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EXTRADITION TREATY WITH MALAYSIA

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

REPORT

[To accompany Treaty Doc. 104–26]

The Committee on Foreign Relations to which was referred the Extradition Treaty Between the Government of the United States of America and the Government of Malaysia, and a Related Exchange of Notes signed at Kuala Lumpur on August 3, 1995, having considered the same, reports favorably thereon with one proviso 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

Modern extradition treaties (1) identify the offenses for which extradition will be granted, (2) establish procedures to be followed in presenting extradition requests, (3) enumerate exceptions to the duty to extradite, (4) specify the evidence required to support a finding of a duty to extradite, and (5) set forth administrative provisions for bearing costs and legal representation.

II. BACKGROUND

On August 3, 1995, the President signed an extradition treaty with Malaysia. The Treaty was transmitted to the Senate for its advice and consent to ratification on May 17, 1996. In recent years the Departments of State and Justice have led an effort to modernize U.S. bilateral extradition treaties to better combat international criminal activity, such as drug trafficking, terrorism and money laundering. The United States is a party to approximately 100 bilateral extradition treaties. According to the Justice Department, during 1995 131 individuals were extradited to the United States and 79 individuals were extradited from the United States.

The increase in international crime also has prompted the U.S. government to become a party to several multilateral international conventions which, although not themselves extradition treaties, deal with international law enforcement and provide that the offenses which they cover shall be extraditable offenses in any extradition treaty between the parties. These include: the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague), art. 8; the Convention to Discourage Acts of Violence Against Civil Aviation (Montreal), art. 8; the Protocol Amending the Single Convention on Narcotic Drugs of 1961, art. 14 amending art. 36(2)(b)(I) of the Single Convention; the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (Organization of American States), art. 3; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8; the International Convention against the Taking of Hostages, art. 10; the Convention on the Physical Protection of Nuclear Materials, art. 11; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna). These multilateral international agreements are incorporated by reference in the United States' bilateral extradition treaties.

III. SUMMARY

A. GENERAL

An extradition treaty is an international agreement in which the Requested State agrees, at the request of the Requesting State and under specified conditions, to turn over persons who are within its jurisdiction and who are charged with crimes against, or are fugitives from, the Requesting State. Extradition treaties can be bilateral or multilateral, though until recently the United States showed little interest in negotiating multilateral agreements dealing with extradition.

The contents of recent treaties follow a standard format. Article 1 sets forth the obligation of contracting states to extradite to each other persons charged by the authorities of the Requesting State with, or convicted of, an extraditable offense. Article 2, sometimes referred to as a dual criminality clause, defines extraditable offenses as offenses punishable in both contracting states by prison terms of more than one year. Attempts or conspiracies to commit an extraditable offense are themselves extraditable. Several of the treaties provide that neither party shall be required to extradite its own nationals. The treaties carve out an exception to extraditable crimes for political offenses. The trend in modern extradition treaties is to narrow the political offense exceptions.

The treaties include a clause allowing the Requested State to refuse extradition in cases where the offense is punishable by death in the Requesting State, unless the Requesting State provides assurances satisfactory to the Requested State that the individual sought will not be executed.

In addition to these substantive provisions, the treaties also contain standard procedural provisions. These specify the kinds of information that must be submitted with an extradition request, the

language in which documents are to be submitted, the procedures under which documents submitted are to be received and admitted into evidence in the Requested State, the procedures under which individuals shall be surrendered and returned to the Requesting State, and other related matters.

B. MAJOR PROVISIONS

1. Extraditable offenses: The dual criminality clause

Article 2 contains a standard definition of what constitutes an extraditable offense: an offense is extraditable if it is punishable under the laws of both parties by a prison term of at least one year. Attempts and conspiracies to commit such offenses, and participation in the commission of such offenses, are also extraditable. If the extradition request involves a fugitive, it shall be granted only if the remaining sentence to be served is more than six months.

The dual criminality clause means, for example, that an offense is not extraditable if in the United States it constitutes a crime punishable by imprisonment of more than one year, but is not a crime in the treaty partner or is a crime punishable by a prison term of less than one year. In earlier extradition treaties the definition of extraditable offenses consisted of a list of specific categories of crimes. This categorizing of crimes has resulted in problems when specific crime, for example drug dealing, is not on the list, and is therefore not extraditable. The result has been that as additional offenses become punishable under the laws of both treaty partners the extradition treaties between them need to be renegotiated or supplemented. A dual criminality clause obviates the need to renegotiate or supplement a treaty when it becomes necessary to broaden the definition of extraditable offenses.

2. Extraterritorial offenses

In order to extradite individuals charged with extraterritorial crimes (offenses committed outside the territory of the Requesting State) such as international drug traffickers and terrorists, provision must be made in extradition treaties. The Malaysia Treaty states that the Requested State shall grant extradition for an offense committed outside the Requesting State's territory if the Requested State's laws provide that an offense committed outside its territory is punishable in similar circumstances (art. 2(5)). If the Requested State's laws do not provide that an offense committed outside its territory is punishable in similar circumstances, under the Malaysia Treaty the Requested State nevertheless has discretionary authority to grant extradition (art. 2(5)). The proposed treaty also states, however, that if the offense for which extradition is sought was committed within the territory of the Requested State, it may deny extradition (art. 2(4)).

In the proposed treaty an obligation to extradite depends mostly on whether the Requested State also punishes Offenses outside its territory "in similar circumstances." This, in effect, appears to be a dual criminality clause applied to extraterritorial offenses. The phrase "in similar circumstances" is undefined in each of the treaties that have such a requirement and in the Letters of Submittal from the Department of State to the President. The phrase appears

to be sufficiently vague to give a reluctant Requested State "wiggle room" to avoid its possible obligation to extradite individuals for crimes committed outside its territory.

3. Political offense exception

In recent years the United States has been promoting a restrictive view of the political offense exception in furtherance of its campaign against terrorism, drug trafficking, and money laundering. The political offense exception in the Malaysia Treaty is a broader provision than is contained in other extradition treaties.

The exclusion of certain violent crimes, (i.e. murder, kidnapping, and others) from the political offense exception has become standard in many U.S. extradition treaties, reflecting the concern of the United Stages government and certain other governments with international terrorism.

