ITSSD
INSTITUTE FOR TRADE, STANDARDS, AND SUSTAINABLE DEVELOPMENT

April 24, 2009

Hon. John F. Kerry, Chairman
U.S. Senate Committee on Foreign Relations
Dirksen Senate Office Building, Room 446
Washington, DC 20510

Hon. Richard G. Lugar, Ranking Member
U.S. Senate Committee on Foreign Relations
Dirksen Senate Office Building, Room 423
Washington, DC 20510

Dear Chairman Kerry and Ranking Member Lugar:

The nonprofit Institute for Trade, Standards and Sustainable Development (ITSSD) appreciates the opportunity to express to you and your fellow committee members its serious concerns about the nomination of Harold Koh to serve as the next Legal Adviser to the United States Department of State. Please find attached a discussion of our reservations, along with substantive references for your review and careful consideration.

While the President and the Secretary of State reserve the right to select the individual from whom they will secure legal advice, the role of the Legal Adviser is considerably broader. Not only does the Legal Adviser represent the interests and convey the views of the United States on various international law issues throughout the world, but the Legal Adviser also performs other functions which may include: a) representing the United States at international organizations and treaty secretariats; b) representing the United States before international tribunals, including the International Court of Justice; c) negotiating, drafting and interpreting treaties; and d) developing and interpreting new international law.

We thank you for your serious consideration of our concerns.

Respectfully,

Lawrence A. Kogan

Lawrence A. Kogan
CEO/President

P.O. Box 496
Princeton Junction, NJ 08550-9998
Email: info@itssd.org
Phone: 609-658-7417
Fax: 609-897-9598
Website: www.itssd.org

ITSSD Concerns About the Nomination of Harold Koh As the Next Legal Adviser to the US Department of State

The following discussion provides evidence of three of Harold Koh's views on international law that would arguably threaten US legal, political and economic sovereignty, US individual rights and US national security.

1. ***"There is still time for the United States Supreme Court to…tip more decisively toward a transnationalist jurisprudence."*** [1]

Apparently, Harold Koh, in his own words, helps us all by explaining what he means by 'transnationalism'.

> *"[T]transnational jurisprudence assumes America's political and economic interdependence with other nations operating within the international legal system…Domestic and international processes and events will soon become so integrated that we will no longer know whether to characterize certain concepts as local or global in nature…[O]ne prominent feature of a globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international…[D]omestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law, not simply to promote American aims, but to advance the broader development of a well-functioning international judicial system.'"* [2]

> *"What is the core of the transnationalist philosophy? Justice Blackmun put it well in an opinion he wrote in the Aerospatiale case in 1987. He said, U.S. courts must look beyond national interest to the 'mutual interests of all nations in a smoothly functioning international legal regime,' and U.S. courts must 'consider if there is a course that furthers, rather than impedes, the development of an ordered international system.' By so saying, he suggested that American judges should not simply worry about the United States of America, they should render rulings that are consistent with the development of an orderly international legal regime."* [3]

> *"[Transnational legal process] can be viewed as having three phases. One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set... The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those*

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Princeton Junction, NJ 08550-9998
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Fax: 609-897-9598
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> *norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process."* [4]

At least one legal commentator, a former law clerk to Supreme Court Justice Antonin Scalia, has explained the logical implications of Harold Koh's theory on transnationalism: the strengthening of transnationalism will inevitably weaken American exceptionalism and the authority of the US constitution and the protections it and its Bill of Rights guarantees to US citizens, by treating international law as superior to and as part of the US constitution and US federal law. "Transnationalism' challenges the traditional American understanding that… 'international and domestic law are distinct, [the United States] determines for itself [through its political branches] when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law.' Transnationalists aim in particular to use American courts to import international law to override the policies adopted through the processes of representative government…What transnationalism, at bottom, is all about is depriving American citizens of their powers of representative government by selectively imposing on them the favored policies of Europe's leftist elites."[5]

According to another legal scholar, "Many academics are even more enthusiastic and explicit about using international law to ensure that judicial interpretations of the U.S. Constitution reflect the values of the wider world community. *Dean Harold Koh of Yale Law School has heralded the death of 'nationalist jurisprudence,' and has suggested that the time is near when 'transnational legal process' will regularly provide precedents to move our own law closer to that embraced by other nations"* (emphasis added).[6]

2. ***"The Vienna Convention is a self-executing treaty – it needs no domestic legislative action to render it enforceable as U.S. law".*** [7]

> *"If our international allies have no assurance that we're actually going to keep our word, then they have much less incentive to keep their word when they're being obliged to do something."* [8]

