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EXTRADITION TREATY WITH BOLIVIA

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

REPORT

[To accompany Treaty Doc. 104–22]

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 the Republic of Bolivia, signed at La Paz on June 27, 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 June 27, 1995, the President signed an extradition treaty with Bolivia. The Treaty was transmitted to the Senate for its advice and consent to ratification on October 10, 1995. 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 it 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 a 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 extra territorial 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 Bolivia Treaty states that so long as the underlying conduct is criminal in both contracting states, it is irrelevant where the criminal acts were committed (art. 2 3(b)). While the meaning of this provision is not entirely clear, it seems to be saying that for an extra territorial crime to be extraditable it is only necessary that the laws of the Requested State punish such a crime on its own territory, but that it is not necessary that its laws punish such a crime when 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. Though some of the treaties considered by the Committee have taken a narrower view then others of the political offense exception, all of them give it a more limited scope than earlier U.S. extradition treaties. In general, the political offense exception is a broad one in the Bolivia Treaty.

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

The United States and other countries appear to have different views on capital punishment. Under the proposed treaties, Bolivia 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.

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 Bolivia treaty moves substantially in the direction of the U.S. position on the extradition of nationals (art. 3). It provides that each party shall have discretion to deny extradition of its own nationals except as to certain offenses with respect to which extradition on the basis of nationality cannot be refused. Such offenses include those as to which there is an obligation to establish criminal jurisdiction under multilateral international agreements in force between the parties. In addition, extradition cannot be refused on the basis of the criminal's nationality for offenses that include murder, kidnapping, rape, drug-and terrorism-related offenses, organized criminal activity, counterfeiting, and certain others. Attempts or conspiracies to commit any of these offenses by a national of the Requested State are also extraditable.

6. Retroactivity

The proposed treaty states that it shall apply to offenses committed before as well as after it enters into force (art. 17). 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.

7. 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 Bolivia Treaty (art. 12) contains exceptions to the rule of specialty that are designed to allow a Requesting State some latitude in prosecuting offenders for crimes other than those which they had been specifically extradited.

8. Lapse of time

The Bolivia 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 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.

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, Pharaoh 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, transshipment 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 REPUBLIC OF BOLIVIA

On June 27, 1995, at La Paz, Bolivia, the United States signed a treaty on extradition with the Republic of Bolivia ("the Treaty"). In recent years, the United States has signed similar treaties with many other countries as part of ongoing and highly successful efforts to modernize out international law enforcement relations. The Treaty is intended to replace the outdated treaty currently in force between the United States and Bolivia, the Treaty of Extradition ("the 1900 Treaty"),[1] with a modern agreement to facilitate the extradition of serious offenders, including narcotics traffickers, regardless of their nationality.

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.

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

Article I—Agreement to extradite

This article, like the first article in every recent United States extradition treaty, formally obligates each Party to extradite to the other, pursuant to the provisions and conditions of the Treaty, persons charged with or convicted of extraditable offenses.

The phrase "found guilty of, or sentenced for" was used instead of "convicted" because of peculiarities in United States and Bolivian criminal procedure and in order to avoid potential interpretation problems due to semantic differences. In Bolivia, the terms "convicted" and "sentenced" are used interchangeability, in part because a defendant cannot be found guilty without being sentenced

[1] Apr. 21, 1900, 32 Stat. 1857, T.S. 399, 5 Bevans 735.

at the same time. On the other hand, in the United States, a defendant who has been found guilty ordinarily will not be sentenced until after a presentence report has been prepared and considered by the court.

The negotiators agreed that the term "found guilty" includes instances in which a defendant has been convicted but a sentence has not yet been imposed. By including all three terms (i.e., "charged," "found guilty," and "sentenced"), the negotiators intended to make it clear that the Treaty applies not only to charged and sentenced persons, but also to persons who are adjudged guilty and flee prior to sentencing.[2]

The article also refers to offenses "in" the Requesting State rather than "of" the Requesting State, thereby obligating Bolivia to extradite fugitives to the United States for state and local prosecutions as well as federal cases.

Article II—Extraditable offenses

This article contains the basic guidelines for determining what constitutes an extraditable offense. The Treaty, like other recent United States extradition treaties, does not list the offenses for which extradition may be granted.