The exclusion from the political offense exception for crimes covered by multilateral international agreements, and the obligation to extradite for such crimes or submit the case to prosecution by the Requested State, is now a standard exclusion and is contained in the proposed treaty. The incorporation by reference of these multilateral agreements is intended to assure that the offenses with which they deal shall be extraditable under an extradition treaty. But, extradition for such offenses is not guaranteed. A Requested State has the option either to extradite or to submit the case to its competent authorities for prosecution. For example, a Requested State could refuse to extradite and instead declare that it will itself prosecute the offender.

4. The death penalty exception

Because Malaysia imposes the death penalty for certain crimes, such as drug trafficking, its provision varies from other treaties with countries that do not impose the death penalty and therefore may refuse extradition for an offense punishable by the death penalty in the Requesting State if the same offense is not punishable by the death penalty in the Requested State, unless the Requesting State gives assurances satisfactory to the Requested State that the death penalty will not be imposed or carried out. The Malaysia treaty goes a step further. It states that if an offense is punishable by the death penalty in the Requesting State but the same offense is not so punishable in the Requested State, the Requesting State shall not even make a request for extradition without prior consultation and agreement by both States.

5. The extradition of nationals

The U.S. does not object to extraditing its own nationals and has sought to negotiate treaties without nationality restrictions. Many countries, however, refuse to extradite their own nationals. U.S. extradition treaties take varying positions on the nationality issue.

The Malaysia Treaty contains the traditional nationality clause providing that neither party is obligated to extradite its own nationals, but that they may do so at their discretion (art. 3). Upon a refusal to extradite, the Requested State may be required by the

Requesting State to submit the case to its authorities for prosecution.[1]

6. Retroactivity

The proposed treaty states that it shall apply to offenses committed before as well as after it enters into force (art. 21). These retroactivity provisions do not violate the Constitution's prohibition against the enactment of ex post facto laws which applies only to enactments making criminal acts that were innocent when committed, not to the extradition of a defendant for acts that were criminal when committed but for which no extradition agreement existed at the time.

The rule of speciality

The rule of speciality (or specialty), which prohibits a Requesting State from trying an extradited individual for an offense other than the one for which he was extradited, is a standard provision included in U.S. bilateral extradition treaties, including the six under consideration. The Malaysia Treaty (art. 16) contains exceptions to the rule of speciality that are designed to allow a Requesting State some latitude in prosecuting offenders for crimes other than those for which they had been specifically extradited.

8. Lapse of time

The Malaysia Treaty has no provision denying extradition if barred by the statute of limitations of either the Requesting or Requested State.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

This Treaty shall enter into force upon the exchange of instruments of ratification.

B. TERMINATION

This Treaty shall 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 Wednesday, July 24, 1996, and ordered the proposed treaty favorably reported with one proviso by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed treaty.

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[1] An article in the Washington Post, A25, of June 28, 1996, reported that the Constitutional Court in Italy refused to allow the extradition to the United States of an Italian-born U.S. citizen or resident under the U.S.-Italy extradition treaty for a murder he committed in the United States despite U.S. assurances he would not be subject to the death penalty.

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. Certainly, sovereign relationships have always been important to prosecution of suspected criminals. The first recorded extradition treaty dates as far back as 1280 B.C. under Ramses II, Pharoah of Egypt. The United States entered into its first extradition treaty in 1794 with Great Britain. Like these early treaties, the basic premise of the treaties is to facilitate, under specified conditions, the transfer of persons who are within the jurisdiction of one nation, and who are charged with crimes against, or are fugitives from, the nation requesting extradition. Despite the long history of such bilateral treaties, the Committee believes that these treaties are more essential than ever to U.S. efforts to bring suspected criminals to justice.

In 1995, 131 persons were extradited to the U.S. for prosecution for crimes committed in the U.S., and the U.S. extradited 79 individuals to other countries for prosecution. After the Senate ratified an extradition treaty with Jordan in 1995, the U.S. Attorney General was able to take into custody an alleged participant in the bombing of the World Trade Center. His prosecution would not be possible without an extradition treaty. Crimes such as terrorism, transhipment of drugs by international cartels, and international banking fraud are but some of the international crimes that pose serious problems to U.S. law enforcement efforts. The Committee believes that modern extradition treaties provide an important law enforcement tool for combatting such crimes and will advance the interests of the United States.

The proposed resolution of ratification includes a proviso that reaffirms that ratification of this treaty does not require or authorize legislation that is prohibited by the Constitution of the United States. Bilateral extradition treaties 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.

VII. Explanation of Proposed Treaty

The following is the Technical Analysis of the Extradition Treaty submitted to the Committee on Foreign Relations by the Departments of State and Justice prior to the Committee hearing to consider pending extradition treaties.

TECHNICAL ANALYSIS OF THE EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND MALAYSIA

On August 3, 1995, the United States signed a treaty on extradition with Malaysia ("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 our law enforcement relations. The Treaty was signed in duplicate in both the English

and Malay languages. While both texts are authentic, the Treaty is unusual in that it provides that, in the case of divergence of interpretation, the English text shall prevail. The Treaty is a major step forward in United States efforts to win the cooperation of countries in the region in combatting Asian organized crime, transnational terrorism, and international drug trafficking.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 18, United States Code, Section 3184 et seq. No new implementing legislation will be needed in the United States. Malaysia has its own internal legislation on extradition [2] which will apply to United States requests under the Treaty.

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

Article 1—Obligation to extradite

This article, like the first article in every recent United States extradition treaty, formally obligates each Contracting State to extradite to the other persons accused or convicted of an extraditable offense, subject to the provisions of the remainder of the Treaty. The article refers to charges brought by the authorities "in" the Requesting State rather than "of" the Requesting State because Malaysia's obligation to extradite to the United States encompasses state and local prosecutions as well as federal cases. It was agreed that the term "convicted" includes instances in which the person has been found guilty, whether or not a sentence has yet been imposed.[3] The negotiators intended to make it clear that the Treaty applies to persons who have been adjudged guilty but fled prior to sentencing.

