



# Homeland Security

June 9, 2006

## INFORMATION

(u) MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Counselor to the Assistant Secretary for Policy

FROM: Michael Scardaville, Special Assistant/International Policy Advisor

SUBJECT: Summary of potential changes to seek in the PNR Undertakings

### Purpose

(u) Per your request, below is a preliminary summary of areas of the Undertakings DHS may want to consider changing. I intend to work with CBP, OGC, TSA and Privacy to address these issues in more detail next week. My goal is provide you with a prioritized and justified list of changes to guide an eventual dialogue with the Europeans.

### Background

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 In addition, some requirements, such as the audit standards, actually improved the overall operation of the program and others reflect existing policy (i.e., redress opportunities).

### Discussion

#### Likely Top Priorities:

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# Homeland Security

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Deleted: June 9, 2006

MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy (u)

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Councilor to the Assistant Secretary for Policy (u)

FROM: Michael Scardaville, Special Assistant/International Policy Advisor (u)

SUBJECT: Summary of potential changes to seek in the PNR Undertakings (u)

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Discussion

Likely Top Priorities

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# Homeland Security

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## INFORMATION

Deleted: June 11, 2006

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MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy (u)

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Councilor to the Assistant Secretary for Policy (u)

FROM: Michael Scardaville, Special Assistant/International Policy Advisor (u)

SUBJECT: Summary of potential changes to seek in the PNR Undertakings (u)

### Purpose

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### Background

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### Discussion

#### *Likely Top Priorities*

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# Homeland Security

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## INFORMATION

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Deleted: June 13, 2006

MEMORANDUM FOR: Stewart Baker, Assistant Secretary for Policy

THROUGH: Paul Rosenzweig, Acting Assistant Secretary, PDEV and Counselor to the Assistant Secretary for Policy

FROM: PNR Working Group

SUBJECT: Summary of potential changes to seek in the PNR Undertakings

Deleted: Michael Scardaville, Special Assistant International Policy Advisor

### Purpose

(u) Per your request, below is an assessment of areas of the Undertakings DHS should seek to change in the S-EE PNR arrangement. [

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Background:

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DEPUTIES MEETING ON PNR

DATE: Tuesday, July 25, 2006  
TIME: 12:00 - TBD  
LOCATION: Facility, Building, Office (e.g., NAC, C 6 2 J  
FROM: Stewart Baker, Assistant Secretary for Policy

OBJECTIVES/DESIRED OUTCOME OF MEETING:

- Establish an interagency negotiating position [

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BACKGROUND:

- On May 30, 2006 the European Court of Justice (ECJ) ruled that the legal instruments the European Union utilized in striking a 2004 agreement with DHS on CBP's access to PNR were inappropriate and required the EU to terminate the agreement by September 30, 2006. The EU has since provided notice that it is terminating the agreement effective that date.
- In issuing this ruling the ECJ indirectly commented on the substance of the issue by emphasizing that the EU's 1995 directive on data protection in first pillar does not apply to the transfer of PNR data which is a law enforcement (third pillar issue). Concern that CBP regulations conflicted with this directive was the principal reason the agreement was struck in the first place. However, the ECJ did not comment on the sufficiency of DHS's efforts to protect privacy.
- However, the current arrangement does have significant impacts on DHS operations. In particular, the limitations on sharing and retention enshrined in the Undertakings has prohibited broader use of PNR data within DHS to combat terrorism and crime. Most affected by this change has been ICE, [

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**PARTICIPANTS:**

*Non-DHS*

*DHS*

Deputy Secretary Jackson

**PRESS PLAN:** "Closed"

**ATTACHMENTS:**

- A. Discussion Document: Analysis of United States Interests in the U.S.-EU PNR dialogue (7/13/06)
- B. Memo: Summary of Potential Changes to the Undertakings (*PENDING*)
- C. Member State Positions known as of 7/20/06
- D. Background on EU views of consent as a solution
- E. DHS' Response Options to European Court of Justice Decision (February 2006)

