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TREATY WITH THE REPUBLIC OF KOREA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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Mr. HELMS, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 104–1]

The Committee on Foreign Relations, to which was referred the Treaty Between the United States of America and the Republic of Korea on Mutual Legal Assistance in Criminal Matters, signed at Washington on November 23, 1993, together with a related exchange of notes signed on the same date, having considered the same, reports favorably thereon with two provisos and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of ratification.

I. PURPOSE

Mutual Legal Assistance Treaties (MLATs) provide for the sharing of information and evidence related to criminal investigations and prosecutions, including drug trafficking and narcotics-related money laundering. Both parties are obligated to assist in the investigation, prosecution and suppression of offenses in all forms of proceedings (criminal, civil or administrative). Absent a treaty or executive agreement, the customary method of formally requesting assistance has been through letters rogatory.

II. BACKGROUND

On November 23, 1993, the United States signed a treaty with the Republic of Korea on mutual assistance in criminal matters and the President transmitted the Treaty to the Senate for advice and consent to ratification on January 12, 1995. In recent years, the United States has signed similar MLATs with many other countries as part of an effort to modernize the legal tools available

to law enforcement authorities in need of foreign evidence for use in criminal cases.

States historically have been reluctant to become involved in the enforcement of foreign penal law.[1] This reluctance extended to assisting foreign investigations and prosecutions through compelling testimony or the production of documents. Even now, the shared interest in facilitating the prosecution of transnational crime is viewed as being outweighed at times by unwillingness to provide information to those with different standards of criminality and professional conduct.

Despite these hindrances, the need to obtain the cooperation of foreign authorities is frequently critical to effective criminal prosecution. Documents and other evidence of crime often are located abroad. It is necessary to be able to obtain materials and statements in a form that comports with U.S. legal standards, even though these standards may not comport with local practice. Also, assisting prosecutors for trial is only part of how foreign authorities may assist the enforcement process. Detecting and investigating transnational crime require access to foreign financial records and similar materials, while identifying the fruits of crime abroad and having them forfeited may deter future criminal activity. It is necessary to have the timely and discrete assistance of local authorities.

Still, it was not until the 1960s that judicial assistance by means of letters rogatory—requests issuing from one court to another to assist in the administration of justice [2]—were approved. Even then, the ability of foreign authorities to use letters rogatory to obtain U.S. assistance was not established firmly in case law until 1975.[3] By this time, the United States had negotiated and signed a mutual legal assistance treaty with Switzerland, the first U.S. treaty of its kind. This treaty was ratified by both countries in 1976 and entered into force in January 1977. Since then, the United States has negotiated more than 20 additional bilateral MLATs, 14 of which are in force.[4]

Absent a treaty or executive agreement, the customary method of formally requesting assistance has been through letters rogatory. The Deputy Assistant Attorney General of the Criminal Division has summarized the advantages of MLATs over letters rogatory to the House Foreign Affairs Committee as follows:

> An MLAT or executive agreement replaces the use of letters rogatory. * * * However, treaties and executive agree-

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[1] E.g., Restatement (Third) of the Foreign Relations Law of the United States Part IV, ch. 7, subch. A, Introductory Note and § 483, Reporters' Note 2 (1987); Ellis & Pisani, "The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis," 19 Int. Lawyer 189, 191–198 (discussing history of U.S. reluctance and evolution of cooperation) [hereinafter cited as Ellis & Pisani].

[2] See In re Letter Rogatory from the Justice Court, District of Montreal Canada, 523 F.2d 562, 564–565 (6th Cir. 1975).

[3] Id. at 565–566.

[4] According to the August 4, 1995, Letters of Submittal accompanying the MLATs with Austria and Hungary, the United States has bilateral MLATs in force with Argentina, The Bahamas, Canada, Italy, Jamaica, Mexico, Morocco, the Netherlands, Spain, Switzerland, Thailand, Turkey, the United Kingdom concerning the Cayman Islands, and Uruguay. MLATs not in force but ratified by the United States include those with Belgium, Colombia, and Panama. Signed but unratified MLATs include the five addressed in this report—those with Austria, Hungary, the Republic of Korea, the Philippines, and the United Kingdom—and one with Nigeria. Treaty Doc. 102–21, 104th Cong., 1st Sess. v (1992)

> ments provide, from our perspective, a much more effective means of obtaining evidence. First, an MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. Letters rogatory, on the other hand, are executed solely as a matter of comity. Second, an MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. Third, in an MLAT we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Fourth, our MLATs are structured to streamline and make more effective the process of obtaining evidence.[5]

Letters rogatory and MLATs are not the only means that have been used to obtain assistance abroad.[6] The United States at times has concluded executive agreements as a formal means of obtaining limited assistance to investigate specified types of crimes (e.g., drug trafficking) or a particular criminal scheme (e.g., the Lockheed investigations).[7] A separate, formal means of obtaining evidence has been through the subpoena power. Subpoenas potentially may be served on a citizen or permanent resident of the United States abroad or on a domestic U.S. branch of a business whose branches abroad possess the desired information.[8]

Additionally, the Office of International Affairs of the Criminal Division of the Department of Justice notes several informal means of obtaining assistance that have been used by law enforcement authorities in particular circumstances. These have included informal police-to-police requests (often accomplished through law enforcement personnel at our embassies abroad), requests through Interpol, requests for readily available documents through diplomatic channels, and taking depositions of voluntary witnesses. Informal means also have included "[p]ersuading the authorities in the other country to open 'joint' investigations whereby the needed evidence is obtained by their authorities and then shared with us." The Justice Department also has made "treaty type requests that, even though no treaty is in force, the authorities in the requested country have indicated they will accept and execute. In some countries (e.g., Japan and Germany) the acceptance of such requests is governed by domestic law; in others, by custom or precedent."[9]

Like letters rogatory, executive agreements, subpoenas, and informal assistance also have their limitations compared to MLATs. Executive agreements have been restricted in scope and application. Foreign governments have strongly objected to obtaining

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[5] "Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the House Committee on Foreign Affairs." 100th Cong., 1st Sess. 36–37 (1987) (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division).

[6] U.S. Dept. of Justice, United States Attorneys' Manual §§ 9–13.520 et seq. (October 1, 1988).

[7] Id. at § 9–13.523.

[8] Id. at § 9–13.525.

[9] Id. at § 9–13.524.

records from within their territories through the subpoena power.[10] There is no assurance that informal means will be available or that information received through them will be admissible in court.

III. SUMMARY

A. GENERAL

Mutual legal assistance treaties generally impose reciprocal obligations on parties to cooperate both in the investigation and the prosecution of crime. Most, but not all, MLATs have covered a broad range of crimes with no requirement that a request for assistance relate to activity that would be criminal in the requested State. The means of obtaining evidence and testimony under MLATs also range broadly. MLATs increasingly are extending beyond vehicles for gathering information to include ways of denying criminals the fruits and the instrumentalities of their crimes.

B. SECTION-BY-SECTION SUMMARY

1. Types of proceedings

MLATs generally call for assistance in criminal investigations and proceedings. This coverage often is broad enough to encompass all aspects of a criminal prosecution, from investigations by law enforcement agencies to grand jury proceedings to trial preparation following formal charges to criminal trial. Most recent MLATs also cover civil and administrative proceedings—forfeiture proceedings, for example—related to at least some types of prosecutions, most frequently those involving drug trafficking. However, the scope of some MLATs has been more circumscribed than the proposed treaty.

