THE HONORABLE FRANKLIN D. BURGESS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CYNTHIA CORRIE AND CRAIG CORRIE, ON THEIR OWN BEHALF AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF RACHEL CORRIE AND HER NEXT OF KIN, INCLUDING HER SIBLINGS; MAHMOUD OMAR AL SHO'BI, ON HIS OWN BEHALF, ON BEHALF OF HIS SURVIVING SIBLINGS MUHAMMAD AL SHO'BI AND SAMIRA AL SHO'BI, AND ON BEHALF OF HIS DECEASED FAMILY MEMBERS, UMAR AL SHO'BI, FATIMA AL SHO'BI, ABIR AL SHO'BI, SAMIR AL SHO'BI, ANAS AL SHO'BI, AZZAM AL SHO'BI AND ABDALLAH AL SHO'BI; FATHIYA MUHAMMAD SULAYMAN FAYED, ON HER OWN BEHALF AND ON BEHALF OF HER DECEASED SON, JAMAL FAYED AND HIS NEXT OF KIN; FAYEZ ALI MOHAMMED ABU HUSSEIN ON HIS OWN BEHALF AND ON BEHALF OF HIS SONS, BAHJAT FAYEZ ABU HUSSEIN, AHMED FAYEZ ABU HUSSEIN, NOUR FAYEZ ABU HUSSEIN AND SABAH FAYEZ ABU HUSSEIN; MAJEDA RADWAN ABU HUSSEIN ON HER OWN BEHALF AND ON BEHALF OF HER DAUGHTERS, HANAN FAYEZ ABU HUSSEIN, MANAL FAYEZ ABU HUSSEIN, INSHERAH FAYEZ ABU HUSSEIN, AND FADWA FAYEZ ABU HUSSEIN; EIDA IBRAHIM SULEIMAN KHALAFALLAH ON HER OWN BEHALF AND ON BEHALF OF HER DECEASED HUSBAND, IBRAHIM MAHMOUD MOHAMMED KHALAFALLAH AND NEXT OF KIN,

Plaintiffs,

v.

CATERPILLAR, INC., a Foreign Corporation,

Defendant.

Civil Action No. C05-5192-FDB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION REQUESTING THAT THE COURT SOLICIT THE VIEWS OF THE STATE DEPARTMENT

NOTED FOR: OCTOBER 21, 2005

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

I. INTRODUCTION

Plaintiffs ask the Court to strike Defendant's Motion Requesting the Court to Solicit the Views of the State Department ("Motion"), or in the alternative strike all but Part III (B), as an improper attempt to re-argue its Motion to Dismiss ("MTD") based on political question grounds; and for improperly raising new arguments and facts (many of which are erroneous, as described herein) that it clearly hopes the Court will consider in ruling on the MTD. The Defendant did not need to re-argue its case or introduce new arguments or facts to bring this Motion. It could simply have relied on Plaintiffs First Amended Complaint ("FAC") and the briefing related to the MTD. If any facts outside of those alleged in the First Amended Complaint are deemed by this Court to be relevant to Defendant's political question or act of state arguments, those issues should not be decided on a motion to dismiss, but should be postponed until after discovery.

If the Court chooses to allow the Motion and/or consider the various arguments and facts raised by Defendant, the Court should still decline to solicit the views of the State Department for several reasons. First, the State Department can intervene and make its views known without being requested to do so when it is aware of the litigation and believes it would harm U.S. foreign relations. Here, officials at the *highest levels* of the State Department have known about this litigation since shortly after it was filed and thus, the State Department has had ample opportunity to give the Court its views, but has chosen not to.

Second, the relationship between Defendant's sales of bulldozers to the Israeli Defense Forces ("IDF") and United States' foreign policy is much more attenuated than Defendant leads the Court to believe. Significant facts Defendant puts before the Court are simply wrong. The sale is not a sales of arms or defense articles through the Foreign Military Sales program (as Defendant has publicly stated for years and as it originally suggested in its MTD), where the U.S. government procures or brokers an item from the manufacturer and sells it to a foreign government. Rather, the bulldozers are sold on a commercial contract basis to the IDF.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

Moreover, it appears from a letter written by a State Department official (attached to the declaration of Craig Corrie) that the sales are *not* subject to an export license under the Arms Export Control Act as sworn by Defendant (although this fact should not really matter in the Court's analysis). In addition, the cases cited by Defendant are all easily distinguishable, and in fact even support Plaintiff's position that a lawsuit against a private corporation for aiding and abetting a violation of international law through a direct commercial sale of equipment does not create a political question.

