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Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America

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Summary

In July 2002, the Rome Statute that created the International Criminal Court (ICC), the first permanent world court created to judge cases involving serious human rights abuses, entered into force. The United States is not a party to the ICC and does not recognize its jurisdiction over U.S. citizens. The Bush Administration has sought bilateral agreements worldwide to exempt U.S. citizens from ICC prosecution, so-called “Article 98 agreements.”

There has been strong bipartisan support for legislation aimed at protecting U.S. soldiers and civilian officials from the jurisdiction of the ICC and sanctioning some foreign assistance to governments of countries that are parties to the ICC and that do not have Article 98 agreements with the United States. In 2002, Congress passed the American Servicemembers’ Protection Act or ASPA (P.L. 107-206, title II), which prohibits military assistance to countries that are party to the ICC and that do not have Article 98 agreements. The Nethercutt Amendment to the FY2005 Consolidated Appropriations Act (H.R. 4818/P.L. 108-447) and FY2006 Foreign Operations Appropriations Act (H.R. 3057/P.L. 109-102) prohibited some economic assistance to the governments of those same countries that do not have Article 98 agreements. The House-passed version of the FY2007 Foreign Operations Appropriations Act (H.R. 5522) would continue those aid prohibitions for FY2007.

Twelve Latin American countries (including Brazil, Bolivia, Ecuador, and Mexico) have been denied U.S. foreign assistance as a result of aid restrictions related to Article 98 agreements. Some Members of Congress and Bush Administration officials have expressed concerns about the unintended effects of these sanctions on U.S. relations with Latin America. Policymakers are considering some options to mitigate these effects without undermining ASPA or diplomatic efforts to secure Article 98 agreements.

On June 15, 2006, the Senate passed an amendment to its version of the FY2007 Defense Authorization, S. 2766, that would modify ASPA to end the ban on some U.S. military aid to countries that are members of the ICC and that do not have Article 98 agreements in place. The House version of the FY2007 Defense Authorization bill, H.R. 5122, would not eliminate the ban on military assistance but is critical of the sanctions and does suggest that President Bush use his waiver authority to exempt partner countries from its provisions.

For more information on U.S. policy with respect to the ICC, see CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court*, by Jennifer Elsea. This report will be updated periodically.

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Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America

Background

In July 2002, the Rome Statute that created the International Criminal Court (ICC) entered into force. The ICC is the first permanent world court with jurisdiction to try individuals accused of war crimes and other serious human rights abuses.¹ The United Nations, human rights groups, and most democratic nations supported the creation of the ICC. Some 100 countries have ratified the Rome Statute and are currently members of the ICC. The United States is not a party to the court and does not recognize ICC jurisdiction over U.S. soldiers or civilians serving in other countries.

The ICC, comprised of eighteen judges and based in The Hague, may hear cases referred to it by the U.N. Security Council or by the states that are parties to the court. The ICC's lead prosecutor may also initiate investigations. Before a case may be tried, the ICC must work with national law enforcement agencies that, with support from the international community, must make arrests and send defendants to The Hague. Since its creation, the ICC has received three referrals by state parties, which involved allegations of war crimes in the Republic of Uganda, the Democratic Republic of the Congo, and the Central African Republic. The United Nations Security Council also referred the situation of allegations of atrocities being committed in Darfur, Sudan to the prosecutor.² The prosecutor then decided to open investigations into the cases involving the Democratic Republic of the Congo, the Republic of Uganda, and Darfur, Sudan. In October 2005, the ICC issued its first arrest warrants to five individuals implicated in connection to the situation in Northern Uganda.

U.S. Policy on ICC Immunity

Although the United States initially supported the idea of establishing an international criminal court, fundamental objections to the proposed court's jurisdiction led the United States to vote against the Rome Statute. The United States' primary objections to the Rome Statute focus on the ICC's possible assertion

¹ These include genocide, crimes against humanity, war crimes, and potentially the crime of aggression. See CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court*, by Jennifer Elsea.

² See "International Criminal Court, Situations and Cases." Available at [<http://www.icc-cpi.int/cases.html>], accessed July 5, 2006.

of jurisdiction over U.S. soldiers who could be charged with “war crimes” resulting from legitimate use of force or U.S. civilians who could be charged for conduct related to carrying out U.S. foreign policy initiatives. Accordingly, the United States has sought immunity provisions through the U.N. Security Council for U.N.-authorized peacekeeping operations, and has pursued bilateral agreements with countries that are parties to the ICC in order to preclude extradition or surrender of U.S. citizens from each respective country to the ICC.

