of Foreign Affairs signed a protocol announcing the intention of each Government to terminate the treaty, the protocol being deemed the notice required under the treaty. (See Hackworth, *Digest of International Law*, Vol. V, pp. 330-331.)

It has been argued that the 1871 treaty would limit the President's ability to carry out the Trade Agreements Act of June 1934, and that the treaty was inconsistent with prevailing legislation.

It should be noted that the legislation referred to did not necessarily override or conflict with the earlier treaty. The Trade Agreements Act of June 12, 1934, provided that the President *may* suspend the application of the duties and other modifications of import restrictions proclaimed in trade agreements to articles

from any country because of its discriminatory treatment of American commerce or because of other acts tending to defeat the principal purposes of the Act. The Department of State felt that Italy's trade control measures were prejudicial to American commerce. Since the suspension of the application of the benefits of trade agreements to Italian goods would have exposed the United States to a charge of violation of the most-favored-nation provisions in the 1871 treaty, the treaty did operate as a limitation on the discretion of the President in executing the Act. But there was no legal necessity for terminating the treaty. It was rather a matter of giving the President greater discretion in applying the provisions of the Trade Agreements Act by terminating the treaty.

Once again, the case is another application of the rule that the President may give notice pursuant to a notice provision in a treaty without Senate or Congressional approval, rather than an exception to a purported rule under which the President may not give such notice without legislative approval. Certainly in this case, it would have been possible for the President to seek Senate or Congressional approval of the notice to terminate.

But even assuming a real inconsistency between a statute and a treaty, or an earlier treaty that limits the President's discretion in applying the terms of a subsequent statute, it does not necessarily follow that in such cases the President should have a right of unilateral action pursuant to a notice provision. In such cases as well, legislative approval for the treaty termination could be sought.

The point is that a rule requiring legislative approval for notices of treaty terminations has not been established in our Constitutional law and practice. The 1936 termination of the 1871 commercial treaty with Italy stands as one more application of the established rule that the President may give notice of termination of a treaty pursuant to a notice provision with or without the prior or subsequent approval of the Senate or the Congress.

1939 — Roosevelt Notice of Termination of the 1911 Commercial Treaty with Japan

On July 26, 1939, Secretary of State Hull wrote to the Japanese Ambassador to the United States giving notice of the intention of the United States to terminate the 1911 commercial treaty with Japan. (9 Bevans 416.) The treaty provided for termination upon six-months' notice. Resolutions were introduced in the Senate on July 18, 1939, and in the House on the following day to the effect that it was the sense of each House respectively that the United States should give the notice required by the treaty. Neither resolution purported to authorize or direct the President in the matter. Before either House had acted, Secretary Hull gave the notice.

It has been maintained that Senator Schwollenback felt that the President was "compelled" to denounce the 1911 Treaty with Japan because of US obligations under the 1922 Nine-Power treaty. In fact, there is nothing in the Nine-Power treaty (44 Stat. 2113; *TS* 723) that required the United States to terminate the 1911 commercial treaty with Japan. The Nine-Power treaty committed the United States, Japan and others to respect the territorial integrity of China, but Japan's invasion of China in 1939 did not legally require the termination of the 1911 treaty, which was entirely commercial in nature.

Nor did the actual notice of termination give any indication that our obligations under the Nine-Power treaty necessitated the termination of the 1911 treaty. Had the United States been legally required to terminate the 1911 treaty, it might be expected that the notice of termination would have at least alluded to such requirement. The US notice states that the 1911 treaty

“contains provisions which need new consideration. Toward preparing the way for such consideration and with a view to better safeguarding and promoting American interests as new developments may require, the Government of the United States, acting in accordance with the procedure prescribed in Article XVII of the treaty under reference, gives notice hereby of its desire that this treaty be terminated, and, having thus given notice, will expect the treaty, together with its accompanying protocol, to expire six months from this date.” (See Hackworth, *Digest of International Law*, Vol. V, pp. 331-332; US Archives, 74D431.)

Senator Schwollenback did not argue that the United States was compelled to denounce the 1911 treaty because of our obligations under the Nine-Power treaty or for any other reason. Senator Schwollenback had introduced a joint resolution, which he believed was made necessary by the Nine-Power agreement, preventing the export from the United States of all goods and materials, except agricultural products,

“which there is reason to believe will, if exported, be used, directly or indirectly, in violation of the sovereignty, or the independence, or the territorial or administrative integrity of any nation whose sovereignty, independence, and territorial and administrative integrity the United States is obligated by treaty to respect”. (*Cong. Recd.*, Vol. 84, Pt. 10, 76th Cong., 1st Sess., p. 10783.)

Senator Schwollenback's only argument with respect to the 1911 treaty with Japan was that his proposed resolution was not inconsistent with that treaty and that notice was therefore unnecessary; if the 1911 treaty was thought to be a problem, however, he would not be “critical” of those who thought the 1911 treaty should be terminated by notice. He did not argue that the United States was compelled to denounce the 1911 treaty. Senator Schwollenback said:

“Mr. President, I do not agree that the 1911 treaty should have prevented our Government from adopting the joint resolution which I introduced. I concede, however, that like all legal questions about which there is an argument, there can be an argument about that question. Under those circumstances I certainly am in no way critical of the Members of this body who contended that before we took further action the 6-months' notice should be given Japan. In matters of this kind, in which we base our position upon a treaty, certainly we must be punctilious. I do not think there was any necessity for our recognizing the 1911 treaty as an obstacle to the proposed action. However, as I say, I am not arguing that point with a view of arguing that my joint resolution . . . should be adopted during this session of the Congress.” (*Ibid.*, p. 10785.)

It was also clear from other Department of State documents at the time that the Administration believed that it had discretion to give the notice. There was no indication that the Executive Branch felt legally compelled to give the notice by the terms of the 1922 Nine-Power treaty. On July 21, 1939, five days before the notice was given, and while the Senate resolution was pending, Secretary Hull wrote to Senator Pittman as follows:

“Notwithstanding the authority which is vested in the Executive in regard to the matters mentioned in the resolution, I am glad to say that the Executive is always pleased to have advice from the Senate and to give such advice full and careful consideration consonant with the great weight to

which the opinions of the Senate are entitled." (Quoted in Hackworth, *op. cit.*, p. 332.)

After the notice of termination was given by the Executive, the Department of State replied as follows to inquiries regarding the President's power to give such notice without the approval of the Senate:

"... the power to denounce a treaty inheres in the President of the United States in his capacity as Chief Executive of a sovereign State. This capacity, as you are aware, is inherent in the sovereign quality of the Government, and carries with it full control over the foreign relations of the nation, except as specifically limited by the Constitution. Without entering into a lengthy discussion of the general and specific arguments leading to this conclusion, it will perhaps be sufficient to quote the conclusion of Professor Willoughby (*Constitutional Law of the United States*, 2nd ed., 1, p. 585): 'It would seem, indeed, that there is no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress for its approval and ratification, although, as has been seen, this has been several times done.' The author questions even the power of Congress, by joint resolution or otherwise, to direct the President to denounce a treaty, though such directions also have been given, and in some instances followed, though in others the direction has been successfully refused (statement issued by the Secretary of State, September 25, 1920). This conclusion would seem to be entirely in accord with the general spirit of the interpretation of the Constitution in this regard by the Supreme Court of the United States as indicated, for instance, by the case of *United States v. Curtiss-Wright*, 299 US, p. 304." (*Ibid.*, pp. 331-332.)

The 1939 termination of the 1911 commercial treaty with Japan is still another case of Presidential notice pursuant to a notice provision without violation by the other party, and without any conflicting statute or treaty. Impossibility of performance was not a relevant factor.

1944 — Roosevelt Notice of Termination of Protocol to 1929 Inter-American Convention for Trade Mark and Commercial Protection

On September 29, 1944, the United States gave notice of denunciation of the Protocol accompanying the General Inter-American Convention for Trademark and Commercial Protection of 1929. Provision was made in the Protocol for denunciation on one year's notice. (2 Bevens 751; TS 833.) The Protocol provided for the registration of trademarks in an Inter-American Trademark Bureau at Havana, Cuba.

The notice of denunciation stated that as the result of the experience of the past several years, the US Government had concluded that the Trademark Bureau and Protocol had failed to serve any purpose which would adequately justify the annual quota of funds contributed by the United States to the Bureau. There was no prior or subsequent communication with the Senate or Congress. The Protocol ceased to be in force for the United States on September 29, 1945. (State Dept. Doc. 710.D4/7-1844, Sept. 29, 1944.)

In a letter dated September 29, 1944, to certain US diplomatic officers in the American Republics, Secretary of State Hull said that the US Government had decided to denounce the Protocol "in view of past ineffectiveness and absence of any evidence of future increased activity". (State Dept. Doc. 710.D4/9-2944, Sept. 29, 1944.)

The treaty could have been carried out; there was no violation; and there was no subsequent inconsistent statute or treaty.

1948 — Truman Notice of Withdrawal from 1937 Whaling Convention

On December 30, 1948, the United States gave notice of withdrawal from the 1937 multilateral convention for the regulation of whaling. (3 Bevens 455.) The notice cited a general understanding at the 1946 whaling conference that the new convention (62 Stat. 1716; *TIAS* 1849; 4 Bevens 248) would completely replace the old agreement and protocol, and that there was an informal understanding by the delegates to the 1946 conference that after the 1946 convention entered into force the contracting parties to the earlier convention would withdraw therefrom. Neither the Senate nor the Congress was consulted in the matter.

Despite the fact that the 1946 convention constituted a comprehensive system for the regulation of whaling, and thus replaced the 1937 convention, it did not result in US termination of the 1931 convention on the same subject (49 Stat. 3079; *TS* 880; 3 Bevens 26) and that convention remains in force to this day.

Trade Agreements Extension Act of 1951

One of the few Congressional enactments during the last fifty years requiring the President to terminate a treaty came in the Trade Agreements Extension Act of 1951. (65 Stat. 72.) That Act provided that as soon as practicable the President should take the necessary action to deny the benefits of trade agreement concessions to imports from the Soviet Union and other communist countries. The commercial treaties with Hungary (8 Bevens 1117) and Poland (11 Bevens 237) respectively provided for most-favored-nation treatment in customs matters. Both treaties provided for termination on notice, one year in the case of Hungary, and six months for Poland.

Accordingly, on July 5, 1951, the Department of State addressed a note to each Government proposing modification of the treaty by termination of the most-favored-nation articles, and giving the required notice that if this proposal was not acceptable the treaty as a whole would terminate within the prescribed time. (Dept. of State Press Release 597, July 6, 1951.) Since neither Government agreed to the proposed modification, the treaties terminated at the end of the prescribed time period.

1952 — Truman Notice of Termination of 1929 Convention on Safety of Life at Sea

Another case in which a subsequent treaty led to a Presidential notice of termination of an earlier treaty was the 1952 termination of the 1929 Convention on Safety of Life at Sea. (2 Bevens 782.) Article 66 of the 1929 Convention provided that it might be denounced within five years after its entry into force by a one-year notice.

The preamble to the 1948 Convention on the same subject recited that promotion of safety of life at sea "may be best achieved by the conclusion of a Convention to replace" the 1929 Convention. (*TIAS* 2495; 3 *UST* 3450.) The 1948 Convention entered into force on November 19, 1952. The notice of denunciation of the 1929 Convention was given by the United States on the same day without further reference to the Senate or the Congress.

Similarly, on May 26, 1965, the United States gave notice of denunciation of the 1948 Convention, pursuant to Article XII of that Convention, because it had been supplanted by the 1960 Convention for Safety of Life at Sea. (*TIAS* 5780;

16 UST 185.) The 1960 Convention entered into force for the United States on May 26, 1965.

1954 — Eisenhower Notice of Withdrawal from 1923 Convention

On May 24, 1954, the United States gave notice of withdrawal from the 1923 Convention on Uniformity of Nomenclature for the Classification of Merchandise (*TS 754*; 33 *LNTS 81*). The Convention contained a provision for withdrawal on one-year's notice. The US notice was given without the prior or subsequent approval of the Senate or Congress. The withdrawal took effect for the United States on May 24, 1955.

