

The Honorable Franklin D. Burgess  
Note on Motion Calendar: October 21, 2005  
ORAL ARGUMENT REQUESTED

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 )

No. C05-5192-FDB

**NOTICE OF MOTION AND MOTION OF  
DEFENDANT CATERPILLAR  
REQUESTING THAT THE COURT  
SOLICIT THE VIEWS OF THE UNITED  
STATES DEPARTMENT OF STATE  
REGARDING POTENTIAL FOREIGN  
POLICY IMPLICATIONS RAISED BY  
THIS ACTION; MEMORANDUM OF  
LAW IN SUPPORT THEREOF**

**ORAL ARGUMENT REQUESTED**

**NOTE ON MOTION CALENDAR:  
OCTOBER 21, 2005**

Defendant's Motion Requesting that the Court Seek  
Views of State Department  
Case No. C05-5192-FDB – Corrie v. Caterpillar, Inc.

**Howrey LLP**  
550 South Hope Street, Suite 1100  
Los Angeles, California 90071  
Telephone: (213) 892-1800  
Facsimile: (213) 892-2300

1 HUSSEIN, AND FADWA FAYEZ ABU )  
 HUSSEIN; EIDA IBRAHIM SULEIMAN )  
 2 KHALAFALLAH ON HER OWN BEHALF )  
 AND ON BEHALF OF HER DECEASED )  
 3 HUSBAND, IBRAHIM MAHMOUD )  
 MOHAMMED KHALAFALLAH AND )  
 4 NEXT OF KIN, )  
 5 Plaintiffs, )  
 6 vs. )  
 7 CATERPILLAR, INC., a foreign corporation, )  
 8 Defendant. )

---

9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26

Defendant's Motion Requesting that the Court Seek  
 Views of State Department  
 Case No. C05-5192-FDB – Corrie v. Caterpillar, Inc.

**Howrey LLP**  
 550 South Hope Street, Suite 1100  
 Los Angeles, California 90071  
 Telephone: (213) 892-1800  
 Facsimile: (213) 892-2300

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

I. INTRODUCTION ..... 1

II. FACTUAL BACKGROUND.....2

    A. Allegations of the Complaint.....2

    B. U.S. Governmental Approval of Caterpillar Sales to Israel .....4

    C. The Israeli Courts, including the High Court of Justice, have made numerous rulings on home demolitions by the IDF .....4

III. ARGUMENT.....5

    A. The views of the Department of State likely would be informative and influential in applying the Act of State and Political Question Doctrines to this case.....6

        1. The United States Government has invested substantial efforts toward Middle East peace for many years. .... 7

        2. Because the Executive approves the sale of Caterpillar bulldozers using U.S. military aid funds, the challenged transactions particularly implicate the conduct of foreign relations in a complex statutory scheme..... 8

    B. This in an appropriate case in which to seek the State Department’s views..... 10

IV. CONCLUSION..... 12

**TABLE OF AUTHORITIES**

**CASES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

*Alperin v. Vatican Bank*,  
405 F.3d 727 (9th Cir. 2005) .....6

*Baker v. Carr*,  
369 U.S. 186 (1962) ..... 11

*Chicago & Southern Air Lines, Inc. v. Waterman Steamship Co.*,  
333 U.S. 103 (1948) .....8

*Crockett v. Reagan*,  
720 F.2d 1355 (D.C. Cir. 1983)..... 10

*Crosby v. Nat’l Foreign Trade Council*,  
530 U.S. 363 (2000) .....9

*Dickson v. Ford*,  
521 F.2d 234 (5th Cir. 1975) .....9

*Doe v. State of Israel*,  
No. 02-1431 (JDB), Slip Op. (D.D.C. October 3, 2003)..... 10

*Environmental Tectonics Corp., Int’l v. W.S. Kirkpatrick & Co., Inc.*,  
659 F. Supp. 1381 (D.N.J. 1987)..... 12

*Estados Unidos Mexicanos v. DeCoster*,  
229 F. 3d 332 (1st Cir. 2000) ..... 12

*Fed. Republic of Yugoslavia v. Park- 71st Corp.*,  
913 F. Supp. 191 (S.D.N.Y. 1995) ..... 12