Bilateral Immunity (“Article 98”) Agreements

Since 2003, the Bush Administration has sought bilateral agreements worldwide to exempt Americans from ICC prosecution, so-called “Article 98 agreements.” As of July 2006, the United States has concluded 102 such agreements.³ These agreements involve each state promising that it will not surrender citizens of the other signatory to the ICC, unless both parties agree in advance to the surrender. Supporters of the policy say that these agreements are not unlike the status of forces agreements (SOFAs) routinely negotiated to protect U.S. soldiers serving abroad from prosecution in foreign courts and are consistent with Article 98 of the Rome Statute. Critics have dismissed Article 98 agreements as unnecessary and accused the U.S. government of “blackmailing” developing countries, many of which are heavily dependent on U.S. assistance, into adopting them.⁴

Congressional Action

There has been strong bipartisan support for legislation aimed at protecting U.S. soldiers and civilian officials from the jurisdiction of the ICC and sanctioning some foreign assistance to governments of countries that are parties to the ICC and that do not have Article 98 agreements with the United States.

The American Servicemembers’ Protection Act (ASPA)

The American Servicemembers’ Protection Act or ASPA (P.L. 107-206, Title II), prohibits military assistance to countries that have not signed Article 98 agreements. On July 1, 2003, pursuant to the ASPA, the Bush Administration terminated military assistance to governments of countries that had not signed Article 98 agreements. Under the legislation, NATO countries or major non-NATO allies are exempted from those military aid restrictions.⁵ ASPA also gives the President the authority to waive the prohibition on military assistance without prior notice to Congress if he determines and reports to the appropriate committees that such assistance is important to the national interest. ASPA has affected International

³ “Article 98 Agreements and the United States,” Georgetown University Law Library, Available at [http://www.ll.georgetown.edu/intl/guides/article_98.cfm].

⁴ Nicholas Kristof, “Schoolyard Bully Diplomacy,” *New York Times*, October 16, 2005.

⁵ Major non-NATO allies of the United States include Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, South Korea, and Thailand.

Military Education and Training (IMET) and Foreign Military Financing (FMF) assistance.

The Nethercutt Amendment

Section 574 of the FY2005 Consolidated Appropriations Act (H.R. 4818/P.L. 108-447) prohibited Economic Support Funds (ESF) assistance to the governments of countries that have not entered into an Article 98 agreement with the United States. Some countries, including NATO members and major non-NATO allies, are exempted from that aid restriction. The President could also waive the prohibition on economic assistance for selected countries without prior notice to Congress if he determined and reported to the appropriate committees that such assistance was important to the national interest. The language also stipulated that countries that have been deemed eligible for Millennium Challenge Account grants will not lose MCA eligibility status due to the Article 98 issue. The Nethercutt Amendment was re-enacted by the 109th Congress as part of the FY2006 Foreign Operations Appropriations Act (H.R. 3057/P.L. 109-102). Unlike the FY2005 appropriation, however, the FY2006 appropriation requires that the President give Congress notice before he invokes a waiver, but that waiver may apply for any country that he deems to be of strategic interest to the United States. It also stipulates that, since ESF may be obligated over a two-year period, any leftover funds from FY2005 may now be made available for democracy and rule of law programs notwithstanding the provisions of Sec. 574 of P.L. 108-447. The House-passed version of the FY2007 Foreign Operations Appropriations Act (H.R. 5522) would continue the FY2006 version of the Nethercutt restrictions for FY2007.

Recent Action

On June 15, 2006, the Senate passed an amendment to its version of the FY2007 Defense Authorization, S. 2766, that would modify ASPA to end the ban on International Military Education and Training (IMET) assistance to countries that are members of the ICC and that do not have Article 98 agreements in place. The House version of the FY2007 Defense Authorization bill, H.R. 5122, would not eliminate the ban on military assistance but is critical of the sanctions and does suggest that President Bush use his waiver authority to exempt partner countries from its provisions. Even if the Senate version of the Defense Authorization becomes law, affected countries could still lose significant amounts of economic assistance that are subject to Nethercutt restrictions.