The Korea Treaty states that the parties shall provide mutual assistance "in connection with the prevention, investigation and prosecution of offenses, and in proceedings related to criminal matters" (art. 1).

2. Limitations on assistance

All MLATs except various types of requests from the treaty assistance provisions. For example, judicial assistance typically may be refused if carrying out a request would prejudice the national security or other essential interest of the Requested State. Requests related to political offenses usually are excepted, as are requests related to strictly military offenses. Unlike the extradition treaties, dual criminalty—a requirement that a request relate to acts that are criminal in both the Requested and Requesting States—generally is not required. Nevertheless, some treaties do contain at least an element of a dual criminality standard. Additionally, some treaties go beyond military and political offenses to also except requests related to certain other types of crimes. Re-

[10] Notwithstanding foreign objections, unilateral methods such as issuing subpoenas on domestic branches may actually have promoted the negotiation of MLATs. According to one commentator, "the principal incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents, and courts to unilateral, extraterritorial means of collecting evidence from abroad." E. Nadelmann, Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement 315 (1993) [hereinafter cited as Nadelmann].

quests related to tax offenses at times have been restricted in an MLAT to offenses that are connected to other criminal activities. Before a request is denied, a Requested State generally is required to determine whether an otherwise objectionable request may be fulfilled subject to conditions.

The Korea Treaty states that assistance may be denied if the conduct involved is not an offense in the Requested State, but a broad range of criminal conduct is excepted from the dual criminality requirement. Excepted conduct includes a long list of crimes, among them drug trafficking, racketeering activity, money laundering, fraud (including securities fraud), immigration crimes, antitrust, bankruptcy, insider trading, crime against computer systems, trade laws, tax evasion, crimes involving intellectual property, firearms offenses, and certain violent crime addressed in multilateral conventions (art. 3 & Annex).

3. Transmittal of requests

Requests under MLATs are conveyed directly through designated Competent Authorities, which in the United States has been the Criminal Division of the Justice Department. The time and paperwork saved in thereby bypassing the courts and diplomatic channels are among the main advantages of MLATs. For example, a report by the Criminal Justice Section of the American Bar Association has stated that the circuitry of the channel for transmitting letters rogatory and evidence obtained under them often effectively frustrates use of letters rogatory as a means of obtaining assistance.[11]

The provisions on the form and contents of requests are contained in article 4 of the respective treaties. All five of the MLATs under consideration require that a request for assistance under an MLAT be in writing, except in urgent situations (in which case a request must be confirmed in writing later, typically within 10 days). Among the information usually to be included in a request are (1) the name of the authority conducting the investigation, prosecution, or proceeding to be assisted by the request; (2) a detailed description of the subject matter and nature of the investigation, prosecution, or proceeding to which the request relates, including, under all of the treaties other than the UK treaty, a description of the pertinent offenses; (3) a description of the evidence or other assistance being sought; and (4) the purpose for which the assistance is being sought.

To the extent necessary and possible, other information that may facilitate carrying out the request also is to be provided, including, for example, information on the whereabouts of information or persons sought or a description of a place or person to be searched and of objects to be seized. Additional information may include lists of questions to be asked, a description of procedures to be followed, and information on allowances and expenses to be provided to an individual who is asked to appear in the Requesting State.

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[11] American Bar Association, Criminal Justice Section, Report (No. 109) to the House of Delegates 3 (1989 Annual Meeting in Honolulu) (hereinafter cited as ABA Report).

4. Execution of requests

Under the proposed treaties the Competent Authority of a Requested State is to execute a request promptly or, when appropriate, transmit the request to authorities having jurisdiction within the Requested State to execute it. The competent authorities of the Requested State are to do everything in their power to execute the request.

Article 5 of the proposed MLAT provides that requests are to be executed in accordance with the laws of the Requested State, unless the treaties provide otherwise. At the same time, the method of execution specified in a request is to be followed unless the laws of the Requested State prohibit it. As is typical in other MLATs the proposed treaty provides that the judicial authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request.

The Central Authority of a Requested State may postpone or place conditions on the execution of a request if execution in accordance with the request would interfere with a domestic criminal investigation or proceeding, jeopardize the security of a person, or place an extraordinary burden on the resources of the Requested State.

At the request of a Requesting State, a Requested State is to use its best efforts to keep a request and its contents confidential. If a request cannot be executed without breaching confidentiality, the Requested State shall so inform the Requesting State, and the Requesting State then is given the option to proceed nonetheless. (Provisions on keeping information provided to a Requesting State confidential are discussed below.)

Requested States generally bear the costs of executing a request other than expert witness fees; interpretation, transcription and translation costs; and travel costs for individuals whose presence is Requested in the Requesting State or a third State.

5. Types of assistance

In conducting a covered proceeding, a Requesting State commonly may obtain assistance from a Requested State that includes (1) the taking of testimony or statements of persons located there; (2) service of documents; (3) execution of requests for searches and seizures; (4) the provision of documents and other articles of evidence; (5) locating and identifying persons; and (6) the transfer of individuals in order to obtain testimony or for other purposes. Also, mutual legal assistance treaties increasingly have called for assistance in immobilizing assets, obtaining forfeiture, giving restitution, and collecting fines.

Taking testimony and compelled production of documents in Requested State

The proposed MLAT permits a State to compel a person in the Requested State to testify and produce documents there. Persons specified in the request are to be permitted to be present and usually have the right to question the subject of the request directly or have questions posed in accordance with applicable procedures of the Requested State. If a person whose testimony is sought objects to testifying on the basis of a privilege or other law of the Re-

questing State, the person nevertheless must testify and objections are to be noted for later resolution by authorities in the Requesting State.

With respect to questioning a witness by a person specified in the request, though most treaties grant a right to question, the proposed Korea MLAT (art. 8) leaves it to the discretion of the requested State to allow questioning by a person specified in the request.

Service of documents

Under an MLAT, a Requesting State may enlist the assistance of the Requested State to serve documents related to or forming part of a request to persons located in the Requested State's territory. This obligation generally is stated as a requirement of the Requested State to "use its best efforts to effect service" (art. 14).

The treaties require that documents requiring a person to appear before authorities be transmitted by a certain time—usually stated as "a reasonable time," "30 days" in the case of the Korea MLAT—before the appearance. The service provisions of the MLAT under consideration is broader than some of those under MLATs currently in force. Provisions under some earlier MLATs provide that a Requested State has discretion to refuse to serve a document that compels the appearance of a person before the authorities of the Requesting State.

Searches and seizures

MLATs compel that an item be searched for and seized in the Requested State whenever a Requesting State provides information that would be sufficient to justify a search and seizure under the domestic law of the Requested State. The MLAT authorizes conditioning or otherwise modifying compliance to assure protection of third parties who have an interest in the property seized. The proposed Korean MLAT contains procedures for verifying the condition of an item when seized and the chain of individuals through whose hands the item passed, but, unlike other MLATs, the Korea treaty does not contain a form for verifying the condition of an item. No other verification is necessary for admissibility in the Requesting State.

Provision of documents possessed by the Government

MLATs provide a variety of means for obtaining documents abroad. Two means—compelled production in a Requested State by an individual there and search and seizure—have been mentioned. Additionally, a Requesting State generally may obtain publicly available documents. In its discretion, a Requested State may provide a Requesting State documents in its possession that are not publicly available if the documents could be made available to domestic authorities under similar circumstances. The proposed MLAT calls for authentication in accordance with procedures specified in the request.

