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TREATY WITH THE PHILIPPINES 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. 104–18]

The Committee on Foreign Relations to which was referred the Treaty between the Government of the United States of America and the Government of the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters, signed at Manila on November 13, 1994, 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 13, 1994, the United States signed a treaty with the Philippines on mutual assistance in criminal matters and the President transmitted the Treaty to the Senate for advice and consent to ratification on September 5, 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 agreements provide, from our perspective, a much more effective means of obtaining evidence. First, an MLAT obligates

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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).

> 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 records from within their territories through the subpoena power.[10]

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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 § 13.524.

[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

Continued

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. MAJOR PROVISIONS

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 Philippines 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 criminality—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. Requests 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

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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].

to determine whether an otherwise objectionable request may be fulfilled subject to conditions.

The Philippines Treaty states that assistance may be denied if a request relates to a political offense. Assistance also may be denied if it relates to a military offense not normally punishable under criminal law. Another basis for refusing assistance is that execution of a request would prejudice the national security or other essential interest of the Requested State. A final reason for denying assistance is that it fails to comply with requirements for form and contents. Before assistance may be denied, the parties are to consult to consider whether assistance may be given subject to conditions (art. 3).

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. The proposed MLAT requires 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, 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.

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

[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).

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 Requesting 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 pro-

posed MLAT with the Philippines (art. 8) limits the right to question to the extent permitted by the Requested State's laws.

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. 13).

The treaties require that documents requiring a person to appear before authorities be transmitted by "a reasonable time" 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 MLAT contains procedures and forms for verifying the condition of an item when seized and the chair of individuals through whose hands the item passed. These provisions state that 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 contains provisions setting out authentication forms.

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. Under the Philippines MLAT (art. 10) immunity, which can apply to all acts committed prior to departure from the Requested State, is at the discretion of the Requesting State only for persons not in custody. 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 forefieture 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. To the extent permitted in domestic law, the proposed Philippines MLAT (art. 16) also require assistance in (1) providing restitution to crime victims and (2) collecting criminal fines. 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 in considers prejudical 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.

While MLATs contain confidentiality and use limits, they do vary. The proposed Philippines MLAT expressly states that nothing in it is to preclude the use or disclosure of information to the extent that the Requesting State's constitution so requires in a criminal prosecution.

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 has 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.
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> 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

[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.

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 compulstory 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 MALTs 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 head, U.S. law enforcement officers 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 Helm's question for the record regarding how the U.S. has made use of the MLAT with Panama after its 1995 ratification:

> 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 provi-

sion 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 PHILIPPINES

On November 13, 1994, the representatives of the Governments of the United States and the Republic of the Philippines signed the Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has entered into 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 is the third such treaty the United States has signed with an Asian country and is a major advance for the United States in its efforts to combat organized crime, transnational terrorism, international drug trafficking and other offenses. The Treaty is also important for the Philippines, as it reflects a formal commitment by the United States to assist in its high priority investigations of public corruption, such as efforts to recover public assets stolen during the administration of former President Ferdinand Marcos.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. The Philippines currently has no specific mutual legal assistance laws in force and intends to enact implementing legislation for 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 prevention, investigation, and prosecution of criminal offenses, and in proceedings relating 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 the Philippines, and other legal measures taken prior to the filing of formal charges in either Contracting Party.[13] The term "proceedings" was intended to cover the full

[13] 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 obligation is a reciprocal one, and the United States must assist the Philippines under the Treaty in connection with investigations prior to the filing of charges in the Philippines.

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 Intl' 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

range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[14] 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;[15] such proceedings are covered by the Treaty.

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

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 continue an offense had they occurred in the Requested State. Paragraph 3 makes it clear that there is no requirement of dual criminality for cooperation under the Treaty, and that assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State.

Paragraph 3 is important because United States and Philippines criminal law differ significantly, and the dual criminality rule would render assistance unavailable to us in many significant areas. During the negotiations, the United States delegation received assurances from the Philipine delegation that assistance is available under the Treaty to United States investigations of key crimes such as drug trafficking,[16] terrorism,[17] organized crime and racketeering,[18] money laundering, tax fraud or tax evasion, exploitation of guest workers and contract laborers,[19] crimes against environmental laws, and antitrust law violations.

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, and it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon."

[14] 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. See 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 those 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.

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

[16] This includes investigations of charges of conspiracy and engaging in a continuing criminal enterprise. See 18 U.S.C. § 2; 21 U.S.C. § 848.

[17] See, e.g., 18 U.S.C. §§ 115, 1203, 2331–38, 49 U.S.C. § 1472.