It has been asserted that a fundamental change in circumstances resulting in impossibility of performance was invoked by the United States in announcing its withdrawal from the Convention. In fact, the United States did not invoke the fundamental change of circumstances doctrine, nor did it refer to impossibility of performance.

Under the 1923 Convention, the parties had agreed to employ the Brussels nomenclature of 1913 in their statistical reporting of international commerce, either exclusively or as a supplement to other systems. However, the Brussels system of 1913 had become outdated. In 1950 the United Nations developed what is known as the Standard International Trade Classification. Following this development was the adoption of the Uniform Central American Customs Nomenclature by the Committee on Economic Cooperation of the Ministers of Economy of Central America sponsored by the UN Economic Commission for Latin America. This nomenclature employed the Standard International Trade Classification as its basis. In 1950 the United Nations Economic and Social Council urged governments to use the Standard International Trade Classification.

Under these circumstances, the Tenth Inter-American Conference of American States, meeting at Caracas, Venezuela, in 1954, adopted Resolution LXXXVIII on Customs Nomenclature. The Resolution, after reciting the above history of the matter, made the following recommendation:

“1. That, inasmuch as the Brussels nomenclature of 1913 has become outdated and has thereby rendered inapplicable the Santiago Convention on Uniformity of Nomenclature for the Classification of Merchandise, the ratifying Governments consider the desirability of withdrawing from the said Convention, as provided in Article V, in order that the Convention may be legally abandoned by all the parties.

2. That the Member States take cognizance of the method used in the development of the new Uniform Central American Customs Nomenclature, accomplished with the assistance of the United Nations and the Inter-American Statistical Institute, and seek to adopt and put in effect as soon as possible the Standard International Trade Classification of the United Nations, either exclusively or as a supplement to the national systems.” (US Archives, 74D431.)

The US notice of withdrawal from the 1923 Convention simply quoted recommendation 1 of Resolution LXXXVIII, and said that “in accordance with the foregoing recommendation”, the US Government was giving its notice of withdrawal. There was no mention of the fundamental change of circumstances doctrine or of impossibility of performance.

In fact the advance in nomenclature clearly did not render “impossible” the use of the “outdated” system. Advances in statistical reporting systems had been

developed and these were deemed more desirable than the older systems. The Inter-American Conference therefore urged States to adopt and put into effect the newer systems. There was no question of impossibility or fundamental change of circumstances.

The case represents another instance of Presidential termination of a treaty by notice pursuant to a notice provision. There was no prior or subsequent approval by the Senate or the Congress. There was no violation, or inconsistent statute or treaty. Impossibility was not a relevant factor.

1962 — Kennedy Notice of Termination of 1902 Commercial Treaty with Cuba

On August 21, 1962, the United States gave notice of termination of the 1902 commercial convention with Cuba. (TS 427; 6 Bevens 1106.) The notice was given pursuant to a one-year notice provision in the convention. At the same time the United States gave notice of termination of the 1934 reciprocal trade agreement with Cuba. (49 Stat. 3559; EAS 67; 6 Bevens 1163.) This was an Executive agreement. Both of these agreements had been suspended on October 30, 1947, by an Executive agreement between the United States and Cuba (6 Bevens 1229) which expressly declared that both agreements would be "inoperative" for as long as the United States and Cuba remained parties to the General Agreement on Tariffs and Trade. (GATT) (TIAS 1700.)

It has been asserted that the termination was a formality mandated by a national policy, adopted by Congress, expressed in the Foreign Assistance Act, the Export Control Act, the Trading with the Enemy Act, the Mutual Assistance Act, the Cuban Resolution of 1962, and the Punta del Este Agreement of 1962.

However, the United States also terminated other trade agreements with friendly European countries at the same time because of the GATT negotiations that had recently been completed. In approving the recommendations of the Interdepartmental Committee on Trade Agreements (TAC) on the conclusion of the 1960-1961 Geneva tariff negotiations, President Kennedy approved the completion of steps for the termination of several suspended bilateral trade agreements with friendly countries which were proposed in such recommendations. Aside from Cuba, agreements with the Belgo-Luxembourg Economic Union, the United Kingdom, France and the Netherlands were also terminated at the same time. (See, e.g., 13 UST 1786, the 1962 termination of earlier trade agreements with the United Kingdom.)

The President's action in giving notice of termination of the 1902 commercial treaty with Cuba was thus taken in a broader context than punitive measures against Cuba. While it is not possible to prove the point, the termination would probably have taken place even had relations with Cuba been friendly.

Put most accurately, the GATT was a subsequent executive agreement, which, along with the executive agreement of October 30, 1947, effectively and legally suspended the operation of the 1902 commercial treaty with Cuba. The final termination of the 1902 treaty was consistent with Congressional enactments, but was not required by them. We have found no evidence that the Congress or Senate addressed the issue or thought at all about authorizing or directing the President to terminate the 1902 treaty. The termination of that treaty was part of a larger program of terminating certain commercial agreements, even with friendly governments, as part of the GATT process, by means of Executive action.

1965 — Johnson Notice of Termination of the Warsaw Convention

On November 15, 1965, the United States gave notice of denunciation of the 1929 Convention for the Unification of Certain Rules relating to International

Transportation by Air and the Additional Protocol relating thereto, known as the Warsaw Convention. (49 Stat. 3000; TS 876; 2 Bevans 983.) The notice was given pursuant to a six-months notice provision contained in Article 39 of the Convention. The notification was withdrawn on May 14, 1966, just one day before the six-months notice period would have expired.

The President's notice of termination, as well as the withdrawal of the notice, did not receive any prior or subsequent approval from the Senate or the Congress. There was no violation of the convention, no subsequent inconsistent statute or treaty, and impossibility of performance was not a factor. The sole reason for giving the notice of termination, as expressed in the official US notice, was "the low limits of liability for death or personal injury" provided in the Convention. (Dept. of State Press Release No. 268, Nov. 15, 1965.)

Hearings were held on the matter by the Senate Foreign Relations Committee, but at no time did the manner of withdrawal become an issue. Many witnesses at the hearings, including attorneys, professors, deans and representatives of lawyers' associations, testified in favor of US withdrawal from the Convention, but it was not suggested that this could be done only with the approval of the Senate or the Congress.

The Senate Foreign Relations Committee itself recommended notice of withdrawal, but did not suggest that the President's notice required the prior or subsequent approval of the Senate or Congress. The Committee said that unless a complementary insurance program was enacted within a reasonable time (which meant prior to the adjournment of the 89th Congress), "the Department of State should take immediate steps to denounce the Warsaw Convention and the Hague Protocol". (S. Exec. Rept. No. 3, 89th Cong., 1st Sess., app. p. 7.) No action was taken by the Senate or Congress, and there were no contentions, as far as we have been able to determine, in the Senate or the Congress that the President alone could not give the notice of denunciation without Senate or Congressional approval.

There was one interchange at the Foreign Relations Committee hearings (between Senator Carlson and a witness who favored denunciation) on the method of giving notice:

Senator Carlson: Mr. Speiser, you suggest that we denounce . . . the Warsaw Convention.

Mr. Speiser: Yes.

Senator Carlson: That gets to be an Executive act, I think, and only the President can do that, isn't that correct?

Mr. Speiser: I have discussed this with the State Department and apparently the United States has denounced treaties in two ways, either by the President alone and the Senate.

Senator Carlson: I would assume that the Senate, of course, could advise the President by resolution. We probably could cut off funds and we probably have other methods, but personally, I would feel that it would be an Executive act. (*Hearings on the Hague Protocol to the Warsaw Convention* before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess., 1965, Pt. 2, p. 42.)

In fact on May 3, 1966, when it was known that the Department of State might withdraw its notice of denunciation, a resolution (S. Res. 256, 89th Cong.) was introduced requesting that the notice *not be withdrawn* until full public hearings were held. The original sponsors of the resolution were Senators Nelson, Hartke,

Kennedy of New York, Montoya and Yarborough. While the resolution was sponsored by 29 Senators, the Administration withdrew the notice before the Senate took action on the resolution.

In brief, there was no indication from the Senate, including the Foreign Relations Committee, or from the House, that the President could not give the notice without Senate or Congressional approval. As noted, there was no treaty violation, no subsequent inconsistent statute or treaty, and impossibility was not a factor. The case stands as a clear example of Presidential notice of termination without Senate or Congressional approval, and without Senate or Congressional objection.

1975 — Ford Notice of Withdrawal from the International Labor Organisation

On November 5, 1975, Secretary of State Kissinger gave notice of intention to terminate United States membership in the International Labor Organisation. The notice became effective, pursuant to the provisions of Article 1 (5) of the ILO Constitution, two years later. The Carter Administration affirmed the withdrawal, did not extend the two-year time period after considering that step, and thus withdrew the United States from the ILO in November 1977. There was no prior or subsequent approval by the Senate or the Congress.

The United States membership in the ILO was not authorized by treaty, but rather by a joint resolution of Congress approved by the President on June 19, 1934. (S.J. Res. 131, Public Res. 43, 73d Cong.) Nevertheless US adherence to the ILO Constitution constituted an extremely important international obligation which included membership in an international organization. Yet termination was accomplished without Congressional approval, and as far as we have been able to determine, the issue of Congressional approval was not raised in either House of the Congress, despite the fact that a number of members of the Senate and House did not favor US withdrawal from the ILO.

1976 — The Fishery Conservation and Management Act

The most recent treaty terminations by the United States have been pursuant to the Fishery Conservation and Management Act of 1976. (P.L. 94-265.) Section 202 (b) of the Act provides that "it is the sense of the Congress" that the United States shall withdraw from any treaty that is not renegotiated within a reasonable time so as to conform with the purposes, policy and provisions of the Act.

Pursuant to this provision, the United States gave notice of intention to withdraw from the 1949 International Convention for the Northwest Atlantic Fisheries (*TIAS* 2089; 1 *UST* 477) on June 22, 1976, effective December 31, 1976. The United States also gave notice of termination of the 1953 convention with Canada for the preservation of the halibut fishery of the Northern Pacific Ocean and Bering Sea (*TIAS* 2900; 5 *UST* 5) on April 1, 1977, effective April 1, 1979; and the 1952 convention for the high seas fisheries of the North Pacific Ocean (*TIAS* 2786; 4 *UST* 380) on February 10, 1977, effective February 10, 1978.

22. STATEMENT OF ABRAM CHAYES, HARVARD UNIVERSITY, CAMBRIDGE, MASSACHUSETTS, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 306-312

Mr. CHAYES. Thank you, Mr. Chairman and Senator Javits. I am going to compress my prepared statement somewhat. I hope it can appear in full in the record.

Senator ZORINSKY. It will appear in its entirety in the record.

Mr. CHAYES. First, let me say it is a pleasure and honor to be testifying again before the Committee. I am glad that the Committee is conducting this inquiry. It is important to reexamine received wisdom from time to time to see how it withstands the impact of changed circumstances and new thinking.

TERMINATION OF TREATIES MATTER OF PRESIDENTIAL POWER

As legal adviser, I accepted, and as professor, I taught the received wisdom that the determination of treaties was a matter of Presidential power. But I must confess that I did so primarily on the basis of the conclusions of text writers, without myself making an independent examination of the underlying materials.

I have now made a more careful review of those materials in preparation for this testimony. I am glad to say that I have not been seriously misleading the young. In particular, I conclude that, as a general matter and particularly as to the mutual defense treaty with the Republic of China, the President has authority to give effective notice of termination in accordance with the terms of the treaty. But the situation is somewhat more complicated than I had supposed. And perhaps it would be helpful to go through my thinking about it.

TERMINATION OF TREATY IN ACCORDANCE WITH TERMS

First, let me say I am not talking about the whole range of questions that the committee is inquiring into. The staff asked me to focus my remarks on termination of treaties, and I am narrowing it somewhat further to termination of a treaty in accordance with its own terms.