Testimony in Requesting State

MLATs do not require the compelled appearance of a person in a Requesting State, regardless of whether the person is in custody

or out of custody in the Requested State. Under provisions on persons not in custody, a Requesting State may ask a Requested State to invite a person to testify or otherwise assist an investigation or proceeding in the Requesting State. A request to invite a witness generally is accompanied by a statement of the degree to which the Requesting State will pay expenses. A Requested State is required to invite the person Requested to appear in the Requesting State and to inform that State promptly of the invited witness's response.

A person in custody may not be transferred to a Requesting State under an MLAT unless both the person and the Requested State consent. A Requesting State is required to keep a person transferred in custody and to return the person as soon as possible and without requiring an extradition request for return. Persons transferred receive credit for time spent in custody in the Requesting State.

The proposed MLAT makes some express provision for immunity from process and prosecution for individuals appearing in the Requesting State in accordance with a treaty request. The Korea MLAT (art. 12) makes immunity mandatory. Immunity from process and prosecution expires if the person appearing in the requesting State stays beyond a designated period after the person is free to leave or if the person appearing voluntarily reenters the requesting State after leaving.

Immobilization of assets and forfeiture

The proposed MLAT contains a forfeiture assistance provision. A Requesting State is permitted to enlist the assistance of a Requested State to forfeit or otherwise seize the fruits or instrumentalities of offenses that the Requesting State learns are located in the Requested State. A Requested State, in turn, may refer information provided it about fruits and instrumentalities of crime to its authorities for appropriate action under its domestic law and report back on action taken by it.

More generally, the MLATs require the parties to assist each other to the extent permitted by their respective laws in proceedings on forfeiting the fruits and instrumentalities of crime. The proposed MLAT provides that forfeited proceeds are to be disposed of under the law of the Requested State, and if that law permits, forfeited assets or the proceeds of their sale may be transferred to the Requesting State.

Limitations on use

To address potential misuse of information provided, MLATs restrict how a Requesting State may use material obtained under them. States at times have raised concerns that MLATs could be used to conduct "fishing expeditions," under which a Requesting State could obtain information not otherwise accessible to it in search of activity it considers prejudicial to its interests. Requested States also are concerned that its own enforcement interests may be compromised if certain information provided by them is disclosed except as is compelled in a criminal trial. As a result, the MLAT contains a provision requiring information be kept confidential and limited in use to purposes stated in the request.

Article 7 of the proposed MLAT allows the Requested State to place confidentiality and use restrictions on information and other material. Typically, a Requested State may require that information or evidence not be used in any investigation, prosecution, or proceeding other than that described in the request. Requested States also may request that information or evidence be kept confidential, and Requesting States are to use their best efforts to comply with the conditions of confidentiality. Nevertheless, once information or evidence has been made public in a Requesting State in the normal course of the proceeding for which it was provided, it may be used thereafter for any other purpose.

Location of persons or items

In whole or in part, MLAT requests most often require the Requested State to locate a person or item. The proposed MLAT requires the Requested State's "best efforts" in locating the person or item.

6. MLATs and defendants

International agreements frequently confer benefits on individuals who are nationals of the State parties. Investment and immigration opportunities, tax benefits, and assistance in civil and commercial litigation are but some of the advantages an individual may enjoy under an international agreement. Nevertheless, it is clear that MLATs are intended to aid law enforcement authorities only.

The resulting disparity between prosecution and defendant in access to MLAT procedures had led some to question the fairness and even the constitutionality of MLATs denying individual rights. (The constitutional provisions most immediately implicated by denying a defendant use of MLAT procedures are the fifth, sixth, and fourteenth amendments.) At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures for compelling evidence abroad if those procedures are available to the prosecution.[12]

Those opposing defendant use of MLAT procedures fear that States would not enter into MLATs if it meant making information available to criminals. Also, MLATs do not preclude accused persons from using letters rogatory to obtain evidence located in the territory of treaty partners, even though the non-mandatory nature of letters rogatory may result in difficulties in obtaining evidence quickly.

In its response to a question for the record by Senator Helms on this issue the State Department stated:

> There are no legal challenges to any of our existing MLATs. It is the position of the Department of Justice that the MLATs are clearly and unquestionably constitutional.

[12] In its 1989 report on MLATs, the Criminal Justice Section of the American Bar Association both strongly supported MLATs and also recommended that "every future MLAT should expressly permit criminal defendants to use the treaty to obtain evidence from the Requested country to use in their defense if they can make a showing of necessity to the trial court." ABA Report at 8.

In 1992, Michael Abbell, then-counsel to some members of the Cali drug cartel, did suggest to the Committee that MLATs should permit requests by private persons such as defendants in criminal cases. To our knowledge, no court has adopted the legal reasoning at the core of that argument.

The Department of Justice believes that the MLATs before the Committee strike the right balance between the needs of law enforcement and the interests of the defense. The MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar. It is not "improper" for MLATs to provide assistance for prosecutors and investigators, not defense counsel, any more than it would be improper for the FBI to conduct investigations for prosecutors and not for defendants. The Government has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and therefore does not need the same tools.

None of the MLATs before the Senate provide U.S. officials with compulsory process abroad. None of the treaties require the treaty partner to compel its citizens to come to the United States, and none permit any foreign Government to compel our citizens to go abroad. Rather, the MLATs oblige each country to assist the other to the extent permitted by their laws, and provide a framework for that assistance. Since the Government does not obtain compulsory process under MLATs, there is nothing the defense is being denied.

The MLATs do not deprive criminal defendants of any rights they currently possess to seek evidence abroad by letters rogatory or other means. The MLATs were designed to provide solutions to problems that our prosecutors encountered in getting evidence from abroad. There is no reason to require that MLATs be made available to defendants, since many of the drawbacks encountered by prosecutors in employing letters rogatory had largely to do with obtaining evidence before indictment, and criminal defendants never had those problems.

Finally, it should be remembered that the defendant frequently has far greater access to evidence abroad than does the Government, since it is the defendant who chose to utilize foreign institutions in the first place. For example, the Government often needs MLATs to gain access to copies of a defendant's foreign bank records; in such cases, the defendant already has copies of the records, or can easily obtain them simply by contacting the bank.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

The Treaty enters into force upon exchange of instruments of ratification.

B. TERMINATION

The Treaty will terminate six months after notice by a Party of an intent to terminate the Treaty.

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed treaty on Wednesday, July 17, 1996. The hearing was chaired by Senator Helms. The Committee considered the proposed treaty on July 24, 1996, and ordered the proposed treaty favorably reported with two provisos by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed treaty.

VI. COMMITTEE COMMENTS

The Committee on Foreign Relations recommended favorably the proposed treaty. The Committee believes that the proposed treaty is in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. In 1996 and the years ahead, U.S. law enforcement officers increasingly will be engaged in criminal investigations that traverse international borders. The Committee believes that attaining information and evidence (in a form that comports with U.S. legal standards) related to criminal investigations and prosecutions, including drug trafficking and narcotics-related money laundering, is essential to law enforcement efforts.