*Haig v. Agee*,  
453 U.S. 280 (1981) .....9

*Hwang Geum Joo v. Japan*,  
172 F. Supp. 2d 52 (D.D.C. 2001)..... 11

*Iwanowa v. Ford Motor Co.*,  
67 F. Supp. 2d 424 (D.N.J. 1999).....8

*Kadic v. Karadzic*,  
70 F.3d 232 (2d Cir. 1995) ..... 11, 12

1 *Mahorner v. Bush*,  
 2 224 F. Supp. 48 (D.D.C. 2002).....9

3 *Millen Indust., Inc. v. Coordination Council for N. Am. Affairs*,  
 4 855 F.2d 879 (D.C. Cir. 1988).....12

5 *Mujica v. Occidental Petroleum Corp.*,  
 6 \_\_\_ F. Supp. 2d \_\_\_, 2005 WL 1962635 (C.D. Cal. June 28, 2005) .....12

7 *Nat’l Coalition of the Union of Burma*,  
 8 176 F.R.D. 329 (C.D. Cal. 1997).....12

9 *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*,  
 10 577 F.2d 1196 (5th Cir. 1978) .....10

11 *Oetjen v. Central Leather Co.*,  
 12 246 U.S. 297 (1918) .....5, 6, 8

13 *Sarei v. Rio Tinto Plc*,  
 14 221 F. Supp. 1116 (C.D. Cal. 2002).....11

15 *Sosa v. Alvarez-Machain*,  
 16 542 U.S. 692 (2004) .....11

17 *Tabion v. Mufti*,  
 18 73 F.R.D. 535 (4th Cir. 1996) .....11

19 *Tel-Oren v. Libyan Arab Republic*,  
 20 726 F.2d 774 (D.C. Cir. 1984).....9

21  
 22  
 23  
 24  
 25  
 26

**STATUTES**

22 U.S.C. § 2321k .....9

22 U.S.C. § 2751 .....8, 9

22 U.S.C. § 2753(a)(1) .....9

22 U.S.C § 2778(a)(1) .....8

22 U.S.C. § 2778(a)(2) .....9

22 U.S.C. § 2778(B)(2) .....9

1 DEFENDANT CATERPILLAR INC. (“Caterpillar”) moves this Court to seek the views  
2 of the United States Department of State regarding any foreign affairs concerns that would be  
3 raised by adjudication of this action. Caterpillar makes this motion to provide the Court with the  
4 legal basis for and customary procedures for obtaining expert information with which to evaluate  
5 Caterpillar’s position that Plaintiffs’ claims are non-justiciable under the political question and  
6 act of state doctrines. The Court’s analysis of those issues likely would be informed and  
7 influenced by the views of the State Department if the Court has any uncertainty that those  
8 doctrines compel dismissal of this case.

9 This motion is based upon this motion and memorandum of law, the declarations of  
10 Frank Weinberg and Richard J. Burdge, Jr. filed concurrently herewith, the briefs on the Motion  
11 to Dismiss,<sup>1</sup> the pleadings on file in this action, such other matters of which the Court may take  
12 judicial notice and such further argument as may be presented at the hearing on this motion.

### 13 I. INTRODUCTION

14 Plaintiffs’ complaint alleges that the Israeli Defense Forces (“IDF”) used Caterpillar  
15 bulldozers to demolish Palestinian occupied buildings in violation of customary international  
16 humanitarian law. Yet, Plaintiffs’ complaint does not seek relief directly from the Israeli  
17 government, the IDF or the soldiers who operated the bulldozers. Instead, Plaintiffs seek relief  
18 from Caterpillar because it sold bulldozers and parts to Israel after it allegedly had actual or  
19 constructive notice that the IDF was committing “war crimes” and violations of international law  
20 by demolishing Palestinian homes with Caterpillar bulldozers. In addition to the substantial  
21 problems with the legal theories they advance as highlighted in the Motion to Dismiss,  
22

23 \_\_\_\_\_  
24 <sup>1</sup> Motion to Dismiss by Defendant Caterpillar, Inc. Pursuant to Fed. R. Civ. P. 12(b)(6) for  
25 Failure to State a Claim and Pursuant to the Political Question and Act of State Doctrines  
26 (“Motion to Dismiss”), noted on the motion calendar for September 23, 2005. A more extensive  
description of the allegations and the claims is contained in the briefing on the Motion to  
Dismiss.