It is quite interesting, given Harold Koh's nomination as the next State Department Legal Adviser, that the sole evidence cited by Mr. Koh within his amicus brief was a statement *not likely made under oath* by a former State Department Legal Adviser that "the Convention was entirely self-executing…and did not require…implementing legislation to come into force." [9] At least one legal commentator has noted how "Koh's academic writings frequently give important legal weight to the positions taken by the State Department legal adviser and by the Solicitor General. If appointed State Department legal adviser, Koh would be closely counseling the Solicitor General on the positions that the United States should take in the courts on questions of international law. Koh himself has highlighted how the 'skill and maneuvering of particular well-positioned individuals…serving as key institutional chokepoints,' can have inordinate influence on American positions on international law."[10]

This reliance upon a named public/political figure, without more, furthermore, is also symptomatic of the transnationalist culture that Mr. Koh would like to import into the United States. Indeed, at least one legal commentator has noted how Harold Koh has referred to the process pursuant to which the Vienna Convention on Consular Relations had been codified and had entered into force as reflecting "transnational process". [11] According to another legal commentator, the natural consequence of this view is the "treat[ment] of ICJ interpretations of US treaty obligations as judgments binding on all domestic U.S. courts, including the U.S. Supreme Court. In this way, the *Medellin* case represents an important first step in bringing a 'new world court order' to the U.S." [12]

The US Supreme Court's ruling in the *Medellin* case, which runs counter to Mr. Koh's view,[13] was that the Vienna Convention on Consular Relations did *not* automatically have effect as domestic law (i.e., it was *not* 'self-executing' – rather, the treaty's legal domestic effect required some affirmative act by either the legislative (i.e., enactment of domestic implementing legislation) or executive branch.), such that it "displaced the role of the House of Representatives in making domestic legislation". The Supreme Court's Majority ruled that the US constitution, through separation of powers, places clear limitations upon the President's power to unilaterally enforce non-self-executing treaties as if they were self-executing, especially where the President and the Congress had not addressed the issue at the time the treaty was signed and ratified – thus, giving deference to the presumption against self-executing treaties. Consequently, a treaty must convey an intention that it is self-executing, *and* it must be ratified on those terms.

Were Harold Koh's view of international law to prevail as matter of US policy in the State Department, it is easy to see how the United States would, in turn, view the United Nations Convention on the Law of the Sea (UNCLOS), and how it would, as a result, fall subject to the pressures and influence of the international community. For example, Justice Stevens, in his dissenting opinion in *Medellin*, contrasted the non-self-executing nature of the treaties reviewed in *Medellin* with the 'self-executing' nature of the UNCLOS – in particular Annex VI, Article 39, the text of which expressly provides for the incorporation of International Seabed Disputes Chamber decisions within U.S. federal domestic law.[14] However, in doing so, Justice Stevens conveniently sidestepped, as one scholar has noted, the complex issue that a future congress would, no doubt, face – namely, how to draft UNCLOS implementing legislation that restricts and conditions the application of UNCLOS Annex VI, Article 39 without also being construed as a violation of UNCLOS Article 309, which prohibits any reservations and exceptions that could be read to nullify any non-self execution declaration[15] Apparently, the UN General Assembly's recent March 2008 resolution 62/215 has opined concerning how the US must act.[16] Indeed, upon US accession to the UNCLOS, UNCLOS Article 39 of Annex VI of the UNCLOS would expressly require the US government to ensure that US domestic courts enforce the decisions of the Seabed Disputes Chamber "in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought" [17]

At least one legal commentator has argued that the self-executing effect of Article 39 of Annex VI arguably presents a potentially serious constitutional conundrum the resolution of which may likely require congressional or presidential action:

> "[T]his provision appears to require U.S. courts to give more than 'full faith and credit' to judgments of this international chamber. Rather, it requires a U.S. court to treat such chamber decisions as equivalent to those of the U.S. Supreme Court. As far as I know, no prior treaty has ever committed the U.S. in quite this emphatic way."[18]

Since the U.S. federal courts would be bound (i.e., would lack the discretion not) to enforce the decisions of the Seabed Disputes Chamber pursuant to Article 39 of Annex VI, the U.S. constitution's Article III allocation of judicial power to U.S. federal courts, including the U.S. Supreme Court, could conceivably be threatened (impaired).[19] However, it is also quite possible that Article 39's self-executing effect (i.e., the UNCLOS' requirement that U.S. federal courts enforce Seabed Disputes Chamber decisions as a matter of U.S. law) would conceivably vest such courts with an "excessive delegation of judicial power under Article III" which, in turn, would effectively be handed off to the Seabed Disputes Chamber. The problem, as this legal commentator explains, is that such excess delegation could not be readily addressed. One possible solution would be for the Senate to attach a declaration to its advice and consent papers stating that this provision is non-self-executing, as the former Bush administration would have liked. However, the Congress would subsequently need to pass legislation implementing the declaration, and this is likely to be construed by other treaty parties as an impermissible 'treaty reservation' that nullifies the very provision in question. And, Congress would still have to figure out some constitutional way to ensure that federal courts enforce an adverse ITLOS judgment.[20]