In any event, if the Court does not strike the new facts raised by Defendant and the Court feels the facts of the sale would make a difference to its analysis of whether to seek the State Department's views, Plaintiffs strongly request that the Court allow limited discovery on this issue.[1] In the alternative, the Court should find it is too premature to seek the views of the State Department, and wait to reassess whether it should until after discovery on several matters, including the nature of the sales and the government's involvement is such sales.

If the Court chooses to solicit the State Department's views, and such an opinion is given, Plaintiffs should have the right to conduct discovery and further argument regarding the State Department's opinion. Finally, if the Court decides to solicit the State Department's views, Plaintiffs submit a letter, which is more neutral and more accurately reflects the tone and substance of letters typically sent by Courts.

II. ARGUMENT

A. The Court Should Strike the Motion, or in the Alternative Most of its Arguments, Facts, and the Weinberg Declaration.

In order to move the Court to seek the Opinion of the State Department, all Defendant needed to do - and should properly have done - was make its motion to the Court noting the facts described in Plaintiffs FAC and arguments it made in its MTD on pgs. 34-37, especially those

[1] If the Court thinks the facts are important for purposes of the pending Motion to Dismiss (given that the Court should not consider the facts in this Motion in its decision regarding whether to dismiss the case on political question grounds) then the Court should deny Defendant's Motion to Dismiss based on political question grounds and invite Defendants to raise it again on a summary judgment motion, after discovery is had on the issue.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

arguments made on pgs. 36-37. It did not need to reiterate its arguments, raise new arguments, or introduce new factual material. A review of Defendant's current Motion demonstrates that it is attempting to re-argue its case set forth in its MTD,[2] raise new arguments such as comity, and introduce new facts regarding the sales (which are inaccurate) it clearly hopes the Court will take into consideration. It can be read in no other way.[3] Thus, all the above is improper argument and introduction of facts, and thus the motion should be stricken; at the very least, all the additional factual material and arguments related to political question, act of state and comity, should be stricken. This would include virtually everything but Section III B.[4]

In addition, Defendant improperly raises issues of comity as it relates to foreign decisions, an argument not raised in the MTD, and certainly not relevant to the Motion currently before the Court. This material should be stricken. First, Plaintiffs are asking the Court to rule on whether Caterpillar aided and abetted human rights violations and violations of the Geneva Conventions that arose as a result of the specific demolitions at issue in the Complaint. FAC ¶ 6, 7, 56-80, 83. Dr. Shany, in his expert opinion, noted that it would be virtually impossible for Plaintiffs to obtain a remedy for such illegal demolitions in Israel, for a variety of reasons, including the new law passed granting immunity to the IDF for all torts in the Occupied Territories and thus any accomplices; and given the hostility of the Israeli courts to such

---

[2] Examples of improper argument and re-argument made by Defendant that do not belong in this Motion and are a clear attempt to re-argue its case regarding political question are found at p.1, l. 20 – p. 2, ll. 3; p. 4, l. 22- p. 5 ll. 8; p. 8, l. 15; p. 5, ll. 10-23; p. 6 – p. 7, l. 7; p. 9, ll. 4 – p. 10, l. 19.

[3] The Motion also improperly seeks to answer the *very questions* that it is asking the Court and the State Department to answer. *See, e.g.,* Motion, p. 2, ll. 17-18 ("Clearly, decisions by this Court affecting those issues have foreign relations implications for the Middle East, which has been a focus of U.S. foreign relations activities for many, many years."); *Id.*, p. 7, ll.3-4 ("The political ramifications of adjudicating those questions in this litigation are so manifest,…").

[4] Most certainly, the Court should not take these facts and argument into consideration in deciding the Motion to Dismiss. A trial court may not consider evidence outside the pleadings in *connection with* a motion to dismiss. *Inlandboatmens Union of the Pac. v. Dutra Group,* 279 F.3d 1075, 1083 (9th Cir. 2002) (emphasis added); Fed. R. Civ. P. 12(b). While the motion to solicit the opinion of the State Department is a separate motion from the Motion to Dismiss, there can be little argument that it is "in connection with" the motion to dismiss. When a district court does consider such extraneous evidence, the motion is converted into a motion for summary judgment, and the non-moving party must be allowed to conduct discovery in order to oppose that motion. *Inlandboatmens Union,* 279 F.3d at 1083.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

lawsuits. *See* Shany Opinion (attached to Plaintiffs Opposition to the MTD), ¶¶ 11, 14, 57(b), 57 (c). To agree with Defendant's position on this would mean that every time a Court found that there was no chance of prevailing in a country's courts, it should also dismiss based on comity. That is neither accurate nor the current state of the law.