Paragraph 1 permits extradition for any offense punishable under the laws of both Parties by deprivation of liberty (i.e., imprisonment or other form of detention) for a maximum period of more than one year, or by a more severe penalty such as capital punishment. The term "maximum" was included to ensure that with respect to offenses punishable by a range of years, the Requested State will look only to the maximum potential penalty in determining whether the offense meets the requirement of being punishable by "more than one year" of imprisonment.

During the negotiations, the Bolivian delegation stated that key offenses such as drug trafficking and organized criminal activity (RICO) are extraditable provided the predicate offense is extraditable.

Defining extraditable offenses in terms of dual criminality rather than attempting to list each extraditable crime obviates the need to renegotiate the Treaty or supplement it if both countries pass laws dealing with a new type of criminal activity or if the list inadvertently fails to cover an important type of criminal activity punishable in both countries. For example, although money laundering is not a crime in Bolivia at this time, according to the Bolivian delegation, the Bolivian government currently is drafting legislation to criminalize money laundering. Once this legislation is passed by the Bolivian Congress, money laundering will automatically be included as an extraditable offense under the dual criminality provision without having to amend the Treaty.

In order to ensure that extradition is not requested for minor offenses, paragraph 2 requires that if the person whose extradition is sought has already been sentenced in the Requesting State, more than six months of that sentence must remain to be served. Provi-

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

sions of this kind are not preferred,[3] but they do appear in some United States extradition treaties.[4]

Paragraph 3 reflects the intention of both Parties to interpret the principles of this article broadly. Paragraph 3(a) requires the Requested State to disregard differences in the categorization of an offense in determining whether dual criminality exists and to overlook mere differences in terminology used to define the offense under the laws of each Party. Paragraph 3(a) also states it shall be irrelevant whether the laws of both Parties contain identical elements as long as the underlying conduct is criminal in both countries.[5] Provisions similar to paragraph 3(a) are present in most recent United States extradition treaties.

Paragraph 3(b) states that extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed. Because United States jurisprudence recognizes jurisdiction in our courts to prosecute offenses committed outside 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,[6] many federal statutes criminalize acts committed wholly outside United States territory. On the other hand, in Bolivia, the government's ability to prosecute extraterritorial offenses is much more limited, except when the offense was committed by a Bolivian citizen.[7] Therefore, paragraph 3(b) reflects Bolivia's agreement to recognize United States jurisdiction to prosecute offenses committed outside the United States. This provision will greatly improve the ability of the United States to obtain extradition for a number of offenses that frequently are orchestrated from abroad, such as narcotics trafficking and acts of terrorism.

In addition, 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 judges know of no similar requirement in their own criminal law, they occasionally have denied on this basis the extradition of fugitives sought by the United States on federal charges. Therefore, paragraph 3(c) requires that such elements be disregarded in applying the dual criminality principle. For example, Bolivian authorities must treat United States mail fraud charges[8] in the same manner as fraud charges under state laws, and must view the federal crime of interstate transportation of sto-

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[3] For example, recent United States extradition treaties with Australia, Canada, Jamaica, New Zealand, and the United Kingdom contain no such requirement.

[4] See, e.g., U.S.-Italy Extradition Treaty, Oct. 13, 1983, art. II(1), T.I.A.S. No. 10837.

[5] See In re Extradition of Russell, 789 F.2d 801, 803 (9th Cir. 1986); *United States* v. *Saccoccia,* 58 F.3d 754, 766 (1st Cir. 1995).

[6] Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987); Blakesley, United States Jurisdiction Over Extraterritorial Crime, 73 J. Crim. L. and Criminology 1109 (1982).

[7] Bolivia, like many countries whose jurisprudence is rooted in the civil law tradition, recognizes broad jurisdiction based on the nationality of the offender. In effect, Bolivian courts have jurisdiction over virtually any offense committed by a Bolivian citizen anywhere in the world. In this respect, this provision also is beneficial to Bolivia in that it allows Bolivia to extradite from the United States one of its citizens accused of committing a crime in a third country, even though United States courts normally would not have jurisdiction over a United States citizen who committed a crime under similar circumstances.

[8] See 18 U.S.C. § 1341.

len property[9] in the same manner as unlawful possession of stolen property.