In the opinion of this commentator, the best way to prevent activist U.S. Federal Courts from exercising excessive Article III authority (i.e., from enforcing, in rubber-stamp fashion, without sufficient foreign policy knowledge and experience the decisions of the UNCLOS Seabed Disputes Chamber) would be to subject U.S. Federal Court authority to the review and approval of the politically accountable branches of the U.S. government – namely, the U.S. President or the Congress.[21] U.S. Federal Courts should recognize this political override authority through resort to *the judicial nondelegation doctrine*. In other words, U.S. Federal Courts would recognize that the President (or Congress) must expressly and clearly authorize a U.S. Federal Court's delegation of Article III powers to an international tribunal by means of executive order (or implementing legislation).[22]

> Such a clear statement requiring judicial enforcement can be expressly provided by the treaty. Alternatively, a clear statement might be found in congressional legislation implementing the treaty, or in an executive order made by the President. *Applying the nondelegation doctrine* [...] *sharply limits, but does not*

eliminate the independent role of domestic courts in deciding how and whether to comply with international tribunal judgments." [23]

This approach appears logical and consistent with the Supreme Court Majority decision in *Medellin*, considering that it is the President of the United States who ultimately possesses the plenary authority, subject to the Treaty Power of the Congress, to conduct foreign affairs on behalf of the nation pursuant to Article II, Section 2, Clauses 1 and 2 of the U.S. Constitution.[24] Yet, depending on the political and policy leanings and proclivities of the U.S. President in office at the time an international tribunal renders an adverse decision against the United States, it may also effectively subject the U.S. constitution and U.S. federal law to override by international law and institutions.

3. *"I believe…that it would be a mistake for our country to attack Iraq without explicit United Nations authorization…I believe such an attack would violate international law."* [25]

According to a recent *Newsweek* article, Mr. Koh's statement "raises the interesting question of whether Koh, as the State Department's lawyer, would try to stop the unilateral use of force by the Obama administration—an armed intervention in, say, Pakistan that lacked U.N. backing." [26]

We should clearly state at the outset of this discussion that, although the US government ultimately took action contrary to Mr. Koh's views, that action was *not* per se illegal, as a matter of international law. This conclusion would apply similarly to future military actions in Pakistan that are authorized by President Obama.

Arguably, Mr. Koh's statement above reflects his view that it was not enough for the United States to have shown good faith by working laboriously through the United Nations (UN) Security Council to craft a politically acceptable resolution (unanimously adopted SC Res. 1441[27]) to preserve international peace and security. Despite the international resolution's nuanced and subtle text, it indisputably: 1) required Iraq to disarm itself of WMDs; 2) subjected Iraq to regular UN weapons inspections and monitoring; 3) provided triggering events that would enable the determination that Iraq had committed a 'material breach' of its international obligations imposed by the resolution; 4) warned Iraq that it would face 'serious consequences' as a result of its continued violation of and noncompliance with its resolution obligations; and 5) should have been enforced by the Security Council when UN weapons inspector reports revealed a 'further material breach'. Apparently, Mr. Koh's statement evidences a preference for leaving nothing to interpretation or State practice, notwithstanding the fact that legal scholars have discussed the legitimacy/legality of this approach to interpreting Security Council resolutions. Let us be clear where Mr. Koh is not: Mr. Koh prefers a classic textual treaty interpretation approach,[28] and disfavors a purposive-legal realist treaty interpretation approach [29] that is consistent with customary international law [30] and supportive of the long-held doctrines of

implied authorization[31] and 'material breach'[32] that have been relied upon to protect US national interests.

It would appear, furthermore, that Mr. Koh's statement reflects the view that the United States should have been denied its inherent customary international law right of individual or collective self-defense,[33] which is separate and apart from the authority of the Security Council under the 'security umbrella' of Chapter VII to authorize the use of force in order to maintain international peace and security; this right cannot be withheld from it.[34] Were Mr. Koh Legal Adviser during 9/11 and the 2002 Security Council proceedings, he would have unilaterally surrendered the customary international law right of the US to act unilaterally to defend itself to the provisions of the UN Charter – specifically Article 2(4). Article 2(4) imposes a general prohibition against the 'use of force', subject to the often narrowly construed exception of 'self-defense' contained with UN Charter Article 51.[35] Surely, Mr. Koh, as a legal scholar, is familiar with the work of the UN International Law Commission. It has concluded that "Article 51 of the United Nations Charter preserves a State's "inherent right" of self-defense in the face of an 'armed attack' and forms part of the definition of the obligation to refrain from the threat or use of force, set forth in Art. 2(4) of the UN Charter."[36] Consequently, a State exercising its inherent right of self-defense, pursuant to Article 51 of the UN Charter, is not even potentially, in breach of Article 2(4). This conclusion is shared by at least one legal commentator who has argued that the inherent right of self-defense against an 'armed attack' would continue to apply [even] where the Security Council does not act (i.e., to enforce a resolution), or it becomes "generally incapable of acting".[37] Lastly, Mr. Koh's views run counter to the political will of the country, as reflected in the Congress during 2002, which resulted in a bipartisan political decision, in the form of a resolution, that legally authorized the 2003 invasion of Iraq, otherwise known as the 'Authorization for Use of Military Force Against Iraq Resolution 2002'.[38]