If the Court decides to consider the issue of comity in this Motion or for the MTD, an issue which Plaintiffs have not had a chance to brief, Plaintiffs respectfully request the opportunity to fully brief this issue.

B. The State Department Can File a Statement of Interest Without Invitation.

As Plaintiffs argued in their Opposition to the MTD, p. 89, the State Department is capable of making its position on these matters known without waiting for a special invitation from the court. To that end, the Executive is free to file a Statement of Interest regardless of an invitation of the court. *See In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 38 (D.D.C. 2000) (to the extent that the United States Government is concerned about the potential adverse foreign relations consequences from the resolution of these lawsuits, the Executive Branch possesses the competence, capacity, and incentive to make its views known ... to this Court).

Several of the reported decisions in which Defendant states the Court invited comment from the state department (Mot. at 7, 11) in fact *do not* reflect Defendant's position and Defendant offers no other supporting evidence. *See Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001); *Fed. Republic of Yugoslavia v. Park –71st Corp.*, 913 F. Supp. 191 (S.D.N.Y. 1995); *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F. 2d 879 (D.C. Cir. 1988). In fact, a review of the dockets do not show any such requests, and indicate that the State Department filed Statements of Interests without invitation. S*ee e.g., Joo, et al v. Japan*, Case No. 1:00-cv-02233-HHK; *Federal Republic v. Park-71st Corp. et al*, Case No. 1:95-cv-03659-AGS.

1. The State Department has known about this case since shortly after it was filed, and it has not sought to intervene or make its views known.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

In May 2005, shortly after this lawsuit was filed, Plaintiff Craig Corrie informed Department of State Secretary Rice's Chief of Staff, a top lawyer with the State Department, and another official about this lawsuit during a discussion about the legal case the Corries brought in Israel. *See* Craig Corrie ("Corrie Declaration"), ¶ 3. When Mr. Corrie informed them of this lawsuit, none of the officials condemned the litigation, suggested such was improper, or indicated in any way that the lawsuit would affect or harm foreign relations; nor has the State Department so indicated since.[5] *Id.*

Thus, the State Department has known for some time about this lawsuit, and has had ample time to intervene and make its views known to the Court, but has chosen not to.

C. Courts Commonly Exercise Their Discretion to Deny a Request to Solicit the State Department's Views.

Courts regularly exercise their discretion to reject a litigant's motion to solicit the views of the State Department. In particular, courts deny requests such as the one here when, because of the posture of the case and lack of discovery, inviting the views of the State Department would be premature.

For example, in *Bowoto v. ChevronTexaco Corp.*, the court denied the defendants' motion to request the State Department's views on the foreign relations implications of the case. No. C 99-2506 (N.D. Cal. Aug. 2, 2004) (order denying motion for court to request views), Exh. B to the Declaration of G. Skinner, Oct. 16, 2005 ("Skinner Decl."), filed concurrently herewith. When the defendants submitted that motion, the litigants in *Chevron* had completed the first phase of discovery but had not yet started the second, which would have focused on the events relevant to the act of state doctrine and other matters on which the State Department might opine. *Id.* at 4-5. In its order, the *Chevron* court found that the case's factual issues had not yet been so

[5] Moreover, the Corries have been discussing their daughter's death with the State Department, *including possible litigation*, at least since June of 2003. *Id.* at ¶ 4. In fact, the Chief of Staff under Secretary Powell, Larry Wilkerson, suggested and encouraged Craig Corrie (both orally and in a written letter) to commence legal action against the IDF, going so far as to provide him with names of Israeli lawyers. *Id.*

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

developed as to give adequate consideration to the opinions of the executive branch, and thus that soliciting the views of the State Department would be premature and unhelpful. *Id.*