Prepared by: Michael Scardaville, PDEV, [ b2 ]

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DEPUTIES MEETING ON PNR

DATE: Tuesday, July 25, 2006  
TIME: 12:00 - TBD  
LOCATION: Facility, Building, Office (e.g., VAC) [ b2 ]  
FROM: Stewart Baker, Assistant Secretary for Policy

OBJECTIVES/DESIRED OUTCOME OF MEETING:

- Establish an interagency negotiating position [ b5 ]

BACKGROUND:

- On May 30, 2006 the European Court of Justice (ECJ) ruled that the legal instrument the European Union utilized as a basis for entering into a 2004 agreement with DHS on CBP's access to PNR was inapplicable, and required the EU to terminate the agreement by September 30, 2006. The EU has since provided notice that it is terminating the agreement effective that date.
- In issuing this ruling the ECJ held that the EU's 1995 directive on data protection in the first pillar does not apply to the transfer of PNR data which is a law enforcement (third pillar issue). Concern that U.S. law and CBP's implementing PNR regulations conflicted with this directive was the basis for entering into the agreement in the first place. However, the ECJ did not comment on the sufficiency of DHS's efforts to protect privacy.
- However, the current arrangement does significantly impact DHS operations. In particular, the limitations on sharing and retention enshrined in the Undertakings have prohibited broader use of PNR within DHS to combat terrorism and crime. Most affected by this change has been ICE, [ b5 ]

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**PARTICIPANTS:**

*Non-DHS*

*DHS*

Deputy Secretary Jackson

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Prepared by: Michael Scardaville, PDEV. E b2

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*Scardaville*

DEPUTIES MEETING ON PNR

DATE: Tuesday, July 25, 2006  
TIME: 12:00 - TBD  
LOCATION: Facility, Building, Office (e.g., MAC, [ b2 ] ]  
FROM: Stewart Baker, Assistant Secretary for Policy

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**PARTICIPANTS:**

*Non-DHS*

**DHS**

Deputy Secretary Jackson

**PRESS PLAN:** "Closed"

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Prepared by: Michael Scardaville. PDEV L b2 J

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DEPUTIES MEETING ON PNR

**DATE:** Tuesday, July 25, 2006  
**TIME:** 12:00 - TBD  
**LOCATION:** Facility, Building, Office (e.g., NAC, C b 2      7  
**FROM:** Stewart Baker, Assistant Secretary for Policy

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**PARTICIPANTS:**

*Non-DHS*

*DHS*

Deputy Secretary Jackson

**PRESS PLAN:** "Closed"

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Prepared by: Michael Scardaville, PDEV, E b2

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CBP CC Comments (to merge with all of [b6] comments, so these supplement these):

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(1) Last 2 paragraphs re DHS views:

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After the 4<sup>th</sup> sentence add: [

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TS # 16-3086024

Background:

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Information exchange with entities inside the European Union territory occur through both government-to-government channels (as in the case of law enforcement information sharing - say between ICE and Scotland Yard) and directly with European air carriers (as in the case of CBP's receipt of Passenger Name Record (PNR) data from carriers offering international flights to and from the United States). A number of converging events in Europe, in particular the European Court of Justice decision on the legality of the EC-US PNR Agreement, announced on May 30, and a proposed EU Framework Decision on exchange of law enforcement data, have major implications for both kinds of information sharing.

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The PNR Case. Shortly after the 2004 signing of the European Union agreement on CBP access to Passenger Name Record data, the European Parliament (EP), disturbed over what it viewed as an attack on personal privacy and its own authority, filed two suits in the European Court of Justice (ECJ) against the actions of the European Commission (EC) and the European Council for entering into the information sharing arrangement. The first suit challenged the authority of the EC and the European Council to enter into the International Agreement without the assent of the Parliament; the second challenged the merits of the arrangement itself—whether the undertakings were adequate to meet the information privacy protections afforded under EU law specifically their Data Protection Directive 95 to ECJ to all individuals.