4. *Conclusion*

Taking all of the above into account, the ITSSD therefore believes that Mr. Koh's opinions are far outside the norm and represent a radical shift from the positions taken by past administrations – both Democratic and Republican.

As at least one legal scholar has noted, "Harold Koh in fact would like to cabin American exceptionalism through the use of transnational materials to assure that American principles would cohere more with the rest of the world." [39] And another legal scholar has emphasized how ["Koh] is all about depriving American citizens of their powers of representative government by selectively imposing on them the favored policies of Europe's leftist elites. Koh is a leading advocate of transnationalism. Further, on the spectrum of transnationalists, ranging from those who are more modest and Americanist in their objectives and sympathies to those who are more extreme and internationalist (or Europeanist), Koh is definitely in the latter category."[40]

Some in the media, as well, have concluded that Mr. Koh's "rather abstruse views on what he calls 'transnational jurisprudence' deserve a close look because—taken to their logical

extreme—they could erode American democracy and sovereignty." [41] And, remarkably, they have admitted that even "conservatives have a point that Koh and the other 'transnationalists' are using their legal theories to advance a political agenda. The international legal norms they wish to inject into American law by and large reflect the values of Social Democratic Europe and liberal American academics…" [42]

Considering, therefore, the international scope of the duties with which the Legal Adviser is charged, including the protection and defense of the constitutionally guaranteed rights of American citizens and the interests of American institutions, and the growing breadth and influence of, and threat posed by international laws and institutions to US sovereignty, this committee must ensure that the views of any nominee for the position of Legal Adviser will promote policies that preserve U.S. national security prerogatives, self-governance, and constitutional principles while defending American values from encroachment by transnational actors.

The ITSSD is deeply concerned that many of Harold Koh's long-held opinions do not measure up to such a standard. Hence, the ITSSD respectfully urges you to reject his nomination for this critical position.

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[1] *See* Harold Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1525 (2003).
[2] *See* Harold Koh, "International Law as Part of Our Law," 98 Am. J. Int'l L. 43, 52-54 (2004); Harold Koh, "The Globalization of Freedom," 26 Yale L.J. 305 (2001)).
[3] *See* Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 Tulsa J. Comp. & Intl. L. 1 (2004).
[4] *See* Harold Koh, *Why Do Nations Obey International Law?* 106 Yale L.J. 2599, 2626 (1997).
[5] *See* Edward M. Whalen, "Harold Koh's Transnationalism", National Review Online Bench Memo (April 20, 2009), at: http://bench.nationalreview.com/post/?q=NGVmODZhNDE5NWM4ZDAyZDhhZjdhZDU1NTQ3ZjliNTE=; Ethics and Public Policy Center website at: http://www.eppc.org/publications/pubid.3793/pub_detail.asp.
[6] *See* John O. McGinnis and Ilya Somin, "Should International Law Be Part of Our Law?, 59 Stanford Law Review 1175, 1187 (2007), accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=790945.
[7] *See* Harold Koh, Counsel for *Amici*, "Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner", in *Medellin v. Texas*, at p. 13, at: http://www.cjlf.org/briefs/Medellin2007/Brief%20of%20Former%20U.S.%20Diplomats.pdf .
[8] *See* Statement of Yale Law School Dean Harold Koh *in* Nina Totenberg, National Public Radio, "High Court Rejects Bush Assertion on U.S. Treaties", National Public Radio (March 26, 2008) at: http://www.npr.org/templates/story/story.php?storyId=89100044 ; http://www.npr.org/templates/player/mediaPlayer.html?action=1&t=1&islist=false&id=89100044&m=89100000 . "Many U.S. diplomats were dismayed. Yale Law School Dean Harold Koh, who served as a State Department official in the Clinton administration, said the decision would create havoc in diplomatic circles for some time to come. 'If our international allies have no assurance that we're actually going to keep our word, then they have much less incentive to keep their word when they're being obliged to do something.'" *See* Nina Totenberg, "All Things Considered: States Not Subject to All Treaties, High Court Rules" (NPR radio broadcast Mar. 25, 2008), at: http://www.npr.org/templates/story/story.php?storyId=89064847 .
[9] *See* Harold Koh, Counsel for *Amici*, "Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner", *supra* at fn 9, at pp. 13-14.