Similarly, in *Kiobel v. Royal Dutch Petroleum Co.*, the defendants requested the court to "ask the U.S. Government what impact it believes adjudicating plaintiffs' claims would have on U.S. foreign relations." Defs.' Reply Mem. of Law in Support of Defs.' Mot. to Dismiss, *Kiobel v. Royal Dutch Petroleum Co.*, 02 CV 7618 (S.D.N.Y. May 5, 2003), Skinner Decl. Exh. C at 2. Along with their motion to dismiss in the case, the defendants also submitted a letter that the Nigerian Federal Ministry of Justice had sent directly to the Department of Justice requesting intervention in the case. *See* Skinner Decl. Exh. D.[6] The magistrate recommended that the court decline to seek the views of the state department, noting that "the DOJ has not sought to intervene in this action nor has it informally expressed any opinion concerning the impact, if any, adjudication of this action will have on" United States' foreign relations. *Kiobel v. Royal Dutch Petroleum Co.*, 02 Civ 7618 (S.D.N.Y. Mar. 11, 2004) (Report and Recommendation of U.S. Magistrate Judge Pitman to U.S.D.J. Wood)[7], Skinner Decl. Exh. E at 16-17. Again, because the U.S. government chose to remain silent, neither seeking to intervene nor informally expressing any opinion of the posture of the case, the Magistrate did not solicit the views of the State Department, and decided that the case was justiciable. *Id.* at 23.

In *The Presbyterian Church of Sudan v. Talisman Energy Inc.*, the judge flatly denied the defendant's motion to request the court to seek a statement of interest from the State Department Office on whether adjudication of that case would negatively impact U.S. foreign policy. No. 01-Civ.9882 (S.D.N.Y. Sept. 4, 2002) (summary rejection of defendant's request to solicit the views of the State Department), Skinner Decl. Exh. F at 2. Like the rejected motion in *Chevron* and the motion here, the *Talisman* defendant moved to involve the executive branch while a

---

[6] Letter from Kanu G. Agabi, Nigerian Attorney General and Minister of Justice, to John Ashcroft, U.S. Attorney General, (Dec. 20, 2002), Submitted as Exhibit A to Declaration of Rory O. Millson filed with Defendant's Motion to Dismiss *in Kiobel v. Royal Dutch Petroleum Co.*, 02 CV 7618 (S.D.N.Y. Mar.17, 2003)

[7] District Judge Kimba Wood is still considering the defendants' objections to the Magistrate Judge's Report and Recommendation, and has neither adopted nor rejected it at this time. Skinner Decl. at ¶ 5.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

motion to dismiss was still pending and before discovery had gotten fully under way. *See* Skinner Decl. Exh. G.[8] The State Department eventually did file a statement of interest in that case without invitation of the court; notably, it waited several years for the factual record and legal issues to be developed before intervening. Docket indicating Statement of Interest of the U.S., *Talisman*, 01 Civ.9882, (S.D.N.Y. Mar. 14, 2005), Skinner Decl. ¶ 8.

This Court should deny Defendant's motion to solicit the views of the State Department as did the courts in *Chevron*, *Kiobel*, and *Talisman*. Defendant seeks to solicit the views of the State Department on foreign policy issues and the political question doctrine because it claims its sales are made pursuant to the Arms Export Control Act and therefore implicate United States foreign affairs. MTD at 40; Motion at 10. To the extent, if any, that this complicated fact-intensive issue affects the application of the political question or act of state doctrines, it is premature to ask the executive branch for a statement of interest before any discovery has taken place. *See, e.g.*, *Chevron*, No. C 99-2506 (N.D. Cal. Aug. 2, 2004) (order denying motion for court to request views), Skinner Decl. Ex. B. In any event, discovery should be allowed before Defendant's questionable representations regarding the sales (*discussed infra*) of its bulldozers are entertained.

Moreover, separation of powers concerns counsel strongly *against* asking the State Department for its views when the Department has voluntarily remained silent for as long as it has here. Often the State Department will wish to refrain from taking an official position. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1963). This is so both because such a statement "might be inopportune diplomatically and because "[a]dverse domestic consequences might result." *Id.* "Since silence . . .may be highly desirable, it would not be wise for the courts

[8] The *Talisman* case was filed on in November 2001, and the defendants filed their first motion to dismiss the case in May 2002 which was denied in March 2003. The court denied the request to solicit the views of the State Department while this motion to dismiss was pending, in September 2002. Fact Discovery began in late 2002 and continued until April 18, 2005. The U.S. Statement of Interest was filed in March, 2005. See Skinner Decl.¶ 8.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

unnecessarily to force the Government's hand." *Calderone v. Naviera Vacuba S/A*, 325 F.2d 76, 77 (2d Cir. 1963), *mod. on other grounds*, 328 F.2d 578 (2d Cir. 1964) (per curiam).