(u)

On May 30, 2004 the European Court of Justice (ECJ) annulled the decision of adequacy made by the European Commission, as well as the European Council's decision to enter into an international agreement with DHS on the access to and use of Passenger Name Records. In issuing this finding, the Court did not rule against CBP's ability to access PNR data, it did not determine that privacy was violated, nor did it take a view on the content of the arrangement. Rather, consistent with the Advocate General's November 2005 opinion, the court found that the decisions of the Commission and Council were premised upon an inapplicable legal basis under European law. Instead of concluding the agreement under the data protection provisions of Article 95, the court deemed that the processing of PNR data is a law enforcement and public security issue, and as a result, is a shared competency between the European Union and Member States under the so called "third pillar."

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The effective date of the ruling is delayed until September 30, 2006 (or the date the agreement is terminated, whichever is sooner). We have an open dialogue with the Commission on this issue and a commitment to, within the confines of the court's ruling, continue to make data available as we attempt to resolve the impact of the ECJ's decision. DHS is expecting a proposal from the European Commission later this month on how to respond to the ECJ decision.

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Prepared by: Michael Scanzaville PLIC/DPEN [ b2 (low) ]

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EU Draft Decision and "Principle of Availability." The European Commission (EC) has drafted a proposed Council Framework Decision "on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters." The Draft Decision, which would have the force of law within the European Union, would lay out procedural rules for information sharing between individual EU member states and between an EU member state and a third party. In late November, in a meeting with Assistant Secretary Stewart Baker, EU Director General for Justice and Home Affairs Jonathan Hall indicated that some form of the Draft Decision was likely to be enacted in 2006.

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A key reason for promulgating the Draft Decision is to provide assurances to the public of continued privacy protection, while enhancing law enforcement cooperation by making law enforcement investigative information more routinely available to all EU member states - the "principle of availability." This principle envisions facilitation of the full and timely exchange of border, law enforcement, and intelligence information within the EU. Inasmuch as this effort parallels the United States' efforts to break down information sharing barriers within the Federal family and between Federal and State agencies, DHS strongly supports the objective. While this framework may facilitate sharing of such information among the EU member states, the draft Decision as written would seriously impede the ability of such states to share similar information outside the EU.

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Data Protection and "Use Limitation" Provisions in Draft Decision. The Draft Decision contains a provision in Article 13 (Transfer to competent authorities in third countries or to international bodies) that would require an EU member state to ensure that "an adequate level of data protection" exists in the U.S. before that member state could share *another member state's* information with U.S. agencies.<sup>1</sup> As a result, European authorities could seek to extend data protection provisions similar to those in the PNR Agreement (e.g., joint reviews, time limits on data retention and restrictions on sharing with other government agencies) to law enforcement information, and thus require additional measures, beyond those already in place under U.S. law (e.g., FOIA, State, existing privacy agreements, before U.S. law enforcement authorities could be considered to have an "adequate" data protection regime under the standard.<sup>2</sup> This provision is very similar to the existing EU Data Protection Directive 95/46 in the first pillar. With respect to that Directive, the EU has found Switzerland, Canada, Argentina, the Isle of Man, and Jersey meet the EU adequacy standards. The U.S. has been found adequate with

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<sup>1</sup> The adequacy finding granted to the U.S. under the PNR Agreement is specific to the transfer of PNR data and only exists in its most basic form. Subject to certain conditions, CBP may transfer information to other authorities, but the transfer of the data outside of CBP for law enforcement purposes is not permitted.

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**Relationship to Existing Agreements and Impact on DHS Law Enforcement Operations.**

The United States has previously entered into a number of binding and non-binding information sharing arrangements at both the European Union and Member State level. For example, with respect to the former, we have signed a 2003 Mutual Legal Assistance Agreement (MLAA) with the European Union and a 2001 information sharing agreement with Europol (the EU-level police agency); with respect to Member States, we signed a 2003 MLAT with Germany, which builds on numerous other MLAs already in force with other EU member states. The United States also has many executive agreements and memoranda of understanding with Member States under which critical information is currently being shared. In recent meetings, officials have articulated that information exchanges under these agreements may be "grandfathered" and allowed to continue upon institution of the framework.