[10] *See* Harold Koh, "On American Exceptionalism,'" *supra* cited in Edward Whalen, "Harold Koh's Transnationalism", *supra*.
[11] *See* Janet Koven Levit, "Medellin v. Dretke: Another Chapter in the Vienna Convention Narrative", 41 Tulsa Law Review 193, 215 (2005), accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944118 .
[12] *See* Julian Ku, "International Delegations and the New World Court Order," 80 Washington Law Review 101, 166 (2005), accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879237 .
[13] Professor Koh is on the record as stating: "Many scholars *question persuasively* whether the United States declaration [that a particular treaty was not self-executing] has either domestic or international legal effect" (emphasis added). *See* Harold Koh, "Is International Law Really State Law?," 111 Harv. L. Rev. 1824, 1828-1829 n. 24 (1998).
[14] Concurring, Slip Op at p. 2.
[15] *See* Julian Ku, "International Delegations and the New World Court Order, *supra* at p. 165.
[16] *See* G. A. Res. A/RES/62/215, Oceans and the Law of the Sea (March 14, 2008) at Preamble, par. 5.
[17] UNCLOS Annex VI, Article 39, (The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought).
[18] See Julian Ku, "Why the Law of the Sea Treaty (Annex VI, Art. 39) Is Unconstitutional," OPINIO JURIS (May 16, 2007), http://opiniojuris.org/2007/05/16/why-the-law-of-the-sea-treaty-annex-vi-art-39-is-unconstitutional.
[19] *Id.,* (Other commentators have taken issue with this interpretation of Annex VI, Article 39 exampled in section "Response of Tobias Thienel"); *See also* Julian Ku, "International Delegations and the New World Court Order", *supra* at 154.
[20] *See* Julian Ku, "International Delegations and the New World Court Order", *supra* at p. 165.
[21] *Id.*, at 166-169, ("Forcing the political branches to clarify their intentions about judicial enforcement prevents them from avoiding responsibility for the consequences of an international tribunal's judgment…Political legitimacy is another related justification for the clear statement rule. By taking courts out of the enforcement process absent the clearest statement by a political branch, the political legitimacy of international tribunal judgments becomes enhanced. Why? Because rather than relying on domestic courts to enforce their judgments, international tribunals will have the imprimatur of Congress or the President for their judgments . . . By relying on the political branches to bring the U.S. into compliance with international obligations, courts ensure that the political branches have made the determination to comply with the international tribunal judgment . . . Finally, a super-strong clear statement rule shifts the decision on compliance with an international tribunal judgment to the institutions of the government with the greatest expertise in foreign affairs: the executive and legislative branches")(emphasis added).
[22] *See* Julian Ku, *International Delegations and the New World Court Order*, supra note 95 at 107, 145-147.
[23] *Id.,* at 107-108 (emphasis added).
[24] U.S. Con. Art. I, Sec. 8, 10 (Congress retains the authority to regulate commerce with foreign nations).
[25] *See* Harold Hongju Koh, "A Better Way To Deal With Iraq", Commentary, Yale Law School (Oct. 21, 2002) at: http://www.law.yale.edu/news/4407.htm, appearing within the *Hartford Courant*, October 20, 2002.
[26] *See* Stuart Taylor, Jr. and Evan Thomas, "The Long Arm of the Law", Newsweek (April 18, 2009), at: http://www.newsweek.com/id/194651 .
[27] SC Res. 1441 (2002), 4644th mtg., SC/7564, 11/8/02. The Provisional (text -draft) Res.1198 was submitted by the United Kingdom of Great Britain and Northern Ireland and the United States of America to the Security Council on November 5, 2002. *See* S/2002/1198. The 15-member Security Council (including nonpermanent member Syria – the most likely member to have abstained or voted against the resolution) unanimously adopted the provisional text as new S.C. Res. 1441 during the morning hours of November 8, 2002; "The latest American text was a product of eight weeks of intense lobbying by the Bush administration. It signaled significant progress and included major concessions to Security Council members concerned about setting off another war in Iraq". *See* "U.S., France Agree on New Iraq Resolution", The Atlanta Journal-Constitution, reported by the Associated Press, 11/8/02, at: http://www.accessatlanta.com/ajc/news/1102/08iraq.html .

