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EXTRADITION TREATIES WITH BELIZE, PARAGUAY,  
SOUTH AFRICA AND SRI LANKA

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OCTOBER 4 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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

REPORT

[To accompany Treaty Docs. 106-38, 106-4, 106-24 and 106-34]

The Committee on Foreign Relations, to which were referred the Extradition Treaty Between the Government of the United States of America and the Government of Belize, signed at Belize on March 30, 2000 (Treaty Doc. 106-38); the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Paraguay, signed at Washington on November 9, 1998 (Treaty Doc. 106-4); the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of South Africa, signed at Washington on September 16, 1999 (Treaty Doc. 106-24) and the Extradition Treaty Between the Government of the United States of America and the Government of the Democratic Socialist Republic of Sri Lanka, signed at Washington September 30, 1999 (Treaty Doc. 106-34) having considered the same, reports favorably thereon with the understandings, declarations and provisos indicated in Section VIII, 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.

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## I. PURPOSE

These treaties obligate the Parties to extradite fugitives at the request of a Party subject to conditions set forth in the treaties.

## II. BACKGROUND

The United States is a party to more than 115 bilateral extradition treaties. The four extradition treaties considered in this report all update existing treaties, namely, the 1972 United States-United Kingdom treaty that now governs U.S. extradition relations with Belize, the 1973 treaty with Paraguay, the 1947 treaty with South Africa and the 1931 United States-United Kingdom treaty that currently governs U.S. extradition relations with Sri Lanka. Each of the new treaties contains the core elements sought by the United States in modern, effective extradition treaties, namely, the dual criminality principle, improved provisional arrest procedures, temporary surrender provisions, extradition waiver provisions, extraterritorial scope for some offenses, retroactivity and elimination of nationality as a basis to refuse an extradition request.

Extradition relationships have long been a basis of United States bilateral relationships. They 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 parties permit the transfer of individuals to another country in order to stand trial for alleged crimes.

## III. SUMMARY

### A. GENERAL

An extradition treaty is an international agreement in which the Requested State agrees, at the request of the Requesting State and under specified conditions, to surrender persons to the Requesting State who are within the Requested State's jurisdiction and who are charged with certain crimes against, or are fugitives from, the Requesting State.

Since the Committee's last review of extradition treaties (see Exec. Rept. 105-23 of October 14, 1998), the Departments of State and Justice have continued efforts to modernize U.S. bilateral extradition treaties to better combat international criminal activity, such as drug trafficking, terrorism and money laundering. Modern extradition treaties share a number of common characteristics: (1) they identify the offenses for which extradition will be granted; (2) they establish procedures to be followed in presenting extradition requests; (3) they enumerate exceptions to the obligation to extradite; (4) they specify the evidence which the Requesting State must supply in order to support a finding in the Requested State of an obligation to extradite; and (5) they set forth administrative provisions for bearing costs and legal representation.

In the United States, the legal procedures for extradition are governed by both federal statutes and self-executing treaties. Federal statutes control the judicial process by which a U.S. judge makes a certification to the Secretary of State that she may extradite an individual under an existing treaty. Extradition proceedings are considered to be non-criminal in nature, and are conducted by

U.S. judges. Habeas corpus is the only legal avenue open to fugitives seeking to challenge a certification of extraditability by a U.S. judge. For its part, the U.S. government may not appeal a finding by a judge, but must instead file a new petition for extradition in that event.

U.S. 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 authorizing extradition for one or more offenses for which the defendant is actually charged; (2) charges for which extradition is sought are actually pending against the defendant in the Requesting State; (3) the defendant is the same individual sought for trial or service of sentence in the Requesting State; (4) probable cause exists to believe that the defendant is guilty of charges pending against him in the Requesting State; and (5) the acts alleged to have been committed by the defendant are punishable as criminal conduct in both the Requesting State and under the criminal law of the United States (i.e., there is “dual criminality”).

After a judge has made a determination that an individual may be extradited under U.S. law, and so certifies to the Secretary of State, the Secretary may nevertheless decline to surrender the individual to the Requesting State on foreign policy or other grounds, as defined in the relevant treaty or even absent an express treaty provision. She may also decline if she believes the request was politically motivated.

## B. KEY PROVISIONS

### 1. *Extraditable Offenses—The Dual Criminality Requirement*

In general, extradition agreements cover only the offenses designated in them. Older U.S. extradition agreements—so-called “list treaties”—designate extraditable offenses through inclusion of a list of covered crimes. Some, but not all, of these agreements include an additional requirement that a listed offense be considered a felony by both the requesting and the requested States. List treaties, which in some cases were negotiated at or before the beginning of the 20th century, are no longer adequate to meet the demands of modern criminality.

Modern extradition agreements either supplement or completely replace the list method with a general dual criminality test. Under this test, extradition may be had for any offense that is punishable by imprisonment of at least 1 year by both the requesting State and the requested State. All four treaties employ some variation of the dual criminality method for determining what are extraditable offenses, and represent substantial improvements over the agreements they replace.

### 2. *Extraterritorial offenses*

The ability of a state to extradite and to obtain the extradition of individuals charged with international drug trafficking or terrorism offenses committed outside of its national territory can be an important weapon in the fight against global crime. A question thus arises over whether offenses which occur outside the territory

of the Requesting State may be considered “extraditable offenses” under extradition treaties.

In general, U.S. extradition agreements concluded before 1960 limit the obligation to extradite to those crimes which are committed within the “jurisdiction” of the requesting State. “Jurisdiction” in the context of these agreements is interpreted to mean territorial jurisdiction only, not criminal jurisdiction. As U.S. criminal law increasingly addresses extraterritorial acts, under older agreements, a disparity arises between the reach of U.S. law and the ability of the United States to bring suspects to trial. To varying degrees, all four of these extradition treaties include provisions which open the door to extradition for extraterritorial offenses which would be otherwise extraditable under the treaty.

### 3. *Retroactivity*

New extradition treaties generally apply to offenses committed before, as well as to those committed after, they enter into force. Application of a new treaty to crimes committed before its effective date does not make certain conduct criminal that was not punishable when committed, which would raise possible *ex post facto* objections under the Constitution. Rather, application of a new treaty to permit extradition for past crimes is a procedural provision that merely adds a law enforcement tool to assist in the prosecution and punishment of conduct that already was criminal when committed. All four treaties expressly apply to offenses committed before the entry into force of the treaty.

### 4. *Surrender of Nationals*

Many “Napoleonic Code” or civil law countries (e.g., Germany, Venezuela and France) decline to extradite their own citizens to foreign countries to face justice for their alleged criminal conduct abroad. Instead, they prosecute their citizens locally for the offense committed abroad. In the U.S. view, this situation is unsatisfactory. Such cases are, at best, a very low priority for the foreign prosecutor or investigating magistrate, who often prove reluctant to devote time and resources to prosecute or investigate conduct which occurred thousands of miles from their jurisdiction. The historic Anglo-American view is that justice is better-served by prosecution in the venue where the offense was committed.

The United States, like many common law countries, does not object to extraditing its own citizens. The United States has sought to negotiate treaties without nationality restrictions. Unfortunately, many civil law countries continue to restrict extradition of their nationals under their extradition agreements, their domestic law, or both. Among the treaties addressed in this respect, therefore, the nationality provision in the Paraguay treaty is significant: the treaty contains an express bar on refusing to extradite on nationality grounds. The other three treaties under consideration also bar withholding extradition on nationality grounds.

### 5. *Political Offense Exception*

As it originally evolved, the political offense exception in international extradition practice protects an individual from being sent abroad to stand trial or face punishment for an offense of a political

nature. Although U.S. extradition practice historically has barred extradition for political offenses, there has been a trend during the last 20 years to narrow the scope of the exception. Newer extradition treaties have excluded from consideration as political offenses (either by specific listing or by general reference) certain universally condemned crimes that are subject of multilateral agreements, such as hostage taking, air hijacking, aircraft sabotage, and attacks on heads of state. In those cases, Party States must prosecute a person accused of a covered crime or extradite the person for trial elsewhere.

The United States significantly departed from previous political offense practice in 1986 with the adoption of a new supplementary extradition treaty with the United Kingdom. Under the supplementary treaty, most serious violent crimes against individuals are excluded from consideration as political offenses. The U.K. model subsequently was used in some treaties concluded with democratic allies (e.g., Canada and Germany), but other recent treaties with democratic allies (e.g., Australia) have not narrowed the political offense exception in line with the U.K. treaty.

The Belize, Sri Lanka, and Paraguay treaties do not limit the political offense exception as narrowly as many other recent agreements do. Still, attacks against a Head of State (or a family member) could not be considered a political offense, nor could a crime covered by a mutually binding multilateral agreement that requires a Party to extradite or prosecute for a specific type of crime (e.g., aircraft hijacking, etc.). The South Africa treaty is to similar effect, but also expressly disallows murder, kidnaping, and hostage taking as political offenses.

The Paraguay, Sri Lanka, and Belize treaties further would deny extradition if the executive authority of a requested State determines that a request is politically motivated. The South Africa treaty would deny extradition if the executive authority of the requested State determines that there are substantial grounds for believing that a request has been made primarily to punish or prosecute on the basis of race, religion, nationality, or political opinion.

#### *6. Capital Punishment*

Typically, foreign treaty partners decline to extradite fugitives to the United States who face the possibility of capital punishment, absent assurances that this penalty will not be imposed.

Capital punishment provisions have become common in recent U.S. extradition agreements. The capital punishment provisions generally authorize the requested State to refuse extradition whenever the extraditable offense is punishable by death in the requesting State, but not in the requested State, unless the requesting State furnishes such assurances as the requested State considers sufficient that the sentence will not be imposed and executed.

The new treaties with Paraguay and South Africa are typical of this approach. The new treaty with Sri Lanka is similar to these, but it contains an exception with respect to crimes which would constitute murder in both States, in which case the prospect of capital punishment is irrelevant. The treaty with Belize does not contain a death penalty restriction, and hence is similar to the eight

extradition treaties with Caribbean countries that were approved by the Senate in 1998 (Exec. Rept. 105–23).

#### *7. Statute of Limitations*

Fugitives often attempt to avoid extradition to a requesting state by asserting that the statute of limitations has expired (also known as “lapse of time” or “prescription”) in the requesting state, the requested state, or both, for the offense giving rise to the extradition request. The Belize treaty states that “[e]xtradition shall not be denied because of the prescriptive laws of either the Requesting State or the Requested State.” Similarly, the Sri Lanka treaty states that extradition is not to be barred “because of the laws relating to lapse of time of either the Requesting State or the Requested State.” The Paraguay treaty is silent on the issue. The South Africa treaty authorizes denial of extradition “when the prosecution has become barred by lapse of time according to the law of the Requesting State.”

#### *8. The Rule of Speciality*

The rule of speciality (also specialty) is designed to assure that an extradited individual will be prosecuted only for the offense for which extradition was granted and that an extradition request for one offense is not a subterfuge for obtaining the defendant to stand trial for unrelated matters. Though the rule applies under every U.S. bilateral treaty, many exceptions commonly are included. Among these are exceptions that permit additional prosecutions (1) with the consent of the requested State, (2) for lesser included offenses, (3) for offenses committed after extradition, or (4) against an extradited individual who has left and then returned to the requesting State, or who has remained in the requesting State for a period of time (usually 30 or 60 days) after being free to leave. All four of the new treaties effectively incorporate the Rule of Speciality.

### IV. ENTRY INTO FORCE AND TERMINATION

#### A. ENTRY INTO FORCE

The Treaties generally provide for the entry into force of the treaty either on the date of, or a short time after, the exchange of instruments of ratification.

#### B. TERMINATION

The Treaties generally provide for the Parties to withdraw from the Treaty by means of written notice to the other Party. Termination would take place six months after the date of notification.

### V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed Treaties on September 12, 2000 (a transcript of the hearing and questions for the record can be found in S. Hrg. 106–660, entitled “Consideration of Pending Treaties”). The Committee considered the proposed Treaties on September 27, 2000, and ordered them favorably reported by voice vote, with the recommendation

that the Senate give its advice and consent to the ratification of the proposed Treaties subject to the understandings, declarations and provisos noted below.

#### VI. COMMITTEE RECOMMENDATION AND COMMENTS

The Committee on Foreign Relations recommends favorably the proposed Treaties. On balance, the Committee believes that the proposed Treaties are in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. The Committee believes that the following comments may be useful to the Senate in its consideration of the proposed Treaties and to the Executive Branch in its application of the Treaties.

##### A. RESTRICTION ON RE-EXTRADITION OF FUGITIVES TO THE INTERNATIONAL CRIMINAL COURT

As discussed in Exec. Rept. 105-23, on July 17, 1998, a majority of nations at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court (Rome, Italy) approved a treaty that would, upon entry into force, establish an International Criminal Court. The Court would be empowered to investigate and prosecute war crimes, crimes against humanity, genocide and aggression. The United States voted against this treaty.

Because of the implications for Americans involved in formulation and execution of United States foreign policy, several members of the Committee remain deeply concerned by the prospect of an International Criminal Court empowered to investigate the matters referred to above that is permanent, could become politicized, and over which there would be limited international political control. This concern is magnified by events since adoption of Exec. Rept. 105-23, namely, International Criminal Tribunal for the Former Yugoslavia Chief Prosecutor Carla del Ponte's claim of jurisdiction over United States and other NATO forces for their conduct during the Kosovo combat operations in 1999.

In light of the Secretary of State's expressed desire that the United States become a "good neighbor" to the Court if it enters into being, and if certain safeguards designed to protect U.S. officials and soldiers from prosecution are approved, as well as other factors, several members of this Committee are concerned that United States bilateral extradition treaties could become conduits for transferring fugitives or charged persons located in the United States to the Court (if it comes into existence) even though the United States voted against its establishment.

Accordingly, the Committee has decided once again to insert into each of the Resolutions of Ratification accompanying the Extradition Treaties discussed in this report an understanding relative to an eventual International Criminal Court. Specifically, the understanding would obligate the President to restate in United States instruments of ratification, relative to each treaty's provision on the Rule of Specialty, that United States consent must be obtained before a treaty partner may re-extradite a U.S.-surrendered person to a third jurisdiction. The understanding further

states that future United States policy shall be to refuse such consent to the transfer of individuals to the International Criminal Court unless the United States ratifies the treaty establishing the Court pursuant to the procedures stated in Article II, section 2, of the United States Constitution.

#### B. USE OF EXTRADITION TREATIES TO AGGRESSIVELY PURSUE INTERNATIONAL PARENTAL CHILD ABDUCTORS

The Committee on Foreign Relations remains concerned about the serious problem of international parental child abduction. Notably, a September 2000 General Accounting Office report (GAOP/ GAO/NSIAD-00-226BR) reveals that an estimated 1,000 children are abducted by one of their parents from the United States annually. Between January 1995 and May 15, 2000, “left behind” American parents initiated nearly 300 cases under the 1980 Hague Convention on the Civil Aspects of International Child Abduction involving just three countries: Germany, Sweden and Austria. Well over half of those cases are unresolved.

The Committee reiterates its grave concern over this troubling issue. The Departments of State and Justice must redouble their efforts to bring international parental child abduction firmly within the scope of offenses covered by existing and future bilateral extradition treaties. Diplomatic efforts must be undertaken to obtain commitments from our treaty partners that international child abduction—whether as an independent offense, or as an offense included within the scope of the offense of kidnaping—shall be deemed an extraditable offense. Law enforcement efforts must be undertaken to ensure that, in all cases of parental child abduction, extradition requests are quickly prepared and sent to the treaty party concerned, even when that party does not extradite its citizens, or would be otherwise unlikely to extradite. The Committee believes that the failure to even request extradition suggests to the treaty partner, and to the abductor, that the United States is not serious about pursuing abductors.