D. There is No Compelling Reason the Court Should Seek the State Department's Views.

1. The Relationship Between the Executive Branch and Defendant's Sale of Bulldozers to the IDF is too Attenuated to Raise a Political Question.

In direct contradiction to Mr. Weinberg's sworn testimony, Plaintiff Craig Corrie attaches to his declaration a letter from a State Department official stating that "The IDF has acquired Caterpillar heavy equipment on a *commercial contract basis* . . ..Such commercial construction equipment *does not require* an export license for export to Israel." *See* Letter from Matthew Reynolds, Acting Assistant Secretary for Legislative Affairs, Department of State, Exhibit A, Corrie Declaration (emphasis added).

a. This is not a Foreign Military Sale under the Arms Export Control Act.

In the political question section of its MTD, Defendant erroneously informed the Court that "the facts will show that Caterpillar sold tractors to the Israeli government pursuant to the Foreign Military Sales Program …and pursuant to a federal export license under the Arms Export Control Act." MTD at 40. Moreover, for years Caterpillar has stated publicly and in the press that it sells its bulldozers through the Foreign Military Sales program (FMS). FAC ¶ 55. The Foreign Military Sales program is a process in which the United States Department of Defense either itself sells or brokers arms from American suppliers to a foreign entity. 22 U.S.C. §§ 2761, 2762.

In its current motion, Defendant no longer alleges the sale was pursuant to the FMS program; but failed to clarify its earlier error for the Court. Caterpillar holds the information regarding the sales and is supposed to inform the Court accurately of the nature of its sales to the IDF. However, it is Plaintiffs and not Defendant who have accurately alleged that Caterpillar's sales to the IDF are direct sales – not sales through the Foreign Military Sales Program. *Id.*

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

Defendant states that "the issues in this case are the same ones addressed in *Doe v. State of Israel*, No. 02-1431 (JDB) Slip Op. (D.D.C. October 3, 2003)." Mot. at 10. Defendant is incorrect. In *Doe v. Israel*, the arms at issue were sold through the Foreign Military Sales program, which as described above, is a highly-regulated program for which approval of specific arms is at issue. Here, the sales were not through the highly-regulated Foreign Military Sales program, but on a commercial contract basis. In fact, the case supports Plaintiffs' position, as it specifically notes that although defense contractors sales of *arms* under the AECA and FMSA's "detailed scheme" likely implicates the political question doctrine, "if the arms sales in question were purely between a private corporation and Israel, the political question doctrine might not be as relevant ...." *Id.* at 17.

b. The evidence shows the sale is *not* subject to an export license.

As mentioned above, the State Department indicated in the Reynolds letter that Defendant sells its bulldozers – classified as commercial construction equipment - to the IDF on a *commercial contract basis*, and that such *does not* require an export license for export to Israel.[9] Whether or not the sales were subject to an export license should not matter to the Court's analysis given that both parties acknowledge that the sales were direct sales between Caterpillar and the IDF rather than a sale by the United States government – however it does demonstrate the sale is even more remotely connected to the Defense Department.

The only United States government involvement in this commercial sale appears to be that Israel *at least partially* financed its purchases from Caterpillar with money granted it under Foreign Military Financing (FMF). Section 23 of AECA, 22 U.S.C. § 2763. Under this

[9] Given that Mr. Weinberg states that the *Israeli government* arranges for export licenses under the Arms Expert Control Act ("AECA") (Weinberg Dec'l, ¶ 4), but that the letter from John Moseley he attaches to his declaration states that "the supplier" is responsible for obtaining export licenses "as required" (which is *Caterpillar*, as listed on page 1 of the letter) (*see* Exhibit A to Weinberg Declaration), it would make sense that no export licenses are required, as stated by Mr. Reynolds. This is corroborated by the Moseley letter, which does not state that such an export license is required -- only that the supplier must obtain an export license "as required."