Paragraph 4 follows the pattern of recent extradition treaties in requiring that extradition be granted for attempting or conspiring to commit, participating in the commission of, or associating to commit an extraditable offense. As conspiracy charges frequently are used in United States criminal cases, particularly those involving complex transnational criminal activity, it is especially important that the Treaty be clear on this point. According to the Bolivian delegation, Bolivia has no general conspiracy statute similar to Title 18, United States Code, Section 371.[10] Therefore, paragraph 2 creates an exception to the dual criminality rule of paragraph 1 by expressly making conspiracy an extraditable crime if the offense that was the object of the conspiracy constitutes an extraditable offense. Paragraph 2 creates a similar exception for the Bolivian offense of illicit association in the commission of an offense.

Paragraph 5 provides that when extradition has been granted for an extraditable offense, it shall also be granted for any other offense for which all of the requirements for extradition are met except for the requirement that the offense be punishable by more than one year of imprisonment. For example, if Bolivia agrees to extradite to the United States a fugitive wanted for prosecution on a felony charge, the United States is also permitted to obtain extradition for any misdemeanor offenses charged, as long as those misdemeanors also are recognized as criminal offenses in Bolivia. Thus, the Treaty incorporates the recent United States extradition practice of permitting extradition for misdemeanors when the fugitive's extradition is granted for a more serious extraditable offense. This practice is generally desirable from the standpoint of both the fugitive and the Requesting State in that: (1) it permits all charges against the fugitive to be disposed of more quickly, either by facilitating plea agreements or trials while evidence is available; and (2) it permits the possibility of concurrent sentences. Similar provisions are found in many recent United States extradition treaties.

Article III—Extradition of nationals

Some countries, including most countries in Latin America, refuse to extradite their own nationals for trial or punishment. Although Bolivia has no law that expressly prohibits the extradition of Bolivian nationals, securing the extradition of Bolivian citizens from Bolivia has been an extremely difficult process for the United States. There is strong public opposition in Bolivia to the extradition of nationals, and the Bolivian government has had difficulty finding the political will to extradite its citizens to the United States. Despite numerous United States requests for the extradition of Bolivians charged with crimes in the United States, in recent times, the Bolivian government has approved the extradition to the United States of only two Bolivian citizens (in July, 1992, and in March, 1995).

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[9] See 18 U.S.C. § 2314.

[10] The closest analogue seems to be the offense of "illicit association" proscribed in article 132 of the Bolivian Penal Code, which makes it an offense for at least four individuals to form an association to participate in or plan a criminal offense.

The 1900 Treaty provides that neither Party shall be bound to deliver up its own citizens. According to the Bolivian delegation, Bolivian legislators, jurists and legal scholars are divided in their interpretation of this provision. Some argue that, while creating no obligation to extradite nationals, the 1900 Treaty nevertheless allows extradition at the discretion of the Requested State. Others maintain that the provision precludes the extradition of nationals altogether.

Because the majority of United States fugitives in Bolivia traditionally have been Bolivian citizens, the United States delegation made clear at the outset of the negotiations that we would not accept a treaty that does not guarantee the extradition of serious offenders regardless of their nationality. In response, the Bolivian delegation maintained that a treaty that calls for the mandatory extradition of Bolivian citizens in all cases would be politically impossible for the Bolivian government to accept and would face certain defeat in the Bolivian Congress's ratification process. Ultimately, an agreement was reached on language satisfying the objectives of both delegations.

This article obligates the Parties to extradite their own nationals for numerous serious crimes, but permits the Executive Authority of the Requested State to exercise discretion concerning extradition of its citizens in some cases.

Paragraph 1 sets forth the general rule that neither Party shall be obligated to extradite its own nationals and enumerates in subparagraphs (a), (b), and (c) offenses excepted from the general rule for which extradition of nationals is mandatory.

Paragraph 1(a) includes offenses for which both Parties have an obligation to establish criminal jurisdiction pursuant to a multilateral treaty. The conventions to which this clause applies at present include the Convention on Offenses and Certain Other Acts Committed on Board Aircraft;[11] the Convention for the Suppression of Unlawful Seizures of Aircraft (Hijacking);[12] the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage);[13] the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances;[14] and the Single Convention on Narcotic Drugs[15] and the Amending Protocol to the Single Convention.[16]

Paragraph 1(b) lists a number of serious offenses for which there is an obligation to extradite nationals, including murder, kidnaping, aggravated assault, rape, sexual offenses involving children, drug trafficking, terrorism, organized crime offenses, major frauds and counterfeiting. Paragraph 1(b) also includes any offenses not listed that are punishable by both Parties by a maximum penalty of at least ten years of imprisonment.[17]