#### C. EXTRADITION OF NATIONALS

All four of the treaties discussed in this report require the extradition of nationals. This noteworthy accomplishment continues an important trend in extradition relationships, particularly with countries of the civil law tradition. The Committee applauds this accomplishment, which reflects well upon State and Justice Department negotiators.

Unfortunately, much remains to be done toward achieving such progress on other fronts. Although many bilateral extradition treaties in force today give each party the discretion to extradite its nationals, few of these treaty partners do so owing to domestic statutory, constitutional or political obstacles reflecting civil law traditions of non-extradition of nationals.

The Committee supports the extradition of U.S. nationals in most instances. But the Committee remains deeply concerned that many nations around the world—including nations on our border or in close proximity—do not readily, if ever, extradite their 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 or modernized extradition relationships with foreign states, that a reciprocal and essentially unconditional commitment to extradite nationals is a key desire of the United States.

Concerning Mexico in particular, the Committee recommends that the Executive Branch approach Mexico's new president at the appropriate time to inform him of the strong United States desire to modernize and improve our bilateral extradition relationship in this area. Concerning the European Union, the Committee recommends that the Executive Branch redouble its efforts to improve the performance of our European friends in this regard.

Finally, unless there are compelling reasons to the contrary, the Committee maintains that the United States should never hesitate to request the extradition of a fugitive from a native country which does not extradite its citizens. The Committee believes that such requests contribute to progress in this area, and rightly place the burden of justifying its refusal on the foreign state.

#### VII. EXPLANATIONS OF PROPOSED TREATIES

What follow are the article-by-article technical analyses provided by the Departments of State and Justice regarding the extradition treaties included in this Report.

##### **Technical Analysis of the Extradition Treaty Between the United States of America and Belize**

On March 30, 2000, the United States signed an Extradition Treaty Between the Government of the United States of America and the Government of Belize (the "Treaty"). In recent years, the United States has signed similar treaties with many other countries as part of a highly successful effort to modernize our law enforcement relations. The new extradition treaty with Belize is a major step forward in United States efforts to win the cooperation of countries in combatting organized crime, transnational terrorism, and international drug trafficking.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 18, United States Code, Section 3184, *et seq.* No new implementing legislation will be needed for the United States. Belize has its own internal legislation on extradition<sup>1</sup> which will apply to United States requests under the Treaty. The Government of Belize will however, need additional implementing legislation to give the Treaty effect. The Treaty will replace the Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, signed at London June 8, 1972, which was applicable to Belize as a former dependency of the United Kingdom.

The following technical analysis of the Treaty has been prepared by the Office of International Affairs, United States Department of

<sup>1</sup>Extradition Act 1870, of 9th August 1870 (hereinafter "the Extradition Act of 1870"). The key sections of the Extradition Act of 1870 which are germane to the interpretation and implementation of the Treaty are discussed in more detail in this Technical Analysis. The Belize delegation stated that this Act would be amended as necessary to encompass provisions of this Treaty.

Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating history. 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 Party to extradite to the other, subject to the provisions of the remainder of the Treaty, persons sought for prosecution or convicted of extraditable offenses. The article refers to charges “in” the Requesting State rather than “of” 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. The term “convicted” includes instances in which the person sought has been found guilty but a sentence has not yet been imposed. The Treaty clearly applies to persons who have been adjudged guilty but fled prior to sentencing.

#### ARTICLE 2—EXTRADITABLE OFFENSES

This article contains the basic guidelines for determining what are extraditable offenses. This treaty, like most recent United States extradition treaties, makes extraditable any offense if it is 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. In addition, paragraph 1 of Article 2 references a non-exhaustive list or schedule, annexed to the Treaty as an integral part thereof of specific offenses for which extradition may be granted provided that the listed offense is so punishable. Defining extraditable offenses in terms of “dual criminality” 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.

The list of extraditable offenses referenced in paragraph 1 includes most of the offenses which were included in the 1972 U.S.-U.K. treaty, as well as more modern offenses such as those relating to money laundering, intellectual property, the environment, taxes, immigration, consumer protection (*i.e.*, antitrust and other offenses), and terrorism. This list was included at the insistence of the Belizean delegation, which expressed concern that the complete absence of an agreed list would greatly burden Belizean judges and slow the extradition process. During the treaty negotiations, the United States delegation received assurances from the Belizean delegation that U.S. offenses which basically enhance penalties, such as operating a continuing criminal enterprise (Title 21, United States Code, Section 848) and offenses under the racketeering statutes (Title 18, United States Code, Section 1961–1968), would be extraditable if the predicate offenses would be extraditable offenses

Paragraph 2 follows the practice of recent extradition treaties in providing that extradition should also be granted for attempting or conspiring to commit, aiding or abetting, counseling or procuring the commission of, or otherwise being an accessory before or after the fact to, an extraditable offense. Conspiracy charges are frequently used in United States criminal cases, particularly those involving complex transnational criminal activity, so it is especially important that the Treaty be clear on this point. In any event, paragraph 2 creates an exception to the “dual criminality” rule of paragraph 1 by making conspiracy an extraditable crime if the offense which was the object of the conspiracy is an extraditable offense.

Paragraph 3 reflects the intention of 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 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 based on an absence of dual criminality of such jurisdictional requirements. This paragraph requires that such jurisdictional elements be disregarded in applying the dual criminality principle. For example, Belizean 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. Furthermore, number 29 on the list of offenses annexed to the Treaty makes clear that offenses relating to fiscal matters, taxes or duties, including tax evasion or fiscal fraud, shall be extraditable offenses notwithstanding that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting State. This provision clarifies that revenue-related offenses 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. Similar provisions appear in other recent U.S. extradition treaties.<sup>2</sup>

Paragraph 4 deals with the fact that in the United States many federal crimes involve acts committed wholly outside United States territory. Our jurisprudence recognizes jurisdiction 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

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<sup>2</sup>See, e.g., U.S.-Austria Extradition Treaty, signed at Washington, January 8, 1998, entered into force January 1, 2000, art. 2(4)(B).

such jurisdiction.<sup>3</sup> However, at the time that the treaty was negotiated, the Belizean Government did not recognize extraterritorial jurisdiction over offenses. In light of assurances that Belize would take steps to develop jurisdiction over extraterritorial matters, the U.S. delegation agreed to the text of Article 2(4), which provides that extradition shall be granted for such offenses if the Requested State could punish an offense committed outside of its territory in similar circumstances.

Paragraph 5 states that when extradition has been granted for an extraditable offense, it shall also be granted for any other offense for which all of the requirements for extradition have been met except for the requirement that the offense be punishable by more than one year of imprisonment. For example, if Belize 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 and included in the request, as long as those misdemeanors would also be recognized as criminal offenses in Belize. 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 other countries.<sup>4</sup>

#### ARTICLE 3—NATIONALITY

Some countries refuse to extradite their own nationals to other countries for trial or punishment, or are prohibited from doing so by their statutes or constitution. The United States does not deny extradition on the basis of the offender's citizenship,<sup>5</sup> and Belize's extradition law contains no exception for Belizean nationals. Therefore, in Article 3 of the Treaty, each State promises not to refuse extradition on the ground that the person sought is a national of the Requested State.

#### 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.

Paragraph 2 describes three categories of offenses which shall not be considered to be political offenses. Similar provisions appear in most recent U.S. extradition treaties.

First, the political offense exception does not apply where there is a murder or other willful crime against the person of a Head of

<sup>3</sup>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).

<sup>4</sup>*See, e.g.*, U.S.-Barbados Extradition Treaty, signed at Bridgetown February 28, 1996, entered into force March 3, 2000, art. 2(5).

<sup>5</sup>*See, generally* Shearer, *Extradition in International Law* 110-114 (1971); 6 Whiteman, *Digest of International Law* 871-872 (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, United States Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens even pursuant to treaties that permit (but do not require) surrender of citizens, if other requirements of the Treaty have been met.

State of the Contracting States, or a member of the Head of State's family.

Second, the political offense exception does not apply to offenses which are included in a multilateral treaty, convention, or international agreement that requires the parties to either extradite the person sought or submit the matter for decision as to prosecution. For example this clause would apply to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.<sup>6</sup>

Third, the political offense exception does not apply to conspiring or attempting to commit, or for aiding and abetting the commission or attempted commission of, the foregoing offenses.

Article 4(3) provides that extradition shall not be granted if the executive authority of the Requested State finds that the request was politically motivated.<sup>7</sup> This is consistent with the longstanding law and practice of the United States, under which the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.<sup>8</sup> During negotiations, the Belizean delegation stated that it will specify in its domestic legislation concerning extradition that "executive authority" means Ministry of Foreign Affairs.

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.<sup>9</sup>

#### ARTICLE 5—PRIOR PROSECUTION

The first paragraph of Article 5 prohibits extradition if the offender has been convicted or acquitted in the Requested State for the offense for which extradition is requested, and is similar to language in many United States extradition treaties.<sup>10</sup> 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.

Paragraph 2 makes it clear that neither State can refuse to extradite an offender on the ground that the Requested State's authorities declined to prosecute, or instituted criminal proceedings against the offender and thereafter elected to discontinue the proceedings. This provision was included because the decision of the

<sup>6</sup>Done at New York December 14, 1973, and entered into force February 20, 1977 (28 UST 1975, TIAS 8532, 1035 UNTS 167).

<sup>7</sup>There are similar provisions in many U.S. extradition treaties. See, e.g., U.S.-India Extradition Treaty, signed at Washington June 25, 1997, entered into force July 21, 1999, art. 5(2).

<sup>8</sup>See, *Eain v. Wilkes*, 641 F.2d 504, 513 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *Koshotos v. Roche*, 744 F. Supp. 904 (D. Mass. 1990), aff'd, 931 F. 2d 169 (1st Cir. 1991).

<sup>9</sup>An example of such a crime is desertion. *Matter of Extradition of Suarez-Mason*, 694 F. Supp. 676, 702-3 (N.D. Cal. 1988).

<sup>10</sup>See, e.g., U.S.-Argentina Extradition Treaty, signed at Buenos Aires June 10, 1997, entered into force June 13, 2000, art. 5(1).

Requested State to forego prosecution, or to drop charges already filed, may have resulted from failure to obtain sufficient evidence or witnesses available for trial, and the Requesting State may not suffer from the same impediments. This provision should enhance the ability to extradite to the jurisdiction which has the better chance of a successful prosecution.

#### ARTICLE 6—EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

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

The first paragraph requires that each formal request for extradition be submitted through the diplomatic channel. A formal extradition request may be preceded by a request for provisional arrest under Article 9, and provisional arrest requests need not be initiated through diplomatic channels if the requirements of Article 9 are met.

Article 6(2) outlines the information which must accompany every request for extradition under the Treaty. Most of the items listed in Article 6(2) enable the Requested State to determine quickly whether extradition is appropriate under the Treaty. For example, Article 6(2)(c)(i) calls for “evidence as to the provisions of the law describing the essential elements of the offense for which extradition is requested,” enabling the requested state to determine easily whether the request meets the requirement of dual criminality under Article 2. However, some of the items listed in Article 6(2) are required strictly for informational purposes so that the Requested State will be fully informed about the charges in the Requesting State. Thus, Article 6(2)(c)(iii) calls for “evidence as to the provisions of the law describing any time limit on the prosecution,” even though Article 8 of the Treaty expressly states that extradition may not be denied due to lapse of time for prosecution.

Article 6(3) describes the additional information needed when the person is sought for trial in the Requesting State. Article 6(3)(c) requires that if the fugitive is a person who has not yet been convicted of the crime for which extradition is requested, the Requesting State must provide “such evidence as would be sufficient, according to the law of the Requested State, to justify committal for trial of the person sought if the offense of which the person has been accused had been committed in the Requested State.” In the United States, courts require a showing of probable cause to extradite.<sup>11</sup> In Belize, courts require a “*prima facie*” showing. The delegations agreed that the Belize standard is essentially identical to a showing of probable cause under U.S. law, and that the language of Article 6(3)(c) should not be interpreted to require a higher burden of proof for extradition than the probable cause standard. The Belize delegation said that the evidence which should be provided to Belize in meeting this standard consists of: an affidavit by the prosecutor describing the case and defining the elements of the charged offenses; sworn statements by some witnesses to the

<sup>11</sup>Courts applying Title 18, United States Code, Section 3184, have long required probable cause for international extradition. See, Restatement (Third) of the Foreign Relations Law of the United States § 476, comment b (1987) (“evidence of criminality as would justify the requested state in holding the accused for trial”).

events charged; and other evidence demonstrating a case against the person, such as copies of fingerprints and photographs of the person sought, photographs of the crime scene, copies of some underlying documentation (demonstrating fraud, for example).

Article 6(4) lists the additional 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, the legal standard required to be met in paragraph 3 is no longer applicable. In essence, the fact of conviction speaks for itself, a position taken in recent United States court decisions, even absent a specific treaty provision.<sup>12</sup>

#### ARTICLE 7—ADMISSIBILITY OF DOCUMENTS

Article 7 governs the authentication procedures for documents prepared for use in extradition cases so that they will be received and admitted as evidence in extradition proceedings.

The article states that when the United States is the Requesting State, the documents in support of extradition must be authenticated by an officer of the United States Department of State and certified by the principal diplomatic or consular officer of Belize resident in the United States although the Belizean delegation stated that this is not necessary under its domestic law. When the request is from Belize, the documents must be certified by the principal diplomatic or consular officer of the United States resident in Belize, consistent with United States extradition law.<sup>13</sup>

The third paragraph of the article permits documents to be admitted into evidence if they are authenticated in any other manner acceptable by the law of the Requested State. For example, there may be information in the Requested State itself which is relevant to and probative of extradition, and the Requested State is free under (c) to utilize that information if it satisfies the ordinary rules of evidence in that state. This insures that evidence which is acceptable under the evidentiary rules of the Requested State may be used in extradition proceedings even if it is not authenticated pursuant to the Treaty. This paragraph also should insure that relevant evidence which would normally satisfy the evidentiary rules of the Requested State is not excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

#### ARTICLE 8—LAPSE OF TIME

Article 8 states that extradition shall not be denied because of the “prescriptive laws,” meaning provisions of the law regarding lapse of time, in either the Requesting or Requested States. The U.S. and Belizean delegations agreed that a claim that the statute of limitations has expired is best resolved by the courts of the Requesting State after the fugitive has been extradited.<sup>14</sup> The

<sup>12</sup>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).

<sup>13</sup>Title 18, United States Code, Section 3190.

<sup>14</sup>This is consistent with settled law in the United States, which holds that lapse of time is not a defense to extradition 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).

Belizean delegation also stated that, under the laws of Belize, the prosecution of felonies is never barred by a statute of limitations, except with regard to certain customs and income tax offenses, which are controlled by a six-year limitations period.

#### ARTICLE 9—PROVISIONAL ARREST

This article describes the process by which a person in one country may be arrested and detained while formal extradition papers are being prepared. Similar provisions appear in all recent U.S. extradition treaties.

Paragraph 1 expressly provides that a request for provisional arrest may be made through the diplomatic channel or directly between the United States Department of Justice and the Attorney General in Belize. The provision also indicates that INTERPOL may be used to transmit such a request. Experience has shown that the ability to use such direct channels in emergency situations can be crucial when a fugitive is poised to flee. Where a request is not made through diplomatic channels, the Department of Justice expects that confirmation will be made through diplomatic channels.

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

Paragraph 3 states that the Requesting State must be advised promptly of the outcome of its application and the reason for any denial.