[18] See 18 U.S.C. §§ 1961–68. The Philippines does not have an identical offense, but does have statutes prohibiting graft and corruption.

[19] For example, the United States Attorney in Saipan is actively investigating labor and human rights violations allegedly committed against Filipinos recruited to work in Saipan. See "United States Pacific Paradise is Hell for Some Foreign Workers: Filipinos Report Beatings, Rapes, Lockups," Wash. Post, Aug. 29, 1994, at A1.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties [20] that states 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 generally to civil matters. Private litigants in the United States may continue to obtain evidence from the Philippines by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, this paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty.

Article 2—Central authorities

This article requires that each Contracting Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States makes all requests to the Philippines on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Philippine Central Authority makes all requests emanating from officials in the Philippines.

The Central Authority for the Requesting State exercises discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible 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 or a person delegated by the Attorney General acts as the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[21] Paragraph 2 also states that the Secretary of Justice of the Philippines or a person designated by the Secretary of Justice serves as the Central Authority for the Philippines.

Paragraph 3 states that the Central Authorities shall communicate with one another directly or through the diplomatic channel. Since United States mutual legal assistance practice has demonstrated that direct communication between Central Authorities is essential to the prompt and efficient execution of requests, our treaties usually do not provide for transmitting requests via diplomatic channels. The Treaty does provide for use of diplomatic channels as an option, however, because longstanding Philippine administrative practice has been to utilize such channels; the Philippines has no explicit law on this topic. The delegations agreed, however that most communications regarding the Treaty will be transmitted directly between Central Authorities; the diplomatic channel will be reserved for unusual situations.

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

[21] C.F.R. § 0.64–1. The Assistant Attorney General for the Criminal Division has in turn delegated this 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).

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; paragraph 1(b) permits denial if a request involves an offense under military law that would not be an offense under ordinary criminal law. It is anticipated that the Central Authorities will employ jurisprudence similar to that used with respect to extradition treaties for determining what constitutes a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph 1(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of the Requested State. This would include cases when 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 to execute requests that might fall in this category. All United States mutual legal assistance treaties contain provisions permitting the Requested State to decline to execute requests if execution would prejudice its essential interests.

The delegations agreed that the phrase "essential interests" is intended to limit narrowly the class of cases in which assistance may be denied. It is not enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example is a request involving prosecution by the Requesting State of conduct that occurred in the Requesting State that is constitutionally protected in the Requested State.

It was agreed that "essential interests" may include interests unrelated to national military or political security, and may be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose of the Treaty is to enhance law enforcement cooperation. The attainment of that goal would be hampered if sensitive law enforcement information available under the Treaty were to fall into the "wrong hands." Accordingly, 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 who likely will 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.[22]

[22] 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.,

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Paragraph 1(d) permits the denial of a request not made in conformity with the Treaty.

Paragraph 2 is similar to article 3(2) of the United States-Switzerland Mutual Legal Assistance Treaty, and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to paragraph 1. For example, a Contracting Party might request information that could be used either in a routine criminal case (which is within the scope of the Treaty) or in a political prosecution (which is subject to refusal under the Treaty's terms). This paragraph permits the Requested State to provide the information on condition that it be used only in the routine criminal case. Naturally, the Requested State should notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requested State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requested State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 4 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requested State of any reasons for denying assistance. 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 should avoid misunderstandings and enable the Requested State to prepare future requests better.

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 "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. Unless otherwise agreed, the request and all documents accompanying the request shall be in English.[23]

Paragraph 2 lists information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and should be provided "to the extent necessary and possible." In keeping with the intention of the Contracting Parties 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 each Contracting Party promptly to undertake diligent efforts to execute a request. The Treaty contemplates that upon receiving a request, the Central Authority will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to comply with the

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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).

[23] The Philippines has two official languages, English and Pilipino, which is based on Tagalog. Several other languages, such as Cebuano, Bicol, Ilocano, and Pampango, are also widely used.

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 request will be fulfilled forthwith. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests for execution to the federal investigators, prosecutors, or judicial officials it deems appropriate to fulfill the request.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to take whatever action 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 pursuant to a request from the Philippines. Rather, it is anticipated that when a request from the Philippines 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 the provisions of the Treaty.[24]

It is understood that if execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested State shall arrange 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 expensive at times, this provision for reciprocal legal representation in paragraph 2 is a significant advance in international legal cooperation. It is also understood that if the Requesting State decides to hire private counsel in connection with a particular request, it is free to do so at its own expense.