Article 2—Extraditable offenses

This article contains the basic guidelines for determining what are extraditable offenses. The Treaty, like most recent United States extradition treaties, including those with Jordan, Jamaica, Italy, Ireland, Thailand, Sweden (Supplementary Convention), and Costa Rica, does not list the offenses for which extradition may be granted. Instead, paragraph 1 permits extradition for any offense punishable under the laws of both Contracting States by deprivation of liberty (i.e., imprisonment, or other form of detention) for more than one year, or by a more severe penalty such as capital punishment. Defining extraditable offenses in terms of "dual criminality" rather than attempting to list each extraditable crime should obviate the need to renegotiate the Treaty or supplement it should both Contracting States pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover an im-

[2] Extradition Act 1992 (Act 479) & Akta Ekstradis, 1979 (Akta 479), as amended July 15, 1992. The key sections of the Extradition Act that are germane to the interpretation and implementation of the Treaty are discussed in more detail in the technical analysis. The Malaysian delegation stated that in Malaysia statutes take priority over treaties, so if the Treaty conflicts with the Extradition Act, the provisions of the Act prevail. However, section 2 of the Act states that if the terms of an extradition arrangement vary from the terms of the Act, the Minister of Home Affairs may issue an order reciting the terms of the Treaty, and "the provisions of this Act shall be applied to that country subject to any restriction, exception, modification, adaption, condition, or qualification contained in the order."

[3] See Stanbrook and Stanbrook, "Extradition: The Law and Practice" 25–26 (1979).

portant type of criminal activity punishable in both Contracting States.

During the negotiations, the United States delegation received assurances from the Malaysian delegation that United States offenses such as operating a continuing criminal enterprise [4] would be extraditable, and that offenses under the racketeering statutes [5] would be extraditable if the predicate offense would be an extraditable offense. The Malaysian delegation also stated that extradition would be possible for such high priority offenses as drug trafficking, terrorism, money laundering, tax fraud or tax evasion, crimes against environmental protection laws, and any antitrust violations which would be punishable in both Contracting States by one year of imprisonment.

Paragraph 2 follows the practice of recent extradition treaties in providing that extradition should also be granted for attempting or conspiring to commit, aiding or abetting, counseling, causing or procuring the commission of, or otherwise being an accessory before or after the fact to an extraditable offense. Conspiracy charges are frequently used in United States criminal cases, particularly those involving complex transnational criminal activity, so it is especially important that the Treaty be clear on this point. Malaysia has no general conspiracy statute like Title 18, United States Code, Section 371. Therefore, paragraph 2 creates an exception to the "dual criminality" rule of paragraph 1 by making conspiracy an extraditable crime if the offense which was the object of the conspiracy is an extraditable offense.

Paragraph 3 reflects the intention of negotiators for both Contracting States to interpret the principles of this article broadly. Judges in foreign countries are often confused by the fact that many United States federal statutes require proof of certain elements (such as use of the mails or interstate transportation) solely to establish jurisdiction in United States federal courts. Because these foreign judges know of no similar requirement in their own criminal law, they occasionally have denied the extradition of fugitives sought by the United States on federal charges on this basis. This paragraph requires that such elements be disregarded in applying the dual criminality principle. For example, Malaysian authorities must treat United States mail fraud charges [6] in the same manner as fraud charges under state laws, and must view the federal crime of interstate transportation of stolen property [7] in the same manner as unlawful possession of stolen property. This paragraph also requires a Requested State to disregard differences in the categorization of the offense in determining whether dual criminality exists, and to overlook mere differences in the terminology used to define the offense under the laws of each Contracting State. A similar provision is contained in all recent United States extradition treaties.

Paragraphs 4 and 5 deal with the fact that many United States federal crimes involve acts committed wholly outside United States territory. Our jurisprudence recognizes jurisdiction in our courts to

[4] See 21 U.S.C. § 848.
[5] See 18 U.S.C. §§ 1961–68.
[6] See 18 U.S.C. § 1341.
[7] See 18 U.S.C. § 2314.

prosecute offenses committed outside of the United States if the crime was intended to, or did, have effects in this country, or if the legislative history of the statute shows clear Congressional intent to assert such jurisdiction. This extraterritorial jurisdiction has proven especially useful in dealing with international drug trafficking. On the other hand, Malaysia's extradition law gives the Minister of Home Affairs the discretion to deny an extradition request if the offense was committed within Malaysian jurisdiction.[8] It was suggested that the Treaty give each Contracting State the discretion to deny extradition in such circumstances. The United States has never agreed to a treaty provision quite so broad, although one treaty does permit denial if the offense occurred within the Requested State's territory.[9]

The compromise reached is reflected in paragraphs 4 and 5, wherein the Contracting States agreed that the Requested State may grant or deny an extradition request that involves an offense that occurred within the Requested State's territory, its airspace and territorial waters, or on its registered vessels or aircraft.[10] The negotiators anticipated that the Requested State will consult the Requesting State under article 20 of the Treaty to discuss the matter before any request is denied under paragraph 4. If the request is denied, the Requested State must submit the case to its authorities for the purpose of prosecution. It is understood that the Requested State must consider prosecution, in good faith, and bring the offender to justice, if possible, but it is not obliged to prosecute if it determines that the facts and its law do not warrant it. At the same time, under paragraph 5, the Requested State may extradite for offenses committed outside of the Requesting State as long as the Requested State's law would permit it to prosecute similar offenses committed outside of its territory in corresponding circumstances. If the Requested State's laws do not provide, the final sentence of the paragraph states that extradition may be granted, but the executive authority of the Requested State also has the discretion to deny the request.[11]

Some recent United States extradition treaties provide that persons who have been convicted of an extraditable offense and sentenced to imprisonment may be extradited only if at least a certain specified portion of the sentence (often six months) remains to be served on the outstanding sentence. The Treaty contains no such requirement. Provisions of this kind are an attempt to limit extradition to serious cases because of the significant costs associated with the process. However, the negotiators of the Treaty felt that

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[8] Extradition Act 1992 § 49(1)(b).

[9] A similar provision is found in article III(2) of the U.S.-Ireland Extradition Treaty. July 13, 1983, T.I.A.S. No. 10813.

[10] It was agreed that for these purposes, "territorial waters" mans "territorial seas." Both the United States and Malaysia claim a territorial sea of twelve nautical miles.

[11] The importance of the issue of extraterritoriality was illustrated in the 1992 United States request to Malaysia for the extradition of Lin Chien Pang. Lin was a Thailand-based major exporter of heroin and a close associate of Burmese drug lord Khun Sa. The United States request was denied by both the trial and appellate courts solely on the basis that Malaysia would not have been able to charge Lin under the facts presented in the United States request as Malaysia's narcotics laws have no extraterritorial application. See *In re a Requisition by the United States for the Return of LIN CHIEN PANG,* Kuala Lumpur Sessions Court, Oct. 2, 1992; *In re a Requisition by the United States for the Return of LIN CHIEN PANG,* High Court of Malaysia at Kuala Lumpur, Jan. 11, 1993. Paragraph 5 remedies this problem by granting the executive authorities the discretion to extradite when there is a lack of extraterritorial application for the offenses for which extradition is sought.

the particular sentence imposed or outstanding is not necessarily an adequate measure of the seriousness of the crime.[12] They preferred the exercise of discretion and good judgment in considering whether to extradite a person to serve the remainder of a sentence, not arbitrary limits in the terms of the treaty. This is the approach taken in our extradition treaties with other countries who follow the common law approach, including Jamaica, England, Canada, Australia, and New Zealand.