Paragraph 4 provides that the fugitive may be released from detention if the Requesting State does not file a fully documented request for extradition with the executive authority of the Requested State within sixty days of the date on which the person was arrested pursuant to the Treaty. This paragraph further explicitly insures that arrested persons have a right of access to the courts; therefore, they can apply for, but not necessarily be granted, bail. When the United States is the Requested State, the term “executive authority” includes the Secretary of State or the U.S. Embassy in Belize City, Belize.

Although the person sought may be released from custody if the documents are not received within the sixty-day period or any extension thereof, the extradition proceedings against the fugitive need not be dismissed. Article 9(5) makes it clear that the person may be taken into custody again and the extradition proceedings may commence when the formal request is presented.

#### ARTICLE 10—DECISION AND SURRENDER

This article restates the legal standard in article 6 which must be met before extradition shall be granted: Extradition shall be granted only if, under the law of the Requested State, the evidence presented is found sufficient either to justify the committal for trial of the person sought for prosecution or to prove that the person is the identical person convicted in the courts of the Requesting State.

This article also 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,<sup>15</sup> or following the conclusion of any litigation challenging that finding,<sup>16</sup> whichever is later. The law in Belize permits the person to apply to a judge for release if he has not been surrendered within two months of the first day on which he could have been extradited.<sup>17</sup>

#### ARTICLE 11—TEMPORARY AND DEFERRED SURRENDER

Occasionally, a person sought for extradition already may be facing prosecution or serving a sentence in the Requested State. Article 11 provides a means for the Requested State to surrender temporarily or defer extradition in such circumstances until the conclusion of the proceedings against the person sought and the serving of any punishment that may have been imposed. Similar provisions appear in our recent extradition treaties with countries such as Austria, Barbados and India.

Article 11(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 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.

Article 11(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.<sup>18</sup> 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.

<sup>15</sup>Title 18, United States Code, Section 3188.

<sup>16</sup>*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).

<sup>17</sup>Extradition Act of 1870, Section 12.

<sup>18</sup>Under U.S. 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).

ARTICLE 12—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.<sup>19</sup> The Belizean delegation stated that it would name the Ministry of Foreign Affairs as its “executive authority” under the Treaty.

ARTICLE 13—SEIZURE AND SURRENDER OF PROPERTY

This article provides that, to the extent permitted by its laws, the Requested State may seize and surrender all property—articles, instruments, objects of value, documents, or other evidence—relating to the offense for which extradition is requested. Similar provisions are found in all recent U.S. extradition treaties. The article also provides that seized objects may be surrendered to the Requesting State upon the granting of the extradition or even if extradition cannot be effected due to the death, disappearance, or escape of the fugitive.

The second paragraph states that the Requested State may condition its surrender of property upon satisfactory assurances that the property will be returned as soon as practicable, or defer surrender altogether if the property is needed as evidence in the Requested State. The rights of third parties to such property must be duly respected.

ARTICLE 14—RULE OF SPECIALITY

This article covers the principle known as the “rule of speciality” (or “specialty”), which is a standard aspect of United States and international extradition practice. Designed to insure that a fugitive surrendered for one offense is not tried for other crimes, the rule of specialty prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of 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 of specialty have developed over the years, this article codifies the current formulation of the rule by providing that a person extradited under the Treaty may only be detained, tried, or punished in the Requesting State: (1) for the offense for which extradition was granted, or a differently denominated offense based on the same facts, provided the offense is extraditable or is a lesser included offense; (2) for offenses committed after the extradition; and (3) for other offenses for which the executive authority of the Requested State consents.<sup>20</sup> Article 14(1)(c)(ii) permits the State which is seeking con-

<sup>19</sup>*Cheng Na-Yuet v. Hueston*, 734 F.Supp. 988 (S.D. Fla. 1990), *aff'd*, 932 F.2d 977 (11th Cir. 1991).

<sup>20</sup>In the United States, the Secretary of State has the authority to grant such consent. See *Berenguer V. Vance*, 473 F. Supp. 1195 (D.C.D.C. 1979).

sent to pursue additional charges to detain the defendant for 90 days while the Requested State makes its determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person to a third state without the consent of the State from which extradition was first obtained.<sup>21</sup> Consistent with the rule of specialty under international law, the prior consent of the United States would be required if Belize were to seek to extradite to an international tribunal, including the International Criminal Court agreed to in Rome on July 17, 1998, a fugitive who had been previously extradited from the United States to Belize.

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

#### ARTICLE 15—WAIVER OF 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 after being advised by a competent judicial authority of the effect of such consent under the law of the Requested State, the person may be returned to the Requesting State without further proceedings. The Parties anticipate that in such cases there would be no need for the formal documents described in Article 6 or further judicial proceedings of any kind.

If the person sought returns to the Requesting State before the Secretary of State signs a surrender warrant, the United States would not view the waiver of proceedings under this article as an “extradition,” and United States practice has long been that the rule of specialty does not apply when a fugitive waives extradition and voluntarily returns to the Requested State.

#### ARTICLE 16—TRANSIT

Article 16(1) gives each State the power to authorize transit through its territory of persons being surrendered to the other country by third countries.<sup>22</sup> Requests for transit are to contain a description of the person whose transit is proposed and a brief statement of the facts of the case with respect to which he is being surrendered to the Requesting State. The paragraph permits the request to be transmitted either through the diplomatic channel, or directly between the United States Department of Justice and the Attorney General in Belize, or via INTERPOL channels.

Under paragraph 2, no advance authorization is needed 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 Requested State is authorized to keep the person in custody

<sup>21</sup> Thus, the provision is consistent with the provisions of all recent U.S. extradition treaties.

<sup>22</sup> A similar provision is in all recent U.S. extradition treaties.

for up to 96 hours until a request for transit is received, and thereafter until transit is effected.

#### ARTICLE 17—REPRESENTATION AND EXPENSES

The first paragraph of this article provides that the United States will represent Belize in connection with requests from Belize for extradition before the courts in this country, and Belize's Attorney General will arrange for the representation of the United States in connection with United States extradition requests to Belize.

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

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

#### ARTICLE 18—CONSULTATION

Article 18 of the Treaty provides that the United States Department of Justice and the Attorney General's Chambers in Belize may consult with each other directly 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 19—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 the Treaty entered into force. It makes clear, however, that the offense must have been an offense under the laws of both Contracting States at the time of its commission and that nothing in the Treaty is to be construed to criminalize any conduct that was not subject to criminal sanctions at the time the offense was committed.

#### ARTICLE 20—RATIFICATION AND ENTRY INTO FORCE

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

In Belize, treaties are executive decisions, and need not be approved by the legislature; however, because the Treaty affects private rights, it must be given effect by the legislature via implementing legislation.

Upon entry into force of this Treaty, paragraph 3 provides that the U.S.-U.K. Extradition Treaty shall cease to have any effect between the U.S. and Belize although it will remain applicable to extradition proceedings in which the extradition documents have already been submitted to the courts in the Requested State. Articles 14 and 15 of this Treaty shall, however, apply.

#### ARTICLE 21—TERMINATION

This Article contains the standard treaty language describing the procedure for termination of the Treaty by either State. Termination shall become effective six months after written notice is received.

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### **Technical Analysis of the Extradition Treaty Between The Government of the United States of America and The Government of the Republic of Paraguay**

On November 9, 1998, the United States signed a new Extradition Treaty Between the Government of the United States of America and The Government of the Republic of Paraguay (hereinafter “the new Treaty” or “the Treaty”). The new Treaty, which will replace the treaty currently in force between the United States and Paraguay<sup>1</sup> (hereinafter “the 1973 treaty”), is part of an ongoing and successful effort to negotiate with Latin American countries modern agreements to facilitate the extradition of serious offenders, including narcotics traffickers, regardless of their nationality.

It is anticipated that the new 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. Likewise, the Treaty will be implemented in Paraguay in accordance with existing Paraguayan extradition law,<sup>2</sup> and no additional implementing legislation will be required.

The following technical analysis of the new Treaty was prepared by members of the United States’ negotiating delegation from the Office of International Affairs, Criminal Division, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based on the negotiating history. 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. The discussion of foreign law reflects the current state of that law to the best of the drafters’ knowledge.

#### ARTICLE I—AGREEMENT TO EXTRADITE

Article 1 of the Treaty, like the first article in every recent United States extradition treaty, formally obligates each Party to extradite to the other, pursuant to the provisions of the Treaty,

<sup>1</sup>Signed at Asuncion on May 24, 1973, and entered into force on May 7, 1974; 25 UST 967; TIAS 7838.

<sup>2</sup>Title XXXIV, Paraguayan Criminal Procedure Code (Codigo de Procedimientos Penales), Article 590 *et seq.* The Paraguayan extradition law is essentially procedural in nature. Relevant provisions of Paraguayan law are discussed in more detail in this Technical Analysis.

persons sought by authorities in the Requesting State for trial or punishment for an extraditable offense.

The negotiating delegations intended that the terms of this article be interpreted broadly. For example, persons sought “for trial” in the United States should include any person sought for prosecution who is the subject of an outstanding warrant of arrest for an extraditable offense, regardless of whether the warrant was issued pursuant to an indictment, complaint, information, or other lawful means.<sup>3</sup> The negotiating delegations also recognized that a large number of cases involving persons extradited to the United States “for trial” may, in fact, never actually go to trial if the charges for which extradition is granted are resolved by guilty plea or other means.

With respect to fugitives from Paraguayan justice, such persons may not be formally indicted under Paraguayan criminal procedure until the latter stages of the criminal process (*i.e.*, at the conclusion of the “plenario”). Therefore, this provision is intended to apply to those fugitives from Paraguay who are “in process”, *i.e.*, those fugitives whose cases may not yet have reached the indictment stage, but for whom there are pending criminal proceedings and outstanding warrants of arrest.<sup>4</sup>

The negotiating delegations also agreed that the term “punishment” in this Article includes not only instances in which the person sought has been sentenced, but also those situations in which such person has been adjudged guilty, either by trial or plea, but a sentence has not yet been imposed.<sup>5</sup>

This Article also refers to persons sought by authorities “in” the Requesting State rather than “of” the Requesting State, since the obligation to extradite, in cases arising from the United States, would apply to fugitives from state and local justice, as well as those wanted by federal authorities.

## ARTICLE II—EXTRADITABLE OFFENSES

This Article contains the basic guidelines for determining what offenses are extraditable. Like such articles in other recent United States extradition treaties, it does not list the offenses for which extradition may be granted. Instead, paragraph 1 of this Article permits extradition for any offense punishable under the laws in both countries by deprivation of liberty (*i.e.*, imprisonment or other form of detention) for a maximum period of more than one year, or by a more severe penalty such as capital punishment).<sup>6</sup> The

<sup>3</sup>*E.g.*, a bench warrant issued *sua sponte* by the court for failure to appear for trial for an extraditable offense.

<sup>4</sup>Although this provision is intended to enable extradition from the United States to Paraguay of a person who is the subject of a Paraguayan warrant of arrest (*orden de prision*) and whose appearance in Paraguay is sought as a necessary step for subjecting such person to criminal prosecution, it is not intended to enable extradition of a person whose appearance has been ordered for the *sole* purpose of giving testimony.

<sup>5</sup>*See*, Stanbrook and Stanbrook, *Extradition: The Law and Practice*, 25–26 (1979). This situation arises most often when a person pleads guilty to an offense in the United States and is allowed to remain free on bond pending sentencing, but flees prior to, and fails to appear as ordered for, his or her sentencing.

<sup>6</sup>During the negotiations, the Paraguayan delegation indicated that, under Paraguayan law, key offenses such as drug trafficking (including continuing criminal enterprises), drug and non-drug related money laundering, terrorism, and organized criminal activity (RICO), as well as certain tax, export, and environmental crimes, would meet the requirements of Article 2(1) and thus be extraditable offenses. Escape also would be an extraditable offense, provided that it involves more than one person and the use of force.

term “maximum period” was included to ensure that, in regard to offenses whose potential penalties are described in terms of a range (e.g., 6 months to 3 years of imprisonment), the Requested State would look only to the maximum potential penalty in determining whether the offense meets the requirement of being punishable by more than one year imprisonment.

Defining extraditable offenses in terms of “dual criminality” rather than attempting to list in the Treaty each extraditable crime obviates the need to renegotiate, amend, or supplement the Treaty if the countries later enact laws dealing with new types of criminal activity, or if the list inadvertently fails to cover important types of criminal activity already punishable in both countries. Under the dual criminality approach, once criminal laws are enacted in both countries to punish a certain type of activity by more than one year of imprisonment, then that criminal activity automatically is included as an extraditable offense.

In regard to a request for a person who has already been sentenced in the Requesting State, paragraph 2 of this Article contains an additional requirement that such person must have more than six months of his or her sentence still to serve.<sup>7</sup> Provisions of this kind are not preferred by U.S. negotiating teams, but they do appear in some U.S. extradition treaties.<sup>8</sup> In this Treaty, the Paraguayan delegation insisted on its inclusion.<sup>9</sup>

Paragraph 3 follows the practice of recent extradition treaties in expressly providing that extradition also shall be granted for conspiring or attempting to commit, or otherwise participating in,<sup>10</sup> the commission of an extraditable offense. Foreign laws often do not define conspiracy or participation in an offense in the same way as U.S. law.<sup>11</sup> Moreover, foreign laws may provide much less severe penalties for an attempt or conspiracy than they do for the offense that is the object of such attempt or conspiracy.<sup>12</sup> Accordingly, it is important that the Treaty be clear that these inchoate offenses are extraditable, especially since they are frequently a part

<sup>7</sup>It was the understanding of the negotiating delegations that the six month period referred in this provision relates to the incarceration portion of the sentence, and not to any post-confinement supervised release period. Accordingly, the person sought must have at least six months left to serve *in custody*, regardless of whether a combination of the incarceration and supervised release periods of the sentence would amount to more than six months.

<sup>8</sup>See, e.g., U.S.-Argentina Extradition Treaty, signed at Buenos Aires June 10, 1997, entered into force June 15, 2000, art. 2(1).

<sup>9</sup>Foreign delegations, particularly those from civil law countries such as Paraguay, sometimes insist on provisions of this kind, in part because such language is included in the U.N. model treaty. In addition, it is not uncommon for persons to spend several months in custody pending extradition, and, subject to the laws of the Requesting State, they may receive, upon their surrender, credit toward the completion of their sentence for the time spent in foreign custody. The Paraguayan delegation insisted on a provision of this kind also in part because, in their view, it is difficult to justify the expense of pursuing the extradition of a person who will likely be released immediately upon or soon after his or her surrender to the Requesting State.

<sup>10</sup>The negotiating delegations intended that “participation in” an offense includes, at a minimum, being an accessory before or after the fact, or aiding, abetting, counseling, commanding, inducing, or procuring the commission of an offense. See, Title 18, United States Code, Sections 2 and 3.

<sup>11</sup>In fact, Paraguayan law does not penalize the offense of “conspiracy,” *per se*. Accordingly, the term “conspiracy” is translated in the Spanish text of the Treaty as “association to commit an offense,” which is the closest analogue to conspiracy under Paraguayan law. The Paraguayan delegation assured the U.S. delegation that the U.S. offense of “conspiracy” would be extraditable under this definition.

<sup>12</sup>Note that the language of paragraph 3 does not require that the conspiracy, attempt, or participation, in itself, satisfy the dual criminality or penalty requirements of paragraph 1 so long as the offense that was the object of such attempt, conspiracy, etc., does so.

of United States criminal cases, including those involving complex transnational criminal activity.

Paragraph 4 further reflects the intention of both countries to interpret the principles of this Article broadly. Paragraph 4(a) requires the 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 in each country. Provisions similar to paragraph 4(a) are contained in all recent United States extradition treaties.