1 adjudication of this action necessarily would involve this Court in U.S. foreign relations actions,  
2 as Caterpillar's bulldozer sales to Israel were approved by the United States government and  
3 funded directly by the United States as part of its military aid to Israel. Plaintiffs' stated goal is  
4 to stop Caterpillar from continuing to sell bulldozers to the State of Israel through a damage  
5 award and/or an injunction, until the State of Israel changes its policies on the use of bulldozers.

6 By this motion, Caterpillar does not intend to suggest that the Court does not already have  
7 sufficient information from which it can decide to dismiss this action as non-justiciable. Ample  
8 justification for just such a ruling was set forth in the briefing in support of the Motion to  
9 Dismiss. See Motion to Dismiss at 31-37; Reply at 34-40. Plaintiffs acknowledge that they are  
10 asking "that the Court order Defendant to cease provision of the equipment and services  
11 complained of to the IDF until the resulting unlawful violations cease." Pl. Br. at 81, n.63.

12 Thus, by this action plaintiffs seek to change, among other things:

- 13 ➤ The foreign military aid program of the United States for Israel;
- 14 ➤ The national security policies of the government of Israel; and
- 15 ➤ The law governing the limitations on the IDF's use of bulldozers for national  
16 security purposes as articulated by Israel's highest court.

17 Clearly, decisions by this Court affecting those issues have foreign relations implications for the  
18 Middle East, which has been a focus of U.S. foreign relations activities for many, many years.

19 If the Court is inclined to seek the views of the State Department, as suggested in the  
20 Motion to Dismiss, then this motion provides additional briefing in support of the propriety of  
21 doing so and a form of a letter to the State Department to assist the Court in the process.

## 22 **II. FACTUAL BACKGROUND**

### 23 **A. Allegations of the Complaint**

24 Plaintiffs allege that the government of Israel has engaged in a policy of demolishing  
25 Palestinian homes in areas Israel occupied following the 1967 Six Day War. First Amended  
26

1 Complaint (“FAC”) ¶ 25. They claim that Israel has demolished homes in these Occupied  
2 Territories for several reasons, including to create “buffer zones” around military bases and other  
3 areas; to discourage growth of the Palestinian population in certain areas; to clear paths for the  
4 IDF’s tanks and other weaponry; and as punitive measures against persons connected to suspects  
5 in attacks against Israeli civilians or soldiers. *Id.* at ¶¶ 27-31.

6 Plaintiffs allege that Rachel Corrie was killed while she was working with a group of  
7 “protesters” from “around the world.” *Id.* at ¶¶ 67, 72. According to the Complaint, on March  
8 16, 2003, Ms. Corrie and other volunteers were protesting IDF demolition activities in the Gaza  
9 Strip. Israeli Defense Forces allegedly were using two Caterpillar bulldozers, accompanied by an  
10 Armored Personnel Carrier (or “tank”), to demolish homes. *Id.* at ¶ 68. The complaint alleges  
11 that Ms. Corrie stood in front of a home to “protect it from demolition,” and a soldier operating  
12 one of the Caterpillar bulldozers intentionally ran her over, killing her. *Id.* at ¶¶ 71, 73.

13 The Complaint alleges that the Palestinian Plaintiffs suffered the loss of their homes, and,  
14 in some instances, personal injury or the deaths of relatives, when the IDF used Caterpillar  
15 tractors to demolish their residences. *Id.* at ¶¶ 56-64, 77-80. Plaintiffs allege that, in several such  
16 instances, IDF demolitions occurred in the context of other military activity, including “attacks  
17 on Palestinian residential areas” (*id.* at ¶ 56), “a large scale Israeli military incursion” into a  
18 refugee camp (*id.* at ¶ 80) and gunfire directed toward neighbors and relatives of injured  
19 Plaintiffs (*id.* at ¶ 61).