Second, let me say I don't believe the courts are going to be very much help to us in this matter. There have only been a few cases in our history that even remotely bear on the question of termination, and they don't answer any of the important questions.

And I don't think that Senator Goldwater and his coplaintiffs are going to change that very much.

Third, two centuries of practice have provided something less than decisive illumination on this problem. In the first place, there is not all that much practice. There are less than 30 instances of treaty termination in our history. And on the whole, with the exception of the treaties of alliance with France and with one or two others, these instances have not involved major political treaties or even, for the most part, significant foreign policy issues.

So that although questions of institutional power have sometimes been touched on, they have never been focused and contested sharply.

I don't think much would be gained by my reviewing these 25 or 30 historical cases once again. I have not made an independent investigation of the original

materials, but it is clear from the secondary accounts that all of them are complex enough to sustain differing interpretations.

NO UNIFORM PRACTICE

To my mind, the most important thing that a review of the practice reveals is that there has been no uniform practice. The record shows all sorts of combinations and permutations of Presidential and congressional action, and it shows some instances of action by the President alone.

In all of these cases and whatever the form chosen, the action has been regarded as effective by our treaty partners, by the Executive branch, by the Congress so far as it appears, and in the few peripheral instances already referred to, Mr. Chairman, by the courts.

Is there anything in the language and structure of the Constitution that contradicts the catholicity of this conclusion? Not that I can find.

The key question here, I take it, is whether the President can act on his own in the first instance to give notice of termination without securing some form of *Congressional approval in advance*. I put aside, once more, the issue of what he could do in the face of contrary Congressional action.

SYSTEM OF CHECKS AND BALANCES

We know that there are checks and balances — divided power — in the Constitutional scheme both as to domestic and foreign affairs. But it is also true that the initiative is differently allocated as to each. Congress makes the laws, subject to Presidential veto. But the President makes treaties, subject to the concurrence of two-thirds of the Senate. This basic distinction is backed up in many ways.

The President receives ambassadors, and thus determines what countries and régimes the United States recognizes. On a whole range of subjects, the President can make agreements without formal Congressional participation, and so on. These arrangements are thought to reflect the superior availability of information to the Executive and the need for unity, dispatch and flexibility in the conduct of foreign affairs.

Congress, of course, has its balancing power. In addition to the advice and consent of the Senate in the case of treaties, there is often the need for implementing legislation, and, increasingly in these days, appropriations to carry out foreign engagements undertaken by the President. But these are essentially negative, revisory powers. They provide a check, but they leave the initiative with the President.

The structure of the overall distribution of the foreign affairs powers, then, seems, at least on first appraisal, to argue for the existence of an independent Presidential initiative in treaty termination.

As Professor Oliver just pointed out, it is hard to say; and as Professor Lowenfeld has pointed out, it is hard to say just what form of Congressional concurrence would be required. Some have said that the authorization might come by a majority vote of both Houses of Congress, as with the repeal of ordinary legislation.

But, although a treaty, like a statute, is the supreme law of the land, it becomes so not by enactment of Congress but by the President's act of ratification, after the advice and consent of the Senate only. It seems anomalous that, if legislative concurrence is required for termination, it should be from a different legislative organ than is required for making a treaty.

TERMINATION BY TWO-THIRDS VOTE

Senatorial partisans argue for concurrence by two-thirds of the Senate, just as with advice and consent to treaties. That sounded unnatural to me when I first heard it, and it sounds only slightly less so now, after I've thought about it for a while.

If we think about the purpose of extraordinary majority requirements, we find they are most often used to insure circumspection, caution, and broad consensus in undertaking serious and extraordinary engagements. This has led some to suggest that the framers stipulated for advice and consent of the Senate for treaty making but not termination, because they fear getting into entangling alliances but not getting out of them.

Senator JAVITS. If I may appeal to the Chair, I have been called to the floor, and, if you will excuse me, I have to leave, but I do have a monitor here so that I can be kept abreast of what you are saying. I offer my humble apologies.

Mr. CHAYES. Thank you. You have been very attentive and interesting in your own comments, Senator. As I said, I think the argument that the Framers were worried about getting into entangling alliances but not getting out of them a bit too easy.

We are increasingly aware that the differences between commission and omission may not be as great as once it was thought. In many cases, and the President is one, termination of a treaty may involve as serious, as extraordinary, and as fundamental a shift in foreign policy as the conclusion of an alliance.

In the last analysis, I reject the notion of Senate concurrence by a two-thirds vote because the requirement of action by an extraordinary majority means the possibility of veto by a minority, acting against the will of the majority. That is a sufficient departure from our usual way of doing things that, in my view, it should not be expanded beyond the cases where it is expressly specified.

It is worth looking at the cognizant areas of war powers where the Constitutional position of Congress is a good deal stronger than as to foreign affairs in general; there, a decade of debate has failed to resolve the Constitutional issue in favor of a requirement of advance approval by Congress.

The present consultative procedures are defined not by the Constitution, but by the War Powers Resolution, and even that does not require affirmative concurrence by Congress in every case within its purview.

The exercise of the war power seems to me a stronger case for advance Congressional approval than treaty termination. The President, by deploying troops, can present Congress with an irrevocable *fait accompli*. By contrast, when the President gives notice of his intention to terminate a treaty there is, in almost every case, a period before the termination becomes final in which the Congress can take whatever action it deems necessary to affect the outcome.

That need not take the form of a Congressional "countermand" to the Presidential notice. In this very case of the mutual defense treaty, Congress has been able to devise and force the President to accept a stronger and much more public commitment to the security of Taiwan than he seemed at first to be willing to make.

POSSIBILITIES FOR LEGISLATIVE PARTICIPATION IN TREATY TERMINATION

There are other possibilities for legislative participation in the treaty termination process. A stipulation to that effect in the Senate resolution of advice and consent would, I believe, be valid. General legislation analagous to the War Powers Resolution might also be possible, but seems to me uncalled for. Treaty ter-

mination has not been a serious problem in our history, and experience does not suggest it needs or is susceptible to uniform treatment.

The kinds of treaties and the kinds and occasions for their modification are too various. The value of flexibility in the termination process is exemplified by the Republic of China case, touching, as it does, both the recognition power of the President and his role as Commander in Chief.

Suppose Congress by resolution should direct the President to withdraw a notice of termination? That is what President Roosevelt called an "iffy" question. If the President were to disregard a joint resolution overriding his veto we would clearly, as everybody before me recognized, be in the midst of a full-scale Constitutional crisis. But it is hard to imagine any such case arising.

The Constitutional system of checks and balances was not intended to produce impasse but to provide each branch with the leverage necessary for the practical accommodation of interests that is the essence of democratic government. That is in fact what has happened with the treaty termination process.

That is the real meaning of the confusing and varied "practice" in this area. In every case, a way has been found to associate both the executive and legislative branches with significant acts of treaty termination.

The cases of mixed termination action, whether the President or Congress moved first, were just such demonstrations of unity through concurrence. And if the truth be told, the cases cited as examples of the President acting alone are really examples of Congressional acquiescence, not Presidential assertions of power made good over Congressional resistance.

That is as it should be. The Constitution is "an instrument of government designed to endure for ages".

I find it hard to make the kind of categorical assertions about the powers that it grants that some of my colleagues have. It must necessarily leave a good deal of room for play in the joints.

On issues of this kind, what is important is not so much the precise legal distribution of power as the practical and effective distribution of power.

In the matter of treaty termination, as in so much else, the Constitution has provided ample opportunity for both branches to exert effective influence over the policy process.

Thank you.

[Mr. Chayes prepared statement follows:]

PREPARED STATEMENT OF PROFESSOR CHAYES

Mr. Chairman, members of the Committee. My name is Abram Chayes. I am a professor at the Harvard Law School, where I teach, among other things, international law. From 1961 to 1964, I was the Legal Adviser of the Department of State. It is a pleasure and an honor to be testifying again before this Committee.

I am glad that the Committee is conducting this inquiry. It is important to reexamine received wisdom from time to time to see how it withstands the impact of changed circumstances and new thinking.

As Legal Adviser I accepted and as professor I taught the received wisdom that the termination of treaties was a matter of Presidential power. But I must confess that I did so primarily on the basis of the conclusions of text writers, without myself making an independent examination of the underlying materials.

I have now made a more careful review of those materials in preparation for this testimony. I am glad to say that I have not been seriously misleading the young. In particular, I conclude that, as a general matter and particularly as to the Mutual Defense Treaty with the Republic of China, the President has

authority to give effective notice of termination in accordance with the terms of the Treaty. But the situation is somewhat more complicated than I had supposed. And perhaps it would be helpful to go through my thinking about it.

Let me establish some propositions at the outset :

First, I am not talking about abrogation or denunciation, much less breach of treaty obligations by the United States. The issue is the termination of a treaty in accordance with its own terms. As for out-and-out abrogation, it appears that this was done only once in our history, in 1798, as to treaties of Friendship and Alliance with France. It was done by an Act of Congress, signed by President Adams, and regarded by all parties, including the courts, as tantamount to a declaration of war. As to breach of a treaty, it is not the United States Constitution, but the other treaty partner that determines what acts of what official organs it will regard as a breach.

But termination in accordance with the terms of the treaty accounts for most of the historical instances cited by both sides in this debate. Most modern treaties contain such provisions, in contrast to those of a century ago, which did not. This contemporary practice reflects the experience of countries that conditions change, not even the most far-seeing statesman can anticipate the course of events, and in any case, a treaty that doesn't embody a fair accommodation of the interests of the parties as currently perceived is not worth much.

Second, the courts are not going to be much help in resolving this issue. In 200 years only the barest handful of cases have touched on the problem of treaty termination and then only in the most peripheral and elliptical way. Political treaties, like the *Mutual Defense Treaty with the Republic of China*, have substantially no domestic law impacts, so the chances for court interpretation are not good. My guess is that Senator Goldwater and his co-plaintiffs are not going to change that.

Third, two centuries of practice have provided something less than decisive illumination of the problem. In the first place, as might be expected, there is not all that much practice. Although there are minor differences about what count, there seems to be general agreement that there have been less than 30 instances of treaty termination in our history. Then, on the whole, with the exception of the treaties with France already mentioned, these instances have not involved major political treaties, or even, for the most part, significant foreign policy issues. Primarily, they concern technical and commercial treaties — load line conventions, tariff nomenclature, extradition and the like. As a result, although questions of institutional power have sometimes been touched on, they have never been focussed and contested sharply. In particular, what might be thought the hardest, testing questions have simply never arisen: can Congress compel an unwilling President to give notice of termination. Conversely, can the President persist in a decision to give notice as against a duly enacted legislative command to the contrary. I shall touch on these questions briefly in a moment, but, as we shall see, it seems to me highly unlikely that they would ever arise as a practical matter.

I don't think much would be gained by my reviewing the 25-30 historical cases once again. I haven't made an independent investigation of the historical materials, and it is apparent from the secondary accounts that all of them are complex enough to sustain differing interpretations. Proponents of Presidential power stress the more recent period since World War I, when the cases that can fairly be characterized as actions by the President alone are concentrated. In a sense, that is fair, because this is the era in which the United States has been a world power. It has been a time of vast expansion in our treaty relations. In a

count we made for our book about ten years ago, my co-authors and I calculated that from the Declaration of Independence to World War I, the United States became a party to about 700 treaties and other international agreements. In the two interwar decades, the number was about 600. And since World War II, there have been more than 4,000. All of these, of course, were not treaties in the constitutional sense, but I think the proportions are about right. On the other hand, this same recent period is the period of the expansion of presidential power at the expense of Congress, a growth that we are in the process of re-examining and, perhaps, revising.

To my mind the most important thing that a review of the practice reveals is that there has been no uniform practice. The record shows all sorts of combinations and permutations of Presidential and Congressional action; and it shows some instances of action by the President alone. In all these cases, and whatever the form chosen, the action has been regarded as effective — by our treaty partners, by the Executive branch, by the Congress so far as appears, and, in the few peripheral instances already referred to, by the courts.