Paragraph 4(b) is also included to further prevent technical differences in Paraguayan and United States law from creating obstacles to extradition. 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 there is no similar requirement in their own country's criminal law, foreign judges occasionally have denied, for a perceived lack of dual criminality, U.S. requests for the extradition of fugitives charged under these federal statutes. Therefore, paragraph 4(b) requires that such elements be disregarded in applying the dual criminality principle. For example, Paraguayan 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.

By providing that extradition shall be granted for offenses even when the illegal acts constituting the offense are committed outside the territory of the Requesting State, Paragraph 5 of this Article is particularly important in ensuring that the Treaty makes extraditable many significant types of modern transnational criminal activity. United States jurisprudence recognizes jurisdiction in U.S. courts to prosecute an offense committed outside the United States if the crime was intended to, or did, have effects in this country, or if the legislative history of the statute shows clear Congressional intent to assert extraterritorial jurisdiction.<sup>13</sup> As a result, many federal statutes (including drug laws) criminalize acts committed wholly outside United States territory. To encompass these crimes, the United States initially proposed language for the Treaty stating that extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed. The Paraguayan delegation rejected the initial proposal but was persuaded to accept an alternative formulation. This alternative formulation, set forth in paragraph 5, not only provides for extradition for offenses committed in whole or in part in the territory of the Requesting State, but also for offenses committed outside the territory of the Requesting State if the offenses have ef-

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<sup>13</sup>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).



fects in the territory of the Requesting State.<sup>14</sup> In addition, paragraph 5 provides for the extraditability of extraterritorial offenses based on other theories of jurisdiction, provided that the laws of the Requested State would recognize jurisdiction over such an offense under similar circumstances.<sup>15</sup> Accordingly, paragraph 5 will enable the United States to obtain extradition for a broad range of criminal activity, including narcotics trafficking and terrorism, which frequently is initiated or orchestrated from abroad.

Paragraph 6 of this Article establishes that when extradition has been granted for an extraditable offense, it shall also be granted for other less serious offenses in the request with which the person is charged, but which, standing alone, would not be extraditable for the sole reason that they are not punishable by more than one year of imprisonment. Thus, if Paraguay 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 offense charged and specified in the request, so long as the misdemeanor would also be recognized as a criminal offense in Paraguay, and all other requirements of the Treaty (except the penalty requirement of Article 2(1)) are met. This provision, which is consistent with recent United States extradition practice, is generally desirable from the standpoint of both the fugitive and the prosecuting country. It permits all charges against the fugitive to be disposed of more quickly and efficiently, by facilitating either plea agreements, when appropriate, or trials while evidence is still fresh, and by permitting the possibility of concurrent sentences. Similar provisions are found in many recent United States extradition treaties.<sup>16</sup>

### ARTICLE III—EXTRADITION OF NATIONALS

Article 3 provides that extradition shall not be refused on the ground that the person sought is a national of the Requested State.

Some countries refuse to extradite their own nationals to other countries for trial or punishment, or are prohibited from doing so by their statutes or constitutions. The United States does not deny extradition on the basis of the offender's citizenship,<sup>17</sup> and Paraguay's extradition law and its Constitution contain no exception for Paraguayan nationals. Therefore, in Article 3 of the Treaty, each State promises not to refuse extradition on the ground that the person sought is a national of the Requested State.

<sup>14</sup>The formulation contained in this Treaty is almost identical to that contained in Article 2 of the 1997 U.S.-Argentina extradition treaty.

<sup>15</sup>Paraguayan law recognizes extraterritorial jurisdiction for certain crimes against the interests or integrity of the State or committed by Paraguayan nationals abroad. Paraguayan law also expressly recognizes jurisdiction over certain international crimes committed abroad, including terrorism and drug trafficking. *See*, Paraguayan Penal Code, Articles 7-9.

<sup>16</sup>*See, e.g.*, U.S.-Barbados Extradition Treaty, signed at Bridgetown February 28, 1996, entered into force March 3, 2000, art. 2(5).

<sup>17</sup>*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, United State Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens even pursuant to treaties that permit (but do not require) surrender of citizens, if other requirements of the Treaty have been met.

This provision is very similar to the provision contained in the new extradition treaty with Argentina,<sup>18</sup> and in other modern U.S. extradition treaties.

Although Paraguay has no constitutional provision or statute that expressly prohibits the extradition of Paraguayan nationals, the 1973 Treaty does not affirmatively obligate either party to extradite its nationals to the other, and Paraguay has never extradited one of its nationals to the United States. Accordingly, the U.S. delegation made it clear from the outset of these negotiations that a provision requiring the extradition of nationals was an indispensable part of a modern extradition relationship. The Paraguay delegation agreed, and it is anticipated that this Article will greatly improve the ability of the United States to secure the extradition of Paraguayan nationals.

#### ARTICLE IV—BASES FOR DENIAL OF EXTRADITION

Paragraph 1 of this Article begins with a general rule that prohibits extradition for political offenses. This principle is commonly known as the “political offense exception” to extradition.<sup>19</sup>

Notwithstanding this general rule, paragraph 1 continues with a description of several categories of offenses that are not to be considered political offenses. The provisions included in paragraph 1 of this Article are common in United States extradition treaties.

First, paragraph 1(a) provides that the political offense exception shall not apply to an attack or other willful crime against the physical integrity of a Head of State of the United States or Paraguay or members of their families. This is the so-called “attentat clause,” which first began appearing in extradition treaties in the early 1900s in order to preclude lenient treatment of anarchists and assassins of Heads of State.

Second, paragraph 1(b) states that the political offense exception shall not apply to offenses for which both Parties have the obligation to extradite or submit the case for decision as to prosecution pursuant to a multilateral treaty such as the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking).<sup>20</sup>

Finally, paragraph 1(c) states that the political offense exception shall not apply to an attempt to commit, a conspiracy or illicit association to commit, or participation in the commission of, the offenses in subparagraphs (a) and (b).

Paragraph 2 states that extradition shall not be granted if the competent authority of the Requested State determines that the extradition request was politically motivated. Under U.S. law and practice, a claim that the extradition request was politically motivated, unlike a claim involving the political offense exception, falls

<sup>18</sup>U.S.-Argentina Extradition Treaty, signed at Buenos Aires June 10, 1997, entered into force June 15, 2000, art. 3. Compare, U.S.-Bolivia Extradition Treaty, signed at La Paz June 27, 1995, entered into force November 21, 1996, art. III, which mandates the extradition of nationals in connection with specified offenses.

<sup>19</sup>The provision in this article is typical in that it does not attempt to define what constitutes a political offense (although it does set forth certain offenses that are *not* political offenses). As a result, the requested country must determine, based solely on its domestic law, whether a particular extradition request should be denied on this basis. Because the Treaty does not provide otherwise, the judiciary decides whether the political offense exception will bar extradition in a particular case. *Eain v. Wilkes*, 641 F.2d 504, 513 (7th Cir. 1981).

<sup>20</sup>Done at the Hague December 16, 1970; entered into force October 14, 1971 (22 UST 1641; TIAS 7192).

outside the scope of judicial review and is exclusively for the executive branch (*i.e.*, the Secretary of State) to consider and decide, as reflected in Article XIX.<sup>21</sup>

Paragraph 4 of this Article states that the Requested State may refuse extradition if the request relates to an offense under military law which would not be an offense under ordinary criminal law.<sup>22</sup> This also is a common provision in United States extradition treaties.

Most recent U.S. extradition treaties contain a provision addressing the relevance of a statute of limitations. Ideally, in the interest of limiting technical bases for the denial of extradition, the Treaty would expressly state that the decision whether to extradite shall be made without regard to the statute of limitations of either the Requesting or Requested States, leaving the interpretation of the Requesting State's laws involving such procedural obstacles to prosecution to the appropriate authorities of the Requesting State. The Paraguay delegation would not agree, however, to a provision that did not prohibit extradition on the basis of the expiration of the Requested State's statute of limitations.<sup>23</sup> Accordingly, the U.S. delegation determined, and the Paraguayan delegation agreed, that the best solution under those circumstances would be for the Treaty to remain silent on the issue. By omitting any reference to lapse of time, the U.S. delegation intended that, at least in the context of extradition proceedings in the United States, the decision whether to extradite would be made without regard to the statute of limitations of either the Requesting or Requested State. While current extradition practice in Paraguay is to deny extradition in cases where Paraguay's statute of limitations would have expired if the crime had been committed there, the Paraguayan delegation confirmed that absence of language to this effect in the Treaty leaves open the possibility of greater flexibility on a case-by-case basis. In any event, the omission is an improvement over the 1973 Treaty, which expressly provides that extradition shall be refused if the statute of limitations of either the Requesting or Requested State has expired.

#### ARTICLE V—PRIOR PROSECUTION

Paragraph 1 of this Article prohibits extradition if the person sought has been convicted or acquitted in the Requested State for

<sup>21</sup> Article XIX also records Paraguayan practice, under which political motivation is determined by the judiciary.

<sup>22</sup> Examples of such offenses are desertion and disobedience of orders. *See, Matter of Suarez-Mason*, 694 F.Supp. 676, 703 (N.D.Cal. 1988).

<sup>23</sup> Consideration of the Paraguayan statute of limitations in the decision whether to grant a U.S. request for extradition could hinder the United States' ability to secure the return of fugitives in some cases. Like many countries throughout the world, Paraguayan lapse of time provisions are tied to the maximum applicable penalty for the offense, and although Paraguayan law enumerates certain circumstances under which the running of the prescription period is interrupted, it does not, as in U.S. law, toll the statute permanently upon the filing of an indictment or for as long as the defendant remains a fugitive. Moreover, unlike the United States, all offenses, even murder, are subject to a prescriptive period. Subject to various interruptions and depending upon the offense, Paraguayan law requires that a person be prosecuted and punished within 3 to 15 years of the date of the criminal conduct. Even if interrupted, however, in no event may a person be prosecuted or punished after the time equal to double the prescription period for the offense has passed. For example, under Paraguayan law, a person wanted for first degree murder must, in any event, be prosecuted and have served his or her sentence within 30 years of the date of the offense.

the offense for which extradition is requested,<sup>24</sup> and its language is similar to that contained in many U.S. extradition treaties.<sup>25</sup> This paragraph will permit extradition in situations in which the fugitive is charged with different offenses in both countries arising out of the same basic illegal transaction.<sup>26</sup>

Paragraph 2 of this Article makes clear that extradition shall not be precluded by the fact that the Requested State's authorities have not instituted criminal proceedings against the person sought for the same offense for which extradition is requested. Moreover, paragraph 2 would permit extradition in situations in which the Requested State instituted such criminal proceedings, but thereafter elected to discontinue the proceedings, provided that the laws of the Requested State regarding double jeopardy would permit their future re-institution.<sup>27</sup> This provision should enhance the ability to extradite criminals to the jurisdiction which has the better chance of a successful prosecution.

#### ARTICLE VI—DEATH PENALTY

Paragraph 1 of this Article 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, unless the Requesting State provides assurances that the death penalty, if imposed, will not be carried out. Similar provisions are found in many recent United States extradition treaties.<sup>28</sup>

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.

The Paraguayan delegation insisted on the inclusion of this Article in the Treaty because Paraguay has abolished the death penalty. However, if Paraguay ever reestablishes the death penalty, this Article will not prevent the United States from securing extra-

<sup>24</sup>The express use of the phrase "convicted or acquitted" in this paragraph prevents the Requested State from refusing extradition on the basis that it has unilaterally immunized the fugitive from prosecution by pardon or granting of clemency. Moreover, nothing in this provision enables the Requested State to bar extradition on the grounds that the person sought has been convicted or acquitted in a third State.

<sup>25</sup>See, e.g., U.S.-India Extradition Treaty, signed at Washington June 25, 1997, entered into force July 21, 1999, article 5(2).

<sup>26</sup>The term "offense" in this provision means the crime, not "the act" for which extradition is requested. A single set of facts may result in several different offenses being charged in different jurisdictions, and prosecution for one such offense would not bar extradition for another. For example, a narcotics trafficker could be charged in Country A with *exporting* drugs and in Country B with *importing* drugs based on one illegal shipment from Country A to Country B. This interpretation is consistent with the overarching goal of the Treaty to expand, rather than limit, the scope of extraditable offenses.

<sup>27</sup>This provision is intended to make clear that extradition shall not be precluded by the mere fact that the fugitive is being proceeded against in the Requested State since the case is not yet resolved. If the Requested State is prosecuting the fugitive for the same offense for which extradition is requested, the Requested State should, pursuant to Article XII of this Treaty, defer extradition until the domestic proceedings are over. Then the Requested State can decide, based on the result of the domestic proceedings, whether to deny the extradition request because of a conviction or acquittal (in accordance with paragraph 1 of this Article), or to grant extradition if the charges were resolved in a manner that does not implicate double jeopardy (such as dismissal without prejudice). Absent these provisions in Articles V and XII, a Requested State could charge a fugitive with the same offense for which his or her extradition is sought, then deny the extradition request due to a pending local prosecution, and finally dismiss its domestic case—allowing the fugitive to escape prosecution altogether.

<sup>28</sup>See, e.g., U.S.-Argentina Extradition Treaty, signed at Buenos Aires June 10, 1997, entered into force June 15, 2000, art.6.

dition for a capital offense provided that the offense is subject to capital punishment in both states.

#### ARTICLE VII—EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

This Article sets forth the appropriate means of transmitting an extradition request and the required documentation and evidence to be submitted in support thereof. It is similar to those in corresponding articles in the United States' most recent extradition treaties.

Paragraph 1 of this Article requires that all requests for extradition be submitted in writing through the diplomatic channel. Paragraph 2 outlines the information that must accompany every request for extradition under the Treaty. Paragraph 3 describes the information needed, in addition to the requirements of paragraph 2, when the person is sought for prosecution 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 convicted in the Requesting State.

Most of the items listed in paragraph 2 enable the authorities of the Requested State to determine quickly whether extradition is appropriate under the Treaty. For example, the "information describing the facts of the offense" and "the text of the law describing the elements of, and applicable penalty for, the offense for which extradition is requested" enable the Requested State to make a preliminary determination whether the dual criminality provision of Article 2 of the Treaty appear to be met. Other items, such as the physical description, identity information, and probable location of the fugitive, assist the Requested State in locating and apprehending the fugitive, and in proving his or her identity at the extradition hearing.

Paragraph 3 requires that if the fugitive is a person sought for prosecution the Requesting State must provide: (a) a copy of the warrant or order of arrest; (b) a copy of the charging document, if any;<sup>29</sup> and (c) "information or evidence that provides a reasonable basis to believe that the person sought committed the offense for which extradition is requested." The language in paragraph 3(c) is consistent with fundamental extradition jurisprudence in the United States, in that it will be interpreted to require that Paraguay provide such information as is necessary to establish "probable cause."<sup>30</sup> The Paraguayan delegation explained that this provision would comport with Paraguay's minimum standard of proof required for pretrial detention, which, similar to the U.S. probable cause standard, is a reasonableness test that requires a judge to

<sup>29</sup> As noted in the analysis of Article 1 above, under Paraguayan criminal procedure, a formal indictment is not normally filed until the latter stages of the prosecution after the accused is brought before a Paraguayan court. In recognition of those instances in which Paraguay might seek the extradition of a person for whom an indictment has not yet been filed, the negotiating delegations agreed to include the phrase, "if any."