Article 3—Nationality

Paragraph 1 states that neither contracting State shall be bound to extradite its own nationals, but each Contracting State shall have the power to do so if, in its discretion, it deems proper to do so. The United States ordinarily does not deny extradition on the basis of the offender's citizenship.[13] However, Malaysian law gives Malaysia's Minister of Home Affairs the discretion to deny the request if the person sought is a Malaysian national,[14] and while Malaysia does not routinely deny extradition on this ground, the Malaysian delegation insisted that the discretion to do so be reflected in the Treaty to ensure that the Treaty is consistent with Malaysian law. Thus, this paragraph permits the United States to extradite its nationals to Malaysia, in accordance with established policy favoring such extradition, and it is anticipated that Malaysia will extradite its nationals in most cases. Similar provisions appear in many recent United States extradition treaties.[15]

Paragraph 2 requires that if the Requested State refuses extradition on the basis of nationality, it must submit the case to its authorities for the purpose of prosecution if asked to do so by the Requesting State. The negotiators agreed that here, as in article 2(4), the Requested State's obligation is, in good faith, to consider prosecuting the person, but it is not obliged to prosecute if it determines, in its sound prosecutorial discretion, that the facts do not make out a criminal offense under its law, or it lacks jurisdiction to prosecute, or if there are other reasons not to proceed.

Article 4—Political and military offenses

Paragraph 1 prohibits extradition for a political offense. This is a common provision in United States extradition treaties.

Paragraph 2 describes three categories of offenses that shall not be considered to be political offenses.[16]

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[12] Cf. *United States* v. *Clark,* 470 F. Supp. 976 (D. Vt. 1979) ("Leniency in sentencing does not give rise to a bar to extradition"). Reliance on the amount of the sentence remaining to be served can also produce anomalous results. For instance, a murderer who escapes from custody with less than six months to serve on a sentence can hardly resist extradition on the basis that murder is not a serious offense.

[13] See generally Shearer, "Extradition in International Law" 110–14 (1970); 6 Whiteman, "Digest of International Law" 871–76 (1968). Our policy of drawing no distinction between United States nationals and others in extradition matters is underscored by Title 18, United States Code, Section 3196, which authorizes the Secretary of State to extradite United States citizens pursuant to treaties that permit but do not expressly require surrender of citizens, as long as the other requirements of the treaty are met. 18 U.S.C. § 3196.

[14] Extradition Act 1992 § 49.

[15] See, e.g., Protocol Amending U.S.-Australia Extradition Treaty, Sept. 4, 1990, art. 3, T.I.A.S. No. —; U.S.-Costa Rica Extradition Treaty, Nov. 10, 1922, art. 8, 43 Stat. 1621, T.S. 668, 6 Bevans 1033; U.S.-Mexico Extradition Treaty, May 4, 1978, art. 9, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[16] These three categories are specifically listed in section 9 of Malaysia's Extradition Act 1992, and appear in almost all recent United States extradition treaties.

First, the political offense exception to extradition does not apply where there is a murder or other willful crime against the person of a Head of State of a Contracting State or a member of the Head of State's family.

Second, the political offense exception does not apply to offenses for which both States have the obligation pursuant to a multilateral treaty, convention, or international agreement, either to extradite the person sought or submit the matter for a decision as to prosecution. The conventions to which this clause would apply at present include the Convention for the Suppression of Unlawful Seizures of Aircraft (Hijacking),[17] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage),[18] and the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[19]

Third, the political offense exception does not apply to conspiring or attempting to commit, or aiding or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, the foregoing offenses.

Paragraph 3 provides that extradition shall not be granted if the executive authority of the Requested State finds that the request was politically motivated.[20] This is consistent with the longstanding law and practice of the United States, under which the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.[21]

Paragraph 4 provides that the executive authority of the Requested State may refuse extradition if the request involves offenses under military law that would not be offenses under ordinary criminal law.[22]

Article 5—Prior prosecution

This article will permit extradition in situations in which the offender is charged with different offenses in each Contracting States arising out of the same basic transaction.

Paragraph 1 prohibits extradition if the offender has been convicted or acquitted in the Requested State for the offense for which extradition is requested. This is similar to language present in many United States extradition treaties.[23]

Paragraph 2 makes it clear that neither Contracting State may refuse to extradite a person sought on the ground that the Requested State's authorities declined to prosecute the person, or in-

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[17] Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

[18] Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.

[19] Dec. 20, 1988, T.I.A.S. No. —. Both the United States and Malaysia are parties to the Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204, and the Amending Protocol to the Single Convention, Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.

[20] There are similar provisions in many recent treaties. See, e.g., U.S.-Jamaica Extradition Treaty, June 14, 1983, art. III(3), T.I.A.S. No. —; U.S.-Spain Extradition Treaty, May 29, 1970, art. 5(4), 22 U.S.T. 737, T.I.A.S. No. 7136, 796 U.N.T.S. 245; U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 4, T.I.A.S. No. 10733; and U.S.-Ireland Extradition Treaty, July 13, 1983, art. IV(c), T.I.A.S. No. 10813.

[21] See *Eain* v. *Wilkes,* 641 F. 2d 504, 513–18 (7th Cir.), cert. denied, 454 U.S. 894 (1981); Koskotos v. Roche, 744 F. Supp. 904 (D. Mass. 1990), aff'd, 931 F.2d 169 (1st Cir. 1991).

[22] An example of such a crime is desertion. See Matter of the Extradition of Suarez-Mason, 694 F. Supp. 676, 703 (N.D. Cal., 1988).

