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SENATE

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UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, DONE AT NEW YORK ON DECEMBER 12, 2001, AND SIGNED BY THE UNITED STATES ON DECEMBER 30, 2003

SEPTEMBER 12, 2018.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 114–7]

The Committee on Foreign Relations, to which was referred the United Nations Convention on the Assignment of Receivables in International Trade, done at New York on December 12, 2001, and signed by the United States on December 30, 2003 (Treaty Doc. 114–7), having considered the same, reports favorably thereon with six declarations and five understandings, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof.

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I. PURPOSE

The United Nations Convention on the Assignment of Receivables in International Trade (the "Convention") provides uniform rules to facilitate cross-border receivables financing. Receivables financing is an important tool in helping U.S. companies secure working capital financing. Within the United States, lenders and buyers of receivables are familiar with providing financing based upon the use of receivables from debtors located within the United States as working capital collateral. Uniform Commercial Code Ar-

ticle 9, as adopted by all 50 states, the District of Columbia, and the territories of Puerto Rico and the Virgin Islands, provides extensive rules on the use of receivables as to finance operations or use as collateral and how to resolve potential conflicts of law. However, U.S. based lenders may be less willing to make loans secured by receivables owed by debtors located outside the United States because such cross-border transactions may involve countries whose laws are not consistent with modern financial practices.

The Convention, if widely adopted, will establish clear rules for resolving conflicts of law with respect to receivables financing. A key element of the Convention includes providing clear rules on establishing location under the treaty, allowing commercial parties to structure deals and effectively choose the forum that suits their needs in many transactions. Further, the Convention requires Parties to establish certain modern commercial finance rules consistent with U.S. Uniform Commercial Code Article 9 practices.

II. BACKGROUND

In the United States, U.S. companies often rely on receivables financing to secure access to working capital for their business operations. An assignment of receivables occurs when one party (the assignor) transfers to another party (the assignee) the right to receive the contractual amount owed by its customers or other third parties (the debtors). Small and medium size businesses in particular use these rights to payments from their customers as working capital or operational funding collateral with their local lenders to secure needed cash to finance purchases of raw materials and other resources. If the assignor, the assignee, and the debtor are U.S. companies, the applicable laws are well understood.

Receivables financing is governed by the principles found in the Uniform Commercial Code (UCC), Article 9 as adopted by the 50 states, the District of Columbia, and the territories of Puerto Rico and the Virgin Islands (referred to herein as "the states"). UCC Article 9 is the foundation for U.S. laws on secured finance. For example, the UCC establishes rules on assignee priority rights and secured lending. The UCC also provides a framework for U.S. courts on resolving conflicts of law between assignors or debtors and assignees located in different states. The U.S. modern commercial finance laws, as represented by the UCC, are considered among the most advanced in the world.

Modern receivables financing principles in the UCC, such as rules that allow interests in future receivables, receivables in bulk financing, and rules on proceeds and other mechanisms protect the assignee's rights. These rules reduce receivables financing risk and cost and make receivables financing an attractive option that has provided U.S. companies, especially small and medium size enterprises with business finance options that have led to significant economic growth and job creation in the United States over the past several decades.

Many countries, however, do not have the kinds of modern commercial finance laws on the assignment of receivables found in UCC Article 9. Because of the risk, cost and uncertainty created by receivables financing laws in other countries that vary greatly or that can be vague or unpredictable, the ability of small and medium sized U.S. enterprises to access financing with lenders using

their international accounts receivables derived from exports or other cross-border transactions is severely limited.

The U.N. Convention on the Assignment of Receivables in International Trade ("the Convention") solves many of these problems. First, the Convention would establish more uniformity with respect to receivables financing in cross border transactions.

Second, the Convention provides a unique benefit to the United States in that it closely reflects UCC Article 9 principles. Many U.S. commercial, finance and business sectors were participants in the development of the Convention and will be familiar with its terms. In addition, the Convention was developed in close coordination with the National Conference of Commissioners on Uniform State Laws ("Uniform Law Commission" or "ULC") and representatives of the American Law Institute (ALI). The Uniform Law Commission, which is composed of representatives of the states, together with the ALI, drafted the Uniform Commercial Code which has been adopted by all the states and jurisdictions of the United States.