To cite an example of how an MLAT can benefit the U.S. justice system, the Committee notes the response by the State Department to Chairman Helms' question for the record regarding how the U.S. had made use of the MLAT with Panama after its 1995 ratifications:

> One recent case from the Southern District of Texas serves as an example of the usefulness of the treaty in the prosecution of financial crimes. In that case, the Assistant U.S. Attorney urgently needed bank records from Panama to verify the dates and amounts of certain money transfers of the alleged fraud proceeds in order to corroborate the testimony of a principal witness. The U.S. requested the records only a short time before they were needed in the trial, and we were pleased that Panamanian authorities produced the records promptly. The records were described by the prosecutor as "the crowning blow" to arguments raised by the defense and indispensable to the Government's ultimate success in the trial.

The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles. To attempt to ensure the MLATs are not misused two provisos have been added to the Committee's proposed resolution of ratification. The first proviso reaffirms that ratification of this treaty does not require or authorize legislation that is prohibited by the Constitution of the United States. Bilateral MLATs rely on relationships between sovereign countries with unique legal systems. In as much

as U.S. law is based on the Constitution, this treaty may not require legislation prohibited by the Constitution.

The second proviso—which is now legally binding in 11 United States MLATs—requires the U.S. to deny any request from an MLAT partner if the information will be used to facilitate a felony, including the production or distribution of illegal drugs. This provision is intended to ensure that MLATs will never serve as a tool for corrupt officials in foreign governments to gain confidential law enforcement information from the United States.

VII. Explanation of Proposed Treaty

The following is the Technical Analysis of the Mutual Legal Assistance Treaty submitted to the Committee on Foreign Relations by the Departments of State and Justice prior to the Committee hearing to consider pending MLATs.

TECHNICAL ANALYSIS OF THE MLAT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA

On November 23, 1993, the United States and the Republic of Korea signed the Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with many other countries as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases.

The Treaty, which is the second mutual legal assistance treaty the United States has signed with an Asian country, is a major advance in United States efforts to gain the cooperation of other countries in the region in combatting organized crime.

It is anticipated that the Treaty will be implemented pursuant to the mutual legal assistance legislation currently in force in the two Contracting Parties; no new legislation is needed. For the United States, the applicable procedural framework is Title 28, United States Code, Section 1782. Korea has its own mutual legal assistance law[13] and does not anticipate enacting new legislation to implement the Treaty.

The following technical analysis of the Treaty was prepared by the United States delegation that conducted the negotiations.

Article 1—Scope of assistance

This article provides for assistance in all matters involving the investigation, prosecution and prevention of crime, and in proceedings related to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Korea, in addition to other legal measures taken prior to the filing of formal charges in either Contracting Party.[14] The term "proceedings" is intended to cover the full

[13] The Republic of Korea International Criminal and Judicial Cooperation Act, Law No. 4343, Mar. 8, 1991 ("Korean International Cooperation Act").

[14] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the United States, as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This

range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[15] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For instance, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature but are still covered under the Treaty.[16]

Paragraph 2 sets forth a list of the major types of assistance specifically considered by the negotiators. Most of the items listed in this paragraph are described in further detail in subsequent articles. The list is not intended to be exhaustive; this is signalled by the word "include" in the opening clause of the paragraph and is reinforced by the final subparagraph.

Paragraph 3 contains a standard provision in United States mutual legal assistance[17] that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence-gathering or to extend to civil matters. Private litigants in the United States may continue to obtain evidence from Korea by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence obtained thereunder.

Article 2—Central authorities

This article requires that each Contracting Party establish a "Central Authority" for transmission, reception and handling of requests. The Central Authority of the United States makes all requests to Korea on behalf of federal, state and local law enforcement authorities in the United States. The Korean Central Authority makes all requests originating from officials in Korea.

The Central Authority of the Requesting State exercises discretion as to the form and content of and the number and priority of requests. The Central Authority of the Requested State is respon-

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obligation is a reciprocal one; the United States must assist Korea under the Treaty in connection with investigations prior to charges being filed in Korea.

Some United States courts have interpreted Title 18, United States Code, Section 1782 to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent" or "very likely." McCarthy, "A Proposed Unified Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l L.J. 772 (1991). The better view is that Section 1782 does not contemplate such restrictions. Conway, In re "Request for Judicial Assistance from the Federal Republic of Brazil; Blow to International Judicial Assistance," 41 Catholic U.L. Rev. 545 (1992). The 1996 amendment to the statute eliminates this problem.

In any event, the Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely, very soon."

[15] One United States court has interpreted Title 28, United States Code, Section 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In re "Letters Rogatory Issued by Director of Inspection of Gov't of India," 385 F.2d 1017 (2d Cir. 1967); *Fonseca* v. *Blumenthal,* 620 F.2d 322 (2d Cir. 1980).

This rule poses an unnecessary obstacle to the execution of requests concerning matters at the investigatory stage and matters customarily handled by administrative officials in the Requesting State. Since this paragraph specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the *India* and *Fonseca* cases.

[16] See 21 U.S.C. § 881; 18 U.S.C. § 1964.

[17] See *United States* v. *Johnpoll,* 739 F.2d 702 (2d Cir. 1984).

sible for receiving each request, transmitting it to the appropriate federal or state agency, court or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General acts as the Central Authority for the United States. The Attorney General has delegated the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[18] Paragraph 2 also states that the Korean Minister of Justice or the persons designated by the Minister of Justice serves as the Central Authority for Korea.

Paragraph 3 states that the Central Authorities shall communicate directly with one another or through the diplomatic channel. Our experience has demonstrated that direct communication between Central Authorities is essential to the prompt, efficient execution of requests. Our treaties therefore usually do not provide for transmitting requests via diplomatic channels. The Treaty does provide for use of diplomatic channels, however, because Korean mutual assistance law prescribes such communication as an option.[19] During the negotiations, however, the delegations agreed that after the initial implementation of the Treaty, most communications regarding the Treaty will be transmitted directly between Central Authorities; the diplomatic channel will be reserved for unusual situations.

Article 3—Limitations on assistance

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph 1(a) permits the Requested State to deny a request if it relates to a political offense or an offense under military law that is not an offense under ordinary criminal law. These restrictions are similar to those found in other mutual legal assistance treaties. It is anticipated that in applying this provision, the Contracting Parties will employ jurisprudence similar to that used in the extradition context.

Paragraph 1(b) is inspired by article 3(1)(d) of the United States-Bahamas Treaty and article 3(1)(d) of the United States-Panama Treaty. It permits a request to be denied if the Requested State determines that there are substantial grounds for believing that granting the assistance would facilitate the prosecution or punishment of the person identified in the request on account of race, religion, nationality or political opinions. This provision was of special importance to Korea because section 6(2) of its International Cooperation Act permits Korean authorities to deny a request for assistance on these grounds.[20] The United States understands the term "on account of" to limit the application of this provision to cases in which the race, religion or political opinion of the offender is the governing motive for the prosecution, as opposed to the de-

[18] 28 C.F.R. § 0.64–1. The Assistant Attorney General for the Criminal Division has in turn delegated the authority to the Deputy Assistant Attorneys General and the Director of the Criminal Division's Office of International Affairs in accordance with the regulation. Directive No. 58, 44 Fed. Reg. 18,661 (1979), as amended at 45 Fed. Reg. 6,541 (1980); 48 Fed. Reg. 54,595 (1983). That delegation subsequently was extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

[19] See Korean International Cooperation Act § 11.