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[11] Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.
[12] Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.
[13] Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570.
[14] Dec. 20, 1988, T.I.A.S. No. —.
[15] Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.
[16] Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.
[17] According to the Bolivian delegation, offenses punishable under Bolivian law by a maximum penalty of at least ten years of imprisonment include the following: perpetrating a disaster on a means of transportation; rape; cattle stealing; treason; espionage; sabotage; armed uprising against the security and sovereignty of the State; attempts on the life of the President and other dignitaries of the State; terrorism; genocide; murder; kidnaping; the manufacture, trafficking,

Paragraph 1(c) includes attempts and conspiracies to commit, participation in, and illicit association in, the commission of any of the offenses described in subparagraphs (a) and (b).

Paragraph 2 provides that with respect to offenses not covered in paragraph 1 (a), (b) or (c), the Executive Authority of the Requested State shall have the power to extradite its nationals, although it may refuse their extradition at its discretion.

Paragraph 3 requires that if the Requested State refuses extradition solely on the basis of nationality, that State must submit the case to its authorities for prosecution if asked to do so by the Requesting State.

Overall, the large class of offenses enumerated under article III for which the extradition of nationals is mandatory creates exceptions greater than the general rule of non-obligatory extradition of nationals. This article establishes a clear framework that enables the United States to obtain the extradition of Bolivian citizens from Bolivia for numerous serious offenses, including narcotics trafficking.

Under this article, the United States will continue to extradite its nationals to Bolivia in accordance with established United States policy favoring such extraditions.[18]

Article IV—Bases for discretionary denial of extradition

Paragraph 1 permits the Executive Authority of the Requested State to refuse extradition when the offense for which extradition is sought is punishable by death in the Requesting State, unless the Requesting State provides assurances that the person sought will not be executed. This paragraph further provides that if the Requesting State gives such assurances, the death penalty, if imposed, shall not be carried out. The Bolivian delegation insisted on this provision because Bolivia has abolished the death penalty. Similar provisions are found in many recent United States extradition treaties.[19]

Paragraph 2 provides that the Requested State may refuse extradition if the request relates to an offense under military law that is not an offense under ordinary criminal law.[20] This also is a common provision in United States extradition treaties.

Article V—Bases for non-discretionary denial of extradition

Paragraph 1 prohibits extradition for political offenses and describes several categories of offenses that shall not be considered political offenses. This is a common provision in United States extradition treaties.

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transportation, importation, distribution, or aggravated use of controlled substances; bribery; and extortion.

[18] 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 nationals of the United States and nationals of other countries in extradition matters has been underscored by Congress in legislation. Title 18, United States Code, Section 3196 authorizes the Secretary of State to extradite United States citizens pursuant to a treaty that permits but does not expressly require surrender of citizens as long as the other requirements of the treaty are met. 18 U.S.C. § 3196.

[19] Similar provisions are present in recent United States extradition treaties with the Bahamas, Germany, Ireland, Italy, Jamaica, Jordan and Thailand.

[20] An example of such an offense is desertion. Matter of the Extradition of Suarez-Mason, 694 F. Supp. 676, 703 (N.D. Cal. 1988).

Paragraph 1(a) provides that the political offense exception does not apply in cases involving a murder or other willful crime against the "person" of a Head of State or a member of the Head of State's family.

Paragraph 1(b) establishes that the political offense exception does not apply to offenses for which both Parties have the obligation to establish criminal jurisdiction pursuant to a multilateral treaty. The conventions to which this clause applies at present include: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft; the Convention on the Suppression of Unlawful Seizures of Aircraft (Hijacking); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage); the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the Single Convention on Narcotic Drugs and the Amending Protocol to the Single Convention.[21]

Paragraph 1(c) provides that the political offense exception does not apply to conspiracy or attempt to commit, or aiding and abetting in the commission or attempted commission of, offenses in subparagraphs (a) and (b).

Paragraph 2 prohibits extradition if the person sought was convicted or acquitted in the Requested State for the offense for which extradition is requested; its language is similar to provisions in many United States extradition treaties. This paragraph permits extradition in situations in which the person sought is charged with different offenses by each Party arising out of the same basic transaction.