<sup>30</sup> United States Courts considering foreign extradition requests in accordance with Title 18, United States Code, Section 3184, have long required probable cause for international extradition. *Ex Parte Bryant*, 167 U.S. 104, 105 (1897); *Restatement (Third) of the Foreign Relations Law of the United States* § 476, comment b (1987).

find sufficient indications or “indicios suficientes” to believe that a person is responsible for an offense.<sup>31</sup>

Paragraph 4 describes the information needed, in addition to that required by paragraph 2, when the person sought has already been convicted in the Requesting State. Paragraph 4(a) applies if Paraguay is the Requesting State, and paragraph 4(b) applies if the United States is the Requesting State. The two subparagraphs contain essentially the same requirements, but were separated at the request of the Paraguayan delegation to avoid any confusion due to differences in Paraguayan and U.S. criminal procedure. For example, the difference in wording between 4(a)(i) and 4(b)(i) reflects the fact that in Paraguay a person is found guilty and sentenced at the same proceeding, from which such documentation always issues. In the United States, on the other hand, a person may be found guilty without having yet been sentenced.

Both subparagraphs (a) and (b) make clear that once a conviction has been obtained, no showing of probable cause is required. In essence, the fact of conviction speaks for itself, a position taken in United States court decisions, even without a specific treaty provision.<sup>32</sup>

Finally, both subparagraphs (a) and (b) require that the Requesting State provide information regarding the extent to which the sentence, if imposed, has been carried out. This information is relevant to the requirement in Article II(2) that the person sought have more than six months sentence left to be served.

#### ARTICLE VIII—TRANSLATION

This Article is a standard treaty provision which requires that all documents submitted in support of an extradition request must be translated into the language of the Requested State. Thus, requests by Paraguay to the United States will be translated into English and requests by the United States to Paraguay will be translated into Spanish.

#### ARTICLE IX—ADMISSIBILITY OF DOCUMENTS

This Article governs the certification and authentication procedures for documents accompanying an extradition request. It states that the documents shall be received and admitted as evidence in extradition proceedings if certified or authenticated by the appropriate accredited diplomatic or consular officer of the Requested State resident in the Requesting State.<sup>33</sup> They are also to be admit-

<sup>31</sup>See, Article 337, Paraguayan Criminal Procedure Code (1997). The Paraguayan delegation advised that their courts could interpret the term “committal for trial,” sometimes used in U.S. extradition treaties, to require a much higher standard of proof, akin to a *prima facie* showing of guilt, that is required for a formal indictment at the latter stages of the Paraguayan criminal process. Accordingly, the delegations agreed to include the reasonable basis language to ensure that the courts of both the United States and Paraguay would apply a similar standard of proof in extradition cases.

<sup>32</sup>See, e.g., *Spatola v. United States*, 741 F.Supp. 362, 374 (E.D.N.Y. 1990), *aff’d*, 925 F.2d 615 (2d Cir. 1991); *United States v. Clark*, 470 F.Supp. 976 (D.Vt. 1979).

<sup>33</sup>This provision is consistent with requirements imposed by United States law. For the United States the “appropriate diplomatic or consular officer would be the “principal” diplomatic or consular officer of the U.S. Embassy in Asunción, Paraguay. See, Title 18, United States Code, Section 3190. Since Paraguayan law does not, however, require that the diplomatic or consular officer be the “principal” one, the term “appropriate” was included. This will render less onerous for U.S. officials the task of obtaining authentication or certification of extradition requests to Paraguay.

ted if certified or authenticated in any other manner accepted by the laws in the Requested State. For example, there may be information in the Requested State itself that is relevant and probative to extradition, and the Requested State is free under subsection (c) to utilize that information if the information satisfies the ordinary rules of evidence in that state. This insures that evidence that is acceptable under the evidentiary rules of the Requested State may be used in extradition proceedings even if it is not authenticated pursuant to other provisions of the treaty. This provision should also insure that relevant evidence, which would normally satisfy the evidentiary rules of the requested country, is not excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

#### ARTICLE X—PROVISIONAL ARREST

This Article describes the process by which a person may be arrested and detained in the Requested State while the extradition documents required by Article VII are being prepared and translated in the Requesting State, a process which normally may take a number of weeks. Provisional arrest serves the interests of justice by allowing for the apprehension of fugitives who pose a risk of flight or danger to the community. Similar articles are included in all modern U.S. extradition treaties.

Paragraph 1 provides that provisional arrest is reserved for cases of urgency pending presentation of the extradition request and that a provisional arrest request shall be transmitted by any written means either through the diplomatic channel or directly between the United States Department of Justice and the Paraguayan Ministry of Foreign Relations.

Paragraph 2 sets forth the information that the Requesting State must provide in support of a provisional arrest request. This paragraph makes it clear that the State requesting provisional arrest need not submit copies of the arrest warrant, judgment of conviction, or other documentary evidence which would be necessary in the full extradition request.

Paragraph 3 requires that the Requesting State must be promptly notified of the disposition of the provisional arrest request.

Paragraph 4 provides that a fugitive who has been provisionally arrested may be released from custody if the Requested State does not receive the fully documented request for extradition within sixty (60) days from the date of the fugitive's provisional arrest.

Finally, paragraph 5 makes clear that a person released under paragraph 4 may be taken into custody again and the extradition proceedings recommenced if the formal request is received at a later date.

#### ARTICLE XI—DECISION AND SURRENDER

Paragraph 1 of this Article requires that the Requested State promptly notify the Requesting State of its decision on the extradition request.

Paragraph 2 requires that, if extradition is denied in whole or in part, the Requested State must provide a reasoned explanation for

the denial and, upon request, copies of the pertinent judicial decisions in the case.

Paragraph 3 provides that if extradition is granted, the Parties shall agree on the date and place of the extraditee's surrender. Paragraph 4, states, however, that if the extraditee is not removed from the territory of the Requested State within two months from the date of the judicial decision of extraditability (or, in the event that the extraditee initiates a legal challenge to such decision, two months from the date of the conclusion of the legal challenge) then the Requesting State risks the release of the extraditee from custody and subsequent refusal of extradition for the same offense.<sup>34</sup>

#### ARTICLE XII—TEMPORARY AND DEFERRED SURRENDERS

Occasionally, a person who is the subject of a foreign extradition request may, at the same time, be facing prosecution on domestic charges or serving a sentence in the Requested State. Article XII provides a means for the Requested State to temporarily surrender the person sought to the Requesting State for the purpose of prosecution or, in the alternative, to defer extradition in such cases until the conclusion of the Requested State's proceedings against the person sought and the service of any sentence that may be imposed in connection therewith. Similar provisions appear in recent United States extradition treaties.

Paragraph 1 of Article XII 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 kept in custody while in the Requesting State, and will be returned to the Requested State at the conclusion of the proceedings in the Requesting State. Such temporary surrender furthers the interests of justice in that it permits the Requesting State to try 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) he or she might resolve all outstanding charges sooner; (2) subject to the laws of each State, he or she may be able to serve concurrently the sentences imposed by the Requesting and Requested States; and (3) he or she can defend against the charges while favorable evidence is fresh and more likely to be available to the defense.

Notwithstanding the above, temporary surrender may not always be feasible, especially if it would significantly interfere with or impede the ongoing criminal proceedings in the Requested State. Accordingly, paragraph 2 of this Article provides that the Requested State may opt to postpone the surrender of a person who is being prosecuted or serving a sentence in the Requested State until the conclusion of the prosecution or the completion of the service of any

<sup>34</sup>This provision is intended to comport with U.S. statutory requirements and judicial interpretations thereof. See, Title 18, United States Code, Section 3188. See, also, *Jimenez v. United States District Court*, 84 S.Ct. 14 (1963) (decided by Goldberg, J., in chambers); *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); and *McElvy v. Civiletti*, 523 F.Supp. 42, 47 (S.D.Fla. 1981). Paraguayan law is silent on the time before which an extraditee must be removed from Paraguayan territory.



sentence imposed.<sup>35</sup> Paragraph 3 provides that, if surrender is postponed, such postponement shall suspend the running of the statute of limitations in the Requesting State for the offenses for which extradition is sought.<sup>36</sup>

#### ARTICLE XIII—MULTIPLE REQUESTS

From time to time, a State will receive concurrent requests from two or more other States for the extradition of the same person, and thus the Requested State must decide to which of the Requesting States to surrender the person. In such situations where one of the Parties to this Treaty, the United States or Paraguay, is the Requested State, and the other Party to this Treaty is one of the Requesting States, Article XIII sets forth some of the factors that the Requested State shall consider in determining to which country the person should be surrendered.

This Article makes clear that the Requested State is not limited to the factors enumerated therein but should consider all relevant factors in weighing its decision to which State to surrender the person sought.

For the United States, the Executive Branch will make the decision to which country the person should be surrendered in accordance with this Article and Article XIX.<sup>37</sup> The Paraguayan delegation advised that, for Paraguay, the competent authority would be the judicial branch.

#### ARTICLE XIV—SEIZURE AND SURRENDER OF PROPERTY

At the time of their arrest in the Requested State for the purpose of extradition, persons are often in possession of property which may represent the proceeds, instrumentalities, or other evidence of the offenses of which they are accused in the Requesting State. The Requesting State has an interest in having this property surrendered with the fugitive upon his extradition, so that the property may be used in the prosecution of the person sought, returned to the victims, or otherwise disposed of appropriately.

Accordingly, paragraph 1 of this Article provides that to the extent permitted by the law in the Requested State, all articles, documents, and evidence connected with the offense for which extradition is granted may be seized and surrendered to the Requesting State. Paragraph 1 further provides that the surrender of such property may occur even if extradition cannot be effected due to the death, disappearance, or escape of the person sought.

Notwithstanding the above, paragraph 2 provides that the Requested State may condition the surrender of the property upon assurances from the Requesting State that the property will be re-

<sup>35</sup> Under U.S. law and practice, the Secretary of State would make the decision to temporarily surrender the fugitive or to defer the surrender. *Koskotas v. Roche*, 740 F.Supp. 904, 920 (D.Mass. 1990), *aff'd*, 931 F.2d 169 (1st Cir. 1991).

<sup>36</sup> This provision was included at the insistence of and for the sole benefit of Paraguay, whose negotiating delegation wished to ensure that the postponement of the surrender of Paraguayan fugitives by the United States would not jeopardize Paraguay's ability to prosecute those fugitives upon their eventual surrender to Paraguay. Under U.S. law, in contrast, the statute of limitations is suspended upon the filing of an indictment or other charging document. *See, e.g.*, Title 18, United States Code, section 3282.

<sup>37</sup> Under U.S. law, the appropriate authority within the executive branch is the Secretary of State. *Cheng Na-Yuet v. Hueston*, 734 F.Supp. 988 (S.D.Fla. 1990), *aff'd*, 932 F.2d 977 (11th Cir. 1991).

turned as soon as practicable and without cost to the Requested State. Alternatively, the Requested State may defer the surrender of the property if it is needed as evidence in that State.

Finally, paragraph 3 provides that the obligation to surrender property under this provision shall be subject to due respect for the rights of third parties in such property.

#### ARTICLE XV—RULE OF SPECIALITY AND EXTRADITION TO THIRD STATES

This Article covers the principle known as the rule of speciality (or “specialty”), which is a standard aspect of U.S. and international extradition practice. Generally, the rule of specialty prohibits the prosecution of an extraditee for offenses other than those for which extradition was granted. By limiting prosecution to those offenses for which extradition was granted, the rule is intended to prevent 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 that may not be extraditable under the Treaty or properly documented at the time that the request is granted. A variety of exceptions to the general rule have developed over the years, and this Article sets forth the current formulation of the rule and its established exceptions.

Paragraph 1 of this Article provides that a person extradited under the Treaty may not be detained, tried, or punished in the Requesting State except for: (1) an offense for which extradition was granted, or a lesser included or differently denominated offense, provided that it is based on the same facts on which extradition was granted;<sup>38</sup> (2) an offense committed after extradition; or (3) any offense for which the competent authority of the Requested State gives consent.<sup>39</sup> Paragraph 1 also provides that, in cases where such consent is sought, the Requested State may require the submission of the supporting documentation called for in Article VII and the State seeking the consent may detain the person for ninety days, or such longer period of time as the Requested State may authorize, while the request for consent is being processed.

Paragraph 2 of this Article prohibits the Requesting State from surrendering the person to a third State for a crime committed prior to extradition under this Treaty without the consent of the State from which extradition was first obtained.<sup>40</sup>

Finally, paragraph 3 permits the detention, trial, or punishment of an extraditee for offenses other than those for which extradition

<sup>38</sup> Allowing the Requesting State to proceed on a “lesser included or differently denominated offense” provides both the prosecution and defense with a measure of post-extradition flexibility to resolve the charges. For example, it allows the defendant to plead to or be convicted at trial of a less serious offense, or it allows the prosecution to supersede the original charges with different charges that, because of a change in circumstances may be more readily provable, so long as they are based on the same facts as the offenses for which extradition was granted.

<sup>39</sup> As provided in Article XIX, in the United States, the Secretary of State has the authority to consent. *See, Berenguer v. Vance*, 473 F.Supp. 1195, 1199 (D.D.C. 1979).

<sup>40</sup> This provision prohibiting re-extradition is intended to prevent the State to which a person is extradited from subsequently extraditing the person to a third State to which the Requested State would not have agreed to extradite. Consistent with the rule of specialty under international law, the prior consent of the United States would also be required if Paraguay were to seek to extradite to an international tribunal, including the International Criminal Court agreed to in Rome on July 17, 1998, a fugitive who had been previously extradited from the United States to Paraguay. This provision thus enables the Requested State to retain a measure of control over the ultimate destination of the person surrendered. A similar provision is contained in all recent U.S. extradition treaties.

was granted, or the extradition of that person to a third State, if: (1) the extraditee leaves the Requesting State and voluntarily returns to it; or (2) the extraditee does not leave the Requesting State within twenty days of being free to do so.<sup>41</sup>

#### ARTICLE XVI—SIMPLIFIED EXTRADITION PROCEDURES

Persons sought for extradition frequently elect to expedite their return to the Requesting State by consenting to their surrender and waiving their right to extradition proceedings in the Requested State.<sup>42</sup> This Article provides that when a fugitive consents to surrender to the Requesting State, the person may be returned to the Requesting State as expeditiously as possible without further proceedings. Such consent must be given before a judicial authority of the Requested State. The Parties anticipate that in such cases there would be no need for the formal documents described in Article VII, or further judicial or administrative proceedings of any kind. Furthermore, in the case where the person sought elects to return voluntarily to the Requesting State under this Article, the process would not be deemed an “extradition,” and therefore the rule of specialty in Article XV would not apply.

#### ARTICLE XVII—TRANSIT

At times, law enforcement authorities escorting a surrendered person to the State where he is wanted for trial or punishment are unable to take such person directly from the surrendering State to the receiving State and must make a stop, scheduled or unscheduled, in another State. This Article governs those situations in which one Party to this Treaty is the receiving State and the other Party is the State through which the surrendered person must transit.<sup>43</sup>

Paragraph 1 of this Article gives each Party the power to authorize transit through its territory of persons being surrendered to the other Party by a third country. Requests for transit under this Article are to be transmitted through the diplomatic channel or directly between the United States Department of Justice and the Paraguayan Ministry of Foreign Relations. Transit requests must contain a description of the person being transported and a brief statement of the facts of the case upon which the extradition is based. Paragraph 1 also provides that the person in transit may be detained in custody during the period of transit.

Paragraph 2 states that no authorization is needed if air transportation is being used and no landing is scheduled in the territory of the other Party. If an unscheduled landing occurs in the terri-

<sup>41</sup>The policy behind paragraph 3 is that an extraditee should not be allowed to benefit from the rule of specialty indefinitely and remain in or return to the Requesting State with impunity. Under this paragraph, if the extraditee chooses to return to or remain in the Requesting State, he or she effectively relinquishes the benefits of the rule. See, e.g., *United States v. Rauscher*, 119 U.S. 407, 430 (1886); 112 ALR Fed. 473, § 28; 6 M. Whiteman, *Digest of International Law*, Ch. XVI, § 46 at 1100, 1105–6; and Restatement (Third) of Foreign Relations Law of the United States, § 477, Comment e.