[23] Similar provisions appear in many treaties, including article 5 of the U.S.-Jordan Extradition Treaty. Mar. 28, 1995, art. 5, T.I.A.S. No. —. In Malaysia, this provision will take precedence over sections 19(1)(h) and 20(d) (iv) and (v) of the Extradition Act 1992, which requires that extradition be denied if the person sought was acquitted in the Requesting State.

stituted criminal proceedings against the person and thereafter elected to discontinue the proceedings. This provision was included because the decision of the Requested State to forego prosecution, or to drop charges already filed, may have resulted simply from a failure to obtain sufficient evidence or witnesses for trial, and the prosecution in the Requesting State may not suffer from the same impediments. This provision should enhance the ability to extradite to the jurisdiction that has the better chance of a successful prosecution.[24]

Article 6—Capital punishment

This article was the subject of extensive discussion at the negotiations. In the United States, capital punishment is usually imposed only if a homicide occurred.[25] In Malaysia, the death penalty is imposed for several offenses involving no loss of life[26] and is mandatory for drug trafficking.[27] The extradition treaty currently in force is silent on this subject, but the United States wanted a provision on this issue in the Treaty to bring the Treaty in line with other modern United States treaties that permit the Requested State to decline extradition if the offense for which extradition is sought is punishable by death in the Requesting State but not in the Requested State—unless the Requesting State provides assurances that the person sought will not be executed.[28] It was felt that cases might arise in which the Requested State might not wish to surrender a person to the other to face a death sentence for activity not punishable by death in the Requested State.

This article deals with this sensitive subject by requiring that if the person sought could be subject to capital punishment in the Requesting State but would not be subject to capital punishment in the Requested State for the same offense, no extradition request may be submitted without prior consultation and agreement by both Contracting States. Since extradition cannot be granted unless an extradition request has been made, and both Contracting States must agree to the making of the request under this article, the Requested State effectively can block extradition of a person under this article by withholding agreement to the making of the request.

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[24] The delegations discussed a provision for the Treaty that would have permitted the Requested State to deny a request if it had considered prosecuting the person sought, but decided not to prosecute. It was argued that such discretion would be useful in cases in which a person might wish to testify or otherwise assist the prosecution only if immunized from criminal prosecution and shielded from extradition as well. The Contracting States agreed that if the Requested State were to ask the Requesting State to withdraw an extradition request in order to facilitate the use of the person as a witness in the Requested State, the Requesting State should give careful and sympathetic consideration to the request.

[25] The United States Supreme Court has held that to apply capital punishment to a person whose offense, however reprehensible, did not take another person's life may violate the Constitution's prohibition against cruel and unusual punishment. *Coker* v. *Georgia,* 433 U.S. 585 (1976).

[26] Malaysia imposes the death penalty for murder, illegal possession of firearms, drug trafficking, kidnapping and gang-robbery resulting in death, and some offenses related to treason, such as waging war against or "imagining, inventing, devising, or intending the death" of Malaysia's king.

[27] Under section 3(B) of Malaysia's Drug Trafficking Act, the death penalty is mandatory for drug trafficking. The law creates a presumption of trafficking from possession of more than a prescribed amount of certain drugs. Malaysia's Attorney General recently instructed prosecutors not to file section 3(B) charges unless actual trafficking can be shown, thus ruling out capital charges based on mere possession coupled with the legal presumption.

[28] See e.g., U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 7, T.I.A.S. No. 10733; U.S.-Ireland Extradition Treaty, July 13, 1983, art. 6, T.I.A.S. No. 10813.

Since article 6 is somewhat unusual, the negotiators discussed its practical operation at great length. It was agreed that the executive authorities of the Contracting States would apply this article.[29] The United States delegation assured the Malaysian delegation that the United States has no predisposition to deny automatically all requests under this provision, and that it would not exercise discretion under article 6 based solely on any difference in the applicable punishments alone. Rather, the United States would consider all of the factors in the case, including the age and health of the person sought, the penalty United States courts would likely impose in a similar case, and whether extradition would be consistent with our constitutional requirements (i.e., whether a United States court would deem execution to be cruel and unusual punishment).

Malaysia wanted the discretionary decision under this article to be made *before* the formal request is submitted in order to avoid obliging the Requesting State to request publicly extradition, supply the supporting evidence, and pursue the matter successfully in the Requested State's courts, only to have the Requested State deny extradition at the last minute on death penalty grounds. The United States preferred that the discretionary decision be made after all litigation on the request has been concluded, since new facts might emerge during the extradition hearings.[30] These differing approaches were reconciled in the diplomatic notes accompanying the Treaty, which provide that neither Contracting State would be bound by any initial agreement to extradite under article 6 if relevant new information arises after the agreement. The notes state that if "* * * non-disclosure of relevant facts during such consultation, whether the non-disclosure was deliberate or otherwise and whether such facts were known or unknown at that time, would nullify the consultation and any resulting agreement reached by the Contracting States.* * *" The term "or otherwise" means that the initial agreement would be invalid even if the new information was unknown to the Requested State when consultations occurred.

Article 6 is most likely to arise in narcotics cases. Neither Contracting State wanted this clause to interfere with the important shared goal of combating drug trafficking. Indeed, the United States delegation reiterated our government's support for Malaysia's vigorous anti-narcotics measures. According to the Department of State International Narcotics Control Strategy Report for 1994: "The Government of Malaysia (GOM) recognizes the seriousness of the narcotics threat domestically and internationally, and conducts a serious, well-funded and well-administered anti-narcotics program, which includes law enforcement, primary prevention, treatment and education."

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[29] When the United States is the Requested State, the Secretary of State decides whether to agree to the request, in coordination with the Department of Justice.

[30] The United States anticipated that only in exceptional cases would a different conclusion be reached by the executive authority of the Requested State following court proceedings than would have been communicated to the Requesting State during pre-request consultations. In such rare instances, the different conclusion would be predicated entirely or in part on the existence of significant facts that arose or became known to the Contracting States after the initial consultations.

Article 7—Extradition procedures and required documents

This article sets out the documentary and evidentiary requirements for an extradition request, and is generally similar to articles in most recent United States extradition treaties.

Paragraph 1 requires that each formal request for extradition be submitted through the diplomatic channel.[31] A formal extradition request may be preceded by a request for the provisional arrest of the fugitive under article 11, and provisional arrest requests need not be initiated through diplomatic channels if the requirements of article 11 are met.

Paragraph 2 outlines the information that must accompany every request for extradition under the Treaty. Most of the items listed in paragraph 2 enable the Requested State to determine quickly whether extradition is appropriate under the Treaty. For example, paragraph 2(c) calls for "a statement of the provisions of the law describing the essential elements of the offense for which extradition is requested," thereby enabling the Requested State to determine easily whether there would be a basis for denying extradition for lack of dual criminality under article 2.