Is there anything in the language and structure of the Constitution that contradicts the catholicity of this conclusion? Not that I can find. The key question here, I take it, is whether the President can act on his own in the first instance to give notice of termination without securing some form of Congressional approval in advance. I put aside, once more, the issue of what he could do in the face of contrary Congressional action.

We know that there are checks and balances — divided power — in the Constitutional scheme both as to domestic and foreign affairs. But it is also true that the initiative is differently allocated as to each. Congress makes the laws, subject to Presidential veto. But the President makes treaties, subject to the concurrence of two-thirds of the Senate. This basic distinction is backed up in many ways. The President receives ambassadors, and thus determines what countries and régimes the United States recognizes. On a whole range of subjects the President can make agreements without formal congressional participation. And so on. These arrangements are thought to reflect the superior availability of information to the Executive and the need for unity, despatch and flexibility in the conduct of foreign affairs.

Congress, of course, has its balancing power. In addition to the advice and consent of the Senate in the case of treaties, there is often the need for implementing legislation and, increasingly in these days, appropriations to carry out foreign engagements undertaken by the President. But these are essentially negative, revisory powers. They provide a check, but they leave the initiative with the President. Congress cannot compel him, for example, to negotiate a treaty or even to ratify once the Senate has given its advice and consent. There is nothing comparable to the legislative override of a Presidential veto.

The structure of the overall distribution of the foreign affairs powers, then, seems, at least on first appraisal, to argue for the existence of an independent Presidential initiative in treaty termination. I confess I am fortified in this conclusion because, as my friend Professor Lowenfeld has pointed out, it is hard to say just what form of Congressional concurrence would be required. Some have said that the authorization might come by a majority vote of both Houses of Congress, as with the repeal of ordinary legislation. But, although a treaty, like a statute, is the supreme law of the land, it becomes so not by enactment of Congress but by the President's act of ratification, after the advice and consent of the Senate only. It seems anomalous that, if legislative concurrence is required for termination, it should be from a different legislative organ than is required for making a treaty.

Senatorial partisans argue for concurrence by two-thirds of the Senate, just as with advice and consent to treaties. That sounded unnatural to me when I first heard it, and it sounds only slightly less so now, after I've thought about it for a while. In the cases after *Myers*, when it appeared that there were some limits on the removal power, it was never suggested that the President should have power to remove an officer provided the Senate agreed. What was urged was some constraint on the President's power — not the approval of the Senate or Congress but a requirement, for example, of just cause for removal to be determined in the first instance by the President, subject perhaps to court review.

If we think about the purpose of extraordinary majority requirements, we find they are most often used to insure circumspection, caution and broad consensus in undertaking serious and extraordinary engagements. This has led some to suggest that the Framers stipulated for advice and consent of the Senate for treaty making but not termination, because they fear getting into entangling alliances but not getting out of them. That is, perhaps, a bit too easy. We are increasingly aware that the difference between commission and omission is not as great as may once have been thought. In many cases, and the present is one, the termination of a treaty may involve as serious, as extraordinary and as fundamental a shift in foreign policy as the conclusion of an alliance.

In the last analysis, I reject the notion of Senate concurrence by a two-thirds vote because the requirement of action by an extraordinary majority means the possibility of veto by a minority, acting against the will of the majority. That is a sufficient departure from our usual way of doing things that, in my view, it should not be expanded beyond the cases where it is expressly specified.

These problems with the form of approval, though instructive, could surely be managed if there were some good reason to read the Constitution as containing a requirement of concurrence in treaty termination. In the cognate area of the war powers, where the Constitutional position of Congress is a good deal stronger than as to foreign affairs in general, a decade of debate has failed to resolve the Constitutional issue in favor of a requirement of advance approval by Congress. The present consultative procedures are defined, not by the Constitution, but by the War Powers Act, and even that does not require affirmative concurrence by Congress in every case within its purview.

The exercise of the war power seems to me a stronger case for advance Congressional approval than treaty termination. The President, by deploying troops, can present Congress with an irrevocable fait accompli. By contrast, when the President gives notice of his intention to terminate a treaty there is, in almost every case, a period before the termination becomes final in which the Congress can take whatever action it deems necessary to affect the outcome. That need not take the form of a Congressional "countermand" to the Presidential notice. In this very case of the Mutual Defense Treaty, Congress has been able to devise and force the President to accept a stronger and much more public commitment to the security of Taiwan than he seemed at first to be willing to make.

There are other possibilities for legislative participation in the treaty termination process. A stipulation to that effect in the Senate resolution of advice and consent would, I believe, be valid. General legislation analogous to the War Powers Act might also be possible, but seems to me uncalled for. Treaty termination has not been a serious problem in our history, and experience does not suggest it needs or is susceptible to uniform treatment. The kinds of treaties and the kinds and occasions for their modification are too various. The value of flexibility in the termination process is exemplified by the Republic of China case, touching, as it does, both the recognition power of the President and his role as Commander-in-Chief.

Suppose Congress by resolution should direct the President to withdraw a notice of termination? That is what President Roosevelt called an "iffy" question. If the President were to disregard a joint resolution overriding his veto we would clearly be in the midst of a full-scale Constitutional crisis. But it is hard to imagine any such case arising.

The Constitutional system of checks and balances was not intended to produce impasse but to provide each branch with the leverage necessary for the practical accommodation of interests that is the essence of democratic government. That is in fact what has happened with the treaty termination process. That is the real meaning of the confusing and varied "practice" in this area. In every case, a way has been found to associate both the executive and legislative branch with significant acts of treaty termination. The effect of the present arrangements is that a major policy initiative involving termination of treaty cannot take place without the concurrence or acquiescence of both branches. The cases of mixed termination action, whether the President or Congress moved first, were just such demonstrations of unity through concurrence. And if the truth be told, the cases cited as examples of the President acting alone are really examples of Congressional acquiescence, not Presidential assertions of power made good over Congressional resistance.

That is as it should be. The Constitution is "an instrument of government designed to endure for ages". As such it must necessarily leave a good deal of room for play in the joints. On issues of this kind, what is important is not so much the precise legal distribution of power as the practical and effective distribution of power.

In the matter of treaty termination, as in so much else, the Constitution has provided ample opportunity for both branches to exert effective influence over the policy process.

Senator ZORINSKY. Thank you, Professor.

23. QUESTIONS TO AND ANSWERS BY ABRAM CHAYES, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 327-333

Senator ZORINSKY. Thank you, Mr. Meeker.

I would like to call on my colleague, Senator Helms, and ask him if he has any questions.

Senator HELMS. Mr. Chairman, I really don't have any questions.

I want to compliment both gentlemen for excellent statements.

CONSTITUTIONAL TWILIGHT ZONE

I judge what both of you are saying is that since the Constitution is silent on the specific issue of treaty termination, that this is really in a constitutional twilight zone?

Mr. CHAYES. Well, I would say that.

I would say that neither the Constitution nor the practice nor the courts nor the judicial materials give us enough material to make any kind of categorical statement about this. And I would say in such a case it seems to me there is likely to be, or to be worked out some sharing of power as a practical matter.

But I think the situation is that the President can start the process by giving notice. Then there is a period in all of these cases before the notice becomes effective. That period gives time for Congress to do what it likes. And in this case, it did alter the significance of the termination of that treaty quite substantially in the legislation that it passed with respect to Taiwan.

Mr. MEEKER. I would differ just a bit. I think the constitutional power to terminate does reside with the President, but that as a matter of good policy and sound administration he ought to consult with the Congress on an important issue such as this before making a decision. That is not, in my view, a constitutional requirement but rather simply sound policy.

CONSTITUTIONAL AMENDMENT ON TREATY TERMINATION

Senator HELMS. I certainly agree, being a cosponsor of the Byrd resolution.

Do you think it is a mistake for Congress to consider a Constitutional amendment which would stipulate that there must be a working relationship on such matters?

Mr. MEEKER. I think, as Mr. Rogers has said, that this is not a very large practical issue for the United States, and indeed has not been in our history. And it seems to me that the present Constitutional arrangements, though not explicit on this point, are perfectly satisfactory, and that Congress and the President can work cooperatively under them.

To try to frame a Constitutional amendment on the subject could well produce confusion or something worse. I would not favor a Constitutional amendment.

Mr. CHAYES. I would agree with that almost precisely. There is very little to add.

Essentially, we have had 20 or 25 cases in history of treaty termination. None of them have even risen to the level of public notice that this one did. And in all of them, as Mr. Meeker has said, whatever the abstract legal distribution of

powers may be, in all of them it was possible to work out some accommodation between the two branches so that the ultimate action reflected, in a broad sense, the public policy of the United States.

Senator HELMS. So what both of you are saying in effect is what some of us at Congress have been saying: It would have been exceedingly beneficial had there been consultation and understanding prior to the act of terminating the treaties with Taiwan.

It has been suggested I ask you what legal significance would each of you give to a Senate resolution on the subject of treaty termination, in light of the Senate's Constitutional powers in the treaty area. I think you have responded to that.

Mr. Chairman, these two gentlemen answered all of the questions that came to mind as they went along.

And I again want to commend you both on excellent statements. I thank you for appearing. I know you did so at some sacrifice to yourselves in terms of time.

Senator ZORINSKY. Thank you, Senator.

SIMILARITY BETWEEN SALT AND MUTUAL DEFENSE TREATY

I would like to ask a question. In your opinion, either Mr. Meeker or Professor Chayes, I would like to ask your opinion as to whether you classify this in the same category as the Strategic Arms Limitation Treaty. Would the President have an equal ability to unilaterally cancel that treaty or a disarmament treaty of any kind? Is this the same in your mind as a mutual defense treaty?

In other words, is there a separation of categories between treaties, or do you treat them all as a single class?

Mr. CHAYES. Well, I have not made distinctions, although it does seem to me that the process might be different in different kinds of cases.

An arms control treaty, most of the arms control treaties we now have, I think all of them provide for withdrawal on notice after some months — I think 3 is the shortest period, where the supreme interests of the Nation are jeopardized. And there again it would seem to me that, as Mr. Meeker and I have both said, and I think everybody has said, it would be very important to have as extensive consultation as time permitted to do that.

But I would think the President could start the 3 months running by giving notice, Mr. Chairman, without getting any formal vote of a legislative body.

Now, what would happen if the legislative body acted thereafter, within the 3-month period, as I said, I think is somewhat cloudy. I guess you would say it is the cloudy area of Constitutional understanding.

Now, if you had a treaty that gave rise to private rights, for example, a trade agreement where the Congress changed something after the President gave notice, there you might get a judicial determination. You might also say that where private rights were created, the desirability of some Congressional action was larger. But I think that, more or less as a Constitutional matter, that both parties, both the Executive and the legislative branches have the authority to move. And it is up to them to exercise the authority on the basis of their political judgment, as to what the situation requires.

Senator ZORINSKY. Thank you.

Mr. Meeker?

Mr. MEEKER. I do not see a basis for distinguishing among treaties with respect to termination.

It seems to me the President has the constitutional authority to terminate regardless of the character of the treaty. In the case of the disarmament treaty,

just as in the case of the treaty with the Republic of China, it seems to me consultation beforehand is important.

With respect to treaties that involve private rights and which might come into litigation in US courts, I would not see really a basis there either for concluding that such a treaty could be terminated only with the consent of Congress or the participation of Congress.

Such a treaty was an issue a few years ago — the Warsaw Convention — which limits in my mind rather undesirably, Mr. Chairman, the recovery that passengers or their legal representatives may make against airlines as the result of injury or death in international flights. The United States during the administration of President Johnson gave a notice of termination because of dissatisfaction with the existing low limits.

I was legal adviser at the State Department at the time and thought that that notice was correct and believed that it should have been maintained. Subsequently, the notice was withdrawn when the airlines were prepared to raise somewhat the limit of liability, but to leave it still very limited.

If the notice had been maintained, and if Congress had indicated a disagreement and had voted a resolution to maintain the treaty in force, I do not think the treaty should have been considered to remain in force.