Paragraph 2 further makes clear that extradition shall not be precluded by the fact that the Requested State's authorities declined to prosecute the person sought, or instituted and subsequently dismissed criminal proceedings against the person. This provision was included because the decision of the Requested State to forego prosecution, or to dismiss criminal charges already filed, might be the result of a failure to obtain sufficient evidence or to locate available witnesses for trail, while the prosecution in the Requesting State might not suffer from the same impediments. This provision should enhance the ability of the Parties to extradite to the jurisdiction that has the better chance of a successful prosecution.

Article VI—Transmission of extradition request and required documents

This article sets forth the appropriate means of transmitting an extradition request and the required documentation and evidence to be submitted in support thereof; it contains language similar to provisions in recent United States extradition treaties.

Paragarph 1 requires that all requests for extradition be submitted through the diplomatic channel. Paragraph 2 outlines the information that must accompany every request for extradition under the Treaty. Paragraph 3 details the additional information needed when the person is sought for trail in the Requesting State. Depending upon whether the United States or Bolivia is the Request-

[21] Supra n. 11–16.

ing State, paragraph 4 or 5 describes the information needed, in addition to the requirements of paragraph 2, when the person sought has already been convicted in the Requesting State.

Most of the items listed in paragraph 2 enable the Requested State to determine quickly whether extradition is permitted under the Treaty. For example, the "description of the facts of the offense" and "the text of the laws describing the essential elements of, and punishment for, the offense for which extradition is requested" called for in paragraphs 2 (b) and (c) enable the Requested State to determine whether a lack of dual criminality exists to deny extradition under article II. Other information, such as the physical description and probable location of the person sought as required under paragraph 2(a), assist the Requested State in locating and apprehending the person sought.

Paragraph 3 requires that if the person sought is charged with but not yet convicted of a crime, the Requesting State must provide certified copies of the charging document and warrant of arrest, along with "such evidence as, in accordance with the laws of the Requesting State, would be necessary to justify the apprehension and commitment for trial of the person sought." This is consistent with United States extradition jurisprudence, which interprets this language to require probable cause.[22] The Bolivian delegation assured the United States that under Bolivian law, the standard applied in determining whether sufficient evidence exists to justify extradition is quite similar to our probable cause requirement.[23]

Paragraphs 4 and 5 describe the information needed in addition to the requirements of paragraph 2 when the person sought has already been convicted in the Requesting State. Paragraph 4 applies when Bolivia is the Requesting State, and paragraph 5 applies when the United States is the Requesting State. The two paragraphs contain essentially the same requirements, but were separated at the request of the Bolivian delegation to avoid any confusion due to differences in Bolivian and United States criminal procedure. For example, paragraph 4 recognizes that when Bolivia is the Requesting State and the person sought has been convicted, a copy of the sentence always will be provided because a person cannot be found guilty in Bolivia without being sentenced at the same time. On the other hand, recognizing that a person in the United States is first convicted and usually sentenced at a subsequent date, paragraph 5 requires that the United States provide a copy of the sentence only if the person sought has in fact been sentenced. Both paragraphs make 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 without a specific treaty provision.[24] The Requesting State must provide only such evidence

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[22] Courts applying Title 18, United States Code, Section 3184 have long required probable cause for international extraditions. Restatement (Third) of the Foreign Relations Law of the United States § 476 comment b (1987).

[23] Article 194 of the Bolivian Criminal Procedure Code requires a showing of obvious and serious indications of guilt ("indicios manifiestos y graves") to permit extradition. According to the Bolivian delegation, this standard is interpreted in light of "reasonableness" or "common sense."

[24] 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); *United States* v. *Clark*, 470 F. Supp. 976 (D. Vt. 1979).

that establishes that the person sought is the person to whom the conviction refers.

Paragraph 6 states that if the person sought has been found guilty in absentia, the documentation required for extradition includes both proof of conviction and the same documentation required under paragraph 3. Paragraph 6 is consistent with the longstanding United States policy of requiring such documentation before extraditing persons convicted in absentia.

Paragraph 7 provides for the submission of additional information if the original request and supporting documentation are viewed as insufficient by the Requested State. This paragraph is intended to allow the Requesting State the opportunity to cure in the request and supporting materials any deficiencies found by the Requested State, which may set a time limit for receipt of the additional information. This paragraph is similar to provisions in other recent United States extradition treaties.