20 The Complaint does not allege that Caterpillar directly participated in any of the  
21 demolitions through its employees or by controlling or directing the IDF. Instead, Plaintiffs’  
22 claims against Caterpillar are all based on the central contention that Caterpillar sold bulldozers  
23 to Israel “when it knew, or should have known,” that the Israeli government was using  
24 Caterpillar tractors in this policy of home demolitions. *Id.* at ¶ 7. Plaintiffs also allege that  
25 Caterpillar failed to “recall” tractors it manufactured after receiving notice of Israel’s conduct.  
26



1           **B. U.S. Governmental Approval of Caterpillar Sales to Israel**

2           The Declaration of Frank Weinberg summarizes some of the involvement of the United  
3 States government in Caterpillar's selling of bulldozers and replacement parts to Israel. Most of  
4 the cost of the bulldozers is paid with U.S. funds provided under the foreign military financing  
5 ("FMF") program. Weinberg Decl. ¶ 3. That program utilizes foreign military aid for Israel  
6 appropriated by Congress, and the Defense Security Cooperation Agency ("DSCA") must  
7 approve the funding of the transaction. In the case of Caterpillar bulldozers, the DSCA found  
8 that the sale to Israel was "consistent with the Arms Export Control Act." *Id.* Exh. A. The  
9 Israeli government obtained export licenses under the Arms Export Control Act ("AECA").  
10 Weinberg Decl. ¶ 4. Caterpillar Defense & Products, which sells the bulldozers to Israel, did not  
11 and does not sell products to Israel that are not approved by the U.S. government. *Id.* ¶ 6.

12           **C. The Israeli Courts, including the High Court of Justice, have made numerous**  
13 **rulings on home demolitions by the IDF**

14           As Plaintiffs' own expert, Dr. Yuval Shany ("Shany"), has described in his opinion, the  
15 Israeli Courts have been quite involved in adjudicating cases regarding home demolitions by the  
16 IDF. Shany indicates that he conducted a "survey of the case law of the Israeli Supreme Court on  
17 house demolitions" in forming his opinion. Shany Opn. at ¶ 26.<sup>2</sup> In fact, Shany refers to the  
18 "jurisprudence of the Israeli Supreme Court" which has determined that house demolitions in the  
19 Occupied Territories "may be lawful in three types of security-related situations." Shany Opn. at  
20 ¶ 24. In addition, Shany cites to several decisions by the Israeli courts that relate to house  
21 demolitions in the Occupied Territories. Shany Opn. at ¶¶ 30, 31, 32, 35.

22           Therefore, Israeli Courts have developed a body of law relating to the legality or illegality  
23 of Israel's policies relating to home demolitions. Plaintiffs' lawsuit now asks a United States  
24

---

25           <sup>2</sup> The Shany Opinion was attached as Exhibit A to Plaintiffs' Brief in Opposition to Defendant's Motion to  
26 Dismiss, filed on August 15, 2005 (document 36).

1 District Judge, sitting in the State of Washington, to apply a different legal standard to judge the  
2 IDF's conduct and the State of Israel's policies for achieving security from terrorism. Israel is a  
3 sovereign nation with its own legal system and is an ally of the United States. As a matter of  
4 comity, this Court should not "second guess" the decisions of Israeli judges who sit in the midst  
5 of the terrorism and security problems in the Middle East and have developed a body of case law  
6 over a number of years relating to whether specific home demolitions by the IDF are lawful.

7 Moreover, to sit in judgment of the Israeli High Court of Justice would be an affront to a foreign  
8 sovereign.

### 9 III. ARGUMENT

10 Adjudication of Plaintiffs' claims implicates a number of areas of considerable foreign  
11 affairs concern to the United States. Adjudication of these claims would necessarily involve this  
12 Court passing judgment on and potentially changing one component of the U.S. military aid to  
13 Israel and thereby drawing into question the remainder of the aid, all of which necessarily  
14 implicates U.S. foreign policy toward Israel. It would also require this Court to pass judgment on  
15 Israel's policies relating to its own national security and policies relating to its responsibilities for  
16 security of the regions under its appointed military governments in the Occupied Territories. A  
17 direct challenge by our government as to the propriety of Israeli military operations is the type of  
18 issue that should be conducted by our government's Executive and Legislative branches. *See*  
19 *generally Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (noting that any remedy for  
20 alleged misconduct of foreign military should come from that country's courts or "through the  
21 diplomatic agencies of the political department of our government.") As the Israeli Courts have  
22 already ruled on a number of issues that are implicated by plaintiffs' claims, this Court would  
23 also be asked to pass judgment on their explication of the law applicable where those courts sit.

