106TH CONGRESS, 1st Session | SENATE | EXEC. RPT. 106–13

EXTRADITION TREATY WITH THE REPUBLIC OF KOREA

NOVEMBER 3, 1999.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 106–2]

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 Republic of Korea, signed at Washington on June 9, 1998 (Treaty Doc. 106–2), having considered the same, reports favorably thereon, with one understanding, one declaration and 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.

CONTENTS

		Page
I.	Purpose	1
II.	Background	2
III.	Summary of Key Provisions	2
IV.	Entry Into Force and Termination	5
V.	Committee Action	5
VI.	Committee Comments	5
VII.	Explanation of Proposed Treaty	8
VIII.	Resolution of Ratification	22
IX.	Annex	25

I. PURPOSE

The proposed extradition treaty: (1) identifies the offenses for which extradition will be granted, (2) establishes procedures to be followed in presenting extradition requests, (3) enumerates exceptions to the duty to extradite, (4) specifies the evidence required to support a finding of a duty to extradite, and (5) sets forth administrative provisions for bearing costs and legal representation.

II. BACKGROUND

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. The United States is a party to approximately 100 bilateral extradition treaties, and several multilateral treaties which require extradition.

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 importance of extradition treaties as a tool for law enforcement is reflected in the increase in the number of extraditions of individuals under treaties. Between September 1997 and 1998, 185 persons were extradited to the United States for prosecution for crimes committed in the United States, and the United States extradited 73 individuals to other countries for prosecution. (The Republic of Korea, by contrast, began negotiating bilateral extradition treaties only recently. The number of such treaties it has signed did not reach a dozen until May 1999, when it signed a bilateral treaty with Mongolia.)

In the United States, the legal procedures for extradition are governed by both federal statute and self-executing treaties. Federal statute controls the judicial process for making a determination to the Secretary of State that she may extradite an individual under an existing treaty. Courts have held that the following elements must exist in order for a court to find that the Secretary of State may extradite: (1) the existence of a treaty enumerating crimes with which a defendant is charged; (2) charges for which extradition is sought are actually pending against the defendant in the requesting nation and are extraditable under the treaty; (3) the defendant is the same individual sought for trial in the requesting nation; (4) probable cause exists to believe that the defendant is guilty of charges pending against him in the requesting nation; and (5) the acts alleged to have been committed by the defendant are punishable as criminal conduct in the requesting nation and under the criminal law of the United States.

Once a court has made a determination that an individual may be extradited under U.S. law, and so certifies to the Secretary of State, she may still refrain from extraditing an individual on foreign policy grounds, as defined in the treaties themselves (or even absent express treaty provisions).

III. SUMMARY OF KEY PROVISIONS

1. Extraditable Offenses: The Dual Criminality Clause

The South Korean treaty, like all modern U.S. extradition treaties, 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 more than one year. Attempts and conspiracies to commit such offenses, and participation in the commission of such offenses, are also extraditable.

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

A separate question arises as to whether offenses committed outside the territory of the Requesting State are extraditable under the treaty. To be able to extradite individuals charged with extraterritorial crimes can be an important weapon in the fight against international drug traffickers and terrorists. The Treaty with the Republic of Korea (in Art. 2(4)) directs that extradition may proceed for an extraterritorial offense if the individual sought is a national of the Requesting State or if the criminal law of the Requested State would reach extraterritorial acts of the type covered by the extradition request. In addition, the Requested State retains discretion to grant extradition for extraterritorial crime even if neither of the foregoing conditions pertains, or to refuse an otherwise extraditable extraterritorial crime if the crime was committed in part within its territory and it has initiated prosecution.

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 exclusion of certain violent crimes, (i.e., murder, kidnaping, and others) from the political offense exception reflects the concern of the United States 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 with the Republic of Korea.

The multilateral international agreement exception clause serves to incorporate by reference certain multilateral agreements to which the United States is a party and which deal with international law enforcement in drug dealing, terrorism, airplane hijacking and smuggling of nuclear material. These agreements require that the offenses with which they deal shall be extraditable under any extradition treaty between countries that are parties to the multilateral agreements. The incorporation by reference of these multilateral agreements is intended to assure that the offenses with which they deal shall be extraditable under an extra-

dition 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.

It should be noted that the incorporation by reference of multilateral international agreements that deal with international law enforcement can have significance only if the Republic of Korea is Party to such multilateral agreement.

4. The Death Penalty Exception

The United States and other countries often have different views on capital punishment, though some countries do impose the death penalty for certain crimes, such as drug trafficking. The Treaty with the Republic of Korea permits the parties to 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. (Art. 7). In addition, in cases where the offense constitutes murder in the Requested State the imposition of capital punishment is not grounds for refusal.

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. The Treaty with the Republic of Korea does not require extradition of nationals, but leaves the decision to the discretion of the Requested State. (Art. 3).

6. Retroactivity

The Treaty with the Republic of Korea applies to offenses committed before as well as after it enters into force. (Art. 20). This retroactivity provision does not violate the Constitution's prohibition of *ex post facto* laws, which applies only to enactments making criminal those acts that were not illegal 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. The Treaty with the Republic of Korea expresses the basic prohibition and also includes the following exceptions: (1) an extradited individual may be tried by the Requesting State for an offense other than the one for which he was extradited if the Requested State (which may request the submission of additional supporting documents) consents; (2) the offense is a lesser included offense; (3) the extradited individual leaves the territory of the Requesting State and voluntarily returns to it; (4) the extradited individual does not leave the territory of the

Requesting State within 25 days after he or she is free to leave; or, (5) the extradited individual voluntarily consents to being tried for an offense other than the one for which he was extradited. These exceptions to the speciality rule are designed to allow a Requesting State some latitude in prosecuting offenders for crimes other than those for which they were specifically extradited.

8. Lapse of Time

The Treaty with the Republic of Korea precludes extradition of offenses barred by an applicable statute of limitations. However, time during which a fugitive has fled prosecution is not to be counted toward the applicable limitation period, or is any other time that would suspend the limitation period under the law of either the Requesting or Requested State.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

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

B. TERMINATION

Either Party may terminate this Treaty at any time by giving written notice to the other Party, and the termination shall be effective six months after the date of such notice.

V. Committee Action

The Committee on Foreign Relations held a public hearing on the proposed Treaty on October 20, 1999 (a transcript of the hearing can be found in the annex to this report). The Committee considered the proposed Treaty on November 3, 1999, and ordered the proposed Treaty favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed Treaty subject to one understanding, one declaration, and one proviso.

VI. Committee Comments

The Committee on Foreign Relations recommends favorably the proposed Treaty. On balance, 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. Several issues did arise in the course of the Committee's consideration of the Treaty, and the Committee believes that the following comments may be useful to the Senate in its consideration of the proposed Treaty and to the State and Justice Departments.

A. RESTRICTION ON TRANSFER OF EXTRADITEES TO INTERNATIONAL CRIMINAL COURT

On July 17, 1998 a majority of nations at the U.N. Diplomatic Conference in Rome, Italy, on the Establishment of an International Criminal Court voted 120–7, with 21 abstentions, in favor of a treaty that would establish an international criminal court. The court is empowered to investigate and prosecute war crimes,

crimes against humanity, genocide and aggression. The United States voted against the treaty.

The Resolution of Ratification accompanying the Extradition Treaty contains an understanding relative to the international court. Specifically, regarding the "Rule of Speciality" the United States shall restate in its instrument of ratification its understanding of the provision, which requires that the United States consent to any retransfer of persons extradited to the Treaty Partner to a third jurisdiction. The understanding further states that future United States policy shall be to refuse consent to the transfer of any person extradited to Korea by the United States to the International Criminal Court. This restriction is binding on the President, and would be vitiated only in the event that the United States ratifies the treaty establishing the court, pursuant to the Constitutional procedures as contained in Article II, section 2 of the United States Constitution.

This provision makes clear that both Parties understand that individuals extradited to the other Party may not be transferred to the international court. Members of the Committee are concerned that the treaty could become conduits for transferring suspects to the international criminal court, even though the United States has rejected the court.

B. EXTRADITION OF NATIONALS

Under Article 3 of the proposed treaty, neither Party is bound to extradite its own nationals. However, either Party may extradite its national "if, in its discretion, it is deemed proper to do so." Permitting such broad discretion to extradite nationals is not the preferred U.S. requirement. The United States seeks in its negotiations to treat extradition of nationals in the same manner as extradition of other individuals.

The technical analysis prepared by the U.S. treaty negotiators, which is set forth in this report, states that the Korean delegation assured the U.S. delegation that it did not foresee that the discretion not to extradite would be used frequently.

The Committee supports the extradition of U.S. nationals. Criminal suspects should not be given safe haven in this country. The alternative—trying them in this country—is often not a realistic option, for two reasons. First, U.S. courts often lack jurisdiction over the crime, because not many crimes are subject to extraterritorial jurisdiction under U.S. law. Second, prosecuting such cases in the United States is often extremely difficult, particularly when the evidence and many of the witnesses are not located in this country, as would often be the case.

The Committee is deeply concerned that many nations around the world do not agree to extradite their own nationals to the United States. The Committee expects that U.S. negotiators will continue to press other nations to agree to extradite their nationals, including in existing treaty relationships. The Committee urges the Executive Branch to emphasize, in discussing new extradition relationships with foreign states, that a reciprocal duty to extradite nationals is a key U.S. negotiating objective.

Under current practice the United States on occasion may not seek extradition if it does not think that a country will extradite,

whether because a country does not have an extradition treaty with the United States, does not extradite its nationals, or would simply be unlikely to extradite under the circumstances. The Committee believes that failure to even request extradition may create the false perception that the United States is not interested in pursuing such individuals. The Committee anticipates that the United States will err on the side of making requests for extradition of nationals, unless law enforcement efforts would be compromised, in order to continue to require treaty partners to respond to U.S. requests for extradition of nationals.