<sup>42</sup>This “waiver of extradition” benefits fugitives in that it allows them to return forthwith to resolve the charges against them in the Requesting State and to spend as little time as possible in custody in the Requested State. It also saves the judicial and law enforcement authorities of the Requested State the significant expense associated with prolonged extradition proceedings.

<sup>43</sup>A similar provision is in all recent U.S. extradition treaties.

tory of a Party, that Party may require a request as provided in paragraph 1 of this Article. If such request is required, it shall be provided within ninety-six hours of the unscheduled landing, and the person in transit may be detained until the transit is effected.

Paragraph 3 makes clear that a request for transit may be denied if the transit would prejudice the essential interests of the Party that receives such a request. The U.S. negotiating delegation considers this paragraph to be superfluous because the authorization of the transit of an extraditee under this Article already is clearly discretionary, and, accordingly, may be denied by the Party receiving a transit request for any reason such Party deems appropriate. This paragraph was included, however, at the insistence of the Paraguayan delegation.

#### ARTICLE XVIII—REPRESENTATION AND EXPENSES

Paragraph 1 of this Article provides that the Requested State shall advise, assist, and, to the fullest extent permitted by its law, represent the Requesting State in extradition proceedings in the Requested State. In accordance with established practice, the Department of Justice will represent Paraguay in all aspects of extradition proceedings in the United States. Likewise, Paraguayan prosecutors (fiscales) will represent the interests of the United States in such proceedings in Paraguay. Specifically, in a typical case, a fiscal will issue an opinion to the Paraguayan extradition court with a legal analysis of the case and a recommendation that the U.S. request be granted. In cases in which the extradition court denies the U.S. request, the fiscal can then appeal that decision to a higher court.

Paragraph 2 provides that the Requesting State will bear expenses of extradition relating to the translation of documents and the transportation of a fugitive to the Requesting State. The Requested State shall pay all other expenses incurred in that State by reason of the extradition proceedings. This is a standard provision in U.S. extradition treaties.

Paragraph 3 provides that neither State shall make any pecuniary claim against the other in connection with extradition proceedings, including arrest, detention, custody, examination, or surrender of the fugitive. This includes any claim by or on behalf of the fugitive for damages, reimbursement, or legal fees, or other expenses occasioned by the execution of the extradition request.<sup>44</sup>

#### ARTICLE XIX—COMPETENT AUTHORITY

The term “competent authority” is used in Articles IV(2), XIII, and XV(1)(c) of the Treaty in connection with the Requested State’s decisions concerning: (1) whether an extradition request is politically motivated; (2) to which State to surrender a fugitive in the face of concurrent extradition requests from two or more States; and (3) whether to consent to a surrendered person’s subsequent prosecution in the Requesting State for offenses other than those for which extradition was granted. Article XIX addresses the fact that during the course of negotiations it became clear that, under

<sup>44</sup>This also is a standard provision in all modern U.S. extradition treaties.

the respective extradition practices in the United States and Paraguay, a different governmental authority would make such decisions for the United States than would for Paraguay.

Under United States law and practice, it is well-established that the executive branch is the competent authority for making such decisions. On the other hand, under Paraguayan practice, such decisions traditionally have been made by the judiciary. Accordingly, this Article simply states that, for the United States, the term “competent authority”, as used in the Treaty, means the appropriate authorities of the executive branch, and the same term, for Paraguay, means its appropriate judicial authorities. Because this Article is entirely consistent with current practices in the United States and Paraguay, it neither expands nor diminishes the powers of the executive or judiciary in either country beyond that which is already recognized.

#### ARTICLE XX—CONSULTATION

This Article provides that the Parties may consult with each other in connection with the processing of individual extradition cases and in furtherance of maintaining and improving procedures for the implementation of the Treaty. This is a standard provision in modern U.S. extradition treaties and serves the interests of the United States in promoting close cooperation with foreign counterparts on extradition issues.

#### ARTICLE XXI—APPLICATION

This Article, like its counterparts in many of the other United States extradition treaties negotiated in the past two decades, expressly makes the Treaty retroactive to cover offenses that occurred before, as well as after, it enters into force so long as the conduct constituted an offense under the law in both parties at the time it occurred.

#### ARTICLE XXII—RATIFICATION AND ENTRY INTO FORCE

This Article contains standard treaty provisions regarding the ratification and entry into force of the Treaty. Paragraph 1 provides that the Treaty shall be subject to ratification, and that instruments of ratification shall be exchanged at Asunción as soon as possible. Paragraph 2 provides that the Treaty will enter into force upon the exchange of the instruments of ratification. Paragraph 3 of this Article provides that the 1973 treaty shall cease to be in effect upon entry into force of this Treaty. Nevertheless, the 1973 treaty shall continue to apply to extradition proceedings in which extradition documents have already been submitted to the courts of the Requested State when the new Treaty enters into force. Paragraph 3 contains an additional caveat, however, that Article XVI of this Treaty (Simplified Extradition Procedures) shall apply to such proceedings.

#### ARTICLE XXIII—TERMINATION

The final Article of the Treaty contains standard treaty language for the termination of the Treaty by either Party through written

notice to the other Party, and states that termination shall become effective six months after the date of such notice.

### **Technical Analysis of the Treaty Between the United States of America and the Republic of South Africa on Extradition**

On September 16, 1999, the United States signed an Extradition Treaty Between the Government of the United States of America and the Government of the Republic of South Africa (“the Treaty”) that is intended to replace the outdated treaty currently in force between the two countries<sup>1</sup> with a modern agreement on the extradition of fugitives. The new extradition treaty is the second modern extradition treaty that the United States has negotiated with a sub-Saharan African country in the past fifty years, and it represents a major step forward in United States efforts to strengthen cooperation with countries in the region in combating terrorism, organized crime, 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. South Africa has its own internal legislation on extradition<sup>2</sup> 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 history. 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 Party to extradite to the other persons sought for prosecution or convicted of an extraditable offense, subject to the provisions of the remain-

<sup>1</sup>Treaty Relating to the Reciprocal Extradition of Criminals, signed at Washington December 18, 1947, entered into force April 30, 1951 (2 UST 884, TIAS 2243, 148 UNTS 85).

<sup>2</sup>Extradition Act, Law No. 67 of 1962 hereinafter “Extradition Act 1962”). The key sections of the Extradition Act 1962 which are germane to the interpretation and implementation of the Treaty are discussed in more detail in this Technical Analysis. The South African delegation said that under Article 231 of South Africa’s Constitution, a treaty such as this as normally brought into force has the force and effect of law in South Africa unless the treaty is inconsistent with the Constitution or an Act of Parliament. Thus, the terms of this Treaty would be overridden by any inconsistent internal law, apparently including pre-existing law, unless the treaty is enacted into law in national legislation. (Such enactment would be the functional equivalent of implementing legislation identical to the Treaty’s terms). This is important because South Africa’s law does contain some provisions that are inconsistent with the Treaty. For instance, Section 11(b) of the Extradition Act 1962 gives the Minister of Justice broad discretion to deny extradition if “ \* \* \* he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being in the interests of justice or that for any other reason it would be unjust or unreasonable or too severe a punishment to surrender the person concerned \* \* \* .” The U.S. delegation made it clear that the United States would consider it a breach of the Treaty if South Africa were to rely on this statute to deny extradition on grounds that are not contained in the Treaty. The South African delegation assured us that South Africa takes its treaty obligations seriously, and agreed to consider the U.S. recommendation that this Treaty be brought into force by enactment into law to ensure that the Treaty would supersede any earlier, inconsistent legislation.

der of the Treaty. The article refers to charges “in” the Requesting State rather than “of” 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 offenses are extraditable. The 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 makes an offense extraditable if it is punishable under the laws of both countries by deprivation of liberty (i.e., imprisonment, or other form of detention), for a period of at least 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 South Africa that extradition would be possible for such high priority 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); money laundering; terrorism; crimes against environmental protection laws; and many antitrust violations.

Paragraph 2 follows the practice of recent extradition treaties in providing that extradition should also be granted for attempting or conspiring to commit, aiding, abetting, inducing, counseling or procuring the commission of, or otherwise being an accessory before or after the fact to, an extraditable offense. Conspiracy charges are frequently used in United States criminal cases, particularly those involving complex transnational criminal activity, so it is especially important that the treaty be clear on this point. The South African delegation indicated that there is a statutory provision for conspiracy in South African law, similar to Title 18, United States Code, Section 371.<sup>3</sup> In any event, paragraph 2 creates an exception to the “dual criminality” rule of paragraph 1 by making conspiracy an extraditable crime if the offense which was the object of the conspiracy is an extraditable offense.

Paragraph 3 reflects the intention of both countries to interpret the principles of this article broadly. Judges in foreign countries are often confused by the fact that many U.S. federal statutes require proof of certain elements (such as use of the mails or interstate transportation) solely to establish jurisdiction in the U.S. 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 ex-

<sup>3</sup> Act No. 17 of 1956; Hosten Edwards Nathan Rosman, *Introduction to South African Law and Legal Theory* 712–713 (1977).

ample, South African authorities must treat U.S. 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 under state law. This paragraph also requires the 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 U.S. 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.<sup>4</sup> In South Africa, however, the Government's ability to prosecute extraterritorial offenses is much more limited. Article 2(4) reflects South Africa's agreement to recognize United States jurisdiction to prosecute offenses committed outside of the United States if South Africa's law would permit it to prosecute similar offenses committed outside its territory in similar circumstances. If the Requested State's laws do not provide for such jurisdiction, the final sentence of the paragraph provides the executive authority of the Requested State with discretion to grant extradition.

Paragraph 5 states that extradition shall be granted for persons convicted of but not yet sentenced for extraditable offenses, and of persons convicted of and sentenced for extraditable offenses. The negotiators intended to make it clear that the Treaty, like other modern extradition treaties, applies to persons who have been adjudged guilty but fled prior to sentencing as well as to those who have fled after sentencing but before completing service of their sentence.<sup>5</sup>

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 South Africa and the U.S. both extradite for tax and fiscal offenses. Similar provisions appear in other recent U.S. extradition treaties.<sup>6</sup>

<sup>4</sup>Restatement (Third) of the Foreign Relations Law of the United States, Section 402 (1987); Blakesley, "United States Jurisdiction over Extraterritorial Crime," 73 *Journal of Criminal Law and Criminology* 1109 (1982).

<sup>5</sup>See, Stanbrook and Stanbrook, *Extradition: The Law and Practice*, 25–26 (1979).

<sup>6</sup>See, e.g., U.S.-Austria Extradition Treaty, signed at Washington, January 8, 1998, entered into force January 1, 2000, art. 2(4)(b).



Paragraph 7 states that when extradition has been granted for an extraditable offense it shall also be granted for any other offense for which all of the requirements for extradition have been met except for the requirement that the offense be punishable by at least one year of imprisonment. For example, if South Africa 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 with which the fugitive has been charged, as long as those misdemeanors would also be recognized as criminal offenses in South Africa and other requirements for extradition are met. 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 other recent extradition treaties.<sup>7</sup>

#### ARTICLE 3—NATIONALITY

Some countries refuse to extradite their own nationals to other countries for trial or punishment, or are prohibited from doing so by their statutes or constitution. The United States does not deny extradition on the basis of the offender's citizenship,<sup>8</sup> and South Africa's extradition law contains no exception for South African nationals. Therefore, in Article 3 of the Treaty, each State promises that extradition shall not be refused on the ground of the nationality of the person sought.<sup>9</sup>

#### ARTICLE 4—POLITICAL AND MILITARY OFFENSES

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

Paragraph 2 describes five 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 violent crime against the person of a Head of State or Deputy Head of State of the Requesting or Requested State, or a member of such person's family. This clause covers a Deputy Head of State because in South Africa the Deputy Head of State acts as Head of State in the Head of State's absence or incapacity.

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

<sup>7</sup>See, e.g., U.S.-Barbados Extradition Treaty, signed at Bridgetown February 28, 1996, entered into force March 3, 2000, art. 2(5).

<sup>8</sup>See, generally Shearer, *Extradition in International Law* 110-114 (1970); 6 Whiteman, *Digest of International Law* 871-876 (1968). The U.S. Government's policy of drawing no distinction between nationals of the United States and those of other countries in extradition matters is underscored by Title 18, United States Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens even pursuant to treaties that permit (but do not require) surrender of citizens, if other requirements of the Treaty have been met.

<sup>9</sup>A similar provision appears in other recent U.S. treaties, many of which state that extradition shall not be refused "on the ground that the person sought is a national of the Requested State." The South African treaty has slightly different wording intended to convey the idea that nothing with respect to the nationality of the person sought, regardless of the country involved, can be used to deny extradition.

the person sought or submit the matter for decision as to prosecution including, for instance, the Convention for the Suppression of Unlawful Seizures of Aircraft, done at the Hague on 16 December 1970 (entered into force for South Africa 29 June 1972), 22 UST 1641, TIAS 7192.

The third and fourth categories of exceptions establish that the political offense exception does not apply to any offense that constitutes murder, or an offense involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage.<sup>10</sup>

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

Paragraph 3 provides that notwithstanding Paragraph 2, extradition shall not be granted if the executive authority of the Requested State determines that there are substantial grounds for believing that the request was made for the purpose of prosecuting or punishing the person sought on account of that person's gender, race, religion, nationality, or political opinion.<sup>11</sup> This paragraph is based on South African law,<sup>12</sup> and is consistent with the long-standing 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.<sup>13</sup>

The final paragraph of the article states that the executive authority of the Requested State shall refuse extradition if the request involves offenses under military law which would not be offenses under ordinary criminal law.<sup>14</sup>

#### ARTICLE 5—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, unless 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.<sup>15</sup>

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.

<sup>10</sup> Similar exceptions are found in our extradition treaties with countries including the United Kingdom and Hungary. See, Supplemental Treaty Concerning the Extradition Treaty Between the United States and the United Kingdom, signed at Washington June 25, 1985, entered into force December 23, 1986, art. 1; U.S.-Hungary Extradition Treaty, signed at Budapest December 1, 1994, entered into force March 18, 1997, art. 4.

<sup>11</sup> There are similar provisions in a number of U.S. extradition treaties. See, e.g., U.S.-Jamaica Extradition Treaty, signed at Kingston June 14, 1983, entered into force September 24, 1984, art. III(3).

<sup>12</sup> Section 11(b)(iv), Extradition Act 1962.

<sup>13</sup> 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).

<sup>14</sup> An example of such a crime is desertion. *Matter of Extradition of Suarez-Mason*, 694 F. Supp. 676, 702-703 (N.D. Cal. 1988). Most recent U.S. extradition treaties permit extradition to be denied for military offenses of this kind, but do not require denial. South Africa insisted that its practice is to treat denial of extradition as mandatory in these cases. Cf. Art. 3(c), United Nations Model Extradition Treaty Article 3(c), 30 I.L.M. 1407 (1991).

<sup>15</sup> See, e.g., U.S.-Austria Extradition Treaty, signed at Washington January 8, 1998, entered into force January 1, 2000, art. 8.

The South African delegation insisted on this provision because South Africa has abolished the death penalty. Its extradition law is silent on the topic, but the delegation felt that South African courts might conclude that it is unconstitutional to extradite a person to the United States to face capital punishment when such punishment could not lawfully be imposed in South Africa.