1           **A. The views of the Department of State likely would be informative and**  
 2           **influential in applying the Act of State and Political Question Doctrines to**  
 3           **this case.**

4           The Constitution places the power of the United States Government with respect to  
 5 foreign policy in the “political” branches of government, the Executive and the Legislative. *See,*  
 6 *e.g., Oetjen*, 246 U.S. at 302 (“The conduct of foreign relations of our Government is committed  
 7 by the Constitution to the Executive and Legislative -- “the political” -- Departments of the  
 8 Government.”); *Alperin v. Vatican Bank*, 405 F.3d 727 (9th Cir. 2005) (“[C]ases interpreting the  
 9 broad textual grants of authority to the President and Congress in the areas of foreign affairs  
 10 leave only a narrowly circumscribed role for the Judiciary.”)

11           While plaintiffs attempt to characterize this action as purely a tort case that does not raise  
 12 foreign policy concerns, their own pleadings belie those arguments. The complaint prays for the  
 13 following relief: “For injunctive and declaratory relief, including, but not limited to, an order  
 14 directing *Defendant to cease its participation in the provision of equipment and services to the*  
 15 *Israel Defense Forces until the resulting human rights violations and war crimes, including*  
 16 *the above described policies of home demolitions cease. . . .*” FAC, Prayer ¶ e (emphasis  
 17 added). Thus, plaintiffs expressly ask this Court (1) to halt a component of the U.S. military aid  
 18 to Israel and (2) to do so until the policies of the Israeli government change. In addition,  
 19 plaintiff’s theory of liability against Caterpillar is entirely predicated upon Caterpillar’s “actual”  
 20 or “constructive” notice that “the bulldozers it was supplying [to the IDF] have been used to  
 21 commit *crimes in violation of international law*” but it “continued to supply bulldozers and  
 22 essential bulldozer parts to the IDF, which were used to *commit the violations* subject to this  
 23 lawsuit . . . .” *Id.* ¶ 13 (emphasis added); *see also id.* ¶¶ 44-54 (allegations incorporated into all  
 24 claims for relief), 85-86 (first claim for relief), 96-97 (second claim for relief), 104 (third claim  
 25 for relief), 124 (fourth claim for relief), 126-27 (fifth claim for relief), 137 (sixth claim for relief)  
 26 & 141-42 (seventh claim for relief). Thus, the question of the legality of the national security

1 strategies adopted by the government of Israel, many of which have survived legal challenges in  
2 the highest courts of Israel, is directly placed in issue by the allegations of the complaint.

3 The political ramifications of adjudicating those questions in this litigation are so  
4 manifest that Caterpillar believes this Court can dismiss this case without further input from the  
5 State Department. However, to erase any doubt, numerous district courts have asked the State  
6 Department, the expert in this area, for its views. If this Court has any doubts, Caterpillar now  
7 asks it to do so too.

8 1. The United States Government has invested substantial efforts toward Middle  
9 East peace for many years.

10 Adjudicating the issues in this case will require this Court to step into the middle of one  
11 of the most sensitive, longest running international political negotiations in modern history. The  
12 United States has been intimately involved with negotiations regarding Middle East peace for  
13 since the State of Israel came into being in 1948. For example, in 1978 President Jimmy Carter  
14 helped facilitate the signing of the Camp David Accords between Egypt and Israel. In 1993  
15 President Bill Clinton oversaw the signing of the Oslo Accords between Israel and the  
16 Palestinian Liberation Organization (“PLO”). In June 2002, President George W. Bush outlined  
17 the principles proposed by the United States, Russia, the European Union and the United Nations  
18 for a “road map for peace” meant to resolve the Israeli-Palestinian conflict.