C. USE OF TREATIES TO AGGRESSIVELY PURSUE INTERNATIONAL PARENTAL KIDNAPING

On October 1, 1998, the Committee on Foreign Relations convened a hearing to consider U.S. Responses to International Parental Kidnaping. The Attorney General, Janet Reno, testified before the Committee, as did four parents whose children were abducted or wrongfully detained in international jurisdictions. The parents recounted their frustration with the current level of U.S. Government assistance in seeking the return of their children.

Although the Attorney General pointed to limitations in the ability of the U.S. Government to resolve many cases of international parental abduction, she also recognized that the United States could do better in assisting in the return of abducted children and pledged to take steps to improve coordination between the Departments of State and Justice.

The State and Justice Departments have testified that the Treaty with the Republic of Korea is designed to ensure that no individual can evade the justice system by travel to a foreign country. This same principal should be true of parents who take their children from the United States in violation of the 1993 International Parental Kidnaping Act. The Committee expects, therefore, that State and Justice Department officials will seek extradition unless it will hinder the law enforcement efforts. The Committee also expects that State and Justice Department officials will raise this issue in the course of negotiation of all bilateral law enforcement treaties and in other bilateral diplomatic exchanges. The Committee anticipates, also, that this issue will be given great scrutiny in the issuance of passports, with a special eye towards passport or visa fraud.

D. NATIONAL SECURITY LAW IN KOREA

The Republic of Korea has long had in place the "National Security Law." According to the State Department's Country Reports on Human Rights Practices for 1998, the law

> permits the authorities to detain and arrest persons who commit acts viewed as supportive of North Korea and therefore dangerous to the Republic of Korea. Authorities arrested not only persons spying on behalf of North Korea but also those who praised North Korea, its former leader Kim Il Sung, or its "self-reliance" political philosophy. . . . The [law] permits the imprisonment of up to 7 years of anyone who 'with knowledge that he might endanger

> the existence or security of the State or the basic order of free democracy, praised, encouraged, propagandized for, or sided with the activities of an antistate organization.'

It is long been recognized that aspects of the National Security Law do not comport with basic civil liberties, particularly the right to free speech or free association.

During the Committee's hearing on the Treaty, the Executive Branch witnesses affirmed that cases under the National Security Law that involve restrictions on civil liberties would not qualify under the "dual criminality" provision of the Treaty, in that the United States does not criminalize certain of the behavior proscribed by the National Security Law. In addition, as the technical analysis emphasizes, such "crime" would fall under the political offense exception of Article 4(1), or the political motivation exception in Article 4(4). The Committee expects the State Department to be vigilant in ensuring that extradition is not permitted in such cases.

VII. Explanation of Proposed Treaty

Technical Analysis of the Extradition Treaty Between the United States of America and the Republic of Korea

On June 9, 1998, the United States signed a treaty on extradition with the Republic of Korea ("the Treaty"). The Treaty, which will be the first extradition treaty to enter into force between the United States and this important ally in the Western Pacific, represents a major step forward in the United States' efforts to strengthen cooperation with countries on the Pacific Rim in combating organized crime, transnational terrorism, international drug trafficking, and other offenses.

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 for the United States. The Republic of Korea has its own extradition legislation[1] which will apply to United States' requests under the Treaty.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—OBLIGATION TO EXTRADITE

The first article of the Treaty, like the first article in every recent United States extradition treaty, formally obligates each Contracting State to extradite to the other persons sought for prosecu-

[1] Extradition Act, Law No. 4015 of August 5, 1988 (hereinafter "Extradition Act 1988") The key sections of the Extradition Act 1988 that are germane to the interpretation and implementation of the Treaty are discussed in more detail in this Technical Analysis. During the negotiations, the Korean delegation said that in Korea a treaty supersedes inconsistent legislation, so the terms of the treaty would override the Extradition Act 1988, but that they as negotiators had been instructed to make the treaty consistent with Korean law as much as possible.

tion, trial, or imposition or execution of punishment for an extraditable offense, pursuant to the provisions of the remainder of the Treaty. The article refers to persons wanted "in" the Requesting State rather than "by" the Requesting State, since the obligation to extradite, in cases arising from the United States, would include state and local prosecutions as well as federal cases.

ARTICLE 2—EXTRADITABLE OFFENSES

This article contains the basic guidelines for determining what are extraditable offenses. This Treaty, like most recent United States extradition treaties, does not list the offenses for which extradition may be granted. Instead, paragraph 1 of the article permits extradition for any offense punishable under the laws in both Contracting States by deprivation of liberty (*i.e.*, imprisonment, or other form of detention), for a period of 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 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 a criminal activity punishable in both countries.

During the negotiations, the United States delegation received assurances from the Koreans that extradition would be possible for such offenses as drug trafficking (including operating a continuing criminal enterprise, in violation of Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Section 1961–1968); drug money laundering;[2] terrorism; tax offenses; crimes against environmental protection laws; and any antitrust violations punishable in both states by more than 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, or otherwise participating in, 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. The Koreans told us that there is no statutory provision for conspiracy in Republic of Korea law, similar to Title 18, United States Code, Section 371. Some U.S. treaties handle this matter by creating an exception to dual criminality and expressly make extraditable both "conspiracy" and its closest analogue under the law of our treaty partner. That approach proved unnecessary in this Treaty because the Korean delegation assured the U.S. delegation that Korea would not deny extradition on dual criminality grounds if "conspiracy" charges were included in the U.S. request for most major crimes covered by the Treaty.[3]

---

[2] Korean law currently does not prohibit the laundering of proceeds of non-drug offenses, but the Korean Ministry of Justice is exploring drafting comprehensive non-drug money laundering legislation. During the negotiations, the Korean delegation said that extradition might be granted to the U.S. for a non-drug money laundering offense if the offender were viewed as having "participated" in the underlying crime.

[3] In Korea, conspiracy to commit an offense is punishable only if specified by statute, and conspiracy to commit the most serious crimes (e.g., murder, drug trafficking, robbery, kidnapping, or larceny) is punishable, as is conspiracy to sponsor foreign aggression, join an organized crime

Continued

Paragraph 3 reflects the intention of both countries 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 the 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, Korean authorities must treat United States mail fraud charges (Title 18, United States Code, Section 1341) in the same manner as fraud charges under state laws, and view the federal crime of interstate transportation of stolen property (Title 18, United States Code, Section 2314) 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 country. A similar provision is contained in all recent United States extradition treaties.

Paragraph 4 deals with the fact that many federal crimes involve acts committed wholly outside United States territory. Our jurisprudence recognizes jurisdiction in our courts to 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.[4] In the Republic of Korea, however, the Government's ability to prosecute extraterritorial offenses is much more limited. Therefore, Article 2(4) reflects the Republic of Korea's agreement to recognize United States jurisdiction to prosecute offenses committed outside of the United States if the Korean law would permit it to prosecute similar offenses committed outside of it in corresponding circumstances and also obligates the Requested State to extradite for extraterritorial crimes committed by a national of the Requesting State. If the Requested State's laws do not so provide, the second sentence of the paragraph states that extradition may be granted, but the executive authority of the Requested State has the discretion to deny the request. The final sentence in the paragraph was necessitated by the fact that Korea's extradition law expressly gives the Minister of Justice the discretion to deny extradition if the offense was committed in Korean territory.[5] The Korean delegation suggested that the Treaty give each Contracting State the discretion to deny extradition in such circumstances. In the view of the United States, however, there is still no reason to deny extradition if the crime was committed in the Requested State's territory

---

group, use explosives, aid fugitives to escape or harbor criminals, commit arson, sabotage or obstruct traffic, tamper with drinking water, or counterfeit currency or securities. It is our understanding that if the U.S. charged a conspiracy to commit a crime and no precisely equivalent conspiracy offense exists under Korean law, extradition might be possible nonetheless if the facts amounted to "participation" in the substantive offense under Korean law.

[4] Restatement (Third) of the Foreign Relations Law of the United States § 402 (1987); Blakesley, "United States Jurisdiction over Extraterritorial Crime," 73 *Journal of Criminal Law and Criminology* 1109 (1982).

[5] Section 9(2), Korean Extradition Act 1988. The law also allows denial of extradition if the offense is subject to pending prosecution in Korea. Section 9(3), Korean Extradition Act.

but the Requested State is not in fact prosecuting that offense. The compromise reached was to provide that extradition may be denied when the offense for which extradition is sought was committed in the territory of the Requested State and a prosecution for that offense is pending in that State.[6]

Paragraph 5 states that when extradition has been granted for an extraditable offense it shall also be granted for any other offense specified in the request even if the latter offense is punishable by less than one year's imprisonment. For example, if Korea agrees to extradite to the United States a fugitive wanted for prosecution on a felony charge, the United States will also be permitted to obtain extradition for any misdemeanor offenses that have been charged, as long as those misdemeanors would also be recognized as criminal offenses in Korea. Thus, the Treaty incorporates recent United States extradition practice by permitting extradition for misdemeanors committed by a fugitive 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 prosecuting country in that it permits all charges against the fugitive to be disposed of more quickly, thereby facilitating trials while evidence is still fresh and permitting the possibility of concurrent sentences. Similar provisions are found in recent extradition treaties with countries such as Cyprus and the Philippines.[7]

Paragraph 6 states that when extradition has been sought for an offense against a law relating to taxation, customs duties, exchange control, or other revenue matters, it shall not be refused on the ground that the Requested State does not have a tax, customs duty, or exchange regulation of the same kind as that in the Requesting State. Similar to paragraphs 3(a) and 3(b) of this article, this provision clarifies that revenue-related offenses, which are still subject to the general dual criminality requirement of this article, need not be based on identical regulations in order to be extraditable. This provision is inspired by Article 2(3) of the United Nations Model Extradition Treaty, and memorializes the fact that the Republic of Korea and the U.S. both extradite for tax and fiscal offenses. Similar provisions appear in recent U.S. extradition treaties with Austria, France, India, Poland, and Trinidad and Tobago.[8]

Paragraph 7 provides that a person who has already been sentenced in the Requesting State may be extradited only if more than four months of the sentence remain to be served. Most U.S. extradition treaties signed in recent years do not contain such a require-

---

[6] It was understood between the delegations that the Requested State may postpone the extradition proceedings against the person sought while that person is being prosecuted for an offense in the Requested State, and it was recognized that once the prosecution is completed the Requested State may have no alternative to denying the extradition request under Article 5 if the person sought was convicted or acquitted.