It seems to me the President did have the authority to terminate it and his action would have been effective even if Congress had expressed itself in the contrary sense.

Mr. CHAYES. The Warsaw Convention case is an interesting case.

I was Mr. Meeker's predecessor as legal adviser, and I started the process of denunciation of the Warsaw Convention, and he carried it out. But that is a very good illustration, I think of what happened.

I think Mr. Meeker is right that the President had power to give notice. I think it also true that if the period of notice had expired without anything else having happened, the treaty would have been terminated, and we would no longer have been subject to its obligations.

The fact is that the notice was withdrawn because a compromise was reached between, on the one hand, the air carriers, and, on the other hand, the administration. And you know if there was that kind of compromise that Congress was in there somewhere. And of course, they were. That is, it was an informal compromise; it did not come to a vote, but the concerned representatives of the Congress also expressed satisfaction with the compromise — whether it was right or wrong, the compromise, we can argue about that.

But in fact, the President did withdraw. And part of the reason for withdrawing was there was a Congressional interest that was expressed in pretty clear terms, and that was part of the mix.

What would have happened if they had come to a head and the Congress had passed a joint resolution directing him to withdraw the notice or reciting that the treaty would remain in force despite the notice, and had passed a joint resolution over Presidential veto? I do not think any of us here can say because it has never happened. And I don't think it likely to happen.

That kind of case might have gotten to the courts because then the next international air crash, Mr. Chairman, the question would have been: Were the carriers subject to any limitation of liability or not? And that is the kind of case a court can really deal with.

But we have never been close to that kind of a head-on collision about treaty termination because there are enough ways for the Congress to exercise its influence so that you don't need to worry about that last step.

Senator HELMS. I have one question that comes to mind. Do you feel the

President can demand a treaty by means of an Executive agreement or parallel declaration of understanding after the treaty has received the advice and consent by the Senate?

Mr. CHAYES. Well, that is one of the most difficult questions. And I take a lot of this up with students, and it is very difficult because the treaties always have general provisions in them like any other enactment, any other law.

And the question is: How do you interpret them? And there are usually a range of possibilities for interpreting them. So the question of: What is a motor vehicle? Does it include trucks? Does it include the trailers or just the tractors? And things of that kind, and much more important things, come to the point where one might say, just as you say about a lot of legislation, if the Senate had known that is what the courts were going to say when they passed it, they would have done something different.

So there is that kind of broad range of interpretation. The particular case you refer to, I think, is the question of the SALT agreement where both parties announced unilaterally that they would continue to abide by the limits. That is a rather interesting matter, as you know, because the Arms Control Act provides that we shall not enter into arms control agreements without submitting them either to the Congress for majority approval of both Houses, or to the Senate by way of treaty.

In this case, this is another example of where the President went to the Senate and consulted with the persons principally involved. It was known in advance that this consultation was being forwarded. Then he secured the agreement of the principally concerned Senators.

In those circumstances, I would not think there is anything improper about that action. The policies that the President said he was going to continue were all policies that were within his authority as President to continue or alter as he chose. And he made a policy statement saying he was going to continue them. And I suppose that was within his power.

If you recall, way back in the Eisenhower administration, we had the first moratorium on testing. That was exactly the way it was established. President Eisenhower said he would not test as long as the Soviets did not test. Then the Soviets said they would not as long as we did not test. That went along until September 1961 when, as you recall, the Soviets broke that moratorium, and we felt free to test then ourselves.

But there was a period within which, without a formal agreement, Mr. Chairman, both parties pursued a reciprocal policy. And I think the President was within his powers in doing that since he was not doing anything that was not within his power to do regardless of what the Soviet Union did or did not do; he could have tested or not tested, as he chose.

LEGISLATING BY INTERPRETATION

Senator HELMS. There are some of us around here who feel that the various agencies do a whole lot of legislating by interpretation anyhow.

Mr. CHAYES. Oh, yes.

Senator HELMS. Mr. Mecker, do you have a comment?

Mr. MEEKER. I just know that parallel declarations raise the issue as to whether the parties to them do intend to make any agreement or not.

They may not intend to make an international agreement between themselves. I think the President of the United States does have a very wide authority, though, to make an executive agreement on his own constitutionally.

Mr. CHAYES. I would just say one further thing. The World Court has held

that a unilateral declaration by a country — I think this was in the case of Thailand, the *Temple* case — a unilateral declaration by a country, not reciprocal in any sense, if it is intended to create an obligation, will do so. There is no principle of consideration for binding contracts and/or *quid pro quo* in international law.

A formal unilateral declaration by a country intending that it be relied on as an obligation-creating declaration, Mr. Chairman, will be effective to do so, according to the World Court.

UNILATERAL AGREEMENT OF SALT IS DEFEATED

Senator ZORINSKY. Professor, then in your estimation do you feel that if SALT were defeated, the President could still turn around and make a unilateral agreement that would be binding?

Mr. CHAYES. He could make a statement as to what his policy would be. And in the SALT case, of course, it is distinguished from the ordinary case because there is a special requirement in the arms control legislation that we don't make any agreements that are not submitted to the Congress or to the Senate.

So whatever his powers to make an Executive agreement are without legislative concurrence in the absence of such a statute, I think that statute displaces his power to make an agreement as to arms control policy.

On the other hand, he could say: "I'm not going to go through the SALT ceilings as long as I am President." And then we would be back in the impoundment problem, and all of that, if the Congress were to direct him, let us say, to build additional missiles, or something of that kind, and pass such an act over his veto.

Senator ZORINSKY. In other words, you would say he is free to create unilateral agreements unless the legislation pertaining to those subjects preclude him from doing so without Congressional advice and consent?

Mr. CHAYES. Well, let's keep it to the area of where, as Commander in Chief, he would have broad powers otherwise.

I don't read the *Belmont* and *Pink* cases as broadly as Mr. Meeker does, but that is a very technical matter, and we don't have to get into that. At least where he would not be changing domestic law in the ordinary sense, I think that the President has broad power to make Executive agreements without the concurrence of the Congress, but Congress can affect that power by legislation, Mr. Chairman, as it has done in the case of the Arms Control and Disarmament Act.

Mr. MEEKER. I would take a somewhat different view, I think.

Congress can obviously enact legislation over a President's veto to change domestic law so as to supersede an international agreement or treaty. But unless it does so, I don't think the President is disabled as a matter of domestic law, Mr. Chairman, from making and implementing an Executive agreement, which is within his Constitutional power.

I think there is a question as to whether the provision in the disarmament legislation is indeed constitutionally effective to inhibit and to prevent a President from making a disarmament agreement if he does not have the advice and consent of the Senate, or a vote of both Houses of Congress.

These questions of levels of armaments are pretty obviously in the area of Presidential authority as Commander in Chief and as the heart of the Government in charge of the Nation's foreign relations.

So I don't think it ought to be accepted that Congress or the Senate, through a measure of that sort, can redistribute Constitutional authority; just as it

seems to me a Senate resolution or reservation to a treaty purporting to limit the President's power to terminate, I think, such a resolution, would not be valid.

Similarly, I would doubt very much that legislation enacted by the Congress could diminish the President's constitutional authority or indeed could increase it.

DEFINITION OF "UNDER THIS OR ANY OTHER LAW"

Senator ZORINSKY. In the Disarmament Act itself, it states that: "No action shall be taken under this or any other law that will obligate the United States to disarm, or to reduce, or to limit the Armed Forces."

What, in your estimation, does "under this or any other law" mean?

Mr. MEEKER. I think the effort of Congress was to establish that disarmament agreements can be made only with the concurrence of the Senate or of the whole Congress, and the issue that I raise is whether that is Constitutionally effective.

Now, obviously, a President who takes action that is inconsistent and in conflict with such a statute is in big political trouble, but I don't think it should be assumed that Congress, through legislation, can diminish the President's Constitutional authority.

Mr. CHAYES. Well, I don't think Congress, through legislation, can diminish the President's Constitutional authority either.

It just depends on where you draw the line, as to his Constitutional authority. And one of the things we have been going through in the last 10 years, it seems to me, is some reevaluation of where those lines are to be drawn.

When I was legal adviser, I won't say it was at the apex of the imperial presidency, but it was pretty high up the hill, and we attempted to draw the line very favorably to the President, we in the Executive branch, and also to a degree that was acquiesced in by the people in Congress. I think our experience in foreign affairs and domestic affairs since that time has shown us we may have been too ready to acquiesce in a very broad reading of the powers of the President.

I remember back in 1952, I was law clerk to Justice Frankfurter, and I remember when the steel seizure case was decided. And there, Justice Jackson in his concurring opinion divides the powers into different segments. He says that when the President and the Congress act together, that is when the power is strongest because we have to assume that the whole Government acting together has the power to do something — in that case seizing the steel mills.

Where the President acts in the absence of legislation, he said, well, there you may tend to indulge some presumption in favor of the President where the foreign policy or war power elements of the situation are strong.

But he said where the President acts against the Congress, then the range of his power is at the narrowest. And of course, in that case it did not extend to seizing the steel mills, although it is perfectly clear that the troops needed the ammunition and the weapons that were being withheld because of the strike.

So I think that when you say that the Congress cannot limit the President's inherent powers by legislation, that is kind of a tautology: You still have to decide where that line is drawn.

And when we get to situations that Senator Helms characterized properly, I think, as in this kind of twilight zone, it seems to me that the Court, if it ever got that, and the rest of us as responsible constitutional interpreters should hesitate to interpret "in the twilight zone" in favor of an unlimited and unreviewable power of the Presidency.

Senator ZORINSKY. Thank you very much, Professor Chayes and Mr. Meeker, for a very outstanding and informative presentation.

Thank you very much. The proceedings of this committee are adjourned.
[Whereupon, the hearing was adjourned at 4:35 p.m., subject to the call of
the Chair.]

24. STATEMENT OF HERBERT J. HANSELL, LEGAL ADVISER, DEPARTMENT OF STATE, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 50-61

Mr. HANSELL. Mr. Chairman, I appreciate the opportunity to appear before you today to discuss Senate Resolution 15.

This resolution would express the sense of the Senate that approval of the Senate is required to terminate any mutual defense treaty between the United States and another nation.

UNITED STATES FULLY COMMITTED TO MUTUAL DEFENSE TREATIES

At the outset, I should like to emphasize on behalf of the administration that the United States is fully committed to our mutual defense treaties. We do not foresee any circumstances in which they would be terminated. There should be no doubts with respect to the strength and firmness of our commitments to our mutual defense treaties and to our treaty partners. Accordingly, this resolution raises an entirely hypothetical issue.

The CHAIRMAN. Now wait a minute. Don't you think that is a bit of hyperbole — you don't see any circumstances in which mutual defense treaties would be terminated?

There are mutual defense treaties that are moribund, like SEATO. Even the headquarters structure has been abandoned. SEATO was never honored, except in its breach, by any of the major signatories, except the United States. Are we going to go on living forever with SEATO?

Mr. HANSELL. Mr. Chairman, this, of course, is intended to address all of our mutual defense treaties.

The CHAIRMAN. Well, that is one of them.

You know, I don't think the State Department serves itself well when it comes in with such overstatements.

Mr. HANSELL. Well, at the moment, with respect to SEATO, it is in force and we remain a party to it. It is an obligation and we don't foresee an occasion that would call for termination of it. Recognizing the facts that you mention, our concern with the resolution is that it somehow suggests that there may be on the part of the Senate, concerns with regard to intent to terminate mutual defense treaties.

The CHAIRMAN. Are you going to tell us that forever and ever, you cannot foresee circumstances when any of these treaties would ever be terminated? On its face, that statement doesn't make any sense. I can foresee many circumstances and so can you in this changing world where it would no longer be in our national interest to preserve or perpetuate a given treaty.

We have just done it with Taiwan. We are just in the act of terminating a mutual security treaty.

It just doesn't seem to me to be helpful to the State Department to say this. It doesn't give you much credibility when you come up here and make a statement like that. This is my only point. I don't think you give us reassurance by making that kind of statement.