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**Current Status.**

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**Related Issues.**

Recently a number of U.S. airlines were notified by the French Directorate General of Civil Aviation (DGAC) that they would be required to apply for authorization from the French DGAC

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Prepared by: Michael Scudaville, et al. PDBV. [ b2 (104) ]

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For the purpose of this mission to continue to work with IS 3/3 to meet the training requirement, the minutes have requested the assistance of the U.S. Government in addressing these matters with relevant French Government authorities.

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US-EU AGREEMENT ON PNR

ES # 06-5081.30

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Talking Points:

- (u) • Thank the EU for presenting us with their proposed replacement text. Emphasize that much as they had to coordinate extensively between their various institutions that the USG must now do the same
- (u) • Emphasize that the USG looks forward to beginning negotiations soon and is committed to working with the EU to find a mutually acceptable solution by September 30, 2006.

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Watch Out For/If Asked:

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Drafted by: Michael Scardaville, Special Assistant/International Policy Advisor. PDEV

Contact: L b2 J

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Page 2

**Background:**

(u) Consistent with the Aviation and Transportation Security Act of 2001, each air carrier operating passenger flights in foreign air transportation to or from the United States must provide the Department of Homeland Security (DHS) Bureau of Customs and Border Protection (CBP) with electronic access to passenger name record (PNR) data to the extent it is collected and contained in the air carrier's automated reservation/departure control systems ("reservation systems"). In 2002, the EU raised concerns that the statutory requirement conflicted with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("European Data Protection Directive"). Most significantly, the European Data Protection Directive places burdens on private sector data controllers that limits their ability to share personal data cross-border with non-EU countries absent a demonstration that the receiving entity in a third country has adequate data protection standards.

(u) After more than a year and half of negotiations, the DHS-led, interagency team reached an arrangement with the European Commission (EC) which permits airlines to legally provide access to passenger name record (PNR) data emanating from within the European Union (EU) to CBP. This access is subject to carefully negotiated limitations as set forth in a set of Undertakings issued by CBP offering detailed assurances on how the DHS component would collect, process, handle, protect and share PNR data received in connection with flights between the U.S. and EU. Compliance with the Undertakings required significant system, policy and operational modifications by CBP and was accomplished on May 13, 2005.

(u) It is important to note that the "PNR Arrangement" is comprised of three linked actions – the unilateral CBP Undertakings, an executive-level international agreement signed on May 28, 2004, and the a finding by the European Commission that the CBP commitments outlined in the Undertakings adequately protect privacy.

(u) **The Joint Review.** On September 20-21, 2005, in a cooperative effort with the DHS Privacy Office, CBP hosted the first U.S.-EU Joint Review with members of the EU. On day one, CBP provided a presentation during the site visit at the National Targeting Center and during the site visit at Dulles International Airport. CBP gave an overview of the operations at each site, as well as demonstrated how CBP operationally uses and protects PNR data derived between the EU and the United States.

(u) On day two, CBP provided a presentation on the efforts taken to fulfill the obligations of the "Undertakings" and the international agreement that was signed on May 28, 2005. The presentation included existing and added policies, training, and the enhancements of our automated system. CBP also addressed questions and concerns during the visit. The Joint Review went well, and has been referenced by both sides as a valuable effort for improving understanding on both sides. The EU team from the Joint Review recently issued its report,

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**Drafted by:** Michael Scardaville, Special Assistant/International Policy Advisor, PDEV

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which was generally favorable despite criticizing the length of time it took CBP to implement the Undertaking, concerns over the protection of information disclosed during the meetings and detailing specific questions and recommendations for further action.