[7] *See* Art. 2(5), U.S.-Cyprus Extradition Treaty, signed June 17, 1996, entered into force September 14, 1999; Art. 2(5), U.S.-Philippines Extradition Treaty, signed November 13, 1994, entered into force November 22, 1996.

[8] *See* Art. 2(4)(b), U.S.-Austria Extradition Treaty, signed January 8, 1998; Art. 2(6), U.S.-France Extradition Treaty, signed April 23, 1996; Art. 2(3)(c), U.S.-India Extradition Treaty, signed June 25, 1997, entered into force July 21, 1999; Art. 3, U.S.-Poland Extradition Treaty, signed July 10, 1996, entered in force August 18, 1999; Art. 2(6), U.S.-Trinidad and Tobago Extradition Treaty, signed March 4, 1996.

ment, but provisions of this kind do appear in some recent U.S. extradition treaties.[9]

ARTICLE 3—NATIONALITY

Paragraph 1 states that neither Contracting State shall be bound to extradite its own nationals, but the Requested State shall have the power to do so if, in its discretion, it be deemed proper to do so. As a matter of longstanding policy, the U.S. Government extradites U.S. nationals.[10] However, Korean law gives the Minister of Justice the discretion to deny extradition if the person sought is a Korean national,[11] and the Korean delegation insisted that the discretion to do so be reflected in the Treaty so that the Treaty would be consistent with Korean law. The Korean delegation assured the U.S. delegation that although the discretion to refuse extradition of nationals was important to it, it did not foresee that that discretion would be used frequently. Similar provisions appear in some other recent U.S. extradition treaties.[12]

Paragraph 2 requires that if extradition is refused solely on the basis of the nationality of the person sought, the Requested State, at the request of the Requesting State, shall submit the case to its authorities for prosecution. The negotiators agreed that the Requested State is obliged to consider prosecuting the person, but 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 do so, thus preserving the important principle of prosecutorial discretion in the United States.

Paragraph 3 states that nationality shall be determined at the time of the commission of the offense for which extradition is requested. In other words, for purposes of this article, the nationality of the person sought at the time of the commission of the offense governs, not the nationality at the time of the extradition hearing. This is to avoid the unfairness that would result when a person escapes extradition by acquiring the nationality of the Requested State after the crime was committed.

ARTICLE 4—POLITICAL AND MILITARY OFFENSES

Paragraph 1 of this article prohibits extradition for a political offense. This is a standard provision in United States extradition treaties.

---

[9] *See* Art. 2(2), U.S.-Luxembourg Extradition Treaty, signed Oct. 1, 1996; Art. 2(1), U.S.-France Extradition Treaty, signed April 15, 1996; Art. 2(1), U.S.-Argentina Extradition Treaty, signed June 10, 1997; Art. 2(2), U.S.-Bolivia Extradition Treaty, signed June 27, 1995, entered into force Nov. 21, 1996.

[10] *See generally* Shearer, *Extradition in International Law*, 110-114 (1970); 6 Whiteman, *Digest of International Law*, 871-876 (1968). Our policy of drawing no distinction between nationals of the United States and those of other countries in extradition matters is underscored by Title 18, U.S. Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens pursuant to treaties that permit (but do not require) surrender of citizens, if other requirements of the Treaty have been met.

[11] Section 9(1), Extradition Law 1988.

[12] *See* Art. 3, U.S.-Malaysia Extradition Treaty, signed August 3, 1995, entered into force June 2, 1997; Art. V., U.S.-Japan Extradition Treaty, signed March 3, 1978, entered into force March 26, 1980, 31 UST 892; Art. V, U.S.-Australia Extradition Treaty, signed May 14, 1974, entered into force May 8, 1976, as amended by Protocol, dated September 4, 1990, entered into force December 21, 1992; Art. VII., U.S.-Jamaica Extradition Treaty, signed June 14, 1983, entered into force July 7, 1991.

Paragraph 2 describes three categories of offenses which shall not be considered to be political offenses.

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

Second, the political offense exception does not apply to offenses which are included in a multilateral treaty, convention, or international agreement, which requires the parties to either extradite the person sought or submit the matter for prosecution, including but not limited to such agreement relating to genocide, terrorism, or kidnapping. The conventions to which this clause would apply at present include, for example, the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking).[13]

Third, the political offense exception does not apply to conspiring or attempting to commit, or participating in the commission of, any of the foregoing offenses.

Paragraph 3 provides that extradition shall not be granted if the executive authority of the Requested State determines that the request, though purporting to be made for an offense for which surrender may be granted, was in fact made for the primary purpose of prosecuting or punishing the person sought on account of that person's race, religion, nationality, or political opinion,[14] or that extradition was requested for political purposes. This paragraph is based on Republic of Korea law,[15] and 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.[16]

The final paragraph of the article states that the executive authority of the Requested State may refuse extradition if the request involves offenses under military law which would not be offenses under ordinary criminal law.[17]

ARTICLE 5—PRIOR PROSECUTION

This article prohibits extradition if the offender has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Similar language appears in many United States extradition treaties.[18] The Korean delegation urged that this provision be expanded because Korean law explicitly requires the Minister of Justice to deny extradition if the person sought is being proceeded against in Korea,[19] even if the person has not yet been convicted or acquitted. The U.S. delegation did not accept this pro-

[13] Done at the Hague on 16 December 1970, entered into force 14 October 1971, 22 UST 1641, TIAS 7192.

[14] There are similar provisions in many U.S. extradition treaties. *See* Art. III(3), U.S.-Jamaica Extradition Treaty, signed June 14, 1983, entered into force September 24, 1984; Art. 5(4), U.S.-Spain Extradition Treaty, signed May 29, 1970, entered into force June 16, 1971 (22 UST 737, TIAS 7136, 796 UNTS 245); Art. 4, U.S.-Netherlands Extradition Treaty, signed June 24, 1980, entered into force September 15, 1983 (TIAS 10733); and Art. IV(c), U.S.-Ireland Extradition Treaty, signed July 13, 1983, entered into force Dec. 15, 1984 (TIAS 10813).

[15] Section 7(4), Extradition Act 1988.

[16] *See Eain* v. *Wilkes*, 641 F.2d 504, 513-518 (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).

[17] An example of such a crime is desertion. *Matter of Extradition of Suarez-Mason*, 694 F. Supp. 676, 702-703 (N.D. Cal. 1988).

[18] *See*, *e.g.*, Art. 5, U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995, entered into force July 29, 1995.

[19] Section 7(2), Extradition Law 1988.

posal, but understands that in such cases the Republic of Korea will likely postpone action on the extradition request pursuant to Article 12, and may then take action under Article 5 as soon as the Korean proceedings are completed.

The parties agreed that this provision applies only if the offender is convicted or acquitted in the Requested State of exactly the same crime he is charged with in the Requesting State. It would not be enough that the same facts were involved. Thus, if an offender is accused in one State of illegally smuggling narcotics into the country, and is charged in the other State of unlawfully exporting the same shipment of drugs out of that State, an acquittal or conviction in one State would not insulate the person from extradition to the other, since different crimes are involved.

ARTICLE 6—LAPSE OF TIME

Article 6 states that extradition may be denied when the prosecution would have been barred by lapse of time according to the law of the Requested State had the same offense been committed in the Requested State.[20] Similar provisions are found in recent U.S. extradition treaties with Japan, France, and Luxembourg.[21]

Korea insisted on this provision because Korean law demands that extradition be denied if the statute of limitations would have expired in either Korea or in the Requesting State.[22] However, the delegations were sensitive to the fact that U.S. and Korean statutes of limitations are so different that this provision could be very difficult to implement. For example, in the United States, the statute of limitations becomes irrelevant when criminal charges are filed. In Korea, however, the statute of limitations for prosecution continues to run even when charges have been filed. Instead, each official act by the prosecution evidencing an intent to prosecute the defendant or capture and re-incarcerate the escapee "interrupts" the period of prescription and restarts the applicable period of prescription. Therefore, the Treaty provides that a request may be denied if it would be timebarred in the Requested State, but that acts or circumstances that would toll the statute of limitation in either state would be applied by the Requested State.

In the United States, the statute of limitations is tolled during the period that a defendant is a fugitive from justice. In Korea, however, the flight of the defendant or escape of a convict does not toll the applicable period of prescription. The second sentence of the paragraph adopts the U.S. standard, stating that the period during which the person for whom extradition is sought fled from justice does not count towards the running of the statute of limitations. In addition, the final sentence of the article states that acts or circumstances that would suspend the expiration of the statute of limitations in either State shall be given effect by the Requested State, and in this regard the Requesting State shall provide a writ-

[20] It is settled law in the United States, that lapse of time is not a defense to extradition at all unless the treaty specifically provides to the contrary. *Freedman v. United States*, 437 F. Supp. 1252, 1263 (D. Ga. 1977); *United States v. Galanis*, 429 F. Supp. 1215, 1224 (D. Conn. 1977).

[21] *See* Art. IV(3), U.S.-Japan Extradition Treaty, signed March 3, 1978, entered into force March 26, 1980, 31 UST 892; Art. 9(1), U.S.-France Extradition Treaty, signed April 23, 1996; Art. 2(6), U.S.-Luxembourg Extradition Treaty, signed Oct. 1, 1996.