Importantly, because the Convention closely reflects UCC Article 9, the administration has assured the committee the Convention will have minimal effect on current financing practice. The Convention would help U.S. businesses who rely on receivables financing to extend their operations across borders because foreign businesses will also be complying with an agreed upon international version of Article 9 of the UCC once their home government has ratified the Convention.

The administration has indicated that the treaty would be self-executing. According to the testimony of the State Department's Acting Legal Advisor in testimony given to the committee on December 13, 2017:

> The treaty would be self-executing, which is consistent with the recommendation of the ULC Committee. There is no need for federal or state implementing legislation. Ratification of the Convention would not change U.S. practice in this area in any material respect. The Convention's rules are largely based on U.S. law and will produce substantially the same results as those under the UCC Article 9.

The Convention is limited to transactions that are international in nature. In addition, the Convention does not create any new legal bodies. As with Article 9, the Convention establishes rules that would facilitate private transactions that are governed by private contract, enforceable through contract remedies. The Convention does not create any appeal mechanism to a foreign government or international body.

While the Convention requires countries party to the Convention to establish minimum standards in some areas such as rules on proceeds or priority assignment (rules already highly developed within the United States beyond the standards required under the Convention), the Convention generally adopts an approach that allows private parties maximum flexibility to develop and adopt their own contractual relationships as will be determined by their own specific business needs.

Finally, the Convention, in Articles 35, 40, 41, and 42, provides additional flexibility for countries party to the Convention to make future declarations with respect to exemption of businesses, public purpose entities, other government entities, or specific transactions from application under the Convention, should the need arise. Given that the goal is to establish more uniformity with respect to these international transactions involving receivables financing across borders, the committee does not anticipate the United States making such a future declaration at this time.

The Convention is supported by the Uniform Law Commission, the U.S. Chamber of Commerce, the Financial Services Roundtable, the Commercial Finance Association, BAFT (Bankers Association for Trade and Finance), Equipment Leasing and Finance Association, the International Swaps and Derivatives Association, Inc., the National Foreign Trade Council, the National Law Center for Inter-American Free Trade, the Small Business & Entrepreneurship Council, the U.S. Council for International Business, Southwestern/Great American, Inc., and the American Bar Association.

A detailed paragraph-by-paragraph analysis of this treaty may be found in the Letter of Submittal from the Secretary of State to the President on this instrument, which is reprinted in full in Treaty Document 114–7. What follows is a brief summary of some key provisions.

III. MAJOR PROVISIONS

As noted above, the Convention focuses generally on secured finance rules and is largely consistent with U.S. law, specifically Article 9 of the Uniform Commercial Code, which the Convention is largely based on. Therefore, according to administration testimony before the Foreign Relations Committee, not only would the Convention require little change in current practices within the United States with respect to receivables financing, the Convention would help promote U.S. UCC rules on receivables financing to the benefit of both U.S. and foreign exporters as well as businesses using foreign receivables for financing or collateral.

It is the considered opinion of the committee that ratification of the Convention is in the interest of the United States. The Convention will support U.S. exports and related cross-border transactions and job growth by facilitating cross-border trade. In particular, among countries ratifying the Convention, the Convention establishes a framework for reconciling conflicts of laws with respect to cross-border receivables financing. Among countries that ratify the Convention, the Convention will also establish new baseline standards, modeled on U.S. modern commercial finance rules, regarding proceeds, priorities, and future and bulk receivables.

III.A. ESTABLISHING RULES FOR RECONCILIATION OF CONFLICTS BETWEEN COUNTRIES ON CROSS-BORDER RECEIVABLES TRADE FINANCE

Establishing clear rules on what law governs competing priority claims over a receivable is one of the key benefits of the Convention. With respect to an assignment of a receivable in international transactions, competing claimants to the receivable could include the other assignees of the same receivable, bankruptcy trustees in

an insolvency proceeding, or creditors of the assignor who intend to make claims on the receivable assigned to an unrelated assignee. With high degrees of uncertainty and without a clear pathway as to how to resolve potential competing claims, a potential assignee, concerned with the status of the priority of their claim to the assignment, may be inclined to avoid an otherwise favorable transaction due to the risks and costs associated with the assignment.