Article 98 Agreements with Latin America and the Caribbean

As of July 2006, the United States has concluded Article 98 agreements with fifteen countries in Latin America and the Caribbean, thirteen of which are in force. The first table at the end of this report depicts the status of each country in the region with respect to the ICC, Article 98, and sanctions in U.S. military and economic assistance. Countries that are subject to sanctions under the ASPA and the Nethercutt amendment are those that are both parties to the ICC and that have not entered into an Article 98 agreement with the United States. Those countries include Barbados, Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Peru, St. Vincent and the Grenadines, Trinidad, Uruguay and Venezuela. Although it has not signed an Article 98 agreement, Argentina is exempt from sanctions as it was declared a “major non-Nato ally” in 1998. Bolivia initially received a six-month waiver from cuts in U.S. military assistance that began in July 2003 because it had signed, but not ratified, an Article 98 agreement. The waiver expired in early 2004.

Most of the Article 98 agreements for Latin America that are currently in force were signed in 2003. In the past two years, only four countries in Latin America and the Caribbean have signed Article 98 agreements. In October 2005, Mexico became the 100th country to ratify the Rome Statute despite the prospect of losing military and economic assistance from the United States.⁶ Chile is likely to soon ratify the Rome Statute and is also unlikely to conclude an Article 98 agreement.

Article 98 and U.S. Aid to Latin America and the Caribbean

The ASPA and the Nethercutt Amendment have had an impact on U.S. foreign assistance to Latin America and the Caribbean. The impact of ASPA and Nethercutt provisions on U.S. foreign aid to the region is depicted in the second table at the end of this report.

Military Assistance

Pursuant to the American Servicemembers’ Protection Act or ASPA (P.L. 107-206, title II), the Bush Administration terminated military assistance to governments of countries that had not signed Article 98 agreements as of July 1, 2003. The military assistance prohibition has included International Military Education and Training (IMET) and Foreign Military Financing (FMF). The IMET program provides training on a grant basis to students from allied and friendly nations. FMF provides grants to foreign nations to purchase U.S. defense equipment, services, and training. In FY2003, prior to ASPA, the United States provided some \$4.65 million in IMET among the 12 countries that are now sanctioned by ASPA. This funding

⁶ “Cut in Military Aid Fails to Budge Fox on ICC,” *Latin American Weekly Report*, February 14, 2006; “U.S. Could Cut Off Aid to Latin American Countries Over ICC,” *EFE News Service*, November 19, 2005.

enabled 771 military officers and civilian officials from those countries to receive training in the United States. In FY2004, aside from Bolivia, which received a temporary waiver from ASPA provisions, none of those countries participated in IMET. ASPA-related sanctions resulted in a loss of \$1.9 million in IMET funding in FY2005 and \$1.3 million in FY2006.

U.S. Southern Command officials also assert that FMF losses, totaling some \$4.4 million in FY2005 and \$3 million in FY2006, have made military modernization projects difficult for the affected countries to continue. Others have responded that the effects of IMET and FMF funding losses have not been that significant when one considers that they have been divided among 11 countries and have only been in effect for the past few years.

Although military assistance losses may not be significant when viewed from a regional perspective, they have resulted in some acute aid cuts for particular countries, including Bolivia, Ecuador and Peru. In addition, Mexico was originally slated to receive \$1.1 million in IMET in FY2006 and, for the first time, some \$2.5 million in FMF funding to purchase weapons and equipment. Those funds have been frozen since Mexico signed on to the ICC in October 2005 and have been cut to \$45,000 in the case of IMET and “zeroed out” in the case of FMF in the FY2007 Administration budget request.

Economic Assistance

Through the security-related ESF program, the United States provides economic aid to countries of strategic interest to U.S. foreign policy. Funding decisions are made by the State Department; programs are managed by USAID and the State Department. Strategic countries of interest to the United States are generally located in the Middle East or South Asia, but 11 Latin American countries have received some ESF funding in recent years, with Bolivia, Ecuador, Mexico, and Peru among the largest recipients. In FY2004, ESF assistance to countries that are now subject to Nethercutt aid restrictions totaled at least \$42.6 million, including some \$11.4 million for Mexico and \$10.5 million for Ecuador. ESF funds were spent on a variety of projects including democracy, rule of law, and economic growth programs. Projected ESF losses for the governments of affected countries due to Nethercutt restrictions could be significant for FY2005 and FY2006 budget cycles; however, a significant portion of the funding scheduled to be cut is being reprogrammed to non-governmental organizations. Funds may be distributed for certain programs as long as the governments in question do not benefit directly from them.