[22] Section 7(1), Korea Extradition Law 1988.

ten statement of the relevant provisions of its statute of limitations, which shall be conclusive.

ARTICLE 7—CAPITAL PUNISHMENT

Paragraph 1 permits the Requested State to refuse extradition in cases in which the offense for which extradition is sought is punishable by death in the Requesting State, but is not punishable by death in the Requested State. This article provides two exceptions to this general rule:

Under subparagraph (a), the extraditable offenses constitutes murder under the laws of the Requested State; or

Under subparagraph (b), the Requesting State provides assurances that the death penalty will not be imposed or, if imposed, will not be carried out.

Similar provisions are found in many recent United States extradition treaties.[23]

Paragraph 2 provides that when the Requesting State gives assurances in accordance with paragraph 1, the assurances shall be respected, and the death penalty, if imposed, shall not be carried out.

ARTICLE 8—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 the United States' most recent extradition treaties.

The first paragraph requires that all requests for extradition be submitted in writing and through the diplomatic channel. A formal extradition request may be preceded by a request for provisional arrest under Article 10, which may be initiated through diplomatic channels, or directly between the respective justice ministries.

Paragraph 2 outlines the information which must accompany every request for extradition under the Treaty. Most of the items listed in this paragraph enable the Requested State to determine quickly whether extradition is appropriate under the Treaty. For example, Article 9(2)(c) calls for "the text of the law describing the essential elements of the offense for which extradition is requested," 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 "reasonable grounds to believe that the person sought has committed the offense for which extradition is requested." This is consistent with extradition law in

[23] *See*, *e.g.*, Art. 8, U.S.-India Extradition Treaty, signed June 25, 1997, entered into force July 21, 1999; Art. 6, U.S.-Thailand Extradition Treaty, signed December 14, 1983, entered into force May 17, 1991.

the United States,[24] and is similar to language in other United States extradition treaties.[25]

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.[26]

Paragraph 5 states that if the Requested State considers the information furnished in support of the request for extradition insufficient under its law with respect to extradition, it may ask that the Requesting State submit supplementary information within a reasonable length of time as it specifies. This paragraph is intended to permit the Requesting State to cure defects in the request and accompanying materials that are found by a court in the Requesting State or by the attorney acting on behalf of the Requesting State, and to permit the court, in appropriate cases, to grant a reasonable continuance to obtain, translate, and transmit additional materials. A similar provision is found in other United States extradition treaties.[27]

Paragraph 6 states that all documents be translated into the language of the Requested State.

ARTICLE 9—ADMISSIBILITY OF DOCUMENTS

Article 9 states that the documents that accompany an extradition request shall be received and admitted as evidence in the extradition proceedings if they are certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting State[28] or if they are certified or authenticated in any other manner accepted by the law of the Requested State.

ARTICLE 10—PROVISIONAL ARREST

This article describes the process by which a person in one country may be arrested and detained while the formal extradition papers are being prepared. Paragraph 1 expressly provides that a request for provisional arrest may be made through the diplomatic channel or directly between the Departments of Justice in the United States and the Republic of Korea.

Paragraph 2 states the information which the Requesting State must provide in support of such a request.

Paragraph 3 states that the Requesting State must be notified promptly of the disposition of its application and, if applicable, the reason for any inability to proceed with the application.

---

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

[25] *See, e.g.*, Art. 8(3)(c), U.S.-Jordan Extradition Treaty, signed March 28, 1995, entered into force June 29, 1995.

[26] *See, e.g.*, *Spatola v. United States*, 741 F. Supp. 362, 374 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615 (2nd Cir. 1991); *United States v. Clark*, 470 F. Supp. 976 (D. Vt. 1979).

[27] *See, e.g.*, Art. 8(5), U.S.-Cyprus Extradition Treaty, signed June 17, 1996, entered into force September 14, 1999; Art. 11, U.S.-Austria Extradition Treaty, signed January 8, 1998.

[28] Thus, the article creates a method of certification for both States that is identical to that provided for in U.S. law. *See* Title 18, United States Code, Section 3190.

Paragraph 4 provides that the person who has been provisionally arrested may be discharged if the Requesting State does not file a fully documented request for extradition with the executive authority of the Requested State within two months of the date on which the person was arrested. The delegations agreed that receipt of the documents by the Embassy of the Requested State shall constitute receipt by the executive authority. Similar provisions appear in all recent U.S. extradition treaties.

Paragraph 5 makes it clear that the discharge of the person shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered later than the two months indicated in paragraph 4.

ARTICLE 11—DECISION AND SURRENDER

This article requires that the Requested State promptly notify the Requesting State through diplomatic channels of its decision on the extradition request. 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 two 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 permits the person to request release if he has not been surrendered within two calendar months of having been found extraditable,[29] or of the conclusion of any litigation challenging that finding,[30] whichever is later. Republic of Korea law requires that the person be released if he is not removed within thirty days after the Minister of Justice issues the surrender order.[31]

ARTICLE 12—TEMPORARY AND DEFERRED SURRENDER

Occasionally, a person sought for extradition may be already facing prosecution or serving a sentence on other charges in the Requested State. Article 12 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 that may have been imposed. Similar provisions appear in our recent extradition treaties with countries such as Jordan, the Bahamas, and Australia.[32]

Paragraph 1 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

[29] Title 18, United States Code, Section 3188.

[30] *Jimenez v. United States 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 (6th Cir. 1978).

[31] Section 35(2), Extradition Law 1988.

[32] *See* Art. 13, U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995, entered into force July 29, 1995; Art. 12, U.S.-Bahamas Extradition Treaty, signed March 9, 1990, entered into force September 22, 1994; Art. IX, U.S.-Australia Extradition Treaty, signed May 14, 1974, entered into force May 8, 1976, as amended by Protocol, dated September 4, 1990, entered into force December 21, 1992.

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 successful prosecution. Such transfer may also be advantageous to the person sought in that: (1) it allows him to resolve the charges sooner; (2) it may make it possible for him to serve any sentence in the Requesting State concurrently with the sentence in the Requested State; and (3) it permits him to defend against the charges while favorable evidence is fresh and more likely to be available to him. Similar provisions are found in many recent extradition treaties.

Paragraph 2 provides that the executive authority of 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 which has been imposed.[33] 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 facing prosecution or serving a sentence.

ARTICLE 13—REQUESTS FOR EXTRADITION MADE BY SEVERAL STATES

This article reflects the practice of many recent United States extradition treaties and lists some of the factors which 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 States for the extradition of the same person. For the United States, the Secretary of State would make this decision.[34]

ARTICLE 14—SEIZURE AND SURRENDER OF PROPERTY

The first paragraph of the article provides that to the extent permitted by its laws the Requested State may seize and surrender all articles, documents, and evidence connected with the offense for which extradition is requested.[35] The second sentence of the paragraph provides that these objects may be surrendered to the Requesting State even if extradition cannot be effected due to the death, disappearance, or escape of the fugitive. Similar provisions are found in all recent U.S. extradition treaties.

The second paragraph states that the Requested State may obtain assurances from the Requesting State to enable it to temporarily surrender the property in such a way as to insure that the property is returned free of charge to the Requested State as soon as practicable, or may defer surrender if the property is needed in connection with pending proceedings in the Requested State.

The final paragraph states that the obligation to surrender property under this provision is subject to due respect for any rights that third parties may have to such property.

---

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

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

[35] The Korean delegation told the U.S. delegation that seizure and surrender of evidence in extradition matters is governed by Section 17(2) of the Extradition Law 1988, and that seizures pursuant to this Article would be carried out under Sections 106 and 215 of Korea's Criminal Procedure Code.

ARTICLE 15—RULE OF SPECIALITY

This article covers the principle known as the rule of speciality, 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 speciality prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of sentence on different charges which 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 for (a) the offense for which extradition was granted, or any other extraditable offense of which the person could be convicted upon proof of the same facts upon which the extradition was granted; or (b) for offenses committed after the extradition; and (c) any other offenses for which the executive authority of the Requested State consents.[36] Article 15(c)(i) permits the Requested State to require the documents described in Article 8 when it is asked for its consent to pursue new charges; requires that a legal record of any statements made by the extradited person with respect to the offense be submitted to the Requested State; and provides that the person extradited may be detained by the Requesting State while the request is being processed, for as long as the Requested State authorizes.

Paragraph 2 prohibits extradition to a third state for an offense committed prior to extradition without the consent of the surrendering State.[37]

Paragraph 3 permits the detention, trial, or punishment of an extraditee for additional offenses if (1) the extraditee leaves and voluntarily returns to the Requesting State, or (2) the extraditee does not leave the Requesting State within 25 days of being free to do so.

ARTICLE 16—SIMPLIFIED EXTRADITION

Persons sought for extradition frequently elect to waive their right to extradition proceedings and to expedite their return to the Requesting State. This article provides that when a fugitive consents to return to the Requesting State, the person may be returned to the Requesting State without further proceedings. It is anticipated that in such cases there would be no need for the formal documents described in Article 8 or further judicial proceedings of any kind.

United States practice has long been that the rule of speciality does not apply when a fugitive waives extradition and voluntarily returns to the Requested State.[38] The second sentence of Article 16 incorporates this practice, and specifies that Article 15, relating to

[36] In the United States, the Secretary of State has the authority to grant such consent. *See Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979).

[37] This provision is consistent with the provisions in all recent U.S. extradition treaties.

[38] *Cf.* Art. 16, U.S.-Netherlands Treaty, signed June 24, 1980, entered into force Sept. 15, 1983, TIAS 10733.

the rule of speciality, shall not apply when a person waives extradition under Article 16.

ARTICLE 17—TRANSIT

Paragraph 1 gives each Contracting State the discretion to authorize transit through its territory of persons being surrendered to the other country by third countries.[39] Requests for transit may be transmitted either through the diplomatic channel, or directly between the Departments of Justice in the United States and the Republic of Korea, and 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 he is being surrendered to the Requesting State. The paragraph specifies that the person may be detained in custody during the period of transit.