Convention Article 22 provides clear rules for determining which country's substantive law may apply with respect to the priority of an assignee's rights over other claimants to the receivable. The Convention applies to cross-border or international receivables or assignment of receivables. The laws governing receivables may vary greatly from country to country. Further, the laws governing questions as to which nation's substantive law should apply may also vary greatly. The Convention would provide a clear path for determining which countries' laws should apply and for determining what that law is and how it might apply to the particular receivables transaction.

III.B. ADOPTION OF MODERN PRIORITY RULES

Convention Article 42 allows countries to declare that they intend to be bound by one of three sets of priority rules as set out in the Annex of the Convention. The first option parallels the system in the United States, and the committee recognizes that the United States is already in compliance with these provisions in the Annex. In fact, the U.S., in several areas, is including understandings and declarations to ensure that the Convention works seamlessly with the Uniform Commercial Code and that U.S. law can continue to lead the world in the development of modern finance rules.

Because the Convention provides conflict-of-law rules to determine which country's law applies to priority conflicts rather than providing substantive rules of priority itself, the substantive rules for resolving priority are generally determined by the domestic law of individual States. The committee notes that the State Department and the Uniform Law Commission have taken the position that current U.S. law reflected in state enactments of the Uniform Commercial Code is consistent with the priority system in sections 1 and 2 of the Annex.

Convention Article 8 (consistent with U.S. UCC Article 9) provides clear, modern finance rules on the assignment of existing and future receivables to secure current and future advances, the bulk assignment of receivables, and allows for the assignment of partial and undivided interests in receivables. For some countries, adoption of the Convention may require changes to current law, but the State Department has informed the committee that current U.S. law and practice is wholly consistent with these provisions of the Convention, a position also supported by the Uniform Law Commission.

Convention Article 24 provides for the adoption of rules on proceeds. As discussed below, the United States has advanced rules on proceeds and intends to offer an understanding that U.S. laws will go beyond the basic standards offered in the Convention. The committee believes that establishing a firm foundation of law with respect to the rights of assignees, as they relate to proceeds, is an

important part of developing modern commercial finance laws and practices. The committee is encouraged to believe that other nations that adopt the Convention will establish these important principles in their laws.

Finally, it is the hope of the committee that other nations seriously consider adoption of the Convention. The committee believes that developing countries in particular could benefit from the anticipated better credit availability and rates that adoption of the modern commercial finance rules of the Convention would generate.

IV. Entry into Force and Denunciation

Convention Article 45 provides that the treaty will enter into force on the first day of the month following the expiration of six months from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession with the depository. Currently, the Republic of Liberia has acceded to the treaty. Because it is widely recognized that the Convention reflects uniform state laws of the United States, the State Department has informed the committee that it expects other countries to consider the Convention once the United States ratifies the treaty. With deposit of its instrument of ratification, the United States would be the second State to join the Convention. Under Article 46, a Contracting State may denounce the Convention at any time by written notification addressed to the depositary. Such denunciation would take effect on the first day of the month following the expiration of one year after the notification is received by the depositary. The Convention would continue to apply to certain assignments concluded before the date of denunciation.

V. Implementing Legislation

The executive branch has indicated its view that the treaty is self-executing. Accordingly, federal or state implementing legislation is not necessary. The Resolution of Advice and Consent to Ratification includes a declaration stating that the Convention is self-executing.

VI. Committee Action

The committee held a hearing to consider the treaty on December 13, 2017. Senator Risch chaired the hearing. The committee considered the treaty on March 20, 2018, and ordered the treaty favorably reported by voice vote, with a quorum present and without objection, with the recommendation that the Senate give advice and consent to its ratification, as set forth in this report and the accompanying resolution of advice and consent to ratification.

VII. Committee Recommendations and Comments

The committee believes the Convention would provide significant benefits for U.S. companies, particularly small and medium sized enterprises that rely on receivables financing to generate working capital and, therefore, recommends the Senate give its advice and consent to ratification. The Convention closely follows UCC Article 9 and is, therefore, consistent with U.S. laws and common prac-

tices. In fact, the committee believes that, because the Convention is based so closely on the United States Uniform Commercial Code, widespread adoption will extend U.S. commercial financing practices globally.