U.S. Policy Approaches

On March 8, 2006, the Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee held a hearing on the “Consequences for Latin America of the American Servicemembers’ Protection Act.” Subcommittee Chair, Senator Norm Coleman, expressed concern that, as a result of the ASPA sanctions, the United States is “missing key opportunities to engage officers...from the

sanctioned countries” and that this could lead to “a loss of U.S. diplomatic influence in the region.”⁷

Witnesses focused their testimonies on describing the political and military effects that ASPA and Nethercutt sanctions have had on countries in Latin America and the Caribbean. One analyst asserted that the loss of IMET is severing “an important linkage between future military leaders [from the region learning about]...the U.S. model of civilian control of the military.” Reduced opportunities in the United States, he added, may lead countries in the region to look elsewhere, including China, Russia, or Venezuela for training. Similarly, ESF restrictions may hamstring both U.S. bilateral and regional efforts to push desperately needed structural reforms, especially in the Andean countries.⁸ Another analyst asserted that the implementation of ASPA has damaged U.S. standing in the region and that “the effort to punish countries that don’t sign Article 98 agreements has been perceived...as bullying or arm-twisting.”⁹ His testimony echoed politicians in the region that have accused the United States of “blackmailing Latin American governments into signing an agreement they oppose in principle.”¹⁰

The witnesses suggested several ways to mitigate the possible negative consequences of ASPA on Latin America and the Caribbean. Those suggestions included encouraging the Bush Administration to issue national interest waivers to key allies in Latin America or declare more countries in the region to be major non-NATO allies (thereby exempting them from the aid restrictions). Another suggested option would be to repeal section 2007 of the ASPA and omit the Nethercutt provision from 2007 Foreign Operations appropriations legislation.

On March 14, 2006, General Bantz Craddock, Commander of the U.S. Southern Command, while testifying before the Senate Armed Services Committee, stated that the ASPA continues to have “unintended consequences” for Latin America, and that without IMET funding, countries have been unable to afford the unsubsidized cost of courses offered in the United States. He stated that “this loss of engagement prevents the development of long-term relationships with future [Latin American] military and civilian leaders.” Senator John McCain agreed with General Craddock’s concerns about ASPA sanctions. He asserted that the United States was paying “a very heavy price” in countries where military aid programs have been cut, and suggested that perhaps sanctions could be eased by an amendment to the \$91 billion Emergency Supplemental Appropriations Act for Defense, the Global War on Terror,

⁷ Statement of the Honorable Norm Coleman, “Consequences for Latin America of the ASPA,” Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee, March 8, 2006.

⁸ Hearing testimony of Peter DeShazo, Center for Strategic and International Studies, Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee, March 8, 2006.

⁹ Hearing testimony of Adam Isaacson, Center for International Policy, Subcommittee on Western Hemisphere Affairs of the Senate Foreign Relations Committee, March 8, 2006.

¹⁰ “U.S. Could Cut Aid to Latin American Countries Over ICC,” *EFE News Service*, November 18, 2005.

and Hurricane Recovery, 2006 (H.R. 4939). His concerns about military aid cuts were echoed by Senators John Warner, Carl Levin, Hillary Clinton, and James Inhofe.¹¹

On June 21, 2006, Representative Dan Burton, chair of the House International Relations Committee's subcommittee on the Western Hemisphere, publicly asked the Bush Administration to change its policy regarding ASPA sanctions, citing congressional concerns about China's expanding influence in the region.¹²

Administration Views. At the beginning of 2006, the Bush Administration appeared to be divided over whether to continue linking U.S. assistance to Article 98 agreements. Secretary of State Condoleezza Rice acknowledged that invoking ASPA sanctions on key U.S. military allies may be "sort of the same as shooting ourselves in the foot," and that waivers of military aid restrictions are being considered on a case-by-case basis.¹³ In addition, the Defense Department's Quadrennial Defense Review called for a possible de-linking of military training programs from ASPA. While the Defense Department, and particularly the U.S. Southern Command, oppose ASPA sanctions on military aid, the Bureau of Political-Military Affairs of the State Department, once overseen by current U.N. Ambassador John Bolton, reportedly strongly supports keeping the sanctions in place.¹⁴ This internal division may be one of the reasons why both State and Defense Department officials declined to testify at the March 8, 2006 hearing of the Senate Foreign Relations Committee on this topic. Some observers note that the possibility of waivers of military aid restrictions should not be interpreted as U.S. support for the ICC.