19 The United States continues to this day to be involved politically in negotiations relating  
20 to the Disputed Territories, trying to bring peace to the region. *See, e.g.*, Quartet Statement on  
21 Middle East Peace, released by the U.N. (September 20, 2005)<sup>3</sup>, available at

22 <sup>3</sup> “Representatives of the Quartet -- U.N. Secretary General Kofi Annan, Russian Foreign Minister Sergei  
23 Lavrov, U.S. Secretary of State Condoleezza Rice, U.K. Foreign Secretary Jack Straw, High Representative for  
24 European Common Foreign and Security Policy Javier Solana, and European Commissioner for External Relations  
25 Benita Ferrero-Waldner -- met today in New York to discuss the Gaza disengagement and the prospects for  
26 movement towards peace in the Middle East. . . . [the Statement concluded] The Quartet reiterates its commitment to  
the principles outlined in previous statements, including those of May 4, 2004, May 9, 2005, and June 23, 2005, and  
reaffirms its commitment to a just, comprehensive, and lasting settlement to the Arab-Israeli conflict based upon  
U.N. Security Council Resolutions 242 and 338.”

1 <http://www.state.gov/p/nea/rls/53569.htm>. This type of long-running and extremely sensitive  
2 political negotiation is precisely the type of political issue that, under the political question  
3 doctrine, is properly committed to the political branches of our government and not to the  
4 judiciary. See *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103,  
5 111 (1948) (finding that “the very nature of executive decisions as to foreign policy is political,  
6 not judicial.”) As the “conduct of the foreign relations of our Government is committed by the  
7 Constitution to the Executive and Legislative- the ‘political’ – Departments of the Government,”  
8 *Oetjen*, 246 U.S. at 302, the “most appropriate” context for application of the political question  
9 doctrine is a case that “concerns the conduct of foreign affairs.” *Iwanowa v. Ford Motor Co.*, 67  
10 F. Supp. 2d 424, 484 (D.N.J. 1999).

11 2. Because the Executive approves the sale of Caterpillar bulldozers using U.S.  
12 military aid funds, the challenged transactions particularly implicate the  
13 conduct of foreign relations in a complex statutory scheme.

14 In addition to the long-running political efforts in the region by the United States,  
15 Caterpillar’s conduct challenged by Plaintiffs’ complaint—*i.e.*, the sale of bulldozers to the State  
16 of Israel—is a political decision that this Court should not review. The sales of bulldozers to  
17 Israel were paid for with FMF funds that were approved by the DSCA. See Weinberg Decl. ¶ 3.  
18 Not only were they approved by the DSCA, the DCSA also determined that the sales were  
19 “consistent with the purposes of the Arms Export Control Act and the applicable FMF grant  
20 agreements.” *Id.* Exh. A. Determining what can and should be sold to a foreign ally is a political  
21 function and should not be reviewed by the judiciary. Israel obtained export licenses under the  
22 AECA for the bulldozers it bought from Caterpillar with FMF funds. *Id.* ¶ 4.

23 The AECA provides that “[I]n furtherance of world peace and security and foreign policy  
24 of the United States, the President is authorized to control the import and export of defense  
25 articles and defense services.” 22 U.S.C § 2778(a)(1). The AECA authorizes the sale of defense  
26 articles to “friendly countries.” *Id.* § 2751. Congress has enacted legislation recognizing Israel as

1 an ally of the United States. *Id.* § 2321k. The AECA also governs the private, non-governmental  
2 sale and export of weapons and prohibits the export of weapons without a license. *Id.* §§  
3 2778(a)(1)-(2), (b)(2).

4 The AECA recognizes the Executive's role in directing foreign policy. "It is the sense of  
5 the Congress that all such sales be approved only when they are consistent with the foreign policy  
6 interests of the United States." *Id.* § 2751. "No defense article or defense service shall be sold or  
7 leased by the United States Government" unless "the President finds" that the sale "will  
8 strengthen the security of the United States and promote world peace." *Id.* § 2753(a)(1).