The committee believes that the Convention will reduce legal risks and costs associated with cross-border receivables financing, as other countries become party to the Convention. With such risk and cost reduction, U.S. lenders will be more willing to provide financing to exporters and businesses using foreign receivables for financing or collateral, thereby facilitating growth in exports and related cross-border transactions, improving U.S. global competitiveness, and creating U.S. jobs.

The committee also notes the testimony of the State Department that ratification by the United States will have a beneficial effect with respect to ongoing efforts to modernize commercial finance rules in other countries:

> U.S. ratification could have a particularly important leadership impact [in encouraging other countries to ratify the Convention.] There are currently a number of regional initiatives underway focused on reforming the law of secured transactions, including in Latin America, Africa, and the Asia-Pacific region. Expanded ratification of the Convention in the near term has the potential to influence these initiatives and to expand the acceptance and use of the Convention's framework for receivables financing in these regions. In addition, the European Union (EU) is currently involved in an effort to develop an internal legal framework concerning the law applicable to third party effects of the assignment of receivables. While there is significant support in the EU for the approach taken in the Convention (and thus under U.S. law), there is also some support for alternative choice of law rules in some cases that would be inconsistent with the Convention and would thus introduce uncertainty into receivables financing governed by the alternative rules. U.S. ratification could helpfully influence the EU process to ensure that the framework adopted is consistent with the Convention.

The committee has included five understandings and six declarations in the resolution of advice and consent.

VII.A. UNDERSTANDINGS INCLUDED IN THE RESOLUTION OF ADVICE AND CONSENT

Section 2, Understanding (1)

> It is the understanding of the United States that paragraph (2)(e) of Article 4 excludes from the scope of the Convention the assignment of (i) receivables that are securities, regardless of whether such securities are held with an intermediary, and (ii) receivables that are not securities but are financial assets or instruments, if such financial assets or instruments are held with an intermediary.

The committee believes this technical understanding is necessary to clarify the scope of paragraph (2)(e) of Article 4. Article 4 deals

with the limitations and exclusions from the scope of the receivables covered by the Convention.

This understanding is intended to clarify that with respect to the Article 4(2)(e) exclusion, the phrase "held with an intermediary" modifies only the phrase "other financial assets" and does not modify the term "securities." As a result, the assignment of securities is excluded from the scope of the Convention regardless of whether the assigned receivables are held with an intermediary. The assignment of other financial assets is excluded from the Convention when the assigned financial assets are held with an intermediary. The administration has informed the committee that a possible alternative reading—that assignments of securities are not excluded from the Convention if the securities are not held with an intermediary—was not the intention of the Convention's negotiators. Nor was the provision intended to refer to "repurchase securities" as if this were a limited class of financial assets being addressed specifically and separately from other securities.

Section 2, Understanding (2)

> It is the understanding of the United States that the phrase "that place where the central administration of the assignor or the assignee is exercised" as used in Articles 5(h) and 36 of the Convention has a meaning equivalent to the phrase "that place where the chief executive office of the assignor or assignee is located."

Article 5 of the Convention is the main provision that provides definitions of terms used in the Convention, including the definition of determining location for the assignor and assignee. Because of the important role of location of parties in determining both the scope of the Convention and the applicable laws, the State Department and the Uniform Law Commission recommended further clarification to ensure the definition is clear under U.S. law.

Under the Uniform Commercial Code, as adopted by the states, location is determined by reference to the place where the "chief executive office" of the assignor is located. Under the Convention, the phrase "central administration office" is used for determining location. Understanding (2) further makes clear that the United States will treat the two phrases as equivalent.

Section 2, Understanding (3)

> It is the understanding of the United States that the reference in the definition of "financial contract" in Article 5(k) to "any other transaction similar to any transaction referred to above entered into in financial markets" is intended to include transactions that are or become the subject of recurrent dealings in financial markets and under which payment rights are determined by reference to (a) underlying asset classes or (b) quantitative measures of economic or financial risk or value associated with an occurrence or contingency. Examples are transactions under which payment rights are determined by reference to weather statistics, freight rates, emissions allowances, or economic statistics.