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 State's internal laws absent specific contrary procedures in the Treaty itself. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

Paragraph 4 states that a request for assistance need not be executed immediately when execution will interfere with an ongoing investigation or legal proceeding in the Requested State. It is understood that the Central Authority of the Requested State determines when to apply this provision. The Central Authority of the Requested State may, at its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost 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

[24] 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.

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 required by paragraph 2(b). Therefore, paragraph 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[25] 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 so indicate, thereby giving the Requesting State an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by public disclosure of the information.

Paragraph 6 requires the Central Authority of the Requested State to respond to reasonable inquiries by the Requesting State concerning progress of its requests. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

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

Article 6—Costs

This article reflects the increasingly accepted international rule that each Contracting Party shall bear 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.[26] Article 6 does oblige the Requesting State to pay fees of expert witnesses; translation, interpretation, 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 states that the Central Authority of the Requested State may request 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. In such cases, the Requesting State is required to comply with the conditions. It will be recalled that article 4(2)(d) states that the Requesting State must specify the reason why information or evidence is sought.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1.

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[25] This provision is similar to language 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. —.

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

Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 permits the Requested State to request that information or evidence provided to the Requesting State be kept confidential or be used only subject to terms and conditions it specifies. 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 wish to cooperate with the investigation in the Requesting State but choose to limit access to information that might endanger the safety of an informant, or unduly prejudice the interests of persons not connected in any way with the matter being investigated in the Requesting State. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State to see valuable evidence while imposing confidentiality restrictions that prevent the Requesting State from using it.

The Philippine delegation expressed particular concern that information it might supply in response to a request by the United States under the Treaty not be disclosed under the Freedom of Information Act. The delegations agreed that paragraph 2, as drafted, does not authorize disclosure under the Freedom of Information Act of information provided under the Treaty.

Paragraph 3 states that once evidence obtained under the Treaty is revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the treaty is revealed to the public in a trial, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even being cited or described in the press. Once that occurs, it is practically impossible for the Central Authority of the Requesting State to block the use of that information by third parties.

If the United States government receives evidence under the Treaty that seems to be exculpatory to the defendant in a criminal case, the United States is obliged to share the evidence with the defendant.[27] Therefore, paragraph 4 states that nothing in article 7 shall preclude the use or disclosure of information in a criminal prosecution to the extent that there is an obligation to do so under the constitution or law of the Requesting State. Advance notice of any such proposed use or disclosure shall be provided by the Requesting State to the Requested State.

It should be noted that under article 1(4), the restrictions outlined in article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Philippine authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the per-

[27] See *Brady* v. *Maryland,* 373 U.S. 83 (1963).

son can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

Article 8—Taking testimony or evidence in the Requested State

Paragraph 1 states that a person in the Requested State from whom evidence is sought 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 any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the requested State must furnish information in advance about the date and place of the taking of testimony.

Paragraph 3 provides that any interested persons specified in the request, including the defense counsel in a criminal case, shall be permitted to be present and, to the extent allowed by the Requested State's laws, to pose questions during the taking of testimony under this article. The Philippine delegation was confident that United States prosecutors can be present and participate in the execution of requests in the Philippines. Current Philippine law, however, places restrictions on the extent to which private lawyers from the United States may question witnesses directly in the Philippines, and leaves the extent of such questioning up to the judge overseeing the proceeding. It is understood 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 person whose testimony or evidence is being taken.

Paragraph 4, when read together with article 5(3), ensures that no person will be compelled to furnish information if the person has a right not to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a request from the Philippines is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States, as well as the constitutional privilege against self-incrimination, to the extent that it applies in the context of evidence being taken for foreign proceedings.[28] A witness testifying in the Philippines may raise any of the similar privileges available under Philippine law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, the Requested State will take the desired evidence and turn it over to the Requesting State along with notice that it 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[29]

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

[29] 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. —.

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, the the case of business records, authentication by the form appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505.[30] It is understood that the second and third sentences of the article provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

The final sentences of article 8 provide that the evidence authenticated by Form A is "admissible" but, of course, it will be up to the judicial authority presiding at the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance or materiality) still must be satisfied in each case.