[20] See Korean International Cooperation Act § 6(2).

sire to punish criminal offenses. When a request to the United States appears to be covered by this provision, the United States Central Authority will ask the Department of State to assist in determining whether the request should be denied on these bases.

Paragraph 1(c) permits the Requested State to deny a Treaty request if execution of the request would prejudice its security or similar essential interests. This includes cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States, will work closely with the Department of State and other government agencies to determine whether or not to execute requests that might fall in this category. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the phrase "essential interests" is limited to very serious reasons. However, it was agreed that these may include interests unrelated to national military or political security.

This provision may be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. One fundamental purpose is to enhance law enforcement cooperation. Attaining that purpose would be hampered if sensitive law enforcement information available under the Treaty were to fall into the wrong hands. Therefore, the United States Central Authority may invoke paragraph 1(c) to decline to provide sensitive or confidential drug-related information pursuant to a Treaty request whenever it determines, after appropriate consultation with law enforcement, intelligence and foreign policy agencies, that a senior foreign government official likely to have access to the information is engaged in or facilitates the production or distribution of illegal drugs, and is using the request to the prejudice of a United States investigation or prosecution.[21]

Extradition treaties sometimes condition the surrender of fugitives upon a showing of "dual criminality," i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense in the Requested State. Paragraph 1(d) states that the Requested State may deny a request for assistance under certain circumstances if the conduct that is the subject of the investigation, prosecution or proceeding in the Requesting State is not an offense under the laws of the Requested State. Although United States mutual legal assistance treaties usually do not include dual criminality as a basis for denying assistance, it is included in the Treaty because Korean mutual assistance law expressly authorizes Korean officials to deny assistance on this basis.[22]

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[21] This is consistent with the sense of the Senate as expressed in its advice and consent to ratification of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13,884 (1989) (treaty citations omitted). See also Staff of Senate Comm. on Foreign Relations, 100th Cong., 2d Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[22] Korean International Cooperation Act § 6(4).

In extradition cases, dual criminality can exist even when the countries call the crime by different names, place the crime in different categories or penalize its commission by different punishments. The dual criminality rule "does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of liability shall be co-extensive, or in other respects the same. * * *"[23] The test is whether the conduct committed in the Requesting State would constitute some criminal offense if committed in the Requested State.[24] Thus, the dual criminality test permits assistance for many United States offenses that do not have exact statutory counterparts in Korea.[25] The negotiators agreed to give a liberal interpretation to paragraph 1(d) in order to provide assistance in as many cases as possible.

One common problem in this area was specifically discussed during the negotiations: certain United States federal offenses call for proof of certain elements (such as use of the mails or interference with interstate commerce) to establish jurisdiction in federal courts. Foreign judges generally have no similar requirements in their own criminal law and on occasion have denied extraditions to the United States on this basis. This problem should not occur under paragraph 1(d) because it is understood that the Requested State must disregard elements required solely for the purpose of establishing federal jurisdiction[26] and must not be misled by mere differences in the terminology that defines the offenses. It appears that most major criminal prosecutions in the United States would qualify for assistance under the dual criminality test.

United States and Korean law differs significantly in some respects, however; for this reason, strict adherence to the dual criminality rule alone might render assistance unavailable to the Requesting State in some areas even though the public policy of the Requested State would not call for such a restriction. Therefore, in order to accommodate each Contracting Party's investigative and prosecution needs, paragraph 2 permits assistance to be granted without regard to dual criminality for 23 categories of criminal conduct listed in the annex to the Treaty. For crimes within these categories, assistance must be provided if the conduct under investigation constitutes an offense under the laws of the Requesting State.

Paragraph 3, which is similar to article 3(2) of the United States-Switzerland Treaty, obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to paragrpah 1. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would fall within the scope of the

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[23] *Collins* v. *Loisel,* 259 U.S. 309, 312 (1922); *Brauch* v. *Raiche,* 618 F.2d 843 (1st Cir. 1980); see also *Matter of the Extradition of Suarez-Mason,* 694 F. Supp. 676 (N.D. Cal. 1988); *United States* v. *Carlos Lehder-Rivas,* 668 F. Supp. 1523 (M.D. Fla. 1987).

[24] *United States* v. *McCaffery,* 2 All E.R. 570 (1984); *Reg.* v. *Governor of Pentonville Prison, ex Parte Budlong,* 1 All E.R. 701 (1980); *Shapira* v. *Ferrandina,* 478 F.2d 894 (2d Cir. 1973).

[25] For example, racketeering, in violation of Title 18, United States Code, Section 1962, does not have a precise counterpart in Korea statutory law. Racketeering charges, however, always involve a pattern of criminal activity that includes two or more "predicate acts" of criminal behavior. The Korean delegation assured the United States negotiators that any Treaty request for assistance in a racketeering case would be granted if the predicate acts are considered criminal offenses in Korea. Similarly, United States laws on insider trading have no exact counterpart in Korean law, but the United States delegation was assured that assistance would be granted if the offender's conduct is considered fraudulent in Korea.

[26] See *United States* v. *Herbage,* 850 F.2d 1463 (11th Cir. 1988); *McCaffery* 2 All E.R. 570.

Treaty) or in a political prosecution (which would be subject to refusal under the Treaty). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before delivering the evidence in question, thereby according the Requesting State an opportunity to decide whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence, it must comply with the conditions specified by the Requested State.

Paragraph 4 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of any reason for denying or postponing execution of the request. This ensures that when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This provision should prevent misunderstandings and enable the Requesting State to better prepare its requests in the future.

Article 4—Form and content of requests

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in such a situation must be confirmed in writing promptly. Unless otherwise agreed to, the request and all documents accompanying the request shall be in the language of the Requested State.

Paragraph 2 lists information deemed crucial to the efficient operation of the Treaty that must be included in each request. Paragraph 3 outlines the types of information that are considered important but not always crucial, which should be provided "to the extent necessary." In keeping with the intention of the negotiators that requests be as simple and straightforward as possible, there is no requirement under the Treaty that a request be legalized or certified in any particular manner.

Article 5—Execution of requests

Paragraph 1 requires the Requested State to undertake diligent efforts to execute a request promptly. The Central Authority of the Requested State reviews the request and immediately notifies the Central Authority of the Requesting State if the request does not comply with the Treaty's terms. If the request does satisfy the Treaty's requirements and the assistance sought can be provided by the Central Authority itself, the assistance is to be provided promptly. If the request meets the Treaty's requirement but its execution requires action by another entity in the Requested State, the Central Authority promptly transmits the request to the appropriate entity for execution. When the United States is the Requested State, the Central Authority will transmit most request to federal investigators, prosecutors or judicial officials for execution.

Paragraph 1 authorizes and requires the federal, state or local authority selected by the Central Authority to take whatever action is necessary and within its power to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursu-

ant to a request from Korea. Rather, it is anticipated that when a request from Korea requires compulsory process for execution, the Department of Justice will ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and under the provisions of the Treaty.[27]

If execution of the request necessitates action by a judicial authority or administrative agency, the Central Authority of the Requested State arranges for the presentation of the request to that court or agency at no cost to the Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes rather expensive, the provision for reciprocal legal representation in paragraph 2 is a significant advance in international legal cooperation. It is also understood that, should the Requesting State choose to hire private counsel in connection with a particular request, it is free to do so.