Paragraph 3 describes the additional information needed when the person is sought for trial in the Requesting State; paragraph 4 describes the information needed, in addition to the requirements of paragraph 2, when the person sought has already been tried and convicted in the Requesting State.

Paragraph 3(c) requires that if the fugitive is a person who has not yet been convicted of the crime for which extradition is requested, the Requesting State must provide such evidence as would justify committal for extradition under the laws of the Requested State, provided that neither Contracting State shall require, as a condition to extradition pursuant to the Treaty, that the other prove a prima facie case against the person sought. This provision is described in more detail in an exchange of diplomatic notes accompanying the Treaty, and, as described, it will alleviate a major practical problem with extradition from Malaysia. The Treaty currently in force permits extradition only if "* * * the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trail, in the case the crime of offense had been committed in the territory of such High Contracting Party, or to prove that the person is the identical person convicted by the courts of the High Contracting Party who makes the requisition.* * *" Malaysian courts have interpreted this clause to require that a *prima facie* case against the defendant be shown before extradition will be granted.[32] By contrast, United States law permits extradition if there is probable cause to believe that an extraditable offense was committed and the offender committed it.[33] To eliminate this imbalance in the burden of proof for extradition, Malaysia agreed to amend its internal procedures to permit extradition based on probable cause

[31] This is consistent with section 12(1) of Extradition Act 1992.
[32] Extradition Act 1992 § 19(4).
[33] Courts applying Title 18, United States Code, Section 3184 have long required probable cause for international extradition. Restatement (Third) of the Foreign Relations Law of the United States § 476 comment b.

if the Treaty expressly prohibits the prima facie standard.[34] Thus, paragraph 3 states that neither Contracting State may require a prima facie case. An exchange of diplomatic notes accompanying the Treaty specifies that Malaysia must supply evidence of probable cause when it seeks extradition from the United States, and the United States will supply Malaysia with information satisfying Malaysia Extradition Law section 20 when the United States seeks extradition from Malaysia. It is understood that Malaysia's Minister for Home Affairs will issue an order under Extradition Act 1992, section 4, directing that probable cause be the standard of proof for extradition under the Treaty rather than a prima facie case under section 19 or no evidence under section 20. This clause should dramatically improve the ability of the United States to extradite from Malaysia, and will be a useful precedent in dealing with other former British colonies.

Paragraph 4 lists the information needed to extradite a person who has already been convicted of an offense in the Requesting State. This paragraph makes it clear that once a conviction has been obtained, no showing of probable cause is required. In essence, the fact of conviction speaks for itself, a position taken in recent United States court decisions even absent a specific treaty provision.[35]

Some United States treaties contain a provision describing the documentation needed for extraditing a person who was found guilty in absentia. There is no provision on this matter in the Treaty because neither the United States nor Malaysia convicts persons in absentia.

Article 8—Admissibility of documents

This article governs the authentication procedures for the documentation provided in extradition requests.

The primary documents in each extradition request are the warrant of arrest (in the case of a person sought for prosecution), the judicial documents proving that the person sought has been convicted (in the case of a person sought to serve a sentence), and the depositions or statements or other evidence containing proof of the offense. This article specifies that these documents, or copies thereof, will be admissible in extradition proceedings if they have been signed or certified by a judge, magistrate, or other competent authority of the Requesting State. This requirement is taken from Malaysian law,[36] and it is understood that in the case of a request from the United States, the term "competent authority" would include a notary public, a clerk of the court, or any other person who ordinarily signs or issues such documents, or the officials in the Department of Justice who typically authenticate extradition documents. The article also requires that when the United States is the Requesting State, the documents must be certified with the official seal of the United States Attorney General or other "Minister of State" such as the Secretary of State as required by Malaysian

[34] The Malaysian delegation offered to extradite without any review of the evidence, as section 20 of its Extradition Act permits, if the United States would reciprocate. This was an offer the United States delegation could not accept without implicating constitutional violations.

[35] See e.g., *Spatola* v. *United States,* 741 F. Supp. 362, 374 (E.D.N.Y. 1990), aff'd, 925 F.2d 615 (2d Cir. 1991); *Clark,* 470 F. Supp. 976.

[36] See Extradition Act 1992 § 24.

law.[37] When Malaysia is the Requesting State, the documents must be certified by the principal diplomatic or consular officer of the United States resident in Malaysia, as is required by United States law.[38]

Paragraph (c) permits documents to be admitted into evidence if they are authenticated in such other manner as may be permitted under the law of the Requested State. For example, there may be information obtainable in the Requested State itself that is relevant and probative to extradition. Under paragraph (c), the Requested State is permitted to consider that information if the information satisfies its ordinary rules of evidence.[39] This ensures that evidence that is acceptable under the evidentiary rules of the Requested State may be used in extradition proceedings even if it is not authenticated pursuant to the Treaty. This paragraph also should ensure that relevant evidence that would normally satisfy the evidentiary rules of the Requested State is not excluded at the extradition hearing based on an inadvertent error or omission in the authentication process.

Article 9—Translation

This article requires that all extradition documents be translated into the language of the Requested State unless this requirement is waived by the Requested State. Malaysia's official language is the Malay language, but several languages are widely used, including English and several Chinese dialects. It is anticipated that all extradition documents for each Contracting State will be submitted in English.

Article 10—Additional documentation

This article states that if the Requested State considers the documents furnished in support of the request insufficient under the Treaty, it shall request that the Requesting State submit necessary additional documents. While the Requested State may set a time limit for the submission of such additional documents, it also may grant a reasonable extension of the time limit, upon request. This article was intended to oblige the Requested State to review any extradition documents it receives under the Treaty, alert the Requesting State of any perceived deficiencies in the documents, and provide reasonable time for remedying those deficiencies. The provision also provides a basis for the Requesting State to seek and receive from the courts considering the case in the Requested State a reasonable extension of time to obtain and transmit the additional documents or evidence to cure any defects found by either the courts or the government of the Requested State.

Article 11—Provisional arrest

This article describes the process by which a person located in a Contracting State may be arrested and detained while the formal extradition request is being prepared.[40]

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[37] See Extradition Act 1992 § 52.
[38] See 18 U.S.C. § 3190.
[39] See Extradition Act 1992 § 50.
[40] Similar provisions appear in all recent United States extradition treaties. The topic of provisional arrest is dealt with in Malaysia's Extradition Act 1992, sections 13(1)(b), 14 and 16.