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

program, Israel, among other nations, receives grants and loans that are administered by the DSCA, which simply provides administrative oversight. [10]

Exactly how the sales take place or how they are funded should not affect the Court's views as to the political question issue, given that such sales are on a commercial contract basis, and given all the argument put forth in Plaintiffs' Opp'n to the MTD, and the arguments outlined below. However, if this issue is important to the Court, it seems clear additional discovery is warranted, as there is a factual dispute and other unknown facts. *See, e.g., Elmaghraby v. Ashcroft*, Slip Copy, 2005 WL 2375202 (E.D.N.Y. 2005) ("Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly.") citing *Crawford-El v. Britton*, 523 U.S. 574, 599-600 (1998); *see also,* Fed. R. Civ. Pr. 26.

2. Plaintiffs' Claims Are Clearly Justiciable.

Even if this Court considers Defendant's additional arguments, Defendant's new authority is not applicable to Plaintiffs' claims. In its re-argument, Defendant continues to ignore that Plaintiffs' claims do not challenge or implicate any act or policy of the political branches, nor challenge any act of Israel within its territory. *See* Opp'n to Def's MTD at 72-90. Defendant cites new cases to support its contention that challenges implicating foreign military aid are nonjusticiable. Even if "most" of the cost of Defendant's bulldozers purchased by the Israeli Government are paid for with money from the U.S. Government, Mot. at 4, Plaintiffs' claims that Defendant violated the law are not then transformed into a challenge of U.S. military aid. Such an assertion is as absurd as saying that a routine cross-border products liability or commercial dispute case would impinge on foreign aid decisions simply because either party received economic assistance from the Government.

[10] *See* U.S. Department of State Foreign Military Financing Summaries, *available at* http://www.state.gov/t/pm/ppa/sat/c14560.htm; DSCA Guidelines for Foreign Military Financing of Direct Commercial Contracts 2, *available at* http://www.dsca.osd.mil/DSCA_memoranda/fmf_dcc_2001/2001_guidelines.pdf.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

To support its contention regarding foreign military aid, Defendant cites *Haig v. Agee*, 453 U.S. 280 (1981) because it quotes *Hariseades v. Shaughnessy,* 342 U.S. 580, 589 (1952) for the general proposition that the conduct of foreign relations is largely immune from judicial interference. *Haig* at 292. This proposition is insignificant, as the Supreme Court has since made clear that it "is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Also, the cases cited by Defendant have no bearing on Plaintiffs claims, which are for damages against a corporation for unlawful acts. The Court in *Haig* confronted the issue of whether the Executive had a statutory right to revoke the passport of an ex-CIA employee for endangering the national security of the United States. *Haig* at 282, 289. Also inapposite is *Chicago & Southern Airline, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), Mot. at 9, as the Court in that case merely decided that challenges to a final order by the Civil Aeronautics Board that had been amended and approved by the President could not be adjudicated. Similarly, in *Crockett v. Reagan,* 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), Mot. at 10, the court affirmed the dismissal of a claim by members of Congress alleging that the President's failure to report to Congress was a war powers violation, and seeking to require the withdrawal from El Salvador of all Armed Forces, weapons, military equipment and aid.[11] Plaintiffs' claims do not challenge the statutory power of the Executive, a Presidential decision, or any action by the United States; nor do Plaintiffs seek to have all economic dealings with Israel stopped, or all foreign military aid.

Defendant also cites to *Oetjen v. Central Leather Company*, 246 U.S. 297 (1918) in an attempt to lend support to its general argument that a challenge to military operations should be conducted by the political branches. Mot. at 5. The Court in *Oetjen*, however, applied the act of state doctrine to dismiss a case in which a Mexican citizen's property in Mexico had been taken

[11] The district court found it could not resolve the particular factual disputes, and that nothing suggested Congress viewed U.S. involvement in El Salvador as subject to the War Powers Resolution. *Crockett* at 1356-57.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

by the Mexican government.[12] *Oetjen* at 303. As Plaintiffs have shown, the Act of State doctrine does not apply to the acts of a foreign state outside of its territory, such as in this case. Opp'n to Def.'s MTD at 84-87.

F. If this Court Does Solicit the State Department's Views, Plaintiffs Must Have the Right to Scrutinize the Factual Basis of Such Views, and to Respond.

If the Court solicits the State Department's views on the litigation,[13] Plaintiffs must be given the right to scrutinize the factual basis for such views, comment on the appropriate weight to be given those views, and argue the relevance of those views to the issues raised in Defendant's MTD. In other cases, courts have so allowed this, recognizing the importance of allowing inquiry into the factual validity of the claims made in a State Department declaration. *See, e.g., Arias v. Dyncorp*, Case No. 01-01908 (D.D.C., Filed 2001) (plaintiffs allowed to depose State Department declaration and in doing so found the claims had little factual support).