(u) **The PNR Case.** Shortly after the 2004 signing of the European Union agreement on CBP access to Passenger Name Record data, the European Parliament (EP), disturbed over what it viewed as an attack on personal privacy and its own authority, filed two suits in the European Court of Justice (ECJ) against the actions of the European Commission (EC) and the European Council for entering into the information sharing arrangement. The first suit challenged the authority of the EC and the European Council to enter into the International Agreement without the assent of the Parliament; the second challenged the merits of the arrangement itself—whether the Undertakings were adequate to meet the information privacy protections afforded under EU law to all individuals.

(u) On May 30, 2006 the European Court of Justice (ECJ) annulled the decision of adequacy made by the European Commission, as well as the European Council's decision to enter into an international agreement with DHS on the use of Passenger Name Records. In issuing this finding, the Court did not rule against the availability of PNR data, it did not determine that privacy was violated, nor did it take a view on the content of the agreement. Rather, consistent with the Advocate General's November 2005 opinion, the court found that the decisions of the Commission and Council were premised upon an inapplicable legal basis under European law. Instead of concluding the agreement under the data protection provisions of Article 95, the court deemed that the processing of PNR data is a law enforcement and public security issue, and as a result, is a shared competency between the European Union and Member States under the so called "third pillar."

(u) The Court's ruling gave the European Commission until September 30, 2006 to establish a new community-wide arrangement to govern PNR access for flights to the United States. However, since the ECJ's decision removes the threat of fines and criminal penalties based on EU law, the immediate consequences for not striking a new arrangement are significantly diminished. Nonetheless, the European Commission will push for an EU-wide solution.

The EU provided notice to the United States of the termination of the agreement effective September 30, 2006 on July 3<sup>rd</sup>. A proposed alternative text was provided by the Finnish Presidency on Wednesday July 19<sup>th</sup>, but subsequent conversations with Commission officials have indicated that this draft is not the final proposal. This proposal is currently being reviewed, but at a minimum a variety of legal questions will have to be explored with the EU to determine both the impact of certain language and whether the legal basis can withstand a new challenge. In addition, the proposal relies on the 2004 Undertakings of CBP. Further, the USG is pending direction from a Deputy's Committee meeting currently scheduled for 7/25.

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**Drafted by:** Michael Scardaville, Special Assistant/International Policy Advisor, PDEV

**Contact:** E 52

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(U) 95 Directives  
"Public Security"

Derived: Schneider MPN  
Reclass: 11/2002

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(v) Specific Issues:

- (v) • *Retention:*
- (v) • *Onward Transfer:*
- (v) • *Data Elements:*
- (v) • *Oversight/Joint Review:*
- (v) • *Push vs. Pull:*
- (v) • *Redress:*

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DRAFT Framework for International Arrangement Regarding EL PNR Access  
May 31, 2006

Note: [Bracketed] text is to be held in reserve as needed for negotiating purposes. It is not the preferred language, but is nonetheless acceptable if needed, subject to certain conditions in some instances.

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[Add additional preambular language, as needed]

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John J. Schindler  
Director of Security

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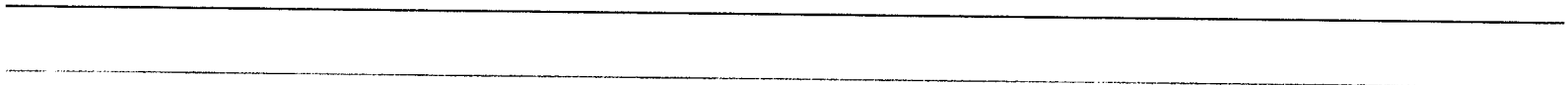
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DRAFT Framework for International Arrangement Regarding EU PNR Access  
May 31, 2006

Note: [Bracketed] text is to be held in reserve as needed for negotiating purposes. It is not the preferred language, but is nonetheless acceptable if needed (subject to certain conditions in some instances).

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Dennis Schindler RFE  
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