Article 5(k) sets out the definition of a "financial contract." As drafted, Article 5(k) is intended to cover both current and future developments in market usage.

Under the Convention, the Article 5(k) definition of financial contracts covers a wide range of financial instruments, including "any other transaction similar to any transaction referred to above." With respect to "other transactions similar to any transaction referred to above," the committee understands that the Convention's drafters recognized that the industry is continually developing new instruments in response to industry needs and circumstances.

This understanding is intended to provide greater clarity regarding the application of this provision to evolving usages. This understanding notes that "financial contracts" could include a variety of transactions that involve recurrent dealings whereby payment rights may be influenced or determined by reference to particular asset class valuations or contingent events that may affect the underlying contract. For further guidance, a non-exclusive list of examples is given in the understanding.

Section 2, Understanding (4)

> It is the understanding of the United States that because the Convention applies only to "receivables," which are defined in Article 2(a) as contractual rights to payment of a monetary sum, the Convention does not apply to other rights of a party to a license of intellectual property or an assignment or other transfer of an interest in intellectual property or other types of interests that are not a contractual right to payment of a monetary sum.

This understanding clarifies the application of the Convention to assignments of receivables involving intellectual property. It clarifies that the Convention's coverage of an assigned right to payment extends only to the right to the payment and does not extend to rights in the underlying intellectual property that is generating the revenue that is the subject of the right to payment.

Section 2, Understanding (5)

> The United States understands that, with respect to Article 24 of the Convention, the Article requires a Contracting State to provide a certain minimum level of rights to an assignee with respect to proceeds but that it does not prohibit Contracting States from providing additional rights in such proceeds to such an assignee.

Article 24 of the Convention "Special Rules on Proceeds" requires Convention countries provide a minimum level of rights to an assignee with respect to proceeds. U.S. law, including that adopted by the states, is highly developed.

In the United States, assignees have rights under "proceeds" provisions of U.S. law to collect money due to the assignee and that should have been paid to the assignee, but which have been diverted to other uses, such as a purchase by the assignor or debtor of other assets. Proceeds provisions under U.S. law allow for the unwinding of such transactions intended to defeat the claims of the assignee. Unlike the United States, many countries do not have modern commercial finance laws governing the rights of an as-

signee to "proceeds." U.S. proceeds laws provide an assignee entitled to payment with the ability to attach liens or other claims to property subsequently purchased with proceeds funds that otherwise should have been paid to the assignee.

This understanding clarifies that with respect to Article 24, the United States and the states retain the right to adopt laws that may go beyond the minimum level of rights an assignee can claim with respect to proceeds as required under the Convention. The understanding makes clear the United States may act to provide additional rights in such proceeds to an assignee.

VII.B. DECLARATIONS INCLUDED IN THE RESOLUTION OF ADVICE AND CONSENT

Section 3, Declaration (1)

> Pursuant to Article 23(3), the United States declares that, in an insolvency proceeding of the assignor, the insolvency laws of the United States or its territorial units may under some circumstances (a) result in priority over the rights of an assignee being given to a lender extending credit to the insolvency estate, or to an insolvency administrator that expends funds of the insolvency estate for the preservation of the assigned receivables (see, for example, Title 11 of the United States Code, Sections 364(d) and 506(c)); or (b) subject the assignment of receivables to avoidance rules, such as those dealing with preferences, undervalued transactions and transactions intended to defeat, delay or hinder creditors of the assignor.

Article 23(3) provides an exception to the general rule in Article 23(2) limiting the ability of the forum state to refuse application of the law of the State in which the assignor is located. Article 23(3) allows a State by declaration to identify preferential rights arising by operation of the law in the forum country in an insolvency preceding that would take precedence over the rights of an assignee. This declaration provides, consistent with Article 23(3), that in insolvency proceedings of the assignor, certain parts of U.S. bankruptcy law providing preferential rights will continue to apply within the United States, regardless of the priority rights of the assignee. The declaration is intended to provide notice of the application of such preferential rights under U.S. bankruptcy laws.

U.S. bankruptcy laws favor efforts to reorganize and preserve the insolvent party if such efforts are reasonably expected to be successful. For example, Chapters 11 and 13 of the United States Bankruptcy Code allow for the readjustment of debts and for corporations or individuals to continue to hold property and pay debts over time to bring the bankrupt party out of insolvency.