Article VII—Certification, authentication, and translation

Paragraph 1 governs the authentication procedures for the documentation accompanying an extradition request. It provides that the documents shall be accepted as evidence if certified and authenticated by the principal diplomatic or consular officer of the Requested State resident in the Requesting State.[25] In addition, in the case of a request from the United States, the documents must be certified by the Department of State; in the case of a request from Bolivia, the documents must be authenticated by the Ministry of Foreign Affairs and Worship.

Paragrpah 2 is a standard treaty provision that requires that all documents submitted in the support of an extradition request be translated into the language of the Requested State. Thus, requests from Bolivia to the United States must be translated into English, and United States requests to Bolivia must be translated into Spanish. Paragraph 2 also makes clear that such translation is at the expense of the Requesting State.

Article VIII—Provisional arrest

This article describes the process by which a person in the Requested State may be arrested and detained while the formal extradition papers are being prepared in the Requesting State.

Paragraph 1 provides that provisional arrest is reserved for cases of urgency and such requests shall be transmitted through the diplomatic channel.

Paragrpah 2 sets forth the information that the Requesting State must provide in support of a provisional arrest request.

Paragraph 3 requires the Requested State promptly to notify the Requesting State of the disposition of the request and any reasons for its denial.

Paragraph 4 provides that an individual who has been provisionally arrested may be released from custody if the documents are not received by the Requested State within 60 days from the date of provisional arrest. In such cases, the individual may be taken

[25] This provision is consistent with requirements imposed by United States law. See 18 U.S.C. § 3190.

into custody again and the extradition proceedings may be recommenced if the formal request is received at a later date.

Article IX—Decision regarding the request

This article requires that the Requested State promptly notify the Requesting State of its decision on the extradition request.

If extradition is denied, in whole or in part, the Requested State must provide a reasoned explanation for the denial and a copy of the pertinent decision by its authorities. If extradition is granted, the Parties shall agree on the date and place of the surrender of the person sought. However, if the Requesting State does not remove the person sought within the time period set by the law of the Requested State, the Requested State may release the person from custody and may subsequently deny an extradition request for the same offense. United States law requires that such surrender occur within two calendar months of a finding that the person is extraditable,[26] or of the conclusion of any litigation challenging that finding,[27] whichever is later. According to the Bolivian delegation, Bolivian law does not specify the time in which a surrender must take place.[28]

Article X—Competing requests

This article sets forth the factors the Requested State shall consider in determining to which country to surrender a person whose extradition was requested by the other Party and one or more other countries. For the United States, the Executive Authority make this decision by taking into account all relevant factors.[29] For Bolivia, the decision is made by the competent judicial authority.[30]

Article XI—Conditional and deferred surrender

A person sought for extradition could be facing prosecution or serving a sentence in the Requested State for offenses other that those for which extradition is requested. This article provides a means for the Requested State to temporarily surrender the person sought to the Requesting State or, in the alternative, to defer extradition until the conclusion of local proceedings against the person and the service of any punishment imposed. Similar provisions are present in recent United States extradition treaties.

Paragraph 1 provides for temporary surrender of a person sought 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 article is kept in custody while in the Requesting State, and is returned to the Requested State at the conclusion of the proceedings in the Requesting State. Such tem-

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[26] 18 U.S.C. § 3188.

[27] See *Jimenez* v. *U.S. District Court,* 84 S. Ct. 14, 11 L.Ed.2d 30 (1963) (decided by Golberg, J., in chambers), *Liberto* v. *Emery,* 724 F.2d 23 (2d Cir. 1983); In re United States, 713 F.2d 105 (5th Cir. 1983); *see also Barrett* v. *United States,* 590 F.2d 624 (6th Cir. 1978).

[28] Therefore, the parenthetical "if any" was added to the text of this article in reference to the laws of the Requested State.

[29] Under United States law, the appropriate authority within the executive branch is the Secretary of State. *Cheng Na-Yuet* v. *Hueston,* 734 F. Supp. 988 (S.D. Fla. 1990), aff'd, 932 F.2d 977 (11th Cir. 1991).

[30] The Bolivian delegation maintained that under Bolivian law, the judicial branch, not the executive, is the competent authority to make this decision. The Bolivian delegation also requested that in cases in which Bolivia is the Requested State, this article set forth a detailed framework of factors to be considered.

porary 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 conviction. Such transfer might also be advantageous to the person sought in that: (1) it permits resolution of the charges sooner; (2) it makes it possible for any sentence to be served 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.