Paragraph 2 states that no advance authorization is required if the person in custody is in transit to one of the Parties and is traveling by aircraft and no landing is scheduled in the territory of the other Party. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request if, in its discretion, it is deemed appropriate to do so. The Treaty specifies that the Requested State is to detain the person for up to 96 hours until a request for transit is received, and thereafter until it is executed.

Paragraph 3 states that permission for the transit shall include permission for the accompanying officials to seek and obtain assistance from appropriate authorities in the Requested State in order to maintain the person in custody. Thus, the Korean National Police might enlist the aid of the U.S. Marshals Service or the Federal Bureau of Investigation in effecting the transit of a prisoner en route to Korea via the United States.

Paragraph 4 states that if the transit is not accomplished within a reasonable time the Contracting State in whose territory the person is held may direct that the person be released.

ARTICLE 18—REPRESENTATION AND EXPENSES

The first paragraph of this article provides that the Requested State shall advise, assist, appear in court on behalf of the Requesting State, and represent the interests of the Requesting State in any proceedings arising out of an extradition request. Thus, the United States will represent the Republic of Korea before the courts in this country in connection with a request from Korea for extradition, and the Republic of Korea will arrange for the representation of the United States in connection with United States extradition requests to the Republic of Korea. In some cases, the Requested State may wish to retain private counsel to assist in the presentation of the extradition request. It is anticipated that in those cases the fees of private counsel retained by the Requested State would be paid by the Requested State.

Paragraph 2 provides that the Requesting State will bear the expenses of the translation of documents and the costs of conveying the person from the territory of the Requested State. The Requested State is to pay all other expenses incurred in that State

[39] A similar provision is in all recent U.S. extradition treaties.

by reason of the extradition proceedings. This is consistent with other U.S. extradition treaties and U.S. law on the subject.[40]

Paragraph 3 provides that neither State shall make a pecuniary claim against the other in connection with extradition proceedings, including arrest, detention, examination, and surrender of the fugitive. This would include any claim by the fugitive for damages, reimbursement, or legal fees, or other expenses occasioned by the execution of the extradition request.

ARTICLE 19—CONSULTATION

The first paragraph of this article provides that the Contracting States shall consult, at the request of either, concerning the application or interpretation of the treaty. This mandatory consultation requirement was added at the request of the United States delegation to address concerns regarding the relationship between this treaty and Korea's National Security Law (NSL).

The NSL, as amended in 1980, restricts "anti-state activities" that endanger "the state or the lives and freedom of the citizenry." Previous Governments in Seoul used the law not only against espionage and sabotage but also to control and punish domestic dissent, such as the publication of unauthorized political commentary, art, or literature, on the grounds that such expressions benefited an "antistate organization." In divided Korea, almost any act of opposition to the Republic of Korea Government could be characterized as benefiting North Korea. The United States has consistently expressed to the Republic of Korea government its strong concerns that the NSL could be used to infringe individual civil liberties, including the right to free expression.

During the extradition treaty negotiations, the U.S. delegation made it clear that the United States does not anticipate extraditing any person to Korea who is charged under the NSL with offenses that would implicate freedom of speech or assembly in the United States and does not anticipate that Korea would make a request for extradition for such an offense. The Korean delegation acknowledged that it understood the United States position. In fact, the United States and Korean delegations agreed that offenses that intruded on freedom of speech or assembly would not be extraditable under the Treaty. First, there would almost certainly be no comparable offense in the U.S. and thus the request would not satisfy the basic requirement of dual criminality to establish the obligation to extradite under Article 2(1). The request would also likely fall within one of the exceptions to the extradition obligation, *e.g.* the crime would be a political offense for which extradition is prohibited under Article 4(1), or the request would be politically motivated, subject to denial under Article 4(4). If Korea were to make such a request for extradition, the United States would use the mandatory provisions of Article 19 to require consultations with Korea in order to confirm its understanding of the applicable law in the Republic of Korea, and to make clear its reading of the treaty on these matters.

[40] *See*, *e.g.*, Art. 19, U.S.-Jordan Extradition Treaty, signed March 28, 1995, entered into force June 29, 1995; Art. 20, U.S.-India Extradition Treaty, signed June 25, 1997, entered into force July 21, 1999.

Article 19 of the treaty provides that the Departments of Justice in the United States and the Republic of Korea may consult with one another with regard to an individual extradition case or on extradition procedures in general. A similar provision is found in other recent U.S. extradition treaties.

ARTICLE 20—APPLICATION

This Treaty, like most of the other United States extradition treaties negotiated in the past two decades, is expressly made retroactive, and covers offenses which occurred before as well as after the date upon which the Treaty enters into force.

ARTICLE 21—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

This article contains standard treaty language providing for the exchange of instruments of ratification as soon as possible. The Treaty is to enter into force upon the exchange of instruments of ratification.

This article also contains the standard treaty language describing the procedure for giving notice of termination of the Treaty. Termination shall become effective six months after the date of notice.

VIII. 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 Republic of Korea, signed at Washington on June 9, 1998 (Treaty Doc. 106–2), subject to the understanding of subsection (a), the declaration of subsection (b), and the proviso of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

> PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 15 concerning the Rule of Speciality would preclude the resurrender of any person from the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the United States consents to such resurrender; and the United States shall not consent to the transfer of any person extradited to the Republic of Korea by the United States to the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing that Court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

> TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of

ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

SUPREMACY OF THE CONSTITUTION.—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.

IX. ANNEX

EXTRADITION TREATY WITH SOUTH KOREA (TREATY DOCUMENT 106–2)

WEDNESDAY, OCTOBER 20, 1999

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:15 p.m. in room SD–419, Dirksen Senate Office Building, Hon. Rod Grams, presiding.

Present: Senators Grams and Biden.

Senator GRAMS. Thank you very much. Sorry we are a little late, but I wanted to get the hearing started to consider the U.S. Extradition Treaty with South Korea.

Today the committee is considering the Extradition Treaty between the Government of the United States and the Government of the Republic of Korea.

This treaty is intended to facilitate the extradition of individuals to stand trial in the countries where they are accused of committing felonies, thereby curbing the ability of international fugitives to find safe haven.

The committee has taken the unusual step of considering this extradition treaty ahead of the standard biennial schedule for consideration of law enforcement treaties in light of a pending request for extradition of an international fugitive currently in South Korea who is being sought by the U.S. District Attorney in Philadelphia to stand trial for murder.

The United States has extradition relationships with more than 110 countries. Extradition treaties have long been a basis for furthering bilateral relationships and represent a recognition by the United States of the legitimacy of a country's judicial system.

Respect for a treaty partner's judicial system is essential since the treaties permit the transfer of individuals to another country in order to stand trial for alleged crimes. The treaty with South Korea, therefore, signals an important advancement in the U.S.-South Korean relationship.

This extradition treaty will also add to a growing web of relationships by the United States that makes it increasingly difficult for criminals to find a safe haven from criminal prosecution. While economic opportunities are created by the increasing globalization of the economy, this openness also facilitates transborder criminal ac-

tivity, such as the terrorist attacks on our embassies in East Africa just last year.

Extradition of criminals, particularly those wanted for terrorism, drug trafficking, and violent crime, has become increasingly important to insure that perpetrators of such heinous crimes are brought to justice.

When the Senate last considered international extradition treaties in the wake of approval of the Rome Treaty and the International Criminal Court, which was adopted by more than 100 countries in July 1998, each treaty's instrument of ratification included a prohibition on the transfer of Americans extradited under the treaty to an international criminal court. The resolution of ratification for the treaty with South Korea will also insure that the transfer of subjects extradited to South Korea will not be made to that misconceived court.

Today the committee will hear from Jamison S. Borek, Deputy Legal Advisor for the Department of State, and also Mr. John E. Harris, Acting Director of the Office of International Affairs of the Department of Justice.

I want to welcome you here to this hearing today.

Now I would like to take a moment and turn it over to Senator Biden for any opening comments he may have.

Senator BIDEN. Thank you, Mr. Chairman. I am grateful that you are holding this hearing. I asked Senator Helms whether he would move this up, and I thank him as well for being willing to do that.

If this extradition treaty with South Korea is approved, I think it will add a new dimension to a 50 year relationship with South Korea that has been growing and getting better.

Ours is an alliance forged in blood, and a sometimes desperate struggle against common adversaries. But it is fitting, it seems to me, that we should complement our extensive security and economic ties by expanding the cooperation area in law enforcement.

This treaty is important for two reasons. First, it acknowledges the tremendous changes which have occurred in South Korea as the country has emerged from years of authoritarian rule to become a thriving multi-party democracy. President Kim Dae Jung has made democracy and accountability a hallmark of his administration, launching sweeping reforms not only in the economic sector but also in the political and judicial realms.

Although the reforms are still underway, the changes in South Korea I think are dramatic and I think are plain to see. Thus, I think it is appropriate that we take note of the reforms and the increased confidence they inspire in Korean courts.

Second, this treaty will pay important and immediate dividends for U.S. law enforcement. Even as we sit here in Washington, a murder suspect, a fugitive from justice wanted for trial in Philadelphia, is now free in South Korea. The only thing preventing him from being returned to the United States to stand trial is the absence of an extradition treaty with South Korea.

Moreover, the treaty is a critical component for overall law enforcement cooperation with South Korean authorities, cooperation which I believe will help combat organized crime, drug smuggling, and international terrorism, as the chairman has mentioned.

Mr. Chairman, by giving its advice and consent to this treaty, the Senate, I hope it will be clear, will be sending a strong signal to the people of South Korea that we value our alliance and we have confidence in their judicial system. We do not sign extradition treaties with countries in whose judicial systems we have little confidence.

It will also send a message to criminals who might seek refuge by fleeing to either country. You can run, but, if apprehended, you can not hide from eventual prosecution.