#### ARTICLE 6—*NON BIS IN IDEM*

The first paragraph of Article 6 prohibits extradition if the offender has been convicted or acquitted in the Requested State for the offense for which extradition is requested, and is similar to language present in many United States extradition treaties.<sup>16</sup> The delegations 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 either of the States would not insulate the person from extradition to the other, since different crimes are involved.

Paragraph 2 makes it clear that neither State can refuse to extradite an offender on the ground that the Requested State's authorities declined to prosecute the offender, or instituted criminal proceedings against the offender and thereafter elected to discontinue the proceedings, provided that the discontinuance does not constitute an acquittal, or the authorities merely decided to investigate. This provision was included because the decision of the Requested State to forego prosecution, or to drop charges already filed, may have resulted, for example, from failure to obtain sufficient evidence or witnesses available for trial, and the Requesting State may not suffer from the same impediments. This provision should enhance the ability to extradite to the jurisdiction which has the better chance of a successful prosecution.

#### ARTICLE 7—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 7 provides a means for the Requested State to temporarily surrender or 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 Austria, Barbados and India.

Paragraph 1 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.<sup>17</sup> The provision's wording makes it clear that the Requested State may postpone the initi-

<sup>16</sup> See, e.g., U.S.-Argentina Extradition Treaty, signed at Buenos Aires June 10, 1997, entered into force June 15, 2000, art. 5(1).

<sup>17</sup> Under U.S. law and practice, the Secretary of State would make this decision. *Koshotas v. Roche*, 740 F. Supp. 904, 920 (D. Mass. 1990), aff'd 931 F.2d 169 (1st Cir. 1991).

ation of extradition proceedings as well as the surrender of a person facing prosecution or serving a sentence.<sup>18</sup>

Paragraph 2 provides that a person wanted for prosecution in the Requesting State who is being prosecuted or is serving a sentence in the Requested State may be surrendered temporarily. A person temporarily transferred pursuant to this provision will be returned to the Requested State at the conclusion of the proceedings in the Requesting State. Such temporary surrender furthers the interests of justice in that it permits trial of the person sought while evidence and witnesses are more likely to be available, thereby increasing the likelihood of 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.

#### ARTICLE 8—LAPSE OF TIME

Article 8 states that extradition shall not be granted when the prosecution has become barred by lapse of time according to the law of the Requesting State.<sup>19</sup> Similar provisions are found in recent U.S. extradition treaties with Austria, India, Poland, Spain, and other countries. This provision must be read together with Article 9(2)(d), which states that the documents in support of each extradition request must contain a statement from the Requesting State describing the applicable lapse of time provisions in that State, and that statement will be conclusive proof of whether the prosecution has become barred by lapse of time.

#### ARTICLE 9—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 most recent United States extradition treaties.

The first paragraph requires that all requests for extradition be made in writing and submitted through the diplomatic channel. A formal extradition request may be preceded by a request for provisional arrest under Article 13, and provisional arrest requests need not be initiated through diplomatic channels if the requirements of Article 13 have been satisfied.

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 "a statement or text of the relevant

<sup>18</sup>Thus, the treaty provides more flexibility than Article 4 of the 1947 U.S.-South Africa Treaty, which flatly requires that extradition be deferred until the conclusion of the trial and the full execution of any punishment awarded \* \* \*

<sup>19</sup>The treaty now in force requires that extradition be denied if the statute of limitations has run or would have run in either the Requesting or Requested State. Article 5, U.S.-South Africa Treaty, *supra*, note 1, even though neither U.S. law or South Africa's Extradition Act 1962 requires this rule. In fact, 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).

law prescribing maximum punishment for the offence(s)” enabling the requested state to determine easily whether the request satisfies the requirement for dual criminality under Article 2.

Paragraph 3 describes the additional information needed when the person is sought for trial in the Requesting State. Paragraph 3(c) requires that if the fugitive is a person who has not yet been convicted of the crime for which extradition is requested, the Requesting State must provide “such information as would justify committal for extradition under the laws of the Requested State, but neither State is required to establish a prima facie case.” This is consistent with extradition law in the United States, and is similar to language in other United States extradition treaties.<sup>20</sup> This provision will alleviate one of the major practical problems with extradition from South Africa. The Treaty currently in force permits extradition only if “\* \* \* the evidence be found sufficient, according to the law of the High Contracting Party applied to, \* \* \* to justify the committal of the prisoner for trial, in case the crime has been committed in the territory of such High Contracting Party \* \* \*” South African courts have interpreted this clause to require that a prima facie case against the defendant be proven in South Africa before extradition will be granted. By contrast, U.S. law permits extradition if there is probable cause to believe that an extraditable offense was committed and the offender committed it.<sup>21</sup> South Africa’s agreement to extradite under the new Treaty based on the lower probable cause standard eliminates this imbalance in the burden of proof for extradition, and should dramatically improve the United States’ ability to extradite from South Africa.

Paragraph 4 lists the information, in addition to the requirements of paragraph 2, 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.<sup>22</sup>

#### ARTICLE 10—ADMISSIBILITY OF DOCUMENTS

Article 10 governs the authentication procedures for documents prepared for use in extradition cases.

The article states that in the case of a request from the United States, the documents must be received in evidence at extradition proceedings if they are accompanied by an apostille or authenticated by the signature and seal of office of either certain South African diplomatic or consular officers, or certain specified government authorities of the United States or other authorized persons. The provision is based on the provisions of South African extradition law.<sup>23</sup>

<sup>20</sup> See, e.g., U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995, entered into force June 29, 1995, art. 8(3)(c).

<sup>21</sup> Courts applying Title 18, United States Code, Section 3184 have long required probable cause for international extradition. Restatement (Third) of the Foreign Relations Law of the United States Section 476, comment b.

<sup>22</sup> 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).

<sup>23</sup> Section 9(3), Extradition Act 1962.

The second paragraph states that when the request is from South Africa, the documents must be certified by the principal diplomatic or consular officer of the United States resident in South Africa, consistent with United States extradition law.<sup>24</sup>

The third subparagraph of the article requires documents to be admitted into evidence if they are authenticated in any other manner acceptable by the laws in the Requested State. For example, there may be information in the Requested State itself which is relevant and probative to extradition, and the Requested State is free under subsection (c) to utilize that information if the information satisfies the ordinary rules of evidence in that state. This insures that evidence which is acceptable under the evidentiary rules of the Requested State may be used in extradition proceedings even if it is not authenticated pursuant to other provisions of the treaty. This paragraph also should insure that relevant evidence, which would normally satisfy the evidentiary rules of the requested country, is not excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

#### ARTICLE 11—TRANSLATION

This article requires that any document that is not in English and is produced in relation to extradition proceedings under this Treaty shall be accompanied by a translation in English. South Africa has eleven official languages: English, Afrikaans, Zulu, Xhosa, Sotho, Venda, Tswana, Tsonga, Pedi, Shangan, and Ndebele. It was decided that it would be more convenient for both Parties if extradition documents were prepared in English in all cases.

#### ARTICLE 12—ADDITIONAL INFORMATION

This article 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 shall notify the Requesting State so that it may submit supplementary information; the Requested State may establish a reasonable length of time for such submission. Paragraph three then provides that nothing shall prevent the executive authority of the Requested State from presenting to a court of that State such supplemental material sought or obtained after its initial submission or after expiration of any time limit established by it. This article 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.<sup>25</sup>

<sup>24</sup>Title 18, United States Code, Section 3190.

<sup>25</sup>*See, e.g.*, U.S.-Costa Rica Extradition Treaty, signed at San Jose December 4, 1982, entered into force October 11, 1991, art. 10.

## ARTICLE 13—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 South Africa. The provision also indicates that Interpol may be used to transmit such a request, and that the application may also be transmitted via post, telegraph, telefax, or any other means, such as email. Experience has shown that the ability to use such direct channels can be crucial in emergency situations.

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

Paragraph 3 states that prompt attention shall be given to the provisional arrest application, and the Requesting State must be notified promptly of the outcome of its application and, if applicable, the reason for any inability to proceed with the application.

Paragraph 4 provides that the person who has been provisionally arrested may be released if the Requesting State does not file a fully documented request for extradition with the executive authority of the Requested State within sixty days of the date on which the person was arrested. The paragraph also specifies that receipt of the documents by the Embassy of the Requested State located in the Requesting State (i.e., for a U.S. request, receipt by the South African embassy in Washington, D.C.) shall constitute receipt by the executive authority. This is consistent with U.S. law on this issue.

Paragraph 5 makes it clear that the person released under paragraph 4 may be taken into custody again and the extradition proceedings may commence when the formal request is presented.

## ARTICLE 14—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 and, under paragraph 5, under certain circumstances, may seek to agree on a new date for surrender. 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 apply for release if he has not been surrendered within two calendar months of having been found extraditable,<sup>26</sup> or of the conclusion of any litigation challenging that finding,<sup>27</sup> whichever is later. The law in

<sup>26</sup>Title 18, United States Code, Section 3188.

<sup>27</sup>*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).

South Africa does not contain any specific time period within which a person must be removed after having been found extraditable.

#### ARTICLE 15—CONCURRENT REQUESTS

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.<sup>28</sup>

#### ARTICLE 16—SEIZURE AND SURRENDER OF PROPERTY

This article provides that to the extent permitted by its laws the requested state may seize and surrender all property—articles, instruments, objects of value, documents, or other evidence—relating to the offense for which extradition is requested.

The second paragraph of the article 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.

The third paragraph enables the Requested State to temporarily surrender the property to the Requesting State with assurances that the property will be returned within a fixed period of time or as soon as practicable, where the property is liable to seizure or confiscation in the Requested State. It may also defer surrender if the property is needed in connection with pending criminal 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 the Requested State or any third parties may have to such property.

#### ARTICLE 17—RULE OF SPECIALITY

This article covers the principle known as the rule of speciality (or “specialty”), which is a standard aspect of United States and international extradition practice. Designed to insure that a fugitive surrendered for one offense is not tried for other crimes, the rule of specialty prevents a request for extradition from being used as a subterfuge to obtain custody of a person for trial or service of 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, paragraph 1 of 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 (1) 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

<sup>28</sup> *Cheng Na-Yuet v. Hueston*, 734 F. Supp. 988 (S.D. Fla. 1990), *aff'd*, 932 F.2d 977 (11th Cir. 1991).



a lesser included offense; and (2) for offenses committed after the extradition; and (3) any other offenses for which the executive authority of the Requested State consents.<sup>29</sup> Article 17(1)(b) permits the Requested State to require the documents described in Article 9 when it is asked for its consent to pursue additional charges.

Paragraph 2 removes the restrictions imposed by paragraph 1 if (1) the person leaves and voluntarily returns to the Requesting State, or (2) the person does not leave the Requesting State within fifteen days of being free to do so.

#### ARTICLE 18—SURRENDER TO A THIRD STATE OR AN INTERNATIONAL TRIBUNAL

This article provides that a person extradited to either State cannot be surrendered to a third state or an international tribunal for a crime committed prior to surrender under this Treaty unless (a) the Requested State consents to that surrender or (b) the person has had an opportunity to leave the territory of the Requesting State and has not done so within fifteen days of final discharge in respect of the offense for which extradited, or has returned to the territory of the Requesting State after leaving it. The reference to international tribunals in this article records the fact that, consistent with the rule of specialty under international law, the prior consent of the United States would be required if South Africa were to seek to extradite to the International Criminal Court agreed to in Rome on July 17, 1998, or to any other international tribunal, a fugitive who had been previously extradited from the United States to South Africa under this Treaty.

Paragraph 2 provides that the Requested State may request relevant information before acceding to a request for consent.

#### ARTICLE 19—WAIVER OF EXTRADITION

Persons sought for extradition frequently elect to waive their right to extradition proceedings 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 surrendered to the Requesting State without further proceedings. The Parties anticipate that in such cases there would be no need for the formal documents described in Article 9 or further judicial proceedings of any kind.

If the person sought returns to the Requesting State before the Secretary of State signs a surrender warrant, the United States would not view the waiver of proceedings under this article as an “extradition,” and U.S. practice has long been that the rule of specialty does not apply when a fugitive waives extradition and voluntarily returns to the Requested State.

#### ARTICLE 20—TRANSIT

Paragraph 1 gives each State the discretion to authorize transit through its territory of persons being surrendered to the other State by third countries.

<sup>29</sup>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).

Paragraph 2 specifies that the transit request is to be transmitted either through the diplomatic channel, or directly between the Departments of Justice in the United States and South Africa, or, in cases of urgency, via Interpol channels.

Paragraph 3 provides that requests for transit are to contain a description of the person whose transit is proposed, including information concerning nationality, and a brief statement of the facts of the case with respect to which he is being surrendered to the Requesting State. Paragraph 4 makes clear that permission to effect transit shall include permission for the person to be held in custody during the transit, subject to the law of the Requested State. If transportation is not continued in a reasonable time, the executive authority of the transit State may order the person's release.

Paragraph 5 states that no advance authorization is required if the person in custody is being transported by air by one State to a third country and no landing is scheduled in the territory of the other State. Should an unscheduled landing occur, a request for transit may be required at that time. The Treaty provides that the person may be kept in custody for up to 96 hours until a request for transit is received, and thereafter until it is executed.

#### ARTICLE 21—REPRESENTATION AND EXPENSES

The first paragraph of this article provides that the United States will make all necessary arrangements and meet the cost of any proceedings, and will represent South Africa in connection with a request from South Africa for extradition before the courts in this country. South Africa undertakes the same obligations including representation of the United States in connection with United States extradition requests to South Africa. 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 Requested State will bear the expenses of extradition incurred in its jurisdiction until the fugitive is surrendered.

Paragraph 3 states that the costs of the translation of documents and the costs of conveying the person from the territory of the Requested State are to be paid by the Requesting State.

Paragraph 4 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 includes any claim by or on behalf of the fugitive for damages, reimbursement, or legal fees, or other expenses occasioned by the execution of the extradition request.

#### ARTICLE 22—CONSULTATION

Article 22 of the treaty provides that the Departments of Justice in the United States and South Africa 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 23—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, on, or after the date upon which the Treaty entered into force. The article specifies that nothing in this Treaty shall be deemed to require or authorize any action by the Requested State that is contrary to the constitution of that State.

## ARTICLE 24—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

This article contains standard treaty language providing that it is subject to ratification and calling for the exchange of instruments of ratification as soon as possible. The Treaty is to enter into force immediately upon such exchange and may be terminated with six months written notice by either State. Upon entry into force, the 1947 Treaty will cease to have any effect. Paragraph 3 provides, however, that the prior Treaty shall apply to any extradition proceedings in which the extradition documents have already been submitted to the courts, except that waiver of extradition under Article 19 shall be available and Articles 17 and 18 concerning the rule of specialty and surrender to a third State or international tribunal shall also apply.

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**Technical Analysis of the Extradition Treaty Between the United States of America and the Democratic Socialist Republic of Sri Lanka**

On September 30, 1999, the United States signed an Extradition Treaty Between the Government of the United States of America and the Government of the Democratic Socialist Republic of Sri Lanka (the "Treaty"). In recent years, the United States has signed similar treaties with many other countries as part of an ongoing effort to modernize our law enforcement relations. The Treaty is intended to replace the current extradition treaty in force with respect to the two countries. That treaty, the Treaty for the Mutual Extradition of Criminals between the United States of America and Great Britain, signed at London December 22, 1931 ("the 1931 Treaty") became applicable to Sri Lanka by virtue of Article 6 of the External Affairs Agreement between the United Kingdom and Ceylon, signed at Colombo on November 11, 1947.<sup>1</sup>

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. Sri Lanka has extradition legislation that will apply to U.S. requests under the Treaty.<sup>2</sup>

<sup>1</sup>Extradition Treaty between the United States and the United Kingdom, signed at London December 22, 1931; entered into force June 24, 1935, 47 Stat. 2122, T.S. 849, 12 Bevans 482, 163 L.N.T.S. 59 (the "1931 Treaty")(applicable to Sri Lanka in accordance with Article 6 of the External Affairs Agreement between the United Kingdom and Ceylon, signed at Colombo November 11, 1947, T.I.F. 9433).