Article 9—Records of Government agencies

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

Paragraph 2 provides that the Requested State "may" share with the Requesting State copies of nonpublic information in government files. The obligation under this provision is discretionary. Moreover, the article states that the Requested State may only exercise its discretion to turn over information in its files "to the same extent and under the same conditions" as it would to its own law enforcement or judicial authorities. The Central Authority of the Requested State determines the parameters of that extent and what those conditions are. The discretionary nature of this provision was deemed necessary because government files of a Contracting Party may contain information available to investigative authorities in that country that justifiably could be deemed inappropriate for release to a foreign government. For example, assistance might be deemed inappropriate if the information requested identifies or endangers an informant, prejudices sources of information needed in future investigations, or reveals information that was given to the Requested State in return for a promise not to divulge it. Of course, a request may be denied under this provision if the law in the Requested State bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for 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 would include tax return information when appropriate. The United States delegation was satisfied after discussion with the Philippine delegation that the Treaty is a "convention re-

[30] Similar to Title 18, United States Code, Section 3505, Form A must be sworn to or affirmed on penalty of criminal punishment for false statement or false attestation. The United States delegation was assured that the making of a false statement on Form A is punishable in the Philippines as perjury in violation of article 183 of the Philippine Penal Code.

lating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and that the United States has discretion to provide tax return information to the Philippines under this article in appropriate cases.[31]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign records that is consistent with Rule 902(3), Federal Rules of Evidence, and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to article 8(5), states that documents authenticated under this paragraph shall be "admissible," although the judicial authority presiding over the trial determines whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

Article 10—Testimony in the Requesting State

This article provides that upon request, the Requested State shall invite persons located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. 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.

Paragraph 1 provides that the witness shall be informed of the amount and kind of expenses to be incurred by the Requesting State in a particular case. Such expenses usually will include the costs of transportation and room and board. When the witness is to appear in the United States, a nominal witness fee also will be provided.

Paragraph 2 establishes that the Central Authority of the Requesting State may determine that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while in the Requesting State. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision does not prevent prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that any safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State notifies the Central Authority of the Requested State that the person's presence is no longer required, or when the person leaves the territory of the Requesting State and thereafter returns to it voluntarily. However, the Central Authority of the Requested State may extend the safe conduct period up to 15 days thereafter if it determines that there is good cause to do so.

[31] Thus, the Treaty, like all other United States bilateral mutual legal assistance treaties, authorizes each Contracting Party to provide tax return information in appropriate circumstances.

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, countries are willing and able to "lend" witnesses to the United States provided the witnesses will be carefully guarded while in the United States and will be returned to the country at the conclusion of their testimony. On occasion, the United States Justice Department also has arranged for consenting federal inmates in the United States to be transported to foreign countries for testifying in criminal proceedings.[32]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[33] which in turn is based on article 11 of the European Convention on Mutual Assistance in Criminal Matters.

There also have been recent situations in which a person in custody in a United States criminal case has demanded permission to travel to another country to be present at a deposition being taken there in connection with the criminal case.[34] Paragraph 2 addresses this situation.

Paragraph 3 provides express authority for the receiving State to maintain the person in custody throughout the person's stay there, unless the sending specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the prisoner consent to be returned to the sending State.

Once the receiving State agrees to assist the sending State's investigation or proceeding pursuant to this article, it is inappropriate for the receiving State to hold the person transferred and require extradition proceedings before returning the person to the sending State as agreed. Therefore, paragraph 3(c) contemplates that extradition proceedings are not required before the status quo is restored by the return of the person transferred. Paragraph 3(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article because it is anticipated that authorities of the contracting Parties will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the receiving State is unable

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

[33] U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 26, 27 U.S.T. 2019, T.I.A.S. No. 8302, 1052 U.N.T.S. 61.

[34] 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).

or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

Article 12—Location or identification of persons or items

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items at the request of the Requesting State. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

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

Article 13—Service of documents

This article creates an obligation on the Requested State to "use its best efforts" to effect the service of summonses, complaints, subpoenas, or other legal documents at the request 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 the Philippines to follow a specified procedure for service), or by the United States Marshals Service in instances when personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State by a reasonable time before the appearance date. The negotiators agreed that a 30-day advance notice is appropriate in most cases, but the Central Authorities are free to agree to permit service with less advance notice, or more, as deemed appropriate on a case-by-case basis.

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

Article 14—Search and seizure

It is sometimes in the interests of justice for one country to ask another country 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.[35] This article creates a formal framework for handling such requests.

Article 14 requires that a search and seizure request include "information justifying such action under the laws of the Requested State." This means that a request to the United States from the

[35] 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.).

Philippines usually must be supported by a showing of probable cause for the search. A United States request to the Philippines has to satisfy the corresponding evidentiary standard there. It is contemplated that such requests are to be carried out in strict accordance with the laws of the Requested State.