Mr. Chairman, I look forward to our hearing and again thank you for moving on this as quickly as you have. I welcome the witnesses and am looking forward to hearing their testimony.

Senator GRAMS. Thank you, Senator Biden.

Ms. Borek, if you have any opening statement that you would like to make, please proceed.

STATEMENT OF JAMISON S. BOREK, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Ms. BOREK. Thank you, Mr. Chairman. If I may, I will shorten my statement and ask that the full document be accepted for the record.

Senator GRAMS. It will be so entered.

Ms. BOREK. Thank you, Mr. Chairman, Senator Biden. Thank you for giving us the opportunity to testify in support of the Extradition Treaty with the Government of the Republic of Korea today.

We greatly appreciate this opportunity to move toward ratification of this treaty, which was signed on June 9 of last year. The growth in transport of criminal activity, especially violent crime, terrorism, drug trafficking, and the laundering of proceeds of organized crime, has confirmed the need for an increased international law enforcement cooperation effort. Extradition treaties, such as the Treaty with the Republic of Korea, are essential tools in that effort.

This will become the first bilateral extradition treaty between the United States and the Republic of Korea. We do not currently have an extradition treaty in place. This provides the opportunity for fugitives from justice to use each of our countries as a haven from the other, an increasing problem given the continuing rise in transnational crime and ease of travel across borders.

Taken together with the Mutual Legal Assistance Treaty with the Republic of Korea, to which you gave advice and consent and which entered into force in May 1997, this will be the basis for significant expanded law enforcement cooperation.

This is a fairly standard treaty in the modern line. It provides for dual criminality, so that all offenses which are criminal, serious crimes in both countries will be covered.

Second, it does cover extraditable offenses committed before entry into force. So it will permit us to seek extradition of persons who have already committed crimes, such as were mentioned by Senator Biden.

It has other improvements which we find in modern treaties. It does contain a provision making the extradition of nationals discretionary. However, in this case, we have to note that the Korean Government does not expect to refuse extradition on the basis of

nationality as a matter of policy. There is discretion under their law for the Minister of Justice to refuse extradition in some cases and, therefore, they believe this discretion should be reflected in the treaty. But we were assured that they do not expect to use this discretion on any sort of frequent or regular basis. They do not have a principled problem with the extradition of nationals.

As you know, this is in other countries a problem which we are striving to overcome with the Department of Justice.

I will not go on with that. It is basically a modern treaty in the modern form. It will be a very useful and important treaty, and we hope very much that you will give it your advice and consent.

I will close here and take your questions.

[The prepared statement of Ms. Borek follows:]

PREPARED STATEMENT OF JAMISON S. BOREK

Mr. Chairman and members of the Committee:

I am pleased to appear before you today to testify in support of the extradition treaty between the Government of the United States of America and the Government of the Republic of Korea.

The Department of State greatly appreciates this opportunity to move toward ratification of this important treaty, which was signed on June 9, 1998. The growth in trans-border criminal activity, especially violent crime, terrorism, drug trafficking, and the laundering of proceeds of organized crime, has confirmed the need for increased international law enforcement cooperation. Extradition treaties such as the treaty with the Republic of Korea now under consideration by this Committee are essential tools in that effort.

Upon entry into force, this will become the first bilateral extradition treaty between the United States and the Republic of Korea. The current absence of an extradition treaty provides the opportunity for fugitives from justice to use each of our countries as a haven from the other, an increasing problem given the continuing rise of transnational crime and the ease of travel across borders. Taken together with the Mutual Legal Assistance Treaty with the Republic of Korea, which entered into force in May 23, 1997, the extradition treaty will provide the basis for significant expanded law enforcement cooperation between our two countries.

Most of the Treaty's provisions are those typically found in other recently negotiated bilateral extradition treaties. The overall Treaty provides significant advantages to the United States, particularly when compared to the absence of any treaty on these issues. The following are some of these important features.

First, the Treaty defines extraditable offenses to include conduct that is punishable by imprisonment or deprivation of liberty for a period of one year or more in both states, or by a more severe penalty. This is the so-called "dual criminality" approach. Treaties negotiated before the 1970s typically provided for extradition only for offenses appearing on a list contained in the instrument. As time passed, these lists grew increasingly out of date. The dual criminality approach obviates the need to renegotiate treaties to cover new offenses in instances in which both states pass laws to address new types of criminal activity.

Second, the Treaty will permit extraditions whether the extraditable offense is committed before or after their entry into force. This provision is particularly useful and important, since it will ensure that persons who have already committed crimes can be extradited under the new treaties from each of the new treaty partners after the treaty enters into force.

Third, the Treaty provides a clear statement of the documentation and other information that will be needed to support extradition requests in either country. Like the analogous provisions in other recent U.S. extradition treaties, this statement will provide prosecutors of both countries with clear guidance on the material needed to make the treaty work effectively and efficiently.

Fourth, the Treaty contains a provision that permits the temporary surrender of a fugitive to the Requesting State when that person is facing prosecution for, or serving a sentence on, charges within the Requested State. This provision can be important to the Requesting State and in some cases the fugitive for instance, so that: 1) charges pending against the person can be resolved earlier while the evidence is fresh; or 2) where the person sought is part of a criminal enterprise, he can be made available for assistance in the investigation and prosecution of other participants in the enterprise.

The Treaty also addresses the important issue of extradition of nationals of the Requested State. As a matter of longstanding policy, the U.S. Government extradites United States nationals. The treaty with Korea does not require each State to extradite its nationals, but empowers each State to do so in its discretion. Should a Requested State refuse extradition on the basis of nationality, it is obliged upon request of the Requesting State to submit the case to its authorities for prosecution. The U.S. delegation pursued mandatory extradition of nationals during the negotiations, but Korean law gives the Korean Minister of Justice the discretion to deny extradition if the person sought is a Korean national, and the Government of Korea insisted that the Minister's discretion needed to be reflected in the Treaty so that it would not be inconsistent with this aspect of Korean law. The provision on nationality is thus similar to that we have included in U.S. extradition treaties with Japan, Australia, Jamaica, and Malaysia. The Korean delegation assured the U.S. delegation that although the discretion to refuse extradition of nationals was important to it, it did not foresee that that discretion would be used frequently.

We will continue our efforts to convince Korea and all other countries to remove remaining restrictions on the extradition of nationals. The U.S. Government has made it a high priority to convince states to change their constitutions and laws and agree to extradite their nationals. As we have discussed with this Committee before, however, this is a very sensitive and deep-seated issue and we have not succeeded in obtaining unqualified approval in all circumstances.

A second issue that often arises in modern extradition treaties involves extraditions in cases in which the fugitive may be subject to the death penalty in the Requesting State. A number of recent U.S. extradition treaties have contained provisions under which a Requested State may request an assurance from the Requesting State that the fugitive will not face the death penalty. A provision of this sort appears in the extradition treaty with Korea.

In sum, Mr. Chairman, the proposed Treaty with the Republic of Korea will create a crucially important first-ever legal framework for extradition relations with an important law enforcement partner. We appreciate the Committee's decision to convene this hearing to consider the treaty.

I will be happy to answer any questions the Committee may have.

Senator GRAMS. Thank you very much, Ms. Borek.

Mr. Harris.

STATEMENT OF JOHN E. HARRIS, ACTING DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. HARRIS. Thank you, Mr. Chairman.

With your permission, I, too, would like to shorten my statement and submit the full text for the record.

Senator GRAMS. It will be so entered.

Mr. HARRIS. Thank you.

Mr. Chairman and members of the committee, I am very pleased to appear here today to present the views of the Department of Justice in support of the new Extradition Treaty between the United States and the Republic of Korea. The Department of Justice participated in the negotiation of the treaty, works closely with Federal, State, and local prosecutors across the country in preparing extradition requests, and is happy to join with the Department of State in urging the committee to report favorably to the Senate and recommend advice and consent to this important agreement.

This extradition treaty is relatively standard, as Ms. Borek indicated. In our statements we have described in more detail some of the standard features in extradition treaties that are also found in this agreement—things like dual criminality, coverage for conspiracy, which is an important tool for prosecutors in insuring that criminals are brought to justice, and coverage for charges that involve offenses committed outside of the United States' territory, extraterritorial offenses. Under some of our older treaties, there is

difficulty in securing extradition for those crimes. This treaty has specific language that clarifies the ground rules for such extradition requests. Also, not least, there is provision for retroactive application of the treaty to crimes that were committed before the treaty was approved.

We are especially pleased by the language in the treaty that makes it possible to secure the extradition of nationals of both countries.

As you know, it is U.S. policy to avoid arbitrary restrictions on the extradition of nationals, and we place no small amount of importance on the Republic of Korea's assurances that the discretionary language on extradition of nationals does not reflect any intention to routinely deny extradition requests that involve Korean nationals.

The only other point that I would like to stress, Mr. Chairman, is that, as has been indicated, this treaty is of particular interest to the Department of Justice because there are real cases out there of criminals who could be brought to justice if the treaty were in place. We see frequent inquiries from prosecutors across the country who are looking into cases involving fugitives that are in Korea.

Some of these cases we believe can be queued up for prompt action as soon as this treaty enters into place. I have already asked my staff to begin reaching out to Federal, State, and local prosecutors so that other cases can be prepared for processing. In other words, this treaty presents an opportunity for the United States to advance its law enforcement interests at the same time we strengthen an important relationship with an important ally.

The last point that I think is worth keeping in mind, as has been indicated, is that this is the first bilateral extradition treaty between the United States and Korea, but it is by no means the beginning of our bilateral law enforcement relationship. The Mutual Legal Assistance Treaty, to which the Senate gave its approval in August 1996 and which entered into force in May 1997, has worked well. It has provided an opportunity for us to get a sense of the value of our improved and strengthened law enforcement relationship in this important area of the world.

The Mutual Legal Assistance Treaty makes it easier to obtain evidence that is necessary to bring charges against criminals. The next logical step in the process is the putting into place of an effective, modern extradition treaty.