Paragraph 1 expressly provides that a request for provisional arrest may be made directly between the United States Department of Justice and the Attorney-General's Chambers in Malaysia. The provision also indicates that INTERPOL may be used to transmit such a request.[41] Experience has shown that the ability to use such direct channels in urgent situations can be crucial, as, for example, when a fugitive is poised to flee from a jurisdiction.

Paragraph 2 lists the information that the Requesting State must provide in support of such a request.

Paragraph 3 states that the Requested State must take appropriate steps to secure the arrest, and the Requesting State must be advised promptly of the outcome of its request.

Paragraph 4 provides that the fugitive may be discharged from custody if the Requesting State does not file a formal request for extradition and supporting documents with the executive authority of the Requested State within 60 days of the date on which the person was arrested pursuant to the Treaty.[42] When the United States is the Requested State, the "executive authority" would include the Secretary of State and the United States Embassy in Kuala Lumpur.[43] The Requested State has the discretion to extend the 60-day period by up to 30 additional days.

Although the person sought may be released from custody if the documents are not received within the 60-day period or any extension thereof, the extradition proceedings against the fugitive need not be dismissed. Paragraph 5 makes clear that a person's discharge from custody based on the Requesting State's failure to submit the timely formal extradition request and supporting documentation shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

Article 12—Decision and surrender

This article requires that the Requested State promptly notify the Requesting State of its decision on the extradition request. It is anticipated that such notification will be provided through diplomatic channels. If extradition is denied in whole or in part, the Requested State must provide an explanation of the reasons for the denial. If extradition is granted, the article requires that the executive authorities of the Contracting States agree on a time and place for surrender of the person. The Requesting State must remove the fugitive within the time prescribed by the law of the Requested State, or the person may be discharged from custody, and the Requested State may subsequently refuse to extradite for the same offense. United States law requires that such surrender occur within two calendar months of the finding that the offender is extraditable,[44] or of the conclusion of any litigation challenging that

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[41] Similar provisions appear in many recent United States extradition treaties and in Malaysia's Extradition Act 1992, section 13(2).

[42] Extradition Act 1992, section 16, permits a magistrate handling a provisional arrest request to order the fugitive held "for such reasonable period of time as * * * he may fix, and for this purpose the Magistrate shall take into account any period in the relevant extradition arrangement relating to the permissible period of remand upon provisional arrest of a fugitive criminal."

[43] Cf. *Clark,* 470 F. Supp. 976.

[44] 18 U.S.C. § 3188.

finding,[45] whichever is later. The law in Malaysia specifies that the surrender must take place within three months of committal to prison for return to the Requesting State.[46]

Article 13—Temporary and deferred surrender

Occasionally, a person sought for extradition already may be facing prosecution or serving a sentence on other charges in the Requested State. This article provides a means for the Requested State to defer extradition in such circumstances until the conclusion of the proceedings against the person sought and the service of any punishment imposed. Similar provisions appear in our recent extradition treaties with Jordan, the Bahamas, and Australia.

Paragraph 1 provides that the Requested State may postpone the surrender of a person who is serving a sentence in the Requested State until the full execution of the punishment is imposed.[47] The provision's wording makes it clear that the Requested State may postpone the initiation of extradition proceedings as well as the surrender of a person being prosecuted or serving a sentence.

Paragraph 2 provides for the temporary surrender of a person wanted for prosecution in the Requesting State who is being prosecuted or is serving a sentence in the Requested State. A person temporarily transferred pursuant to this provision will be returned to the Requested State at the conclusion of the proceedings in the Requesting State. Such temporary surrender furthers the interests of justice in that it permits trial of the person sought while evidence and witnesses are more likely to be available, thereby increasing the likelihood of a successful prosecution. Such transfer may also be advantageous to the person sought in that: (1) it permits resolution of the charges sooner; (2) it makes possible serving any sentence in the Requesting State concurrently with the sentence in the Requested State; and (3) it permits defense against the charges while favorable evidence is fresh and more likely to be available. Similar provisions are found in many recent extradition treaties.

Article 14—Requests for extradition made by several States

This article reflects the practice of many recent United States extradition treaties in listing some of the factors that the executive authority of the Requested State must consider in determining to which country a person should be surrendered when reviewing requests from two or more countries for extradition. For the United States, the Secretary of State makes this decision;[48] for Malaysia, the decision is made by the Minister of Home Affairs.[49]

Article 15—Seizure and surrender of property

This article provides that to the extent permitted by its laws, the Requested State may seize and surrender all articles, documents

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[45] *Jimenez* v. *U.S. District Court,* 84 S. Ct. 14, 11 L.Ed.2d 30 (1963) (decided by Goldberg, J., in chambers); see also *Liberto* v. *Emery,* 724 F.2d 23 (2d Cir. 1983); *In re United States,* 713 F.2d 105 (5th Cir. 1983); *Barrett* v. *United States,* 590 F.2d 624 (1978).

[46] Extradition Act 1992 § 43.

[47] Under United States law and practice, the Secretary of State makes this decision. *Koskotas* v. *Roche,* 740 F. Supp. 904, 920 (D. Mass. 1990), aff'd, 931 F.2d 169 (1st Cir. 1991).

[48] *Cheng Na-Yuet* v. *Hueston,* 734 F. Supp. 988 (S.D. Fla. 1990), aff'd, 932 F.2d 977 (11th Cir. 1991).

[49] Extradition Act 1992 § 48.

and evidence connected with the offense for which extradition is granted.[50] The article also provides that these items may be surrendered to the Requesting State even if extradition cannot be effected due to the death, disappearance, or escape of the person sought.

Paragraph 2 provides that the Requested State may condition its surrender of property in such a way as to ensure that the property is returned as soon as practicable and may defer surrender altogether if the property is needed as evidence in the Requested State. The surrender of property under this provision is expressly made subject to due respect for the rights of third parties in such property.

Article 16—Rule of specialty

This article covers the principle known as the rule of specialty, which is a standard aspect of United States extradition practice. Designed to ensure that a fugitive surrendered for one offense is not tried for other crimes, the rule of specialty prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of a sentence on different charges that may not be extraditable under the Treaty or properly documented at the time that the request is granted.