Gentlemen, I'm terribly sorry, but we have another vote on. We will come back again to take this matter up where we are leaving it off.

The committee will be in recess for a few minutes.

[A brief recess was taken.]

The CHAIRMAN. The hearing will come back to order.

The prepared statement of the Department of State will be included in the record as though read so that we may go directly to questions.

[Mr. Hansell's prepared statement follows:]

PREPARED STATEMENT OF MR. HERBERT J. HANSELL

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today to discuss Senate Resolution 15.

This Resolution would express the sense of the Senate that approval of the Senate is required to terminate any mutual defense treaty between the United States and another nation.

At the outset I should like to emphasize on behalf of the Administration that the United States is fully committed to our mutual defense treaties. We do not foresee any circumstances in which they would be terminated. There should be no doubts with respect to the strength and firmness of our commitments to our mutual defense treaties and to our treaty partners. Accordingly, this resolution raises an entirely hypothetical issue.

I recognize that the resolution has been proposed as a consequence of the termination of the mutual defense treaty with Taiwan. However as this Committee is fully aware, the termination of that treaty occurred in unique circumstances, which would not be applicable with respect to any other US defense treaty.

The termination of that treaty occurred in the context of and was necessary because of the establishment of relations with the Government of the People's Republic of China as the legal government of China. From the time of the 1972 Shanghai Communiqué it was acknowledged by this Government that all Chinese maintained that there was but one China, and it was recognized that normalization would mean that it would not be possible to continue that mutual defense treaty in force. The circumstances associated with termination of recognition of Taiwan as a government, and recognition of the PRC as the sole government of China, obviously were unique to that situation, and are without any relevance or application whatsoever to any other mutual defense treaty or treaty partners.

US Constitutional history also demonstrates that there is no need for such a resolution. The genius of the Constitutional Framers is once again shown by the fact that, while the Constitution is silent on the issue of treaty termination, there has been a remarkable degree of harmony and accommodation between the Executive and legislative branches on treaty terminations. Various treaties have been terminated in two centuries of US Constitutional history, some involving action by both branches, some by the Executive alone. There have been very few instances of formal or official disagreement by one branch with action taken by the other relative to treaty termination. This record indicates clearly that our Constitutional practice of accommodation has worked successfully for nearly 200 years and that it ought not to be tampered with now.

While treaty termination may be, and sometimes has been, undertaken by the President following Congressional or Senate action, such action is not legally necessary. Presidents have often terminated treaties without Senate or Congressional action.

The President's Constitutional authority to terminate treaties is currently the subject of litigation in the Federal-District Court for the District of Columbia, in the case of *Goldwater et al. versus Carter et al.*, a suit instituted by Members of this body and of the House of Representatives against the President and the Secretary of State.

Mr. Chairman, the existence of that litigation places the Executive branch in a dilemma. Our presence here today in response to the Committee's request that we testify on S. Res. 15 is evidence of our strong desire to be as cooperative as possible with this Committee and the Senate. At the same time, out of deference to the Court, we do not think it would be appropriate for the Executive branch, which is a party to that litigation, to argue its case publicly in another forum. Accordingly, we trust the Committee will understand that, while we do have some general comments on the broad Constitutional issues related to treaty termination, we are not able to deal with certain of these issues in this hearing as fully as we would like to.

The reasons underlying our view of the President's power to terminate treaties are set forth in a brief filed by the Department of Justice with the Court on behalf of the President and Secretary of State; with the Committee's permission, we will submit a copy of that brief for the record of this hearing.

Mr. Chairman, the view of the Constitution reflected in the Resolution would in our judgment be in sharp conflict with the President's Constitutional responsibility and authority, and would be an unwise departure from US Constitutional practice. There are a number of practical reasons why, in our form of government, the President needs to have authority to terminate treaties. Over the years the United States has made a great many treaties with other States, and it has terminated a comparatively small number of these treaties. In each case there is a good reason for termination.

Those reasons can vary from a change in our view of the legal status of one of the parties, as in the case of Taiwan, to the enactment of legislation in the United States which makes it impossible for the US to meet its treaty obligations. There may be a fundamental change in circumstances that were relied upon by the parties in making the treaty or a material breach by the other party that warrants a firm and prompt response.

There are also situations where the President is called upon to determine whether a treaty remains in force or is suspended. Such questions arise for example when a new State is formed, when diplomatic relations are suspended, when the parties become engaged in armed conflict, and when a treaty is fully executed or becomes obsolete. In United States practice these judgments are made by the President. So, too, in cases of treaty termination, a judgment will be needed that may engage the responsibilities assigned to the President under the Constitution or that cannot practicably be determined by a vote. There will be instances, too, Mr. Chairman, when the President needs to be able to act expeditiously to terminate a treaty and not just in emergencies affecting the national security.

There are other considerations that enter into the analysis of treaty termination issues. The President needs to have the option of using the possibility of treaty termination in his bargaining with other nations, and to exercise fully his constitutional responsibility for recognition of foreign governments under the Constitution. A treaty may become impossible to perform, or the other party may wish to terminate the treaty. In such circumstances, the President should be in a position to act.

Mr. Chairman, substantial differences in the consequences of treaty making and treaty termination explain the different procedures involved in the two

processes. Put most simply, treaty termination is less risky and significant than treaty making, and may have to be accomplished rapidly.

Professor Louis Henkin, in *Foreign Affairs and the Constitution* (1972), explained why the President alone may terminate treaties:

“... perhaps the Framers [of the Constitution] were concerned only to check the President in ‘entangling’ the United States; ‘disentangling’ is less risky and may have to be done quickly, and is often done piecemeal, or *ad hoc*, by various means or acts”. (At p. 169.)

Mr. Wallace McClure, in *International Executive Agreements* (1942), wrote that the Senate was a check against the President’s treaty-making power, but that termination, or “negative action, not being feared by the constitution makers, was left to the repository of general executive power, that is, to the President”. (At p. 306.)

The views I have expressed comport with the modern practice of the United States and with the views of most scholars who have addressed the issue. Numerous authorities on Constitutional and international law who have addressed this issue have concluded that the President may terminate treaties, without specification or limitation as to the type of treaty. For example, the American Law Institute, in the *Restatement of Foreign Relations Law of the United States* (1965), states in Section 163:

“Under the law of the United States, *the President* or a person acting under this authority, *has with respect to an international agreement to which the United States is a party, the authority to . . . take the action necessary to accomplish* under the rule stated in section 155 *the termination of the agreement in accordance with provisions included in it for the purpose . . .*” (At p. 493.)*

The Restatement commentary to this provision states that this rule is “based on the authority of the President to conduct the foreign relations of the United States as part of the executive power vested in him by Article II, Section 1, of the Constitution”. (At p. 493.)

Professor Henkin states:

“Once the Senate has consented, the President is free to make (or not to make) the treaty and the Senate has no further authority in respect of it. Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; *nor has the Senate any authoritative voice in interpreting a treaty or in terminating it.*” (*Foreign Affairs and the Constitution*, at p. 136.)

Dr. Elbert M. Byrd, Jr., of the University of Maryland, has written in his book *Treaties and Executive Agreements in the United States* (1960) that:

“... from a constitutional view, it is much easier to terminate treaties than to make them. A treaty by definition in constitutional law, can come into existence only by positive action by the President and two-thirds of the Senate, but a simple majority of both Houses with the President’s approval can terminate them, and *they may be terminated by the President alone.*” (At p. 145.)

* Emphasis supplied throughout.

Professor Laurence H. Tribe, of the Harvard Law School, has written in his recently published *American Constitutional Law* (1978) as follows:

"Although influenced (often decisively) by congressional action or constitutional restraint, *the President . . . has exclusive responsibility for announcing and implementing military policy, for negotiating, administering, and terminating treaties or executive agreements; for establishing and breaking relations with foreign governments; and generally for applying the foreign policy of the United States.*" (At pp. 165-166.)

Mr. Wallace McClure, in his work entitled *International Executive Agreements* (1941), wrote:

"It is customary for treaties to carry provisions laying down the steps to be taken if one of the participating governments wishes to divest itself of the obligations which have been assumed; for instance, a year's notice by one party to the other or others. But treaties do not specify the organ of the national government by which such notice is to be given. *In the United States the Executive gives the notice. Sometimes he has given it on his own initiative solely.*"

Professor Myres S. McDougal, William F. Townsend, Professor of Law at the Yale Law School, wrote as follows in his study with Asher Lans on "Treaties and Congressional-Executive or Presidential Agreements: Inter-changeable Instruments of National Policy", 54 *Yale Law Journal* 336 (1945): ". . . Termination (of treaties) may be effected by *Executive denunciation*, with or without prior *Congressional authorization.*" (At p. 336.)

Professor Randall H. Nelson, of Southern Illinois University, in an article entitled "The Termination of Treaties and Executive Agreements by the United States: Theory and Practice", 42 *Minnesota Law Review* (1958):

"Diplomatic practice coupled with judicial opinion demonstrates that the President, as the chief organ of foreign relations, has the primary responsibility with respect to the termination of treaties. *He may perform this function alone or in conjunction with the Congress or the Senate.*" (At p. 906.)

The late Professor Jesse S. Reeves of the University of Michigan, in an article entitled "The Jones Act and the Denunciation of Treaties", 15 *American Journal of International Law* (1921), stated that:

"It seems to be within the power of the President to terminate treaties *by giving notice on his own motion without previous Congressional or Senatorial action.* It would seem, on the other hand, that the President cannot be forced by Congress or by the Senate to perform the international act of giving notice." (At p. 38.)

Professor Westel Willoughby, late of Johns Hopkins University, wrote in his work *The Constitutional Law of the United States* (1929) that:

"It would seem indeed, that there is *no constitutional obligation upon the part of the Executive to submit his treaty denunciations to the Congress* for its approval and ratification although, as has been seen, this has been done several times." (Vol. I, at p. 585.)

In summary, Mr. Chairman, we urge that the Committee not approve this resolution. We believe it is not needed, that it unnecessarily raises questions as to the intentions of the United States to adhere to its mutual defense treaties,

and that it is in conflict with US Constitutional practice which has worked successfully for nearly 200 years.

Thank you, Mr. Chairman, I will be happy to try to respond to any questions you or the Committee members may have.

25. STATEMENT OF LAWRENCE A. HAMMOND, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 192-196

Mr. HAMMOND. Mr. Chairman, I am pleased to be here this afternoon in response to the Committee's letter of last week requesting the views of the Department of Justice and of the Attorney General on Senate Resolution 15 concerning mutual defense treaties.

LAWSUIT CHALLENGING PRESIDENTIAL TREATY TERMINATION AUTHORITY

Mr. Chairman, as you noted in your opening remarks, there is a lawsuit presently pending in the district court for the District of Columbia which raises the issue of the President's authority to terminate the mutual defense treaty with the former Republic of China. The President is the named defendant in that suit and the Department of Justice, in the performance of its statutory duty, is representing the President.

The pendency of that litigation places this Department in a difficult, although certainly not unfamiliar, situation. As attorneys for the United States, we are bound by the canons of ethics and by the governing rules of court for the US District Court for the District of Columbia. Those sources prevent us, among other things, from commenting on the merits of the claims upon which we have relied in that litigation. Specifically, I refer the Committee to disciplinary rule 7-107 (G) of the Code of Professional Responsibility, to Ethical Consideration 7-33 of that code, both of which are quoted in pertinent part in this statement, and to Rule 100 of the US District Court Rules for the District of Columbia, which make those rules and standards binding on attorneys appearing in Federal court in this circuit.

The CHAIRMAN. Excuse me, but I believe I know where you are headed. You are simply saying that you agree with Mr. Hansell, right?

Mr. HAMMOND. Yes.

The CHAIRMAN. Let me then ask that we insert your statement and proceed directly to our questions.

[Mr. Hammond's prepared statement follows:]

PREPARED STATEMENT OF MR. LARRY A. HAMMOND

Mr. Chairman:

I am pleased to be here this afternoon in response to the Committee's letter of last week requesting the views of the Department of Justice and of the Attorney General on Senate Resolution 15, concerning mutual defense treaties.