We compliment the committee for moving the treaty to consideration and bringing attention to it. We look forward to prompt and, we hope favorable action on it.

Thank you.

[The prepared statement of Mr. Harris follows:]

PREPARED STATEMENT OF JOHN E. HARRIS

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice in support of a new extradition treaty between the United States and the Republic of Korea. The Department of Justice participated in the negotiation of this treaty, and today joins the Department of State in urging the Committee to report favorably to the Senate and recommend its advice and consent to ratification.

Upon ratification, this will be the first extradition treaty to enter into force between the United States and this important ally in Asia. The treaty will improve upon the network of modern extradition treaties the United States has in force with

others in the region, including Japan, Thailand, the Philippines, and the Hong Kong Special Administrative Region. It represents a major step forward in the United States' efforts to strengthen cooperation with countries of the Pacific Rim in combating organized crime, transnational terrorism, international drug trafficking, and other offenses. In addition, the extradition treaty will join the Mutual Legal Assistance Treaty (MLAT) between the United States and the Republic of Korea, which entered into force in 1997, to form an important set of tools for prosecutors and law enforcement authorities to use to obtain the return of international fugitives and the evidence necessary to convict them at trial.

Inasmuch as the Departments of Justice and State have prepared a detailed technical analysis of the treaty, I would like to speak today in more general terms about why we view this treaty as an important mechanism in investigating and prosecuting serious offenses.

The extradition treaty between the United States and the Republic of Korea represents a continuing effort by the Department of Justice and the Department of State to modernize our international extradition relations and deny "safe haven" to criminals wherever in the world they may seek refuge. The treaty further reflects our effort to conclude agreements that incorporate the most modern and efficient approaches to international extradition, like those contained in the treaties presented to the Committee last year. A brief review of some of the salient features follows.

First, this treaty, like most recent United States extradition treaties, is not limited by a list of offenses for which extradition may be granted. Instead, it permits extradition for any offense that is punishable in both countries by more than one year's imprisonment, or by a more severe penalty. This modern "dual criminality" approach makes it unnecessary to renegotiate the treaty or supplement it when laws relating to new crimes are enacted. During the negotiations, the United States delegation received assurances from their Korean counterparts that extradition would be possible for such offenses as drug trafficking, including operating a continuing criminal enterprise; racketeering; drug money laundering; terrorism; tax offenses; crimes against environmental protection laws; and antitrust violations. The Korean delegation also indicated that non-drug money laundering, although not currently a crime in Korea, might be extraditable if the offender were viewed as having "participated" in the underlying crime. The Korean Ministry of Justice is exploring the drafting of comprehensive non-drug money laundering legislation.

Second, this treaty provides that extradition should be granted for attempting or conspiring to commit, or otherwise participating in, an extraditable offense. This ensures that extradition is possible for certain drug-related offenses and crimes under our Continuing Criminal Enterprise (CCE) and Racketeer Influenced and Corrupt Organizations (RICO) statutes. The treaty also permits extradition for any offense specified in a request, even if it is punishable by less than one year's imprisonment, when extradition has been granted for an extraditable offense.

The Republic of Korea's ability to prosecute extraterritorial offenses is more limited than that of the United States. Our jurisprudence recognizes jurisdiction in U.S. courts to prosecute offenses committed outside of the United States if the crime was intended to have effects in this country, or did have such effects, or if there was clear Congressional intent to assert such jurisdiction. In the treaty, the United States' more expansive approach is accommodated by the Koreans' agreement to recognize United States jurisdiction to prosecute offenses committed outside its territory if Korean law would permit it to prosecute offenses committed outside the Republic of Korea in similar circumstances or if the offense has been committed by a national of the Requesting State. If the laws in the Requested State do not so provide, the executive authority of the Requested State has the discretion to grant extradition, provided that the requirements of the treaty are met.

Third, the treaty permits the extradition of nationals on a discretionary basis. The U.S. Government extradites United States nationals, and places a high priority on securing the mandatory extradition of nationals in its modern extradition treaty negotiations, as it did during the talks with Korea. This treaty contains a discretionary formulation at the insistence of the Korean delegation, in order to make the treaty provision consistent with Korean law. The Korean delegation assured the United States delegation that they did not foresee the frequent use of this discretion when determining whether to extradite Korean nationals to the United States. This treaty provision also requires that if extradition is refused solely on the basis of the nationality of the person sought, the Requested State, when asked by the Requesting State, shall submit the case to its authorities for prosecution.

The new extradition treaty also incorporates a variety of procedural improvements over the practice in some of our older treaties. For example, it clarifies the procedure for "provisional arrest," the process by which a fleeing fugitive can be arrested upon request, pending the preparation of documents in support of extradition. Fur-

ther, the treaty allows each State to temporarily transfer for trial a person who is already serving a sentence in one State. Once the trial is completed, the person will be returned to finish the original sentence and then will finally be surrendered if he or she is convicted and sentenced to a period of incarceration with respect to the offense for which temporary surrender was granted. In appropriate cases, the ability to surrender fugitives temporarily will serve the interests ofjustice by avoiding prolonged delays prior to surrender, by which time the evidence in the other country may no longer be compelling or even available. Procedural improvements of this kind allow the legal framework for extradition to operate more efficiently.

It is important to note that this treaty will apply to offenses committed both before and after the date it enters into force. In establishing a first-time extradition relationship with the Republic of Korea, it will significantly enhance our ability to combat transnational crime in the region, both in terms of current and emerging challenges to law enforcement. For these reasons, I request that you approve the treaty promptly.

I will be happy to answer any questions the Committee may have.

Senator GRAMS. Thank you very much, Mr. Harris.

I have just a quick couple of questions.

The proposed treaty with South Korea represents a new bilateral extradition treaty relationship with that country. Ms. Borek, what specific events led to the negotiations of this treaty?

Ms. BOREK. Thank you, Mr. Chairman. Mr. Harris may want to add to this.

I think we have been interested in an extradition treaty relationship with Korea for some time because this is an area in which we do not want to have a safe haven possibility. I think, as Senator Biden mentioned, there were some prior concerns about the legal system which posed an impediment to perhaps putting it on a priority list for moving forward.

I think the democratic reforms and the tremendous progress that has been made in the Republic of Korea in recent years have really answered these concerns and questions and, therefore, we are comfortable now and quite happy to move forward with a treaty that, certainly from a law enforcement point of view, will be very important to us.

Senator GRAMS. Mr. Harris, did you have anything to add to that?

Mr. HARRIS. I don't think I really have anything to add.

One thing the Justice Department takes into account when we work with the State Department in selecting priorities for negotiation is the number of fugitives that would be apprehended under the treaty. With the increase in Korean immigration to the United States, increased business and commercial ties, and a general close relationship between the two countries, we did reach a point where it was clear that Korea was one of the countries where both governments would benefit from an improved ability to secure the extradition of fugitives. That, coupled with the democratic reforms, made this a logical step in the expansion of U.S. relations.

Senator GRAMS. Ms. Borek, I understand that in some instances the treaty deviates from the model. The proposed treaty follows the U.S.-Japan Extradition Treaty. Is the U.S.-Japan treaty in effect the model for all extradition treaties in Asia?

Ms. BOREK. With your permission, I might defer that question to Mr. Harris, who was actually personally involved in this negotiation.

Mr. HARRIS. Thank you.

I think the answer is no, the U.S.-Japan Treaty is not the model for our extradition negotiations in Asia. But it is a good treaty. It has proven to be a workable relationship and, given the similarity in some aspects of Korean and Japanese law, it made sense that it was consulted in determining what the proper language should be in the treaty with Korea.

But I think it is fair to say that both governments during the negotiations did approach this with an effort to craft the best agreement for the U.S. and Korea with the Japanese treaty merely one of several points of reference, one with which I think it is fair to say the Korean Government is especially comfortable. This is not, by any means, the only reference point.

Senator GRAMS. Senator Biden mentioned and so did I in our opening statements that consideration of this treaty has been expedited in order to facilitate the return of an individual that is charged with murder in Philadelphia. What assurances do you have that the South Koreans will, in fact, extradite this individual, given that there is discretion to deny extradition since he is a national of the Republic of Korea?

Mr. Harris.

Mr. HARRIS. That is a good question. Of course, we are not able to predict with absolute certainty the outcome of a judicial or executive request in a country before the treaty is in place. But we have worked closely with the prosecutors in Philadelphia. We have talked with the appropriate authorities in the Republic of Korea. Assuming that the Commonwealth of Pennsylvania, working with the Department of Justice, submits the documents in support of a request for this individual's extradition, consistent with the terms of the treaty, we have been assured that the request will be positively considered by the Republic of Korea.

They further stated that, at this time, they see no impediments or problems with prospective extradition.

Senator GRAMS. Ms. Borek, did you want to comment?

Ms. BOREK. I might just add that we have already had, I think, a very positive, cooperative relationship with the Government of the Republic of Korea on this case. There is an official ban on the exit of the individual from the country so as to minimize the flight risk. At one point they did offer even to prosecute him themselves.

So, as Mr. Harris says, I think we have established a cooperative relationship and we do understand that they will look at this in a very positive light.

Of course, even in our case we would not say what U.S. courts would do. But we are not aware of any reason why there should be a problem. Certainly nationality is not such a reason.

Senator GRAMS. Thank you.

Senator Biden.

Senator BIDEN. I only have a couple of questions.

Mr. Harris, it is good to see you again. I am used to seeing you in the Judiciary Committee in the past.

This question is for either or both of you if you wish to comment. It concerns dual criminality. This has been one of the staples in our extradition treaties.

There are provisions in South Korean that do not comport with ours, provisions in South Korean law that do not comport with

what we consider constitutionally permissible conduct. Their National Security Law limits, broadly I might add, political speech of a certain category, that is, speech which might be construed as supportive of North Korea.