9 Issues impacting foreign military aid are distinctly the province of the political branches  
10 of government and nonjusticiable political questions. *Haig v. Agee*, 453 U.S. 280, 292 (1981)  
11 ("[T]he conduct of foreign relations . . . [is] exclusively entrusted to the political branches . . .  
12 [and] immune from judicial inquiry or interference."); *Tel-Oren v. Libyan Arab Republic*, 726  
13 F.2d 774, 803 (D.C. Cir. 1984)(Bork, J.)("Questions touching on the foreign relations of the  
14 United States make up what is likely the largest class of questions to which the political question  
15 doctrine has been applied."); *Chicago & Southern Airline, Inc. v. Waterman S.S. Corp.*, 333 U.S.  
16 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not  
17 judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities,  
18 nor responsibility and have long been held to belong to the domain of political power not subject  
19 to judicial intrusion or inquiry."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363,  
20 386 (2000)("the nuances of the foreign policy of the United States . . . are much more the  
21 province of the Executive Branch and Congress than of this Court")(citation omitted). Several  
22 courts have ruled that challenges to foreign aid to Israel and military aid to other countries are  
23 nonjusticiable political questions. *See Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir.  
24 1975)(military aid to Israel); *Mahorner v. Bush*, 224 F. Supp. 48, 49 (D.D.C. 2002)(military and  
25  
26



1 economic aid to Israel); *Crockett v. Reagan*, 720 F.2d 1355, 1356-67 (D.C. Cir. 1983)(per  
2 curiam)(military aid to El Salvador).

3 The issues in this case are the same ones addressed in *Doe v. State of Israel*, No. 02-1431  
4 (JDB), Slip Op. (D.D.C. October 3, 2003). See Supplemental Authority, filed September 22,  
5 2005 (document 42). There, the Court was confronted with a claim against a number of defense  
6 contractors alleging that they sold weapons and munitions “pursuant to detailed arms export  
7 regulations” to Israel, when they knew or should have know that they were not being used for  
8 purpose of self-defense—allegedly in violation of the AECA and the Foreign Assistance Act. *Id.*  
9 at 14-16. The court found that all the sales were made “in the context of ongoing United States  
10 policy of military and financial support for Israel” and thus were “tightly intertwined with United  
11 States foreign policy.” *Id.* at 16. As the sales were an “integral part of foreign policy,” the court  
12 found that the government’s authorization of the sales could not be challenged in the courts. *Id.*  
13 As the court states, “Issues involving AECA directly impact, if not challenge, United States  
14 foreign policy, an area that is hardly the proper province of the courts.” *Id.* at 17.

15 Given that the Caterpillar sales of bulldozers were and will be done only in compliance  
16 with the AECA and with foreign military financing funding, foreign relations clearly are  
17 implicated and the views of the State Department regarding the implications of adjudicating this  
18 action likely would be extremely influential on this Court’s analysis of the political question  
19 motion to dismiss.

20 **B. This in an appropriate case in which to seek the State Department’s views.**

21 Courts considering the political question doctrine frequently look to the views of the  
22 Executive Branch when determining whether the issues raised in the case warrant the application  
23 of the doctrine. See, e.g., *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*,  
24 577 F.2d 1196, 1204 n.14 (5th Cir. 1978) (noting that it is “clear that whether the state  
25 department believes that judicial action would interfere with its foreign relations is germane to  
26

1 whether a court may decide actions involving foreign relations.”) Although courts are not bound  
2 by the State Department’s opinion on any ultimate question of law, such as whether the act of  
3 state or political question doctrines compel the dismissal of a case, the State Department’s views  
4 regarding the potential foreign affairs implications of the issues presented are highly relevant.  
5 *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (holding that State Department  
6 statement of interest is not dispositive, but should be accorded “respectful consideration”);  
7 *Tabion v. Mufti*, 73 F.R.D. 535, 538 (4th Cir. 1996) (finding State Department’s opinions should  
8 be accorded “substantial deference”); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 754 n.21  
9 (2004) (“In such cases, there is a strong argument that federal courts should give serious weight  
10 to the Executive Branch’s view of the case’s impact on foreign policy.”). Where, as here, the  
11 United States government has been, and continues to be, intimately involved in the Middle East  
12 peace process, its views on the consequences of adjudicating this action should be extremely  
13 valuable in assisting the Court in its analysis.