U.S. bankruptcy laws are considered among the most advanced. For example, the bankruptcy code contains "avoidance" rules whereby the bankruptcy judge can reach back up to 90 days and invalidate a transaction intended to defraud or otherwise avoid payments to legitimate creditors. Further, as noted above, U.S. bankruptcy laws favor efforts to rehabilitate insolvent businesses if possible (as opposed to proceeding directly to liquidation.) In such cases, the court may appoint a "debtor in possession" to manage the company's affairs, including invalidating certain contracts to

keep the business afloat. Under U.S. law, because the debtor in possession is taking certain risks to keep the company going, they may be afforded certain rights to priority of payment as the manager of the insolvent company.

With this declaration, for bankruptcy proceedings commenced in the U.S. courts, these preferential rights arising under U.S. bankruptcy law would take precedence over the rights of an assignee.

Section 3, Declaration (2)

> Pursuant to Article 36 of the Convention, the United States declares that, with respect to an assignment of receivables governed by enactments of Article 9 of the Uniform Commercial Code, as adopted in one of its territorial units, if an assignor's location pursuant to Article 5(h) of the Convention is the United States and, under the location rules contained in Section 9–307 of the Uniform Commercial Code, as adopted in that territorial unit, the assignor is located in a territorial unit of the United States, that territorial unit is the location of the assignor for purposes of this Convention.

Article 36 provides that a State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State. This "federalism" declaration supplements the Convention's Article 5(h) and Article 36 rules on location. The declaration is intended to ensure that the location rules of Uniform Commercial Code 9–307, as adopted by the states, are upheld. The declaration simply clarifies that if the assignor's location under Article 5(h) is determined to be the United States, then further determination of the assignor's location within a territorial unit of the United States will be determined by reference to the laws of the United States. Specifically, the location rules of UCC 9–307, as adopted by the states, shall apply.

Section 3, Declaration (3)

> Pursuant to Article 37 of the Convention, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit thereof determined in accordance with Article 36 and the Article 5(h) definition of location. However, to the extent under the conflict-of-laws rules in force in that territorial unit a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference to "law of the United States" with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence refer primarily to the conflict-of-laws rules in Section 9–301 of the Uniform Commercial Code as enacted in each state of the United States.

Article 37 of the Convention addresses the issue of which law is to be applied within the "territorial units" of a State. Article 37 further provides that a State may specify by declaration other rules for determining the applicable law, which may be the law of another territorial unit of the State. For the purpose of determining conflict of laws rules within the United States and for determining

which particular state's law may apply within the United States, this declaration preserves the existing location rules, state by state, of the UCC as adopted by the states.

UCC Article 9 contains detailed rules that determine which U.S. state's laws may govern a particular transaction determined under the Convention to be subject to U.S. law. This declaration affirms that, once location is determined to be the United States under the Article 5(h) definition, to determine applicable law, one must then look to state laws, as adopted, to make the final determination as to which law may apply. The committee notes that among the U.S. states and territories adopting the provisions of UCC Article 9, there is a high degree of uniformity, creating an essentially uniform law within the United States.

Section 3, Declaration (4)

> Pursuant to Article 39 of the Convention, the United States declares that it will not be bound by Chapter V of the Convention.

Chapter V (Articles 26–32) of the Convention is optional. Under Article 39 a State may declare that it will not be bound by the Rules in Chapter V. The committee understands that Chapter V is intended to fill gaps with respect to conflict of laws rules.

The United States has very advanced rules in this area and while the rules among the United States produce essentially the same results, the executive branch and Uniform Law Commission recommended that U.S. adoption of Chapter V, given the wording differences with U.S. law, would overly complicate interpretation of the law with little corresponding benefit. The executive branch hopes, however, to promote the adoption of Chapter V among countries party to the Convention that have underdeveloped laws on receivables financing.

Section 3, Declaration (5)

> Pursuant to Article 40, the United States declares that the Convention does not affect contractual anti-assignment provisions where the debtor is a governmental entity or an entity constituted for a public purpose in the United States.