G. If the Court Decides to Seek the Views of the State Department, It Should Use the Letter Attached by Plaintiffs.

The letter attached to Mr. Burdge's declaration as a suggested letter the Court should use to solicit the views of the State Department is clearly biased and is an obvious attempt to again improperly argue its MTD to the Court and it contains erroneous information.[14] Plaintiffs proffer a neutral and accurate letter that is much more similar in tone to the letters attached to Mr. Burdge's Declaration. Skinner Decl., Exh. A.

---

[12] Moreover, premises underlying the *Oetjen* decision have since been challenged by the Supreme Court, which made clear that the Act of State doctrine is not compelled by the nature of sovereign authority, as implied in *Oetjen*. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964). As discussed above, *Baker v. Carr* made clear that cases touching on foreign relations may be justiciable, *Baker* at 211, despite the assertion made in *Oetjen* that the propriety of foreign relations conduct is not subject to judicial inquiry. *Oetjen* at 302. Defendant has reached far to attempt to find support for its argument that Plaintiffs' claims are nonjusticiable.

[13] In addition, even if a statement of interest is received, this Court does not need to defer to the positions taken in it. *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1180 (D. Cal. 2002) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995)); and *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1057 n6 (3d Cir. 1988), citing *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

[14] *See, e.g.*, Declaration of Richard Burdge (Burdge Dec'l), Exhibit A; (use of the term "military operations"); (stating that IDF "might" use the bulldozers in violation of the law, rather than the term "would" which more accurately reflects the Complaint); fifth paragraph (repeatedly stating that the Court may be required to pass judgment on the discretionary decisions of the State of Israel and of issues decided by Israel courts, rather than stating such is Defendant's position); sixth paragraph ("this litigation attempts to stop military aid provided by the U.S. government to on of this country's allies," rather than stating such is Defendant's position).

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

III. CONCLUSION

For all of the reasons discussed herein, the Court should deny Defendant's Motion.

DATED this 17th day of October, 2005.

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC

S/GWYNNE SKINNER
Gwynne L. Skinner, WSBA No. 23490
Davida Finger, WSBA No. 32818

GWYNNE L. SKINNER
PUBLIC INTEREST LAW GROUP PLLC
705 Second Avenue, Suite 501
Seattle, WA 98104
Tel: (206) 447-0103
Fax: (206) 447-0115
gskinner@pilg.org

JENNIFER M. GREEN
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
Tel: (212) 614-6431
Fax: (212) 614-6499
jgreen@ccr-ny.org

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2005, I filed the foregoing document with the Clerk of the Court using the CM/ECF electronic filing system and notification of such filing will be sent to the following:

James L. Magee GRAHAM & DUNN PC 2801 Alaskan Way, Suite 300 Seattle, WA 98121-1128 Tel: 206.624.8300 Fax: 206.340.9599 Email: jmagee@grahamdunn.com ***ATTORNEYS FOR DEFENDANT***	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☒ ECF Filing/E-Mail Transmission
Joanne E. Caruso (Pro Hac Vice) Richard J. Burdge, Jr. (Pro Hac Vice) David G. Meyer (Pro Hac Vice) HOWREY SIMON ARNOLD & WHITE LLP Suite 1100 Los Angeles, CA 90071 Tel: 213.892.1800 Fax: 213.892.2300 Email: carusoj@howrey.com Email: burdger@howrey.com Email: meyerg@howrey.com ***ATTORNEYS FOR DEFENDANT***	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☒ ECF Filing/E-Mail Transmission
Robert G. Abrams (Pro Hac Vice) HOWREY SIMON ARNOLD & WHITE LLP 1299 Pennsylvania Avenue N.W. Washington, D.C. 20004-2402 Tel: 202.383.6935 Fax: 202.383.6610 Email: abramsr@howrey.com ***ATTORNEYS FOR DEFENDANT***	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☒ ECF Filing/E-Mail Transmission

I certify and declare under the laws for the United States and the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 17th day of October, 2005, at Seattle, King County, Washington.

/s/ Gwynne Skinner
Gwynne Skinner

SEATTLE UNIVERSITY
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, Washington 98122-4340
TELEPHONE: (206) 398-4130
FACSIMILE: (206) 398-4136