



THE NON-RENEWAL OF THE “NETHERCUTT AMENDMENT” AND ITS IMPACT ON THE BILATERAL IMMUNITY AGREEMENT (BIA) CAMPAIGN

On March 11, 2009, President Obama signed into law the Fiscal Year 2009 omnibus appropriation bill, Public Law No. 111-8, which did not include the so-called “Nethercutt Amendment”. With the non-renewal of the Nethercutt provision and the repeal of military assistance funding under the American Servicemembers’ Protection Act (ASPA) in 2006 and 2008, no anti-ICC sanctions remain. However, the omission of the Nethercutt provision does not change the status of the bilateral immunity agreements (BIAs) concluded by the United States.

Beginning in August 2002, the US concluded approximately 102 BIAs, although it is unclear how many of these are legally binding. In 2007, the US concluded its last publicly reported BIA with Montenegro, although there were some reports of unsuccessful US approaches about BIAs as recently as October 2008. Since 2008, there have not been any reports of the US pursuing additional BIAs. The BIAs, according to the Bush administration, were drafted out of a concern that existing agreements, especially, Status of Forces or Status of Mission Agreements (SOFAs or SOMAs), did not sufficiently protect Americans from the jurisdiction of the International Criminal Court (ICC). The Bush administration stated that these agreements were within the bounds of Article 98 of the ICC’s Rome Statute. However, it is generally agreed that Article 98 applies only to military or civilian officials on government business in another country. In this view, shared by the European Union, the BIAs stretched Article 98 too far in applying to all Americans in the other country.

Sanctions for failure to sign a BIA included: the Nethercutt provision, renewed annually, which stopped Economic Support Fund (ESF) aid; and ASPA, which ended International Military Education and Training (IMET) and Foreign Military Funds (FMF) to nations unwilling to enter into a BIA with the United States. The ending of military and economic sanctions was due to the damage they did to relations with countries important to the US.

Without the Nethercutt amendment or other sanctions, the US has no leverage to compel further agreements or adherence to the existing ones. Most of the BIAs, according to their provisions, will remain in effect “until one year after the date on which one party notifies the other of its intent to terminate the agreement.” A country which is party to a BIA would notify the other party through diplomatic channels that it no longer wished to be bound by the agreement. One year thereafter, as specified in most of the agreements, the parties would no longer be obligated to obtain each other’s consent, in the case of reciprocal agreements, or the consent of the US, in the case of non-reciprocal agreements, to transfer nationals to the ICC.

The Obama administration has stated its intent to cooperate with the International Criminal Court. In response to a question from the Senate Foreign Relations Committee, Secretary of State Clinton remarked that the United States will end its “hostility” towards the court. Further, Susan Rice, US Ambassador to the United Nations, in her first address to the Security Council, expressed US support of the Court’s investigation in Sudan. These statements coupled with the removal of sanctions tied to BIAs signal a positive shift in the US relationship with the ICC and may lead to greater participation in the work and activities of the Court. The Obama administration has made no formal policy decision yet on the ICC or the BIAs.





Timeline of ICC-Related Sanctions in US Legislation

American Servicemembers' Protection Act (ASPA)

- **July 24, 2002:** Public Law 107-206, which includes international Military Education and Training (IMET) and Foreign Military Financing (FMF) sanctions, is signed into law by President Bush.
- **October 17, 2006:** amendment eliminating IMET sanctions from ASPA included in the National Defense Appropriations Act for Fiscal Year 2007 becomes law.
- **January 22, 2008:** amendment included in HR 4986 to eliminate restriction FMF to nations unwilling to enter into BIAs becomes law.

Nethercutt Amendment

- **December 7, 2004:** Public Law 108-447, which includes Nethercutt for FY 2005, is signed into law.
- **December 2006:** Public Law 109-102, which renews Nethercutt for FY 2006, is signed into law.
- **February 15, 2007:** Public Law 110-5, which does not renew Nethercutt for FY 2007, is signed into law.
- **December 26, 2007:** Public Law 110-161, which renews Nethercutt for FY 2008, is signed into law.
- **March 12, 2009:** Public Law No. 111-8, which does not renew Nethercutt for FY 2009, is signed into law by President Obama.

Additional Resources

For more information about US legislation related to the ICC: <http://www.amicc.org/usinfo/congressional.html>.

To learn more about the BIA campaign: http://www.amicc.org/usinfo/administration_policy_BIAs.html.

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