Paragraph 2 states that the Central Authority of the Requested State shall arrange for requests from the Requesting State to be presented to the appropriate authority in the Requested State for execution. In practice, the Central Authority for the United States will transmit the request with instruction for execution to an investigative or regulatory agency, the office of a prosecutor, or another governmental entity. If execution requires the participation of a court, the Central Authority will select an appropriate representative, generally a federal prosecutor, to present the matter to a court. Thereafter, the prosecutor will represent the United States, acting to fulfill its obligations to Korea by executing the request. Upon receiving the court's appointment as a commissioner, the prosecutor/commissioner will act as the court's agent in fulfilling the court's responsibility to do "everything in its power" to execute the request. Thus, the prosecutor may only seek compulsory measures after receiving permission from the court to do so.

The situation with respect to Korea is different. Its Central Authority will transmit the request to the appropriate court with general advice regarding Korea's obligation under the Treaty and the general evidentiary and procedural requirements of the United States.

Paragraph 3 provides that all requests shall be executed in accordance with the laws of the Requested State except to the extent that the Treaty specifically provides otherwise. Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested States' internal laws absent specific contrary procedures in the Treaty itself. For the United States, the Treaty is intended to be self-executing; no new legislation is needed to carry out United States obligations under the Treaty.

Paragraph 4 states that a request for assistance need not be executed immediately when execution would interfere with an ongoing investigation or legal proceeding in the Requested State.[28] The Central Authority of the Requested State determines when to apply this provision. The Central Authority of the Requested State may act, in its discretion, to obtain or preserve evidence that otherwise

[27] Paragraph 1 specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy requests under the Treaty.

[28] See Korean International Cooperation Law § 7.

might be lost or compromised before the conclusion of the investigation or legal proceedings in the Requested State.

It is anticipated that some United States requests for assistance may contain information that, under our law, must be kept confidential. For example, it may be necessary to set out information that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation or proceeding," as is required by article 4(2)(b) of the Treaty. Therefore, paragraph 5 enables the Requesting State to call upon the Requested State to keep the information contained in the request confidential.[29] If the Requested State cannot execute the request without disclosing the information in question (as may be the case if execution requires a public judicial proceeding in the Requested State), or if for some other reason this confidentiality cannot be assured, the Treaty obliges the Requested State to indicate this to the Requesting State. This enables the Requesting State to withdraw the request rather than risk jeopardizing its investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State as to the progress of the execution of its requests. This language is intended to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the reasons for this outcome to the Central Authority of the Requesting State. For example, if the evidence sought cannot be located or the witness to be interviewed invokes a privilege under article 8(4), the Central Authority of the Requested State reports this to the Central Authority of the Requesting State.

Article 6—Costs

This article reflects the increasingly accepted practice that each Contracting Party bears the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[30] Article 6 does oblige the Requesting State to pay fees of expert witnesses, translation and transcription costs, and allowances and expenses related to travel of persons pursuant to articles 10 and 11.

Article 7—Limitations on use

Paragraph 1 requires that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. Pursuant to arti-

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[29] Similar provisions appear in other United States mutual legal assistance treaties. See, e.g., U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5) T.I.A.S. No. —; U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985, art. 6(5) T.I.A.S. No. —; U.S.-Italy Mutual Legal Assistance Treaty, Nov. 13, 1985, art. 8(2), T.I.A.S. No. —.

[30] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985, art. 8, T.I.A.S. No. —.

cle 4(2)(d), the Requesting State must specify the reason why information or evidence sought under the Treaty is needed.

Paragraph 2 provides that the Requested State may request that the information it provides to the Requesting State be kept confidential. Under most United States mutual legal assistance treaties, conditions of confidentiality are imposed only when necessary and are tailored to fit the circumstances of each particular case. For instance, the Requested State may agree to cooperate with an investigation in the Requesting State but may choose to limit access to information that might endanger the safety of an informant or unduly prejudice the interests of persons not connected with the matter being investigated.

Paragraph 2 additionally requires that if conditions of confidentiality are imposed, the Requesting State is required only to employ its "best efforts" to comply with them. The "best efforts" language is intended to provide flexibility in order to avoid a breach of the Treaty whenever the Sixth Amendment to the United States Constitution requires that the defendant be provided access to evidence that was obtained under the Treaty subject to confidentiality restrictions. Moreover, the purpose of the Treaty—to produce evidence for use at trials—would be frustrated if the Requested State routinely permitted the Requesting State to see valuable evidence but imposed confidentiality restrictions that prevented its introduction at trial.

Once evidence obtained under the Treaty has been revealed to the public (as envisioned by the Treaty), paragraph 3 provides that the Requesting State is free to use the evidence for any purpose.

It should be kept in mind that under article 1(4), the restrictions outlined in article 7 are for the benefit of the Contracting Parties, and the enforcement of these provisions is left entirely to the Contracting Parties. If a person alleges that a Korean authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person may inform the Central Authority of the United States of the allegations, which are to be considered as a matter between the Contracting Parties.

Article 8—Taking testimony and evidence in the Requested State

Paragraph 1 states that a person in the Requested State shall be compelled, if necessary, to appear and testify or produce documents, records or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or by any other means available under the law of Requested State. Paragraph 2 requires the Requested State, upon request, to furnish logistical information in advance about the taking of testimony.

Paragraph 3 provides that any interested parties, including the defendant and defense counsel in criminal cases, may be permitted to be present at and to pose questions during the taking of testimony under this article. Korean law places restrictions on the extent to which witnesses may be questioned directly by attorneys and others and leaves the extent of such questioning to the discretion of the judge overseeing the proceeding. Therefore, the Treaty provides that in the event that direct questioning of a witness is not possible, the defendant and defense counsel may submit questions for the judge to pose to the witness.

Paragraph 4, read together with article 5(3), ensures that a person may not be compelled to furnish information if the person has a privilege not to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a request from Korea is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney-client, interspousal) available in proceedings in the United States, as well as the constitutional privilege against self-incrimination, to the extent that the privilege is applicable.[31] Of course, a witness testifying in Korea may raise any applicable privilege available under Korean law.

Paragraph 4 further requires that if a witness attempts to assert a privilege unique to the Requesting State, the authorities in the Requested State will take the desired evidence and turn it over to the Requesting State along with notification that the evidence was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting State, where the scope of the privilege and the legislative and policy reasons underlying it are better understood. A similar provision appears in many recent United States mutual legal assistance treaties.[32]

Paragraph 5 provides that documents, records and articles of evidence produced pursuant to the Treaty may be authenticated in accordance with the procedures specified in the request. The paragraph states that if the evidence is certified in this manner, it is "admissible" in the Requesting State. The judicial authority presiding at the trial, of course, determines whether the evidence should in fact be admitted. The negotiators anticipated that evidentiary tests in addition to authentication (such as relevance and materiality) will have to be satisfied in each case.

Many United States mutual legal assistance treaties specify that evidence produced pursuant to a request is admissible in the Requesting State if it is authenticated by a custodian of records or other qualified person who completes a certification, which is usually located in a specified form appended to the treaty.[33] The negotiators agreed that it is desirable to have uniform procedures for certifying or authenticating evidence obtained under the Treaty. Taking into account the internal laws of both Contracting Parties, the negotiators developed three certification forms for establishing the authenticity of such evidence. The forms are appended to the diplomatic notes that were exchanged between the Contracting Parties on November 23, 1993. The authentication procedure for business records to be employed in United States requests is based on Title 18, United States Code, Section 3505.