Paragraph 2 is designed to ensure that records are kept of articles seized and/or delivered under the Treaty. This provision effectively requires that the Requested State keep detailed and reliable information regarding the condition of an article at the time of seizure and the chain of custody between seizure and delivery to the Requesting State.

This article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to bring the Requested State's law enforcement officers to the Requesting State to provide authentication and chain of custody testimony each time the Requesting State uses evidence produced pursuant to this article. As in articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication at trial leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if some other reason exists to do so aside from authenticity or chain or custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many United States extradition treaties.[36]

Article 15—Return of documents, records, and items of evidence

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible if the Central Authority of the Requested State specifically requests prompt return at the time the items are furnished to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development of practice.

The article also states that if both Central Authorities agree, the documents, records, or items may be disposed of in a mutually acceptable manner other than by return to the Requested State. Thus, in appropriate cases, the Central Authorities may agree that transferred items may be sold,[37] forfeited, transferred to a third state,[38] or destroyed.[39]

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[36] *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; US.-Mexico Extradition Treaty, May 4, 1978, art. 19, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[37] It may be more cost effective to sell the item in the Requesting State and repatriate the proceeds of the sale.

[38] It is possible to imagine situations in which the person with a claim to an item transferred from the Philippines to the United States resides in neither Contracting Party.

[39] For example, if the item transferred is a sample of narcotics seized during a search, destruction of the sample at the conclusion of the case would be consistent with standard procedure in the United States.

Article 16—Assistance in forfeiture proceedings

A major goal of the Treaty is to enhance the efforts of both Contracting Parties in combatting narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to article 17 in the United States-Canada Mutual Legal Assistance Treaty and article 15 of the United States-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes a Central Authority to notify the other Central Authority of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" is intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the Contracting Party in which the proceeds or instrumentalities are located may take whatever action is 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 the Philippines, they can be seized in aid of a prosecution under Title 18, United States Code, Section 2314,[40] or 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, this article contemplates that the Contracting Parties will be especially willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) also allows for 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] This is consistent with the laws of countries such as Switzerland and Canada; there is a growing trend among countries toward enacting legislation of this kind in the battle against narcotics trafficking.[42] The United States delegation expects that article 16 will enable this legislation to be even more effective.

Paragraph 2 states that the Contracting Parties shall assist one another to the extent permitted by their laws in proceedings relating to forfeiture of proceeds or instrumentalities of offenses, restitution to crime victims, and collection of fines imposed as sentences in criminal convictions. It specifically recognizes that authorities in the Requested State may take immediate action to immobilize the

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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] 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 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).

assets temporarily pending further proceedings. Thus, if the law of the Requested State enables it to seize in aid of a proceeding in the Requesting State or to enforce a judgment of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either Contracting Party to take any action that exceeds its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either Contracting Party against property identified by the other if the relevant prosecution authorities do not deem it proper 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 approved by the Secretary of State.[44] Paragraph 3 is consistent with this framework and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by its laws.

Article 17—Compatibility with other treaties

This article states that assistance and procedures provided for under the Treaty shall not prevent assistance under any other applicable international agreements. Article 17 also provides that the Treaty shall not be deemed to prevent recourse to any assistance available under the internal laws of either Contracting Party. Thus, a Treaty leaves provisions of United States and Philippine law that deal with letters rogatory completely undisturbed and does not alter any pre-existing agreements concerning investigative assistance.[45]

Article 18—Consultation

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of 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 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 otherwise might be sought via methods less acceptable to the Requested State. Very

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

[44] E.g., 18 U.S.C. § 981(i)(1).

[45] See e.g., Agreement on the Provision of Documents to the Government of the Republic of the Philippines, United States-Philippines, Mar. 15, 1986, T.I.A.S. No. —; Agreement on Procedures for Mutual Legal Assistance, United States-Philippines, Mar. 31, 1987, T.I.A.S. No. —.

similar provisions are contained in recent United States mutual legal assistance treaties.[46]

It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

Article 19—Application

This article states that the Treaty shall apply to any request presented after it enters into force, 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; similar provisions are found in most United States mutual legal assistance treaties.

Article 20—Ratification, entry into force, and termination

Paragraph 1 contains standard provisions on the procedures for ratification and the exchange of instruments of ratification.

Paragraph 2 provides that the Treaty shall enter into force immediately upon the exchange of instruments of ratification.

Paragraph 3 contains standard treaty language setting forth the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are present in other United States mutual legal assistance treaties.

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 Government of the United States of America and the Government of the Republic of the Philippines on Mutual Legal Assistance in Criminal Matters, signed at Manila on November 13, 1994. 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. 8, 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. —.