[28] The classic textual interpretation of any Security Council resolution, including Resolution 1441, is based on a hierarchy of interpretative rules and an understanding of all of the circumstances surrounding its adoption. One of the very few authoritative sources on how to interpret Security Council resolutions is contained with a passage that appears within the International Court of Justice's Namibia Advisory Opinion: "The language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council". *See* "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1971)" I.C.J. Reports 15 at 53, *cited in*: Michael Byers, "The Shifting of International Law: A Decade of Forceful Measures Against Iraq" (2002), at p. 2, at: http://leda.law.duke.edu/leda/data/8/IRAQrtf.html . As one legal commentator has noted, "[this] passage suggests an approach to interpretation similar to that set out in Articles 31 [and 32] of the Vienna Convention on the Laws of Treaties". *See* Byers, *supra* at p. 2. Article 31(1), for example, "provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'". 1155 United Nations Treaty Series 331 (1969). This approach presumes that treaty parties "had an original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired according to its terms or been replaced by mutual consent." *See* Byers, *supra*, at p.4.

[29] The process by which State behavior rises to the level of 'State Practice' and 'Opinio Juris' to create customary international law, appears to closely resemble the 'purposive' and 'legal realist' approaches to treaty interpretation. *See* Byers, *supra* at p. 4. The 'purposive' approach "emphasize[s] a comprehensive examination of the context of [a] treaty aimed at ascertaining the common will of the parties, as that common will has evolved over time". *Id*., at p. 3. Similarly, the 'legal realist approach' "regard[s] explicit and implicit agreements, formal texts, and state behavior as being in a condition of effervescent interaction, unceasingly creating, modifying, and replacing norms…Texts, themselves, serve as only one among a large number of means for ascertaining original intention…Original intention does not govern at any point in time, for original intention has no intrinsic authority. The past is relevant only to the extent that it helps us to identify currently prevailing attitudes about the propriety of a government's acts and omissions." *Id*. at p. 4. The different ways that countries continue to interpret Security Council resolutions, including Resolution 1441, are reflective of these two different approaches (classic vs. purposive-realist), which themselves, are representative of a deep divide within the international legal community. At least one commentator has noted that: "Traditionally most international lawyers considered that resolutions and declarations were only able to contribute as expressions 'Opinio Juris', with some writers going so far as to suggest that they cannot even constitute reliable evidence of 'Opinio Juris', because State representatives frequently do not believe what they themselves say…In response, many non-industrialized States and a significant number of writers asserted that resolutions and declarations are important forms of State practice which are potentially creative, or at least indicative, of rules of customary international law…They have argued that such an approach [would entail] acts in opposition to [and thus, in violation of] existing rules of customary international law. " *Id*., at p.7. Other commentators have observed how these differing approaches to interpreting Security Council resolutions have impacted the ascendancy of the doctrine of self-defense. , and they have arrived at several conclusions. First, the U.S. [and other like-minded States are] "engaged in the progressive development of this area of international law". *Id*., at p.6. *See also* Dino Kritsiotis, "The Legality of the 1993 U.S. Missile Strike on Iraq and the Right of Self-Defense in International Law", 45 International and Comparative Law Quarterly (1996) 162 at p. 176. Second, "different approaches to the question of an extended right to self-defense indicate a division between industrialized and non-industrialized States, with industrialized States pushing for a more extended right through their physical acts, and non-industrial States resisting such moves through their statements in the United Nations General Assembly." *See* Byers, *supra* at p. 6; Christine Gray, "After the Cease-Fire: Iraq, the Security Council and the Use of Force", 68 Brit. Y.B. Int'l L. 135, 176 (1994). "Third, justifications advanced by the U.S. 'either appear to extend existing justifications for the threat or use of force, or to create new one[s]'". These collective observations would seem to explain the U.S.' current approach to interpreting United Nations Charter provisions and Security Council resolutions. Since the U.S. has not ratified the Vienna Convention, it is predisposed to interpreting treaties,

including the Charter, pursuant to the principles of customary international law. To establish new customary international law, and especially as it pertains to the interpretation of treaties, the U.S. has followed the advice of some legal commentators to continue to express its intentions by recourse to actions rather than statements. These commentators have "insisted that only physical acts count as State practice, which means that any State wishing to support or oppose the development or change of a customary rule must engage in some sort of act, and that statements or claims do not suffice". *See* Byers, *supra* at p. 7. Accordingly, U.S. military actions taken to enforce the provisions of Security Council resolutions, without regard to securing a correct textual interpretation of the resolutions' terms or an evaluation of Council Members' statements can be seen as an attempt to shape State Practice, and establish Opinio Juris.