As you are well aware, there is a lawsuit presently pending in the District Court for the District of Columbia which raises the issue of the President's authority to terminate the Mutual Defense Treaty with the former Republic of China, *Goldwater v. Carter*, Civil Action No. 78-2412 (D.D.C.). The President is the named defendant in that suit and the Department of Justice, in the performance of its statutory duty, is representing the President. The pendency of that litigation places this Department in a difficult, although not unfamiliar, situa-

tion. As attorneys for the United States we are bound by the canons of ethics and by the governing rules of court for the United States District Court for the District of Columbia. Those sources prevent us, among other things, from commenting on the merits of the claims upon which we have relied in that lawsuit. Specifically, I refer the Committee to Disciplinary Rule 7-107 (G) of the Code of Professional Responsibility*, to Ethical Consideration 7-33** of that Code, and to Rule 100 of the US District Court Rules for the District of Columbia, which makes those rules and standards binding on attorneys appearing in federal court in this Circuit. Our posture is made particularly difficult in this case because we have taken the position in the District Court that the issue of Presidential power to terminate treaties is a matter not appropriate for judicial resolution. Indeed, to whatever extent the question may be thought not to have been finally determined by the Constitution itself, it is a matter properly resolvable by accommodation between the Executive and Legislative Branches. Nonetheless, so long as that litigation is pending we are significantly restricted in our ability to comment on the underlying Constitutional questions.

Outside the context of this particular lawsuit we agree that the Senate is entitled to the legal views of the Executive Branch on the question whether the resolution now before this Committee expresses an appropriate view of the controlling constitutional principles concerning treaty termination. On that question I can advise the Committee that it is the Justice Department's opinion that the President's power in this area cannot properly be circumscribed in the manner suggested in Senate Resolution 15. Our reasons for so concluding are the same as those expressed in the Statement of Mr. Herbert Hansell, the Legal Adviser for the Department of State, which has been submitted to this Committee. We concur in its conclusions and reasoning. Thank you.

* A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

1. Evidence regarding the occurrence or transaction involved.

* * *

4. His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
5. Any other matter reasonably likely to interfere with a fair trial of the action.

** A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury . . . The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

26. QUESTIONS TO AND ANSWERS FROM THE LEGAL ADVISER AND THE DEPARTMENT OF STATE, TREATY TERMINATION, HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, NINETY-SIXTH CONGRESS, FIRST SESSION, 9, 10 AND 11 APRIL 1979, PP. 197-208

Senator JAVITS. Would you agree with him on the substance or do you just agree with him on the fact that you shouldn't speak?

Mr. HAMMOND. No, we also agree with him on the substance.

Senator JAVITS. Is that the essence of your brief?

Mr. HAMMOND. Yes, and with the brief filed in the court.

The CHAIRMAN. Let me ask you this. Are you constrained with respect to answering questions because of the court action?

Mr. HAMMOND. Mr. Chairman, it is our view that the constitutional questions can be addressed without necessarily talking about the particular claims and facts of this case. To that extent, we do not feel restrained.

The CHAIRMAN. All right.

VARIOUS WAYS OF TERMINATING A TREATY

Let's consider the different ways that a treaty can be terminated, ways that don't seem to be subject to much doubt.

Clearly a treaty can be terminated if the two Houses of Congress agree upon its termination and the President concurs by signing a joint Congressional resolution. Would you agree?

If the Congress passes a joint resolution terminating a given treaty and the President concurs by signing the resolution, is that one method by which a treaty can be terminated?

Mr. HANSELL. May I answer that, Mr. Chairman?

The CHAIRMAN. Please.

Mr. HANSELL. That would, in fact, terminate the domestic law effect of the treaty. The President would have to take action to terminate the treaty as a matter of the international relationships that are created by the treaty.

TERMINATION OF TREATIES WITH NO PROVISIONS FOR TERMINATION

The CHAIRMAN. Suppose that the treaty does not contain any provision relative to termination? Suppose that treaties were written the way your statement was written and that it was never contemplated that under any circumstances would any mutual defense treaty ever be terminated, so no termination clause was even placed in the treaty. How would such a treaty be brought to an end? If it contains no termination clause, how would such a treaty be terminated?

Mr. HANSELL. The President, under the Constitution, would have the power to terminate the treaty.

The CHAIRMAN. With or without the concurrence of Congress?

Mr. HANSELL. He would have the authority to do it without the concurrence of Congress.

The CHAIRMAN. On what basis do you make that statement?

Senator JAVITS. What is the authority?

Mr. HANSELL. The authority is the President's constitutional role in im-

plementing treaties and his authority under the Constitution to conduct the foreign relations of the United States.

The CHAIRMAN. Are you making an argument that he has inherent authority to terminate treaties at will, whether or not the Congress concurs and whether or not the treaty contains any provision to terminate? That's what you're saying.

Mr. HANSELL. I would not make that sweeping a generalization, Mr. Chairman.

The CHAIRMAN. But it seems to me you have.

Mr. HANSELL. I am saying that the Constitution does repose in the President authority to terminate international obligations of the United States.

The CHAIRMAN. Where does the Constitution so provide?

Mr. HANSELL. The power of the President as defined in article II, Mr. Chairman.

The CHAIRMAN. Well, where does article II say that the President may terminate treaties or international agreements?

Mr. HANSELL. It does not expressly so state, of course.

Senator JAVITS. Well, what are you relying on? Read it to us.

The CHAIRMAN. Just what are you relying on?

Mr. HANSELL. I would like to express one very important comment in regard to all this. As I think Senator Javits expressed earlier in this hearing, this is fundamentally a matter of accommodation between the two branches. Let me quote one paragraph from my prior statement that has been submitted for the record. It is this.

There has been a remarkable degree of harmony and accommodation between the Executive and legislative branches on treaty terminations. Various treaties have been terminated in two centuries of US Constitutional history, some involving action by both branches — that is, the legislative and executive — and some by the executive alone. There have been very few instances of formal or official disagreement by one branch with action taken by the other relative to treaty termination.

PRESIDENTIAL AUTHORITY UNDER ARTICLE II OF THE CONSTITUTION

The CHAIRMAN. Well, that may be because there have been relatively few cases where anyone from the State Department has asserted that the President has the authority, with or without the concurrence of the Congress, to terminate any treaty whether or not it contains a termination clause, and can do so unilaterally.

I ask you for your source of authority for such a statement. You said article II. I asked you what part of article II, and you have not yet responded appropriately.

Mr. HANSELL. May I quote, Mr. Chairman, from the American Law Institute Restatement of the Foreign Relations Law of the United States.

Under the law of the United States, the President or a person acting under his authority, has, with respect to an international agreement to which the United States is a party, the authority to take the action necessary to accomplish —

and then it refers to a rule in section 55, which we can get to in a moment —

the suspension or termination of the agreement in accordance with provisions included in it for the purpose.

The CHAIRMAN. But that does not respond to my question. I am talking about a treaty that does not contain any such provision.

Mr. HANSELL. I understand that, Mr. Chairman.

The CHAIRMAN. You have also cited the Constitution. Will you cite me the provision of the Constitution on which you rest your case?

Mr. HANSELL. I would need to refer you to article II, the provisions of which I don't have with me at the moment.

Senator JAVITS. We will get that for you.

Mr. HANSELL. It concerns the power of the President to conduct the foreign relations of the United States, which have inherently been recognized as the basis for that power.

If I may paraphrase the brief of the United States in the litigation that previously was referred to, it notes that article II provides, in pertinent part, that the Executive power shall be vested in a President of the United States; that the President shall be Commander-in-Chief; that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. The statement in the brief on this issue is as follows:

Article II confers the Executive power in general terms, strengthened by specific provisions where emphasis was appropriate and limited by direct constraints where limitation was intended. No express constraint was placed on the termination of treaties nor was any express power with respect to treaty termination granted to Congress. The Senate role of advising and consenting in the making of treaties is, therefore, not an independent source of legislative power, but is, instead, a limitation upon the treaty-making power granted to the President.

The President's power to terminate treaties, Mr. Chairman, is derived by implication, not by express terms, from article II. In two centuries of constitutional history exercised on a number of occasions, and has been recognized, I think, by most authorities. It has been the consistent view of the Department of State and the executive branch that the President has that authority.

PRECEDENTS FOR PRESIDENTIAL TERMINATION OF TREATIES WITHOUT TERMINATION PROVISIONS

The CHAIRMAN. Well, we have been given a good deal of scholarly opinion to the contrary. The committee has been referred to any number of cases where the Congress has acted to terminate treaties with the concurrence of the President.

Can you cite a case where the President has terminated a treaty that did not contain a provision relating to termination, and without the concurrence of the Congress?

You heard Senator Goldwater examine, or analyse, the 12 cases the State Department had presented and said that there were extenuating circumstances in those cases and, therefore, they were not valid as precedents for the proposition that you put to us this afternoon.

Mr. HANSELL. I did hear that, Mr. Chairman, and I welcome the opportunity to refute that comment. In the memorandum which we have submitted for the record, and also in the brief filed with the district court, are identified a number of instances of Presidential termination. In my statement, if you will turn to pages 6, 7, 8, 9, and 10, you will see there listed statements by a group of eminent constitutional and international law scholars, such as Professor Henkin, Professor McClure, Dr. Byrd of Maryland, Professor Tribe of Harvard, Professor McDougal of Yale, Professor Nelson of Southern Illinois, Professor Reeves of Michigan, Professor Willoughby of Johns Hopkins, and quotations from their works on this issue.

We did not include in my statement, but there have been included in the memorandum I have submitted for the record, the dozen instances to which Senator Goldwater referred. I do have to say to you, without any reflection on the scholarship of his staff, that his characterization can only be described as erroneous.

Let me identify some of those for you, Mr. Chairman, if I may, because I think in answer to your question I can quickly enumerate the treaty terminations that would respond to your question.

I will identify very hastily the cases listed in the memo, and then those that I can recall which were treaties that did not have a termination notice provision.

In 1815, President Madison terminated the Treaty of Amity and Commerce with the Netherlands; in 1899, President McKinley terminated certain articles of the Extradition, Friendship, and Commerce Treaty with Switzerland; in 1920 — and this one I am quite sure was a treaty that had no termination clause — President Wilson terminated a Treaty of Amity, Commerce and Navigation with Belgium. These were all instances where there was Presidential action only.

In 1927, President Coolidge gave notice of termination of the 1925 treaty with Mexico on the prevention of smuggling. In 1933, President Roosevelt issued notice of withdrawal from the Multilateral Convention for the Abolition of Import and Export Prohibitions and Restrictions. In 1933 President Roosevelt gave notice of termination of the Extradition Treaty with Greece. In 1936, President Roosevelt terminated the 1871 Treaty of Commerce with Italy. In 1939, President Roosevelt terminated a 1911 Treaty of Commerce and Navigation with Japan. In 1944, President Roosevelt terminated the Inter-American Convention for Trademark and Commercial Protection.

In 1954, President Eisenhower gave notice of withdrawal from the 1923 Convention on the Uniformity of Nomenclature for the Classification of Merchandise.

In 1962, President Kennedy terminated the 1902 Convention on Commercial Relations with Cuba. In 1965, President Johnson gave notice of denunciation of the 1929 Warsaw Convention Concerning International Air Travel, which subsequently was withdrawn contrary to the request of a number of members of this body.

As I said, I am clear about one of those cases, but would have to check the others again, as to whether or not there was a provision for notice of termination.

The CHAIRMAN. Senator Javits?

Senator JAVITS. Thank you, Mr. Chairman.

Mr. Hansell, you don't have to answer any of these questions orally now. Just take them away and think about them. Have a home examination.

It seems to me that we need to know the following.

EFFECT OF PASSAGE OF SENATE CONCURRENT RESOLUTION 2

If we passed Senate Concurrent Resolution 2 and the House passes it, and the President vetoes it, which we must assume, as he may do that, and we passed it over his veto, it then becomes law. Now, having passed the law contained in this bill, would the President thereafter be able to terminate a treaty according to its terms?