Paragraph 2 provides that the Requested State may postpone the surrender of a person who is being prosecuted or serving a sentence in the Requested State until the conclusion of the prosecution or the full execution of any punishment imposed.[31]

Article XII—Rule of specialty

This article covers the rule of specialty, a standard principle of United States extradition law and 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 are not extraditable under the Treaty or not properly documented in the request.

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 not be detained, tried, convicted or punished in the Requesting State for an offense committed prior to surrender except with respect to: (1) an offense for which extradition was granted; (2) a differently denominated offense that nonetheless is based on the same facts as the offense for which extradition was granted; and (3) any other offense for which the Requested State gives consent.[32] Paragraph 1(c)(2) provides that in cases in which such consent is sought, the Requested State may: (1) require the submission of supporting documentation as set forth in article VI; and (2) detain the person for 90 days, or such longer period of time as the Requested State may authorize, while the request for consent is being processed.

Paragraph 2 prohibits the Requesting State from surrendering an extraditee to a third state for a crime committed prior to extradition under the Treaty without the consent of the Requested State.[33]

Paragraph 3 permits the detention, trial or punishment of an extraditee for additional offenses, or the extradition of that person to a third state, if the extraditee (1) leaves the Requesting State and voluntarily returns to it; or (2) does not leave the Requesting State within 30 days of being free to do so.[34]

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[31] 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).

[32] In the United States, the Secretary of State has the authority to consent to a waiver of the rule of specialty. See *Berenguer* v. *Vance,* 473 F. Supp. 1195, 1199 (D.D.C. 1979).

[33] A similar provision is contained in all recent United States extradition treaties.

[34] The policy behind paragraph 3 is that an extraditee should not be allowed to benefit from the rule of specialty indefinitely by remaining in or returning to the Requesting State with impunity. Under this paragraph, if the extraditee chooses to return to or remain in the Requesting State, the extraditee effectively "waives" the benefits of the rule. Generally, we prefer that the time period afforded the person to leave the Requesting State be as short as practicable, e.g., 10 or 15 days, to avoid frustration by law enforcement and the public from having such a person

Article XIII—Waiver of extradition

Persons sought for extradition frequently elect to waive their right to extradition proceedings in order to expedite their return to a Requesting State. This article provides that when a person sought consents to surrender to the Requesting State, the person may be returned to the Requesting State as expeditiously as possible without further proceedings. Such consent must be given before a judicial authority of the Requested State.

The delegations agreed that in such cases there is no need for the formal documents described in article VI or any further judicial or administrative proceedings.

When a person sought elects to return voluntarily to the Requesting State under this article, the process is not deemed an "extradition"; therefore, the rule of specialty does not apply.

Article XIV—Seizure and surrender of property

This article provides that to the extent permitted by the law of the Requested State, any assets, objects of value, or documents relating to the offense (whether proceeds, instrumentalities, or other relevant evidence) shall be surrendered to the Requesting State upon the granting of the extradition. Article XIV further provides that surrender of these items shall occur even if extradition cannot be effected due to the death or disappearance of the person sought.

The obligation to surrender property under this provision is subject to due respect for the rights of third parties in the property.

Article XV—Transit

Paragraph 1 gives each Party the power to authorize transit through its territory of persons being surrendered to the other Party by a third state.[35] Requests for transit under this article are to be transmitted through the diplomatic channel and must contain a description of the person being transported and a brief statement of the facts of the case upon which the surrender is based.

Paragraph 2 requires that a Party shall respond promptly to transit requests, but allows a Party to refuse permission for transit if such transit would compromise its essential interests.

Paragraph 3 states that no authorization is needed when air transportation is being used and no landing is scheduled in the territory of the other Part. If an unscheduled landing occurs in the territory of a Party, that Party may require a request as provided for in paragraph 1. In such a case, the person in transit shall be kept in custody for up to 96 hours until a request for transit and thereafter until transit is effected.

Article XVI—Representation, consultation, and expenses

Paragraph 1 compels the competent authorities of the Requested State, by all legal means within their power, to advise, assist and

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at large in the community. The Bolivian delegation, however, requested a period of at least 30 days in order to allow an extraditee the opportunity to obtain necessary travel documents and to get personal and/or business affairs in order. Although 30 days is longer than we generally prefer, equivalent and longer time limits are not uncommon in recent United States extradition treaties.