On June 22, 2006, Adolfo Franco, Assistant Administrator for Latin America and the Caribbean at the U.S. Agency for International Development, suggested that the Bush Administration was considering lifting ICC-related sanctions against Latin American countries. He stated that the Administration had not yet decided whether to lift the sanctions on all countries affected in the region or only for a select few. Some analysts have asserted that the Administration may lift the sanctions in order to improve the United States' image in the region and to encourage Latin American countries to oppose Venezuela's bid for a non-permanent seat on the U.N. Security Council.¹⁵

¹¹ "Combatant Commander's Military Strategy and Operational Requirements in Review of the FY2007 Defense Budget," Hearing of the Senate Armed Services Committee, March 14, 2006; CQ Transcriptions.

¹² "Chile-U.S.: Talks Underway to Avoid ICC-Related Sanctions," *Latin News Weekly Report*, July 4, 2006.

¹³ Pablo Bachelet, "U.S. Sanctions Could Be Waived," *The Miami Herald*, March 15, 2006.

¹⁴ Jackson Diehl, "A Losing Latin Policy: Are We About to Punish Democratic Allies?" *Washington Post*, March 10, 2006.

¹⁵ "Linking of ICC-related Sanctions Seen as Linked to Opposing Venezuela's UN Bid," *Latin American Security and Strategic Review*, June 2006.

Table 1. Status of ICC and Article 98 Agreements in Latin America and the Caribbean

Country	Rome Statute	Party to ICC	Article 98 Agreement	Subject to U.S. Aid Cut off?
Antigua and Barbuda	X	X	X	No
Argentina	X	X		Exempt
Bahamas	X			No
Barbados	X	X		Yes
Belize	X	X	X	No
Bolivia	X	X	Signed, not ratified	Yes
Brazil	X	X		Yes
Chile	X			No
Colombia	X	X	X	No
Costa Rica	X	X		Yes
Dominica		X	X	No
Dominican Republic	X	X (a)	X	No
Ecuador	X	X		Yes
El Salvador			X	No
Grenada			X	No
Guatemala			Signed, not ratified	No
Guyana	X	X	X	No
Haiti	X		X	No
Honduras	X	X	X	No
Jamaica	X			No
Mexico	X	X		Yes
Nicaragua			X	No
Panama	X	X	X	No
Paraguay	X	X		Yes
Peru	X	X		Yes
Saint Kitts and Nevis			X	No
Saint Lucia	X			No
Saint Vincent and the Grenadines		X (a)		Yes
Suriname				No
Trinidad and Tobago	X	X		Yes
Uruguay	X	X		Yes
Venezuela	X	X		Yes

a. Indicates accession to the ICC for those countries that were not original signatories of the Rome Statute.

Table 2. Effects of ASPA Sanctions on Military Assistance to Latin America and the Caribbean

(\$ in thousands)

Country	FY2003 IMET	FY2003 FMF	FY2004 IMET Loss	FY2004 FMF Loss	FY2005 IMET Loss	FY2005 FMF Loss	FY2006 IMET At-Risk	FY2006 FMF At-Risk	FY2007 IMET At-Risk	FY2007 FMF At-Risk
Barbados	125						50			
Bolivia	800	2,000	589	3,976	800	1,984	800	1,800	45	25
Brazil	483						50		45	
Costa Rica	336						50		45	
Ecuador	645	990			300	992	50	750	45	25
Mexico	1,250		N/A	N/A	N/A	N/A	50		45	
Paraguay	297				250		50		45	
Peru	592	990			300	992	50	300	45	25
St. Vincent	88				133		50			
Trinidad/Tobago	150	390					50		45	
Uruguay	450	990			150	397	50	150	45	
Venezuela	683						50		45	
Totals	4,649	5,360	589	3,976	1,933	4,365	2,450	3,000	450	75