Since a variety of exceptions to the rule have developed over the years, this article codifies the current formulation of the rule by providing that a person extradited under the Treaty may only be detained, tried, or punished in the Requesting State: (1) for the offense for which extradition was granted or any lesser offense proved by the facts on which extradition was grounded; (2) for an offense committed after the extradition; and (3) for an offense for which the executive authority of the Requested State consents.[51] Paragraph 1(c)(ii) permits the Contracting State that is seeking consent to pursue new charges to detain the person extradited for 90 days, or for such longer time as the Requested State may authorize, while the Requested State makes its determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person to a third State for an offense committed prior to his surrender without the consent of the Requested State.[52]

Finally, paragraph 3 permits the detention, trial, or punishment of an extraditee for additional offenses, or extradition to a third state if: (1) that person leaves and returns voluntarily to the Requesting State; or (2) that person does not leave the Requesting State within 15 days of being free to do so.

Article 17—Waiver of extradition proceedings

Persons sought for extradition frequently elect to waive their right to extradition proceedings in order to expedite their return to the Requesting State. This article provides that when a fugitive

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[50] Similar provisions are found in all recent United States extradition treaties and in Malaysia's Extradition Act 1992, section 45.

[51] In the United States, the Secretary of State has the authority to consent to a waiver of the rule of specialty. *Berenguer* v. *Vance,* 473 F. Supp. 1195, 1199 (D.D.C. 1979). For Malaysia, the Minister for Home Affairs maintains this authority. Extradition Act 1992 § 8(e).

[52] Thus, the provision is consistent with Malaysian law on this topic and with provisions in all recent United States extradition treaties. Extradition Act 1992 § 8(f).

consents to return to the Requesting State after being advised by a competent judicial authority of the effect of such consent under the law of the Requested State, the person may be returned to the Requesting State without further proceedings. The negotiators anticipated that in such cases, there would be no need for the formal documents described in article 7 or for further judicial proceedings of any kind.

If the person sought returns to the Requesting State before the Secretary of State signs a surrender warrant, the United States would not view the waiver of proceedings under this article as an "extradition." United States practice has long been that the rule of specialty does not apply when a fugitive waives extradition and voluntarily returns to the Requested State. However, Malaysian law and policy differ; Malaysia might wish the rule of specialty to apply in some cases in which a waiver of proceedings occurred.[53] Thus, paragraph 2 permits the Requested State to require that the rule of specialty in article 16 apply to surrenders pursuant to article 17.[54]

Article 18—Transit

Paragraph 1 empowers each Contracting State to authorize transit through its territory of a person being surrendered to the other Contracting State by a third state.[55] Requests for transit are to contain a description of the person whose transit is proposed and a brief statement of the facts of the case with respect to which transit is sought. The paragraph permits the request to be transmitted either through the diplomatic channel, or directly between the United States Department of Justice and the Malaysian Ministry of Home Affairs. INTERPOL channels may be used to transmit such a request. However, the negotiators agreed that the diplomatic channels will be employed as much as possible for requests of this nature.

Paragraph 2 describes the procedure each Contracting State should follow when seeking to transport a person in custody through the territory of the other. Under this provision, no advance authorization is needed if the person in custody is in transit to one of the Contracting States, is travelling by aircraft and no landing is scheduled in the territory of the other Contracting State. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request in its discretion. The Treaty ensures that the person shall be detained until a request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

Article 19—Representation and expenses

Paragraph 1 provides that the United States will represent Malaysia in connection with a request from Malaysia for extradition before the courts in this country, and the Malaysia will arrange for

[53] See Extradition Act 1992 § 22.
[54] Cf. U.S.-Netherlands Extradition Treaty, June 24, 1980, art. 16, T.I.A.S. No. 10733.
[55] A similar provision is present in all recent United States extradition treaties and in Malaysia's Extradition Act 1992, section 40.

the representation of the United States in connection with United States extradition requests to Malaysia.

Paragraph 2 provides that the Requested State will bear all expenses of extradition except those expenses relating to the ultimate transportation of a fugitive to the Requesting State and the translation of documents, which are to be paid by the Requesting State. The negotiators recognized that cases may arise in which the Requesting State may desire to retain private counsel to assist in the Requested State's presentation of the extradition request. It is anticipated that in such cases the fees of private counsel retained by the Requesting State must be paid by the Requesting State.

Paragraph 3 provides that neither Contracting State shall make a pecuniary claim against the other in connection with extradition proceedings, including a claim arising out of the arrest, detention, examination, or surrender of the fugitive. The negotiators intended this provision to include any claim by the fugitive for damages or reimbursement of legal fees or other expenses occasioned by the execution of the extradition request.

Article 20—Consultation

This article provides that the United States Department of Justice and the Attorney-General's Chambers of Malaysia may consult with each other directly or through the facilities of INTERPOL in connection with an individual extradition case or in furtherance of maintaining and improving procedures for implementing this Treaty. A similar provision is found in recent United States extradition treaties.[56]

Article 21—Application

The Treaty, like most of the other United States extradition treaties negotiated in the past two decades, is expressly made retroactive covering offenses that occurred before as well as after the Treaty enters into force.

Article 22—Entry into force

The first paragraph of this article provides for the entry into force of the Treaty, together with the accompanying exchange of notes interpreting certain portions of the Treaty, when the Contracting States have notified one another through a further exchange of diplomatic notes that the requirements for entry into force under their respective laws have been completed.

Paragraph 2 of this article provides that the 1931 Extradition Treaty between the United States and the United Kingdom, which governs extradition between the United States and Malaysia, will cease to be in effect upon the entry into force of this Treaty. However, it will still be in effect in extradition proceedings that were submitted and in effect prior to the entry into force of this Treaty.

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[56] See, e.g., U.S.-Jordan Extradition Treaty, Mar. 28, 1995, art. 20, T.I.A.S. No. —. See also extradition treaties awaiting to be entered into force: U.S.-Belgium Extradition Treaty, Apr. 9, 1987, art. 19, T.I.A.S. No. —; U.S.-Switzerland Extradition Treaty, Nov. 11, 1990, art. 24, T.I.A.S. No. —; U.S.-Philippines Extradition Treaty, Nov. 13, 1994, art. 18, T.I.A.S. No. —; U.S.-Hungary Extradition Treaty, Dec. 1, 1994, art. 21, T.I.A.S. No. —.

Article 23—Termination

This article contains standard treaty language describing the procedure for termination of the Treaty by either Contracting State by giving written notice through the diplomatic channels to the other State. The termination shall become effective six months after the date of such notice.

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 Extradition Treaty Between the Government of the United States of America and the Government of Malaysia, and a Related Exchange of Notes signed at Kuala Lumpur on August 3, 1995. The Senate's advice and consent is subject to the following proviso, 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.

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