[35] A similar provision is present in all recent United States extradition treaties.

represent the interests of the Requesting State in connection with the processing of extradition requests in the Requested State.

Paragraph 2 provides that the Parties shall consult with each other with regard to individual extradition cases and extradition procedures in general.

Paragraph 3 requires the Requesting State to bear expenses of extradition relating to the translation of documents and the transportation of the person sought to the Requesting State.

Paragraph 4 provides that neither Party shall make a pecuniary claim against the other in connection with extradition proceedings, including arrest, detention, examination or surrender of the person sought. This includes any claim by the person for damages or reimbursement of legal fees or other expenses occasioned by the execution of the extraction request.

In paragraph 1, the phrase "by all legal means within their power" was included because the law and practice of the United States and Bolivia are quite different on this issue. In accordance with established practice, the United States will represent Bolivia before the courts of this country in connection with Bolivian extradition requests. According to the Bolivian delegation, however, Bolivian law and practice prohibit the Bolivian executive branch from intervening in an extradition proceeding once the case has been submitted to the Bolivian judiciary. Under Bolivian law, every foreign extradition request is submitted directly to the Bolivian Supreme Court, which reviews the request and supporting documentation and ultimately issues a decision approving or denying the request. Basically, the extradition case is decided without oral argument or personal appearances by the parties in court. The only Bolivian official who becomes involved in the proceedings is the Bolivian Attorney General, who makes a written recommendation to the court that the request either be approved or denied. In the Bolivian legal system, however, the Attorney General is not part of the executive branch of government. The Attorney General is an independent authority within the judicial branch who represents only the interests of the "Bolivian people." The Attorney General does not represent the Requesting State and cannot be compelled to argue for extradition if the Attorney General believes that the court should deny the request. The Bolivian delegation also indicated that at this time, there is no possibility Bolivia will modify this aspect of its internal procedure.

The Bolivian delegation did agree, however, that in certain ways the Bolivian executive branch can expand its role in the extradition process to better represent the interests of the United States. The types of assistance that the Bolivian delegation agreed to provide are outlined in a pair of diplomatic notes exchanged when the Treaty was signed. The Bolivian government agreed therein that the Ministry of Foreign Affairs will conduct a substantive review of documents submitted with extradition requests for the purpose of assessing compliance with Bolivian evidentiary and other legal requirements, and will advise the United States on any need for revision or supplementation of documents. Therefore, in conjunction with the Ministry of Justice, the Ministry of Foreign Affairs will prepare a written opinion or declaration regarding whether the offenses named in a request are extraditable, whether the request

and supporting documentation are properly certified or authenticated for admission into evidence, and whether extradition is appropriate under the Treaty. The Ministry will then submit this opinion or declaration to the Bolivian Supreme Court when it files the extradition request and supporting documentation with the court.

The Bolivian delegation indicated that in certain cases the hiring of private counsel by the United States might be necessary to respond to legal briefs and motions filed by defense counsel. In this regard, the Bolivian delegation stated that the Ministry of Foreign Affairs will follow up and report on the progress of extradition cases, and will advise the United States on the need to hire private counsel in those cases in which exceptional advocacy is deemed necessary.

Overall, this article will improve the handling in Bolivia of United States extradition requests. By expanding the role of the Bolivian executive branch in the extradition process and by increasing communication between our two governments, the ability of the United States to secure extraditions from Bolivia will be enhanced.

Article XVII—Application

This article, like its counterparts in most other United States extradition treaties negotiated in the past two decades, expressly makes the Treaty retroactive to cover offenses that occurred before the Treaty enters into force, provided they were offenses under the laws of both Parties at the time they were committed.

In addition, this article expressly states that the Treaty applies to extradition requests pending at the time it enters into force for which a final decision has not yet been rendered.

Article XVIII—Final provisions (ratification, entry into force, and termination)

Paragraph 1 contains standard treaty language providing for ratification of the Treaty and exchange of the instruments of ratification at Washington, D.C. as soon as possible. The Treaty will enter into force immediately upon the exchange.

Paragraph 2 provides that the 1900 Treaty, which is currently in force, shall become null and void upon the entry into force of this Treaty.

Paragraph 3 contains standard treaty language for the termination of the Treaty by either Party through written notice to the other Party. 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 the Republic of Bolivia, signed at La Paz on June 27, 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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