Mr. HAMMOND. Excuse me, Senator, are you referring to Senator Goldwater's resolution?

Senator JAVITS. I am referring to the resolution introduced by Senator Goldwater, Senate Concurrent Resolution 2.

Mr. HAMMOND. That is a concurrent resolution, I believe, and is not subject to the President's consideration or to his veto.

Senator JAVITS. OK, let's leave out the concurrent resolution. Suppose we passed Senate Joint Resolution 2, and it was passed over the President's veto, that is, he had vetoed it. Would he, in your opinion, thereafter, have the power to terminate a treaty, except according to the terms of the law which we have passed?

That is the real \$64 question to me. Frankly, I don't think we can do anything about the past, including the PRC. But that doesn't solve it at all. That's not even why it was raised.

That is why I said you don't have to answer this now.

Mr. HANSELL. Senator, I think I would like to accept your invitation not to do so for the reason that you have posed a hypothetical issue which we prefer, for a good many reasons, not to try to speculate about. But I understand the serious interest of the Committee in the question and with your permission, I would like to take it and consider how we might respond to it.

Senator JAVITS. Might I ask you to do this hurriedly and quickly. We don't want you to go away under any false impression. There is really nothing hypothetical about it because we can report out a joint resolution instead of a concurrent resolution. There is nothing to stop us from doing that at all. On the contrary, I am sure that the sponsors would be very pleased to do this.

That is a very pertinent question.

[The information referred to follows:]

CAN THE CONGRESS BY LAW PROHIBIT THE PRESIDENT FROM TERMINATING EXISTING OR FUTURE TREATIES WITHOUT CONGRESSIONAL CONCURRENCIES?

[supplied by Department of State]

In our judgment, a statute purporting to prohibit the President from terminating existing or future treaties without Congressional concurrence would be unwise as a matter of policy, would raise serious Constitutional questions, and would be in conflict with a Constitutional practice that has worked successfully for nearly 200 years.

As a matter of policy, it would be unwise to weaken in this fashion the President's power to conduct foreign policy, and in any event such legislation would be unworkable more often than not. There are many situations in which the President must make determinations and findings of fact that will result in a termination of a treaty, or its suspension or in a withholding of performance.

The President must decide whether there has been a material breach by the other party justifying responsive action, or whether armed conflict or other emergency indicates a termination or suspension. There may have been a fundamental change in the circumstances relied upon in the making of the treaty, and this too must be determined by the President.

The President must decide whether a treaty has become impossible to perform, and whether a treaty has been fully executed or has become obsolete. The President will have to decide whether a change in the legal status of one of the parties will necessitate termination, and he will have to make decisions regarding the effect of the formation of a new State, or the severance or suspension of diplomatic relations with an existing State.

Even aside from these determinations, which must be made by the President, it would not be wise to weaken the President's option of using the possibility of treaty termination in his bargaining with other nations, or to use treaty termination as an incident to recognition. In addition, the other party to a treaty

may wish to terminate, even without a termination provision, and the President should be in a position to respond through executive action.

As a matter of law, we believe that legislation of this kind would raise serious Constitutional questions. In our view, treaty termination is a Presidential power under article II, Section 1, of the Constitution.

Article II deals with the executive power and provides in pertinent part that "The executive power shall be vested in a President of the United States of America . . ." and that "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . .". Article II confers the executive power in general terms, strengthened by specific provisions where emphasis was appropriate, and limited by direct constraints where limitation was intended. No express constraint was placed on the termination of treaties, nor was any express power with respect to treaty termination granted to Congress. The Senate role of advising and consenting in the making of treaties is, therefore, not an independent source of legislative power but is, instead, a limitation upon the treaty-making power granted to the President. Such limitations upon the general grant of executive power are to be strictly construed and not extended by implication. *Myers v. United States*, 272 US 52, 164 (1926); 1 *Annals of Congress*, 462-64, 496 (1789). Cf., *Sutherland*, 2A *Statutory Construction* §47.08 (1973).

The great majority of modern Constitutional and international law authorities and scholars who have addressed the issue support the power of the President, acting alone, to terminate treaties. Many of these authorities have been cited in the memorandum from the Legal Adviser to the Secretary of State dated December 15, 1978. The legal scholars speak in sweeping terms. Thus Professor Laurence Tribe of Harvard Law School states that "the President . . . has exclusive responsibility for . . . terminating treaties". Professor Henkin of Columbia Law School states that the Senate has no "authoritative voice in interpreting a treaty or in terminating it". Professor McDougal of Yale Law School states that "termination [of treaties] may be effected by executive denunciation, with or without prior Congressional authorization". Professor Reeves of Michigan, writing as long ago as 1921, stated that the President may give notice of termination of a treaty "on his own motion without previous Congressional or Senatorial action" and that "the President cannot be forced by Congress or by the Senate to perform the international act of giving notice".

Practice and precedent also confirm the President's power to terminate treaties. The Department of State analysis of US treaty termination practice shows that there have been 25 instances of Presidential action to terminate treaties throughout the nation's history. The President acted alone on 12 occasions, and there was some form of prior or subsequent Congressional action in 13 cases. Most of the 12 cases of Presidential termination without action by Congress occurred in the 20th century. The details are set forth in the Legal Adviser's memorandum of December 15, 1978.

It is important to note that in the modern era, that is, the last 60 years, no effort has been made by Congress to interpose a Constitutionally based objection to the President's unilateral treaty termination action. This has been true even when the Senate focussed directly on a treaty termination, such as President Johnson's 1965 notice of withdrawal from the 1929 Warsaw Convention on air travel.

It should also be noted that several of the cases of termination action by the President acting alone involved important treaties. In addition to the Warsaw Convention case, there was also President Kennedy's notice of termination of the 1902 Commercial Treaty with Cuba, President Roosevelt's 1939 notice of

termination of the 1911 Commercial Treaty with Japan, President Roosevelt's 1933 notice of termination of the 1931 Extradition Treaty with Greece (the notice was subsequently withdrawn), and President Coolidge's 1927 notice of termination of the 1925 Treaty with Mexico on the Prevention of Smuggling.

Finally, our history demonstrates that there is no need for such legislation. As noted in the Legal Adviser's statement, there has been a remarkable degree of harmony and accommodation between the Executive and legislative branches on the issue of treaty termination. Some treaties have been terminated by the President acting alone, and some with Congressional action, but there have been very few instances of disagreement by one branch with action taken by the other. Our Constitutional practice of accommodation has worked successfully for nearly 200 years, and there is no need to tamper with it now.

27. REFERENCE TO INTERNATIONAL COURT OF JUSTICE OF DISPUTES UNDER
TRUSTEESHIP AGREEMENT FOR JAPANESE MANDATED ISLANDS

Recommendation :

1. The United States should not take the initiative to propose a provision in the trusteeship agreement for the Japanese mandated islands which would require reference to the International Court of Justice of disputes arising under the agreement.

2. If the inclusion of such a provision is supported by other delegations, the United States should take the position that :

a. The United States by its declaration of compulsory jurisdiction has already accepted a substantial obligation to refer disputes arising under the trusteeship agreement to the Court; and

b. The United States would have no obligation to the inclusion of such a provision in the trusteeship agreement so long as it contain a proviso to the effect that it was "subject to any limitations and conditions contained in the declarations of the respective members under Article 36 of the Statute of the Court".

3. The United States should oppose the inclusion of any provision which would impose upon it any obligation to accept jurisdiction of the Court which goes beyond the Senate approved declaration accepting jurisdiction of the Court on behalf of the United States.

Discussion :

The trusteeship agreement submitted by New Zealand to the General Assembly contains the following provision (Article 16) :

"If any dispute should arise between the administering authority and another member of the United Nations, relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or similar means, shall be submitted to the International Court of Justice."

Similar provisions are contained in the other trusteeship agreements submitted to the General Assembly, some providing "If any dispute *whatever* . . .". Also, the terms of the Japanese mandate confirmed by the Council of the League of Nations for the islands included a similar provision as an obligation of the mandatory.

The obligation that such a provision would impose upon the United States as the administering authority of the former Japanese mandated islands exceeds, in certain respects which are discussed below, the obligation of compulsory jurisdiction accepted by the United States on the basis of a resolution approved by two-thirds vote of the Senate.

a. It is assumed that the above provision would require submission of disputes either by the administering authority or by another member of the United Nations which is a party to the dispute. The provision would, on

this assumption, satisfy the requirement of reciprocity which is one of the features of the Senate resolution.

b. It is not entirely clear whether the above provision would require the submission to the Court of disputes which are essentially within the domestic jurisdiction of the administering authority.

On the one hand, it may be contended that the provision is not intended to require such submission in view of the absence of any specific reference to a waiver of the immunity expressed in the principle of Article 2, Paragraph 7, of the Charter that nothing in the Charter shall require the members to submit matters essentially within their domestic jurisdiction to settlement under the Charter. By such reasoning it would be concluded that whether or not a dispute involved the interpretation or application of the trusteeship agreement, such dispute, if it is essentially within the domestic jurisdiction of the administering authority, is not required to be submitted to the Court for decision.

On the other hand, it may be argued that by means of the above provision (especially when the phrase "any dispute *whatever*" is present), the administering authority has consented to the compulsory jurisdiction of the Court in all cases regardless of the principle of Article 2, Paragraph 7. Alternatively, it may be argued that by the inclusion of the above provision in the trusteeship agreement, it is recognized that any matter relating to the interpretation or application of the trusteeship agreement is not a matter which is essentially within the domestic jurisdiction of the administering State and is therefore properly to be referred to the Court.

The Senate resolution relative to the acceptance of compulsory jurisdiction of the Court contains a proviso that the declaration shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States*". It is quite possible that the United States will regard certain matters which may be the subject of disputes arising under the trusteeship agreement as being essentially within its domestic jurisdiction, even though such disputes may involve the interpretation or application of the trusteeship agreement. In any event, there would appear to be no doubt that the obligation which would be imposed on the United States by the above provision, regardless of the interpretation given to it, would not contain the limitation which is present in the phrase "as determined by the United States". In view of the action by Congress imposing this particular limitation, it would be unwise for the Executive to accede to an obligation of compulsory jurisdiction in the case of the Japanese mandated islands which does not contain this limitation.

c. If the trusteeship agreement is to be of a bilateral character, between the United States and the Security Council, the agreement would not be enforceable in the Court unless, as seems probable, the Court would recognize suits by other Members of the United Nations for the purpose of enforcing their rights under the agreement. If the Security Council alone were competent to enforce the agreement against the United States, no dispute could be adjudicated by the Court inasmuch as the Security Council may not be a party before the Court and the only legal remedy of the Security Council would be to request an advisory opinion from the Court.

If other members of the United Nations are permitted to enforce their rights against the United States under the trusteeship agreement directly in the Court, the agreement would in this respect resemble a multilateral agreement. In such case, it should be noted that the Senate resolution provides that the declaration

of compulsory jurisdiction shall not apply to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction". Even though the trusteeship agreement may not be a "treaty", it is doubtful whether the principle in this proviso was intended by Congress to apply only to treaties and not to executive agreements, since breaches of obligations under both come equally within the compulsory jurisdiction accepted in the declaration. The acceptance of the New Zealand type provision would therefore appear to constitute an agreement to jurisdiction of the type excepted in the proviso in the absence of special agreement. The type of provision which is recommended in this paper would permit as a limitation upon the agreement of the United States to jurisdiction of the Court over disputes arising under the trusteeship agreement, the requirement that all parties affected by the decision must also be parties to the case before the Court.

CERTIFICATION

I, the undersigned, Davis R. Robinson, Agent of the United States of America, hereby certify that each document submitted by the United States of America pursuant to Article 56 of the Rules of Court is an accurate translation, transcription, reproduction, or representation.

(Signed) Davis R. ROBINSON,
Agent of the United States
of America.