[30] Security Council resolutions, however, are unlike treaties, because they are adopted by an executive organ rather than agreed upon contractually. Since it is arguable that the Vienna Convention would not directly apply to Council resolutions, and no other treaty exists which can resolve this issue, it has been argued that Security Council resolutions must be interpreted pursuant to the rules of customary international law. The rules of customary international law also happen to serve as the rules of interpretation for those States, such as the U.S., that have not ratified the Vienna Convention. See Byers, supra at p. 4. International customary law consists of the regular practices and rules (norms) among States that States follow. These practices and rules become rules of international law when they satisfy two conditions. First, State practice must demonstrate that States engage in acts consistently within their borders and with other States, as reflected by court decisions, legislation, and diplomatic practice. Second, State practice must rise to the level of "Opinio Juris". In other words, State practice must demonstrate that such acts are "accepted" as law. These actions must be based on more than morality, habit or convenience. States must be acting out of 'obligation'. The rule need not be obeyed absolutely all of the time. Once a custom has become established, it is, with certain exceptions (States may opt out of a rule, if, through their behavior, they demonstrate that they have 'persistently objected to the rule), universally binding, even upon States that did not participate in the formation of the rule.

[31] The doctrine of implied authorization effectively calls for interpreting a resolution based on its overriding purpose(s) and objective(s) in order to cloak a State's action with the legitimacy of a Council mandate. At least one study has shown that military actions taken in reliance upon the Security Council's 'implied authorization' are often subject to strong condemnation by other Council Members. It analyzed Security Council behavior dating back to 1961, as well as, American and British military actions taken during the past ten years. *See* Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations To Use Force, Cease-Fires And The Iraqi Inspection Regime", 93 A.J.I.L. 124 (Jan.1999) at pp. 130-133. The study concluded that, in none of the cases did the Council intend to authorize any military action, but that other behavior demonstrated by the Council and its members may have contributed to the perception that authorization was granted. The authors also acknowledged the potential of such State behavior to have an impact on the behavior of other States. The study's brush with legal realism sheds some important light on the motivations underlying State behavior. It noted, for example that "diplomatic and political reality may preclude the Council from publicly authorizing actions that its members privately desire or at least would accept." And, it recognized how a group of States that have acted to enforce a Security Council resolution that the Council itself was unwilling to enforce, can conceivably argue that they acted on behalf of a clearly articulated community mandate rather than unilaterally. *Id.*, at p. 130. In the end, the study also found that it was the perceived "inability of the Security Council to authorize force when some believe it to be clearly needed [that] has propelled the search for 'implied authorization": "Political necessity finds a home in legal realist theory. That theory eschews or tempers formal textual rules, in favor of the law's operational code, which can be derived only from a contextual and empirical analysis of how elites actually behave. From this perspective, arguments that an implied Security Council authorization exists and is sufficient, reflects the elite's willingness to tolerate certain forceful action by individual States, even if such behavior conflicts with the formal rules embodied in the Charter". *Id*., at p. 131. Such a creative approach to interpreting Security Council resolutions had been first clearly evidenced in connection with 'Operation Provide Comfort' launched by the U.S., the U.K. and France during April 1991. That operation resulted in the creation of no-fly zones in northern and southern Iraq in order to protect the Kurds from attacks launched by Saddam Hussein before the formal cease-fire arguably was executed. These countries justified their military actions based on the language of Resolution 688, which "…was not passed under Chapter VII of the Charter and did not expressly authorize the use of force [or even refer to Resolutions 678 or

687]" (Resolution 688 demanded that Iraq end the repression of its civilian population and allow access to international humanitarian organizations. SC Res. 688 (1991)). Nevertheless, the U.S. the U.K. and France "[claimed] that their actions …were 'consistent with', 'supportive of', 'in implementation of' and 'pursuant to' Resolution 688". *Id*.