Am I right in understanding that most cases brought under the National Security Law would not be extraditable?

Ms. BOREK. Yes, Senator. This certainly was a focus of attention during the negotiation because we were concerned specifically about that law. We definitely concluded that the dual criminality requirement would be a bar to the kinds of cases that we were worried about, which involved what we would consider to be undue infringement on freedom of speech and political association.

There is also, of course, the political offense exception which could come into play in a particular case.

Senator BIDEN. Give me an example of how that would come into play.

Ms. BOREK. Well, to the extent that there is a particular offense involved in what would be considered political activity, you could invoke the political offense exception directly. But that is really a more specialized exception, and the dual criminality requirement I think would take care of it before you even got to that particular political offense exception.

Senator BIDEN. Yesterday, I met with the South Korean ambassador—an impressive fellow, by the way. I was very impressed with not only how articulate he was but his sense of circumstance in South Korea as well as in the region. But that is just an aside.

He indicated that South Korea and the South Korean people are very interested in this treaty. I am sure no one in America has any idea about this treaty. Notwithstanding your significant positions, this is not going to make the press. This is not going to be something people are going to talk about.

But as he says, in South Korea the Korean Government has a very high level of interest in this treaty as well as, apparently, there is an interest that goes beyond just government circles.

Do you have a sense, Ms. Borek, about this. First, is that true, if you know? I do not expect you necessarily to know this, but I would be curious if you do know. Is it true and, second, why so?

Ms. BOREK. Well, I would have to say, and I am speculating here, that I think it may be because of the factors that you mentioned in your initial statement and that I mentioned in response to the question. There has been a hesitation about having an extradition treaty with the Republic of Korea in the past due to some aspects of concerns we had about the judicial system and what might happen in terms of rights of individuals. To say now that we really don't have these concerns is an endorsement, in a sense, of the judicial system. It is something to which we pay attention, always, in any case, with an extradition treaty. So it could be that, from this point of view, this is a sign of progress that has been made.

Also, just from a practical point of view, I think they do want to make some extradition requests. So I think there is also a law enforcement interest on the part of the Korean Government as well.

Senator BIDEN. To get back to the extradition request, let's assume there is someone who is a Korean national who violated, without any question, their National Security Law by praising the

North or calling for a unified country under the North, or whatever, who fled to the United States. Is that the kind of crime for which we would extradite?

Ms. BOREK. No, sir. That would not meet the dual criminality criterion.

I might say that we have not had problems with this kind of case in our extradition relationship, and I certainly would not expect it in this case. I think the Government of Korea perfectly well understands what the issues are in this area and they were discussed. I don't expect that there would even be a problem.

Senator BIDEN. I don't have any doubt about it, either. But, quite frankly, I think that is the one thing that would be raised in opposition to this treaty by some, unless we affirmatively outline at the front end that that is not a crime for which the United States would believe the person is extraditable under this treaty. If we do not say it, I am sure there will be some talk show host somewhere who will suggest that that is what we are doing. This is why I wanted it on the record.

Maybe it is unfair to say "talk show host." I have a friend who says that "assumption is the mother of all screw-ups." I think for us to assume that people would know that we would not do that and that the treaty would not compel us to do that would be a mistake. That is why I bothered to ask the question. I realize you knew that I knew the answer. I could tell by looking at your face which suggested you thought "why is he asking me that question?" That is the reason I asked the question.

The last point I will make is this. It is not a question. I think, just to give you one person's opinion, first of all, I think you did a good job in negotiating this treaty. I think it is a very positive step. I think the more we establish the notion of the rule of law binding nations that have economic, as well as political relationships, that nations are ultimately bound and tied by the rule of law, this, ultimately, is the security that the relationship will be, will stay firm.

I would just note parenthetically one Senator's view. I think that Korea's attention to our willingness to sign an extradition treaty with them, which is at least a maturation of our position from the past, is evidence of the fact that moral suasion makes a difference; that those who suggest that treaties we sign with other nations—and here everyone in the press is now going to think I am talking about the conference on the Test Ban Treaty, because I am so preoccupied with that. But I am not merely talking about that. I am talking about the role of moral suasion in international relations. I think that countries who wish to become part of the international community in a way that is accepted across the board increasingly understand that the rule of law, commitment to treaties, court systems that function, and judicial systems that are fair, that these ultimately are a sine qua non for any further legitimization.

I think that is the reason why it is important in my view—this is just me—why I think it is so important for the Korean Government. But I also think it is evidence of the fact that we should not refrain, as a Nation, from making clear what our minimum standards are, no matter what the economic, political, or security benefits there are in dealing with a nation. Ultimately, to become a full

fledged partner with the United States of America, you must accede to the basic rule of law and have court systems that function.

I think Korea has done that, as I said at the outset. This is pure dicta on my part, but I think that is the reason why the Korean Government understands that this is an important deal in terms of our recognition of their, the legitimacy of their judicial system.

So I do not think we should underestimate the impact that we have when we abide by and insist others abide by the rule of law.

At any rate, I don't have any further questions. But I thank you both for the professional way in which you went about negotiating this treaty and the way in which you have presented the case.

I have no further questions, Mr. Chairman.

Senator GRAMS. Thank you, Senator Biden.

I have just a few followup questions, especially on the extradition of nationals. In the proposed treaty, extradition of nationals is discretionary rather than mandatory.

Ms. Borek, did you discuss with the Korean delegation the types of instances in which they would not foresee extraditing their nationals?

Ms. BOREK. I know the general issue was discussed. I believe, and Mr. Harris can correct me, that they did not have in mind a particular kind of case in which they would not extradite nationals. It was more a question that under their law the Minister of Justice had certain discretion and they could not override that legal discretion by having an absolute provision in the treaty.

So it was a hypothetical need to preserve a theoretical prerogative, rather than a particular kind of case where they saw a problem.

Senator GRAMS. Who will decide that discretion?

Ms. BOREK. Well, it will certainly be up to the Government of Korea in a given case if we are requesting someone from them. But under their law, it is the Minister of Justice who would have the discretion, ultimately.

Senator GRAMS. Mr. Harris, will this treaty have any effect on the large U.S. armed forces presence in South Korea or in the surrounding region?

Mr. HARRIS. That was one of the issues discussed during the negotiations, and our conclusion was that it would not.

Senator GRAMS. It would not?

Mr. HARRIS. It would not.

There is, of course, a Status of Forces Agreement that governs the extent to which criminal jurisdiction is available in those cases. This treaty does not interfere with or obstruct the operation of that.

Senator GRAMS. In another area, in the past, the Justice Department witnesses have referred to the United States as being on, and I quote, "the cutting edge of criminalizing newly emerging criminal activities, such as money laundering, computer related abuses, and environmental crimes."

Does the proposed treaty adequately allow the United States to reach individuals who commit these types of crimes that maybe some other countries do not recognize?

Mr. HARRIS. It does, Senator. I am happy to report that during the negotiations, we carefully went through with the Republic of

Korea the high priority offenses that the Justice Department is interested in making sure are covered by modern extradition treaties. We were persuaded that, for the overwhelming majority of them, there is dual criminality and there is, indeed, the wherewithal for effective extradition arrangements.

Senator GRAMS. Ms. Borek, during consideration of a number of extradition treaties last year, the Senate added an understanding regarding the "rule of speciality" that is contained in all treaties, which insures that no persons are tried for crimes for which they are not extradited. The prohibition extends to the transfer of an individual without the consent of the original requested State.

Does the State Department continue to support the inclusion of an understanding that no U.S. citizen extradited under the treaty may be transferred to the International Criminal Court if that court is established without the United States ratification of the treaty creating the court?

Ms. BOREK. Yes, Senator.

Senator GRAMS. It does cover that?

Ms. BOREK. Yes.

Senator GRAMS. And what does the Justice Department say, Mr. Harris?

Mr. HARRIS. Yes, Senator.

Senator GRAMS. Great. I wanted to make sure we had that on record.

I just wanted to ask one final question dealing with the statute of limitations.

Article 6 of the proposed treaty bars extradition in cases where the law of the requested State would have barred the crime due to a statute of limitations having run out.

Now South Korea, unlike other treaty partners with similar commitments, also allows the time to continue running on the time limitation, even when charges are filed. Actions that would toll the statute of limitations, therefore, will apply under this treaty.

So the question is are you confident that this article of the treaty adequately insures that fugitives cannot simply run out the clock by fleeing to Korea?

Mr. HARRIS. Senator, this article of the treaty was the subject of considerable negotiation. As you may recall, of the treaties that were before the Senate last fall, most of them had slightly different language. Many of our most modern extradition treaties flatly state that the statute of limitations of the requesting State will apply.

We have a few in which it was not possible to reach that resolution. In this case, because of the specific provisions of Korean law, we did agree that the statute of limitations of the requested State would apply. But, as you have indicated, the specific language in the article is crafted so that those factors which toll the statute of limitations under the law of the requesting State would be given weight.

So when the United States is making a request to Korea, there should be the ability to prevent a miscarriage of justice by the statute of limitations of Korea having expired before extradition can be accomplished.

Senator GRAMS. Is there anything either of you would like to add?

Ms. Borek.

Of course, that is usually what gets you into trouble, that last added statement.

Ms. BOREK. No, thank you, sir. I was just going to say thank you for holding this hearing today.

Senator GRAMS. I remember that, having been a reporter, that was always the last question—is there anything you would like to add?

Mr. HARRIS. I would like to thank you, Mr. Chairman, and the committee for holding this hearing and allowing this to go forward.

Senator GRAMS. Thank you. I appreciate both of you being here for your statements and also for your answers.

Just one final note. We will leave the record open for three business days and other members of the committee might have questions that they would like to enter in writing. We would ask for a prompt response if you do receive those. We appreciate that.

Thank you very much for being here today.

The hearing is concluded.

[Whereupon, at 2:48 p.m., the hearing was concluded.]