14 For example, in *Sarei v. Rio Tinto Plc*, 221 F. Supp. 1116 (C.D. Cal. 2002) the court held  
15 that the political question doctrine barred plaintiff’s suit after considering the opinion of the State  
16 Department that “continued adjudication of this lawsuit could negatively impact the peace  
17 process,” the success of which “is an important United States foreign policy objective.” *Id.* at  
18 1196. Given the input from the Department of State, the Court found that ignoring the statement  
19 “would surely ‘express[] lack of the respect for the coordinate branches of government,’ and  
20 cause ‘the potentiality of embarrassment from multifarious pronouncements by various  
21 departments on one question.’” *Id.* at 1197-98 (quoting *Baker v. Carr*, 369 U.S. 186, 217  
22 (1962)).

23 A number of district courts have requested the views of the State Department in such  
24 cases. *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 64 (D.D.C. 2001) (relying on State  
25 Department views in support of conclusion that political question doctrine barred action for  
26



1 reparations); *Mujica v. Occidental Petroleum Corp.*, \_\_\_ F. Supp. 2d \_\_\_, 2005 WL 1962635 (C.D.  
2 Cal. June 28, 2005); *Nat'l Coalition of the Union of Burma*, 176 F.R.D. 329, 335 (C.D. Cal.  
3 1997) (court asked State Department "to express its views concerning the potential ramifications  
4 of this litigation of the foreign policy of the United States."); *Fed. Republic of Yugoslavia v.*  
5 *Park- 71st Corp.*, 913 F. Supp. 191, 193-94 (S.D.N.Y. 1995) (dismissing action based upon  
6 Statement of Interest filed by the United States); *Environmental Tectonics Corp., Int'l v. W.S.*  
7 *Kirkpatrick & Co., Inc.*, 659 F. Supp. 1381 (D.N.J. 1987) (requesting State Department views on  
8 the Act of State issues at the motion to dismiss stage); *see also Estados Unidos Mexicanos v.*  
9 *DeCoster*, 229 F. 3d 332, 342 (1st Cir. 2000) (noting that "the district court commendably  
10 invited comment from the U.S. Department of State."); *Millen Indust., Inc. v. Coordination*  
11 *Council for N. Am. Affairs*, 855 F.2d 879, 881 (D.C. Cir. 1988) ("the courts recognize the value  
12 of obtaining views of the Executive Branch in matters relating to the application of the act of  
13 state doctrine and giving appropriate weight to those views."); *Kadic v. Karadzic*, 70 F.3d 232,  
14 250 (2d Cir. 1996) (declining to dismiss based on political question doctrine where State  
15 Department's statement of interest indicated it had no concern about adjudication of the action.)

16 Although Plaintiffs appear to contend that the court should wait for the State Department  
17 to act affirmatively absent a request by this Court, (Opposition to Motion to Dismiss at 89:8-19),  
18 in each of the cases cited above, the State Department did not inject itself into the judicial  
19 process without first being asked by the court.

#### 20 **IV. CONCLUSION**

21 For all the foregoing reasons, the Court should grant Defendant's motion and solicit the  
22 views of the State Department regarding whether the continued adjudication of this litigation  
23 raises foreign policy concerns.  
24  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

GRAHAM & DUNN PC

By: /s/ James L. Magee

James L. Magee, WSBA #1294  
Email: [jmagee@grahamdunn.com](mailto:jmagee@grahamdunn.com)  
2801 Alaskan Way ~ Suite 300  
Seattle, WA 98121-1128  
Phone: (206) 624-8300  
Fax: (206) 340-9599

HOWREY LLP  
Robert G. Abrams (admitted pro hac vice)  
Email: [abramsr@howrey.com](mailto:abramsr@howrey.com)  
1299 Pennsylvania Avenue, NW  
Washington, DC 20004  
Phone: (202) 383-6935  
Fax: (202) 383-6610

HOWREY LLP  
Joanne E. Caruso (admitted pro hac vice)  
Email: [carusoj@howrey.com](mailto:carusoj@howrey.com)  
Richard J. Burdger, Jr. (admitted pro hac vice)  
Email: [burdger@howrey.com](mailto:burdger@howrey.com)  
David G. Meyer (admitted pro hac vice)  
Email: [meyerd@howrey.com](mailto:meyerd@howrey.com)  
550 South Hope Street, Suite 1100  
Los Angeles, CA 90071  
Phone: (213) 892-1800  
Fax: (213) 892-2300

Attorneys for Defendant Caterpillar Inc