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[31] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[32] See, e.g., U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2), T.I.A.S. No. —.; U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 7(2), T.I.A.S. No. —.

[33] See, e.g., U.S.-Thailand Mutual Legal Assistance Treaty, Mar. 19, 1986, arts. 8, 9 & 11, T.I.A.S. No. —; U.S.-Cayman Islands Mutual Legal Assistance Treaty, July 3, 1986, arts. 8, 9 & 14, T.I.A.S. No. —; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, arts. 9, 13 & 15, T.I.A.S. No. —; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990, arts. 8, 9 & 14, T.I.A.S. No. —; U.S.-Argentina Treaty, Dec. 4, 1990, arts. 8, 9 & 14, T.I.A.S. No. —.

Article 9—Records of government agencies

Paragraph 1 obliges each Contracting Party to furnish the other with copies of publicly-available records of government departments and agencies. The term "government departments and agencies" includes all executive, judicial and legislative units of the federal, state and local levels of government in both Contracting Parties.

Paragraph 2 provides that the Requested State "may" share with the Requesting State copies of non-public information located in its government files. The obligation under this provision is discretionary. Moreover, the article states that the Requested State may only exercise its discretion to provide information in its files "to the same extent and under the same conditions" as it would reveal the information to its own law enforcement or judicial authorities. The Central Authority of the Requested State determines to which extent and under which conditions disclosure will be permitted.

The discretionary nature of this provision was deemed necessary because some government files may contain information that would be available to domestic investigative authorities but would be deemed inappropriate for release to a foreign government. For example, assistance under the Treaty would be considered inappropriate when release of the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request also may be denied under this provision if disclosure of the information is barred by the law of the Requested State.

The United States delegation discussed whether this article should serve as a basis for the exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters and that such assistance include tax return information when appropriate. Therefore, the United States delegation was satisfied that the Treaty constitutes a "convention relating to the exchange of tax information" [34] for purposes of Title 26, United States Code, Section 6103(k)(4). The United States has the discretion to provide tax return information to Korea under this article in appropriate cases.

Pursuant to the November 23, 1993, exchange of diplomatic notes between the Contracting Parties, documents provided under this article may be authenticated under the provisions of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents,[35] to which both the United States and Korea are signatories. Thus, the diplomatic notes accompanying the Treaty establish a procedure for authenticating official foreign records by certification that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, like article 8(5), states that documents authenticated under this paragraph shall be "admissible" at trial. The judicial authority presiding at the trial, however, maintains the au-

[34] 26 U.S.C. § 6103(k)(4).
[35] Oct. 5, 1961, 33 U.S.T. 883, T.I.A.S. No. 10072, 527 U.N.T.S. 189.

thority to determine whether the evidence should in fact be admitted. As with article 8, evidentiary tests other than authentication (such as relevance and materiality) must be established in each case. Appropriate forms for certifying the evidence are appended to the diplomatic notes exchanged on November 23, 1993.

Article 10—Testimony in the Requesting State

This article provides that upon request, the Requested State shall invite witnesses who are located in its territory to travel to the Requesting State. An appearance in the Requesting State under this article is not mandatory; the invitation may be refused by the prospective witness. The Requesting State is expected to pay the expenses of such an appearance pursuant to article 6.

Article 11—Transfer of persons in custody

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, a foreign country involved has been willing and able to "lend" the witness to the United States, provided the witness would be carefully guarded while in the United States and would be returned at the conclusion of the testimony. On occasion, the Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in their criminal proceedings.[36] This article provides an express legal basis for cooperation in these matters. The provision is based on article 26 of the United States-Switzerland Treaty, which in turn is based on article 11 of the European Convention on Mutual Assistance in Criminal Matters.

There have been recent situations in which a defendant in custody in the United States has demanded permission to travel to another country to be present at a deposition to be taken there in connection with the defendant's criminal case.[37] Paragraph 2 addresses this situation.

Paragraph 3 provides express authority for the receiving State to maintain the person in custody while in the receiving State unless the sending State specifically authorizes release of the person. The paragraph also authorizes the receiving State to return the person in custody to the sending State as soon as circumstances permit, or as otherwise agreed to. The transfer of a person in custody under this article requires the consent of the person and of the Contracting Parties. The provision does not require that the person consent to being returned to the sending State.

It is inappropriate for the receiving State to hold the person transferred and require receipt of an extradition request in order to return the person transferred to the sending State. The paragraph contemplates that extradition proceedings are not required before the status quo is restored by the return of the person trans-

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[36] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for the transfer of four federal prisoners to the United Kingdom to testify for the Crown in the case of *Regina* v. *Dye, Williamson, Ells, Davies, Murphy and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[37] *See, e.g., United States* v. *King,* 552 F.2d 833 (9th Cir. 1976) (defendants insisted on traveling to Japan to be present at deposition of certain witnesses in prison).

ferred. The person is to receive credit for time served while in the custody of the receiving State.

Article 12—Safe conduct

This article, like article 27 of the United States-Switzerland Treaty, provides that a person who is in the Requesting State for testifying or for confrontation purposes pursuant to a request under articles 10 or 11 shall be immune from criminal prosecution, detention or any restriction on personal liberty, or service of process in a civil suit while present in the Requesting State. This "safe conduct" is limited to events arising from acts or convictions that preceded the person's departure from the Requested State. This provision does not inhibit the prosecution of a person for perjury or other crimes committed while in the Requesting State.

Paragraph 2 states that the safe conduct guaranteed expires 15 days after the Requested State has been officially notified and the person's presence is no longer required, or if the person leaves the Requesting State and voluntarily returns to it thereafter.

Article 13—Location or identification of persons or items

This article, a standard provision in all United States mutual legal assistance treaties, provides for the ascertainment of the location or identity of persons (such as witnesses, potential defendants or experts) or items believed to be in the Requested State. This information must be sought in connection with an investigation or proceeding covered by the Treaty. The Treaty requires only that the Requested State employ its "best efforts" to locate the persons or items sought by the Requesting State.

The obligation to locate persons or items is limited to persons or items that are or may be located in the territory of the Requested State. Thus, the United States is not obliged to attempt to find persons or items that might be in third countries. In all cases, the Requesting State is expected to supply all available information about the last known location of any person or item sought.

Article 14—Service of documents

This article creates an obligation for the Requested State to employ its "best efforts" to effect the service of summonses, complaints, subpoenas and other legal documents on behalf of the Requesting State.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Korea to follow a different specified procedure for service) or by the United States Marshals Service when personal service is requested.

Paragraph 2 requires that when the documents to be served call for the appearance of a person in the Requesting State, the documents must be received by the Central Authority of the Requested State not later than 30 days before the date set for any such appearance. The negotiators agreed that this 30-day advance notice would be appropriate in most cases, but they left open the possibility for the Central Authorities to agree to permit service with less advance notice.

Paragraph 3 requires that proof of service be returned to the Requesting State.

Article 15—Search and seizure

It is sometimes in the interests of justice for one country to ask another to search for, secure, and deliver articles or objects needed as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[38]

This article creates a formal framework for handing such requests. The article requires that the request include "information justifying such action under the laws of the Requested State." Accordingly, a Korean request to the United States must be supported by a showing of probable cause for the search and seizure. A United States request to Korea must satisfy the corresponding evidentiary standard for a search and seizure in Korea. It is contemplated that the search and seizure will be carried out in strict accordance with the law of the Requested State.