Article 40 allows a State to exempt certain government entities, subdivisions thereof, and entities constituted for a public purpose from the scope of Convention Articles 9 and 10 that covers limitations on assignments and transfer of security rights. It is the understanding of the committee that the State Department recommends a carve-out for these government entities and entities constituted for a public purpose.

The committee notes that the President, with the advice and consent of the Senate, could modify the scope of this declaration in the future. (*See* VII.C. Future Declaration under the Convention, below.)

Section 4, Self-Execution Declaration

> The Senate's advice and consent under section 1 is subject to the following declaration: This Convention is self-executing.

The Senate's sixth declaration declares that the advice and consent under Section 1 is subject to the declaration that the Convention is self-executing.[1] This declaration is consistent with statements made in the Letter of Submittal from the Secretary of State to the President on this instrument. The Senate continues to include statements regarding the self-executing nature of treaties in resolutions of advice and consent, in light of the Supreme Court decision, *Medellin* v. *Texas,* 128 S. Ct. 1346 (2008). The committee continues to believe that a clear statement in the resolution is warranted. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110–12.

VII.C. FUTURE DECLARATIONS UNDER THE CONVENTION

The committee notes that the Convention provides some flexibility to adjust to changed circumstances and allows certain additional declarations to be made in the future should the need arise. In particular, the following Articles allow for a party to the treaty to make a declaration "at any time:"

1. Article 35 allows a State to exclude from application under the Convention, certain territorial units within a State in which different systems of law are applicable. The Convention allows for the State to declare the extent to which the Convention shall apply to those territorial units.
2. Article 40 of the Convention allows a State to exempt government entities, central or local, any subdivision thereof, or entities constituted for a public purpose.
3. Article 41 of the Convention allows a State to declare at any time that it will not apply the Convention to specific types of assignment or to the assignment of specific categories of receivables clearly described in a declaration.
4. Article 42 of the Convention allows a State to declare at any time that it will be bound by the priority rules set forth in the Annex to the Convention.

The committee reminds the President that, should it be necessary to consider, in the United States interest, making a declaration with respect to Articles 35, 40, 41 or 42, the committee must be notified in advance with a reasonable period for consideration and with a description giving the reasons for the proposed change.

While, historically, the United States has rarely sought to modify a condition to consent to ratification included by the Senate, precedent nevertheless exists for cooperation between the two branches to effectuate a modification to a condition to ratification. The committee recalls the example whereby in 1984, then President Reagan sought the Senate's advice and consent for the withdrawal of a reservation that had previously been included with the U.S. ratification of the Patent Cooperation Treaty. See Letter of Transmittal from President Ronald Reagan, July 27, 1984, in Treaty Doc. 98–20. The Senate gave its advice and consent to the withdrawal two years later.

To the extent any future modification of any understanding or declaration allowed under the Convention goes beyond a tacit

[1] Treaty-Doc. 114–7 at p. VI (stating that "The Convention would be self-executing and there would not be a need for the enactment of implementing legislation.")

change and constitutes a substantive change to the terms of the Convention, the committee expects any such substantive change to follow a similar Constitutional process of the President seeking the advice and consent of the Senate to the modification.

At times, circumstances may require that minor, technical adjustments be made to treaties to which the Senate has given its advice and consent. There may be times when such an adjustment may not rise to the level of a substantive amendment requiring the advice and consent of the full Senate. The committee has previously indicated its willingness to consider tacit amendments proposed by the executive branch on a case-by-case basis and has provided an incomplete list of illustrative factors to be considered when determining if a change is tacit in nature or a substantive change:

1. The significance and character of the amendment;
2. Whether it is technical or administrative;
3. Whether it is consistent with the object and purpose of the treaty and simply implements objectives already identified in the treaty;
4. Whether the proposed amendment can be given effect without Congressional action;
5. Whether the committee has indicated (in its report on the treaty or otherwise) that such amendments are to be submitted to the Senate for advice and consent.

VIII. TEXT OF THE RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

TEXT OF THE RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION OF THE UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, DONE AT NEW YORK ON DECEMBER 12, 2001, AND SIGNED BY THE UNITED STATES ON DECEMBER 30, 2003

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

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO UNDERSTANDINGS AND DECLARATIONS.