[32] Several legal commentators have shown that the use of the implied authorization doctrine was later supplemented by the doctrine of "material breach" to justify 'Operation Desert Fox'. That series of bombings and missile attacks took place during December 1998, following Iraq's cessation of cooperation with U.N. weapons inspectors seeking access to suspected weapons sites, including presidential palaces. The U.S. and the U.K. claimed that their actions were lawful, based on the authority of Resolutions 1154 and 1205. See Gray, supra at p. 14. However, these resolutions, although passed under Chapter VII, did not explicitly authorize the use of force. Resolution 1154, citing Resolution 687, required Iraq to provide immediate and unrestricted access to UNSCOM and IAEA inspectors, and warned that any violation of the resolution would have the 'severest consequences' for Iraq. See SC Res. 1154. Resolution 1205 condemned the decision by Iraq to stop cooperation with UNSCOM and demanded that Iraq rescind its decision. See SC Res. 1205. Facing condemnation for their actions from other Security Council Members, including France, Russia and China, the U.S. and the U.K. not only relied on the argument of implied authorization, but also claimed that their use of force was a lawful response to Iraq's "material breach" of the cease-fire reached pursuant to paragraph 33 of Resolution 687. See Gray, supra at p.15. Paragraph 33 of Resolution 687 provides, the Security Council "declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the above provisions, a formal cease-fire (emphasis added) is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990). SC Res. 687 (1991). The question of whether the doctrine of "material breach" applies to Resolution 687 is rooted in a statement made by Secretary-General Boutros-Boutros Ghali to the press in response to the January 1993 American, British and French attacks against Iraqi missile sites in the no-fly zones. He stated that "the raid…and the force that carried out the raid, have received a mandate from the Security Council according to Resolution 678 and the cause of the raid was the violation by Iraq of Resolution 687". See Gray, supra at pp. 15-16; White and Cryer at p.272; Lobel and Ratner at p.148, citing: U.N. Dep't of Public Information, The United Nations and the Iraq-Kuwait Conflict, 1990-1996, UN Sales No. E.96.I.3 (1996) (Introduction by Boutros Boutros Ghali, Secretary-General of the United Nations at 33). This statement gave rise to several implications. First, that Iraq's noncompliance with the disarmament provisions of Resolution 687 constituted a "material breach" of its obligations under prior Council resolutions. Second, that said breach vitiated (or suspended) the cease-fire agreement reached with Iraq pursuant to Resolution 687(33). Third, that said annulment or suspension reactivated the 'unilateral use of force' provision of Resolution 678(2). The validity of the legal argument regarding "material breach" has long since been debated among legal scholars. See, e.g., Lobel and Ratner, supra at pp.148-152; Nigel White & Robert Cryer, "Unilateral Enforcement of Resolution 687: A Threat Too Far?", 29 Cal. W. Int'l L.J. 243 (Spring 1999), at pp. 266-268, 279; Gray, supra at pp. 15-16; Sean M. Condron, "Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox", 161 Mil. L. Rev. 115, (Sept. 1999), at pp. 167-174; Marc Weller, "The Legality of the Threat or Use of Force Against Iraq", The Journal of Humanitarian Assistance (June 2000) at pp. 3-5, at: http://www.jha.ac/articles/a031.htm. The determination of whether or not Iraq's violations of the Resolution 687 cease-fire agreement constituted a "material breach", such that the 'unilateral use of force' provisions of Resolution 678 continued to survive, had arguably remained relevant to the implementation of Resolution 1441" in futuro, especially if, despite a 'finding' of an Iraqi 'material breach', the Council had subsequently failed to authorize, pursuant to Chapter VII, the 'collective use of force'. See Lobel and Ratner, supra fn 108; Condron, supra at pp. 171, 174; Gray, supra at p. 16.

[33] A discussion of the concept of 'self-defense' has been attached for your review to these comments as an annex.

[34] The Security Council "was never intended to be a coercive enforcer of all international law; it was only intended to respond to threats to international peace and security". *See* White and Cryer, *supra* at p.248. However, as opposed to individual States or regional organizations, the Security Council can authorize military action in response to threats to the peace which fall short of an actual or imminent armed attack. Marc Weller, "The Legality of the Threat or Use of Force Against Iraq", *supra* at p. 3.

[35] ***See* discussion in attached annex**.

[36] *See* "The International Law Commission's Articles on State Responsibility", United Nations International Law Commission, Articles and Commentaries, compiled by James Crawford (Cambridge Univ. Press © 2002) at p. 166, at: http://books.google.com/books?id=8JJkOMKwH8sC&pg=PA166&lpg=PA166&dq=Article+51+of+the+United+Nations+Charter+preserves+a+State%E2%80%99s+%E2%80%9Cinherent+right%E2%80%9D+of+self-defense+in+the+face+of+an+%E2%80%98armed+attack%E2%80%99+and+forms+part+of+the+definition+of+the+obligation&source=bl&ots=0uh_0gunuG&sig=4I5YfeM7KZDlRshVHidw-D5Z2R4&hl=en&ei=1LfxSezlMsrHtgePzOmeDw&sa=X&oi=book_result&ct=result&resnum=1

[37] *See* Louis Henkin, "The Use of Force: Law and U.S. Policy" at *Right v. Might: International Law and the Use of Force 37* (1989).

[38] *See* "Text of Joint Congressional Resolution on Iraq", PBS Online NewsHour, (10/12/02), at: http://www.pbs.org/newshour/bb/middle_east/july-dec02/joint_resolution_10-11-02.html .

[39] *See* John O. McGinnis, "Foreign to Our Constitution", 100 Northwestern University Law Review 303, 319 at fn 58, at: http://www.law.northwestern.edu/journals/lawreview/v100/n1/303/LR100n1McGinnis.pdf.

[40] *See* Edward Whalen, "Harold Koh's Transnationalism", *supra*.

[41] *See* Stuart Taylor, Jr. and Evan Thomas, "The Long Arm of the Law", *supra*.

[42] *Id.*