Paragraph 2 is designed to ensure that a record is kept of the chain of custody of articles seized pursuant to the Treaty. This provision effectively requires that the Requested State keep detailed and reliable records regarding the condition of the article at the time of seizure and the chain of custody between seizure and delivery to the Requesting State. Paragraph 2 also provides that the certification is admissible without the need for additional authentication at trial in the Requesting State, thereby relieving the Requested State of the burden and expense of sending its law enforcement officers to the Requesting State to testify as to authentication and chain of custody. The injunction that the certificates be admissible without additional authentication does not preclude the trier of fact from finding evidence inadmissable, despite the presence of a certificate, for some other reasons besides a defect in authenticity or the chain of custody.

Paragraph 3 states that the Requested State need not surrender any articles it has seized unless it is satisfied that any interests of third parties in the seized items are adequately protected. This permits the Requested State to insist, for example, that the Requesting State promise to return the article to the Requested State at the conclusion of the proceeding in the Requesting State. This article is similar to provisions in many United States extradition treaties.[39]

Article 16—Return of items

This article requires that any documents, records or articles of evidence furnished under the Treaty be returned to the Requested State as soon as possible if the Requested State requests their return. It is anticipated that unless original records or articles of

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[38] See, e.g., *United States ex rel. Public Prosecutor of Rotterdam, Netherlands* v. *Van Aalst,* Case No. 84–67-Misc.-018 (M.D. Fla., Orlando Div.).

[39] See, e.g., U.S.-United Kingdom Extradition Treaty, June 8, 1972, art. 13, 28 U.S.T. 227, T.I.A.S. No. 8468, 1049 U.N.T.S. 167; U.S.-Canada Extradition Treaty, Dec. 3, 1971, art. 15, 27 U.S.T. 983, T.I.A.S. No. 8237; U.S.-Japan Extradition Treaty, Mar. 3, 1978, art. 13, 31, U.S.T. 892, T.I.A.S. No. 9625, 1203 U.N.T.S. 225; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 19, 31 U.S.T. 5059, T.I.A.S. No. 9656.

some intrinisic value are provided, the Requested State routinely will waive its right to their return.

Article 17—Assistance in forfeiture proceedings

A major goal of the Treaty is to enhance the effectiveness of the Contracting Parties in combatting narcotics trafficking. One significant strategy involves the efforts of United States authorities in seizing and confiscating money, property and other proceeds of drug trafficking.

This article is similar to article 17 of the United States-Canada Treaty and article 15 of the United States-Thailand Treaty. Paragraph 1 authorizes the Central Authority of each Contracting Party to notify the other Central Authority of the existence in the latter's territory of proceeds of serious offenses such as drug trafficking. The term "fruits or instrumentalities" is intended to include items such as money, vessels or other valuables that either were used in the commission of the crime or were purchased or obtained as a result of the crime.

Upon receipt of notification under this article, the Central Authority of the Contracting Party in which the fruits of instrumentalities are located may take whatever action is considered appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Korea, the assets may be seized in aid of a prosecution under Title 18, United States Code, Section 2314,[40] or may be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner.

If the assets are the proceeds of drug trafficking, the negotiators contemplated that the Contracting Parties will be especially willing to help one another pursuant to article 17. Title 18, United States Code, Section 981(a)(1)(B) allows for the forfeiture to the United States of property

> which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States.[41]

It is anticipated that Korea's assistance in forfeiture actions pursuant to article 17 will enable this legislation to be even more effectively implemented. Title 18, United States Code, Section 981(a)(1)(B) is consistent with laws in other countries, such as Switzerland and Canada. There is a growing trend among nations toward legislation of this kind in the battle against narcotics trafficking.[42]

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[40] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad. 18 U.S.C. § 2314.

[41] E.g., 18 U.S.C. § 981(a)(1)(B).

[42] For example, article 3 of the United Nations Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances calls for the signatory nations to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters. A Report on the

Paragraph 2 states that the Contracting Parties shall aid one another in proceedings relating to the forfeiture of the fruits or instrumentalities of offenses. It specifically recognizes that authorities in the Requested State may take immediate action to restrain temporarily the disposition of assets pending further proceedings. Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or to enforce judgement of forfeiture levied in the Requesting State, the Treaty encourages the Requested State to do so. The language of this article was carefully selected, however, so as not to require either Contracting Party to take any action that would exceed its internal legal authority. It does not mandate the institution of forfeiture proceedings or the initiation of temporary restraints by either Contracting Party against property identified by the other if the prosecuting authorities do not deem it appropriate to do so.[43]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in the law enforcement activity that led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country and be agreed to by the Secretary of State.[44] Article 17, which is consistent with this framework, enables either Contracting Party to transfer forfeited assets or the proceeds of the sale of such assets to the other to the extent permitted by its laws.

Article 18—Compatibility with other treaties, agreements or arrangements

This article states that assistance and procedures provided for by the Treaty shall not prevent assistance under any other international convention or agreement between the Contracting Parties. It also provides that the Treaty shall not be deemed to prevent recourse to any other assistance available under the internal laws of either Contracting Party. Thus, the Treaty leaves the provisions of United States and Korean law regarding letters rogatory undisturbed and does not alter any pre-existing agreements concerning investigative assistance, such as the Protocol Amending the Single Convention on Narcotic Drugs, 1961.[45]

Article 19—Consultation

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article calls upon the Contracting Parties to share those ideas with one another and encourages them to agree

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Status of the Draft, the U.S. Negotiating Position, and Issues for the Senate, S. Rpt. No. 100–64, 100th Cong., 1st Sess. 6–11, 25–26 (1987).

[43] Unlike United States law, Korean law does not allow for forfeiture in civil cases. However, Korean law does permit forfeiture in criminal cases. Accordingly, a defendant must be convicted in order for Korea to confiscate property.

[44] 18 U.S.C. § 981(i)(1).

[45] Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118.

on the implementation of such measures. Practical measures of this kind might include methods of keeping each other informed of the progress of investigations and cases in which Treaty assistance was utilized, and the use of the Treaty to obtain evidence that might otherwise be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[46]

Article 20—Ratification, entry into force, and termination

Paragraphs 1 and 2 and standard treaty provisions that set forth the procedures for the ratification, exchange of instruments of ratification and entry into force of the Treaty.

Paragraph 3 states that the Treaty shall apply to requests presented pursuant to it even if the relevant acts or omissions occurred before the date on which the Treaty enters into force. Provisions of this kind are common in law enforcement agreements, and similar provisions are found in most United States extradition treaties.

Paragraph 4 contains a standard provision for termination of the Treaty. A Contracting Party must give three months notice of its intent to terminate the Treaty.

VIII. TEXT OF THE RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of The Treaty Between the United States of America and the Republic of Korea on Mutual Legal Assistance in Criminal Matters, signed at Washington on November 23, 1993, together with a Related Exchange of Notes signed on the same date. The Senate's advice and consent is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

> Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.
>
> Pursuant to the rights of the United States under this Treaty to deny requests which prejudice its essential public policy or interest, the United States shall deny a request for assistance when the Central Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this Treaty is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

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[46] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985, T.I.A.S. No. —; U.S.-Cayman Islands Mutual Legal Assistance Treaty, July 3, 1986, T.I.A.S. No. —; U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990, T.I.A.S. No. —.