The Senate advises and consents to the ratification of the United Nations Convention on the Assignment of Receivables in International Trade, done at New York on December 12, 2001, and signed by the United States on December 30, 2003 (the "Convention") (Treaty Doc. 114–7), subject to the understandings of section 2 and the declarations of sections 3 and 4.

SEC. 2. UNDERSTANDINGS.

The Senate's advice and consent under section 1 is subject to the following understandings, which shall be included in the instrument of ratification:

(1) It is the understanding of the United States that paragraph (2)(e) of Article 4 excludes from the scope of the Convention the assignment of—

(A) receivables that are securities, regardless of whether such securities are held with an intermediary; and

(B) receivables that are not securities, but are financial assets or instruments, if such financial assets or instruments are held with an intermediary.

(2) It is the understanding of the United States that the phrase "that place where the central administration of the assignor or the assignee is exercised," as used in Articles 5(h) and 36 of the Convention, has a meaning equivalent to the phrase, "that place where the chief executive office of the assignor or assignee is located."

(3) It is the understanding of the United States that the reference, in the definition of "financial contract" in Article 5(k), to "any other transaction similar to any transaction referred to above entered into in financial markets" is intended to include transactions that are or become the subject of recurrent dealings in financial markets and under which payment rights are determined by reference to—

(A) underlying asset classes; or

(B) quantitative measures of economic or financial risk or value associated with an occurrence or contingency. Examples are transactions under which payment rights are determined by reference to weather statistics, freight rates, emissions allowances, or economic statistics.

(4) It is the understanding of the United States that because the Convention applies only to "receivables," which are defined in Article 2(a) as contractual rights to payment of a monetary sum, the Convention does not apply to other rights of a party to a license of intellectual property or an assignment or other transfer of an interest in intellectual property or other types of interests that are not a contractual right to payment of a monetary sum.

(5) The United States understands that, with respect to Article 24 of the Convention, the Article requires a Contracting State to provide a certain minimum level of rights to an assignee with respect to proceeds, but that it does not prohibit Contracting States from providing additional rights in such proceeds to such an assignee.

SEC. 3. DECLARATIONS TO BE INCLUDED IN THE INSTRUMENT OF RATIFICATION.

The Senate's advice and consent under section 1 is subject to the following declarations, which shall be included in the instrument of ratification:

(1) Pursuant to Article 23(3), the United States declares that, in an insolvency proceeding of the assignor, the insolvency laws of the United States or its territorial units may under some circumstances—

(A) result in priority over the rights of an assignee being given to a lender extending credit to the insolvency estate, or to an insolvency administrator that expends funds of the insolvency estate for the preservation of the assigned receivables (see, for example, title 11 of the United States Code, sections 364(d) and 506(c)); or

(B) subject the assignment of receivables to avoidance rules, such as those dealing with preferences, undervalued transactions and transactions intended to defeat, delay, or hinder creditors of the assignor.

(2) Pursuant to Article 36 of the Convention, the United States declares that, with respect to an assignment of receivables governed by enactments of Article 9 of the Uniform Commercial Code, as adopted in one of its territorial units, if an assignor's location pursuant to Article 5(h) of the Convention is the United States and, under the location rules contained in section 9–307 of the Uniform Commercial Code, as adopted in that territorial unit, the assignor is located in a territorial unit of the United States, that territorial unit is the location of the assignor for purposes of this Convention.

(3) Pursuant to Article 37 of the Convention, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit thereof determined in accordance with Article 36 and the Article 5(h) definition of location. However, to the extent under the conflict-of-laws rules in force in that territorial unit, a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference to "law of the United States" with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence refer primarily to the conflict-of-laws rules in section 9–301 of the Uniform Commercial Code as enacted in each State of the United States.

(4) Pursuant to Article 39 of the Convention, the United States declares that it will not be bound by chapter V of the Convention.

(5) Pursuant to Article 40, the United States declares that the Convention does not affect contractual anti-assignment provisions where the debtor is a governmental entity or an entity constituted for a public purpose in the United States.

SEC. 4. SELF-EXECUTION DECLARATION.

The Senate's advice and consent under section 1 is subject to the following declaration: This Convention is self-executing.

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