<sup>2</sup>*See*, Extradition Law, No. 8 of 1977 of The National State Assembly, 1977 (hereinafter the "Sri Lanka Extradition Act").

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 history. 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

This article formally obligates both parties to the Treaty to extradite to each other persons sought by the authorities in the Requesting State for trial or punishment for an extraditable offense. The phrase "sought by the authorities . . . for an extraditable offense" is used rather than "charged with an extraditable offense" to provide for the submission and consideration of extradition requests for persons wanted for prosecution but not yet formally charged. In Sri Lanka a warrant is issued for an accused person, but formal judicial charges are not filed until the defendant is in custody and brought before a judge.<sup>3</sup>

Article 1 refers to persons sought by authorities "in" the Requesting State rather than "of" the Requesting State, thereby obligating Sri Lanka to extradite fugitives sought by authorities of the United States or any political subdivision thereof.

#### ARTICLE 2—EXTRADITABLE OFFENSES

Article 2 defines an extraditable offense. The article permits extradition for any offense punishable under the laws of both Contracting States by deprivation of liberty for a period of more than one year or by a more severe penalty. Termed "dual criminality," this method of defining extraditable offenses was used in lieu of listing each extraditable offense as in the 1931 treaty. Dual criminality eliminates the need to renegotiate or supplement the Treaty if both Contracting States pass laws creating a new type of criminal offense, or if the list inadvertently fails to include a criminal activity punishable by both Contracting States. Sri Lanka and the United States determine whether a crime is punishable under the laws of both contracting states by assessing the fugitive's underlying acts, not by comparing the elements of crimes. During the negotiations, both sides discussed certain crimes such as narcotics trafficking, terrorism, degradation of the environment, money laundering, racketeering, anti-trust, export control violations, tax violations, child molestation, securities law violations, and parental kidnapping and concluded that such crimes were offenses in both countries.

Paragraph 2 of Article 2 provides that extradition shall also be granted for an attempt or a conspiracy to commit, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to, any extraditable offense. This is significant because conspiracy charges are frequently used in U.S. criminal prosecutions involving complex transnational criminal ac-

<sup>3</sup>U.S. law allows extradition without judicial charges pending in the foreign country. *In Re Assarsson*, 635 F. 2d 1237 (7th Cir. 1980).

tivity. This creates an exception to the dual criminality rule of paragraph 1 since any offense included in Article 2 Paragraph 2 is extraditable, even if found only within the laws of the Requesting State, so long as the underlying offense satisfies the requirements of paragraph 1.

Paragraph 3 reflects the intention of the Contracting States to interpret the principles of this article broadly. Similar provisions are contained in all recent U.S. extradition treaties.

Paragraph 3(a) requires a Requested State to disregard differences in the categorization of, or terminology used to describe the offense when determining whether dual criminality exists. In determining whether an offense is extraditable, the focus is on the acts constituting the offense rather than a comparison of the U.S. and Sri Lanka criminal code provisions defining the offenses.

Paragraph 3(b) is included to make clear that elements such as the use of the mails or interstate transportation are merely jurisdictional and provide no basis for denying extradition. 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 determining dual criminality. For example, Sri Lankan authorities must treat United States federal 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.

Paragraph 4 recognizes that extraditable crimes can involve acts committed wholly outside the territory of the Requesting State. United States jurisprudence recognizes jurisdiction to prosecute certain 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.<sup>4</sup> This paragraph reflects the fact that the Requested State shall not inquire into the extraterritorial jurisdictional basis of the Requesting State's prosecution. If the dual criminality and other requirements of the Treaty are satisfied, extradition shall be granted regardless of where the act or acts constituting the offense occurred.

Paragraph 5 provides that if extradition for one offense has been granted, extradition shall also be granted for any other offense punishable by less than one year's deprivation of liberty, so long as the lesser offenses meet all other requirements for extradition. For example, if Sri Lanka agrees to extradite to the United States a fugitive wanted for prosecution of a felony, Sri Lanka must also grant extradition for any misdemeanor offenses for which the fugi-

<sup>4</sup>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). Some U.S. criminal laws specifically provide for jurisdiction over crimes committed abroad.

tive is sought, so long as those misdemeanors would also be recognized as criminal offenses in Sri Lanka and are included in the request. This practice is generally desirable to both the fugitive and the prosecuting party as it permits all charges against the fugitive to be adjudicated more quickly, thereby facilitating trials while evidence is still fresh and permitting the possibility of concurrent sentences. Similar provisions are found in other recent extradition treaties.<sup>5</sup>

#### ARTICLE 3—NATIONALITY

Authorities in some countries, because of statutory or constitutional prohibitions or as a matter of policy, do not extradite nationals to another country. Neither the United States<sup>6</sup> nor Sri Lanka<sup>7</sup> denies extradition on the basis of the fugitive's nationality. Therefore, in Article 3 the Contracting States agree not to refuse extradition because the person sought is a national of the Requested State.

#### ARTICLE 4—POLITICAL AND MILITARY OFFENSES

Paragraph 1 of this article prohibits extradition for a political offense. This is a standard provision in U.S. extradition treaties and is incorporated in the Sri Lanka Extradition Act.<sup>8</sup>

Paragraph 2 designates specific offenses which, for the purposes of the Treaty, shall not be considered political offenses. Under subparagraph 2(a) murder or other violent crime against the person of a Head of State or Government of a Contracting State, or a member of the family of such Head of State or Government is not to be considered a political offense.

The next five subparagraphs exclude offenses from the political offense exception that are the subject of multilateral treaties, conventions, or international treaties to which both Contracting States are parties and which obligate them to extradite the person sought or submit the matter for prosecution. Paragraphs 2(b) through 2(e) list specific offenses in this category including: aircraft hijacking;<sup>9</sup> aviation sabotage;<sup>10</sup> any crime against an internationally protected person;<sup>11</sup> and violence at airports,<sup>12</sup> and paragraph 2(f) covers any other such offense.

Finally, under 2(g), a conspiracy or attempt to commit any of the foregoing offenses, or aiding or abetting a person who commits or

<sup>5</sup> See, e.g., U.S.-Barbados Extradition Treaty, signed at Bridgetown, February 28, 1996, entered into force March 3, 2000, art. 2(5).

<sup>6</sup> See, generally Shearer, *Extradition in International Law* 110-14 (1970); 6 Whiteman, *Digest of International Law* 871-76 (1968). U.S. policy of drawing no distinction between nationals of the United States and those of other countries in extradition matters is underscored by Title 18, United States Code, Section 3196, which authorizes the Secretary of State to extradite U.S. citizens even pursuant to treaties that permit (but do not require) surrender of citizens, if other requirements of the Treaty have been met.

<sup>7</sup> See, Sri Lanka Extradition Act § 1(7).

<sup>8</sup> See, Sri Lanka Extradition Act § 7(a).

<sup>9</sup> Convention on the Suppression of Unlawful Seizures of Aircraft, Dec. 16, 1970 22 U.S.T. 1641, T.I.A.S. 7192.

<sup>10</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. 7570.

<sup>11</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167.

<sup>12</sup> Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Dec. 17, 1979, T.I.A.S. No. 11081.

attempts to commit such offenses is not considered a political offense.

Paragraph 3 of this article provides for denial of extradition when the executive authority of the Requested State determines that the request is politically motivated, notwithstanding the exceptions in paragraph 2.<sup>13</sup> In Sri Lanka, a finding that a request was politically motivated may come from either a minister in the executive branch or the courts. Whether such a finding comes from the courts or the executive, the executive authorities are responsible for the implementation and administration of that decision. Due to this responsibility, the Sri Lankan delegation assured us that a decision of the courts would still be considered to be “determined by the executive authority.” Under longstanding law and practice of the United States, the Secretary of State alone has the discretion to determine whether an extradition request is based on improper political motivation.<sup>14</sup>

Paragraph 4 of this article permits refusal of an extradition request for acts which constitute an offense under military law, but not ordinary criminal law.<sup>15</sup>

#### ARTICLE 5—PRIOR PROSECUTION

Paragraph 1 prohibits extradition if the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.<sup>16</sup> This provision serves to prevent extradition only when the person sought has been convicted or acquitted in the Requested State for the same crime that is charged in the Requesting State. The term “offense” in this provision means the crime and does not mean the act for which the extradition is requested. A single set of facts may result in different offenses in different jurisdictions, and a prosecution for one such offense should not bar extradition for another. For instance, 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 either one of the States would not insulate the person from extradition to the other, since different crimes are involved. Further, this provision does not permit a state to refuse extradition because the fugitive has been convicted or acquitted in a third state.

Paragraph 2 makes it clear that neither Contracting State can refuse to extradite on the grounds that the Requested State’s authorities declined to prosecute or pardoned the offender, or instituted criminal proceedings against the offender and thereafter elected to discontinue the proceedings. For example the Requested State may have decided to forego prosecution, or to dismiss charges, because of a failure to obtain sufficient evidence for trial,

<sup>13</sup>There are similar provisions in many U.S. extradition treaties. See, e.g., U.S.-India Extradition Treaty, signed at Washington June 25, 1997, entered into force July 21, 1999, art. 5(2).

<sup>14</sup>See, *Eain v. Wilkes*, 641 F. 2d 504, 513 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *Koskotos v. Roche*, 931 F. 2d 169, 174. See, also, Title 18, United States Code, Section 3186.

<sup>15</sup>An example of such an offense is desertion. *Matter of Extradition of Suarez-Mason*, 694 F. Supp. 676, 702-03 (N.D. Cal. 1988).

<sup>16</sup>Language used in this article is similar to that used in many recent U.S. extradition Treaties. See, e.g., U.S.-India Extradition Treaty, signed at Washington June 25, 1997, entered into force July 21, 1999, art. 6.

whereas substantial evidence may be available in the Requesting State.<sup>17</sup> This provision should enhance the ability of the Contracting States to extradite to the jurisdiction with the better chance of a successful prosecution.

#### ARTICLE 6—LAPSE OF TIME

Article 6 provides that the decision by the Requested State whether to grant the request for extradition shall be made without regard to statutes of limitations of either state.<sup>18</sup> The 1931 Treaty contains a bar to extradition when prosecution has become barred by lapse of time according to the law of either State. However, the preferred modern approach is not to bar extradition on this basis. The parties agreed to leave resolution of such issues to the courts of the Requesting State. This approach is contained in many modern U.S. extradition treaties.<sup>19</sup>

#### ARTICLE 7—CAPITAL PUNISHMENT

Paragraph 1 permits the Requested State to refuse to extradite a fugitive 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, unless (a) the extraditable offense constitutes murder under the laws of the Requested State; or (b) the Requesting State provides assurances, which the Requested State considers sufficient, that the death penalty will not be imposed or, if imposed, will not be carried out.<sup>20</sup>

Paragraph 2 provides that when the Requesting State gives acceptable assurances in accordance with Paragraph 1(b) of this Article, those assurances shall be honored and the death penalty, if imposed, shall not be carried out.

#### ARTICLE 8—EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

This article sets forth the procedural, documentary and evidentiary requirements to support an extradition request.<sup>21</sup>

Paragraph 1 requires that each formal request for extradition be submitted through the diplomatic channel. A formal extradition request may be preceded by a request for provisional arrest under Article 11, which, in exceptional cases of unusual urgency, need not be initiated through diplomatic channels.

Paragraph 2 details the information which must accompany a request for extradition. Some requirements delineated in Article 8(2) enable a Requested State to more easily ascertain the proper identity and whereabouts of a fugitive. Other requirements facilitate the assessment of whether extradition is appropriate. For example, Article 8(2)(c) requires “a statement of the laws describing the es-

<sup>17</sup> See, Sri Lanka Extradition Act § 7(2).

<sup>18</sup> This is consistent with settled law in the United States, which holds that lapse of time is not a defense to extradition 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).

<sup>19</sup> See, e.g., U.S.-Barbados Extradition Treaty, signed at Bridgetown February 28, 1996, entered into force March 3, 2000, art. 8.

<sup>20</sup> Similar provisions are found in many recent U.S. extradition treaties. See, e.g., U.S.-India Extradition Treaty, signed at Washington June 25, 1997, entered into force July 21, 1999, art. 8.

<sup>21</sup> A similar article appears in most recent U.S. extradition treaties.



sential elements of the offense for which extradition is requested” and 8(2)(d) requires a statement of the provisions of the law prescribing punishment for offense. Such information should enable the Requested State to determine whether the dual criminality requirement under Article 2 has been met.

Paragraph 3 describes the additional information needed when the person is sought for prosecution. Such requests must be supported by a copy of the warrant or arrest order and a copy of the charging document, if those documents exist. In addition, the Requesting State must provide sufficient information to support “a reasonable basis to believe that the person to be extradited committed the offense for which extradition is requested and is the person named in the warrant of arrest.” This evidentiary requirement is consistent with fundamental U.S. extradition jurisprudence, which mandates sufficient evidence to establish probable cause before finding a fugitive extraditable.<sup>22</sup> The delegations agreed that the language “a reasonable basis to believe. . .” in Article 8(3)(c) should not be interpreted to require a higher burden of proof for extradition than the probable cause standard. The Requested State need not provide proof sufficient to convict the offender, a much higher standard, in order to find him/her extraditable.

Paragraph 4 contains the requirements for documents and information which must accompany a request to extradite a person who has been found guilty of the offense for which extradition is sought. This paragraph makes clear that once a person has been found guilty, no showing of the relevant burden of proof as described in paragraph 3 is required. In essence, a finding of guilt speaks for itself, a position taken in U.S. court decisions even absent a specific treaty provision.<sup>23</sup>

Subsection (d) of paragraph 4 states that if the person sought was found guilty in absentia, the documentation and information required under paragraph 3 must be submitted with the extradition request. In other words, information sufficient for a showing of probable cause must accompany a request for extradition of a person found guilty in absentia.

#### ARTICLE 9—ADMISSIBILITY OF DOCUMENTS

Article 9 sets forth the authentication conditions for receiving and admitting extradition documents into evidence.

Subparagraph (a) states that evidence intended for use in extradition proceedings in Sri Lanka shall be admissible if they are signed or certified by a judge, magistrate, or an official of the United States, and sealed with the official seal of a competent authority of the United States. This language was crafted to meet the requirements of Sri Lankan law on the authentication of documents to be used as evidence in extradition proceedings (Section 14 (2) of the Sri Lankan Extradition Act). The standard Department of Justice certification and sealing of extradition documents already meets the requirements of the subparagraph in general, and should

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

<sup>23</sup>See, e.g., *Spatola v. United States*, 741 F. Supp. 362, 374 (E.D.N.Y. 1990), aff'd, 925 F.2d 615 (2d Cir. 1991); *United States v. Clark*, 470 F. Supp. 976 (D. Vt. 1979).

ensure the admissibility of U.S. extradition documents in Sri Lankan extradition proceedings. In addition, however, Sri Lanka recommended that individual affidavits contained in our extradition packages be sworn before a judge or magistrate in the United States rather than a notary public.<sup>24</sup>

Subparagraph (b) states that evidence intended for use in extradition proceedings in the United States shall be admissible if certified by the principal diplomatic or consular officer of the United States resident in Sri Lanka, consistent with U.S. extradition law.<sup>25</sup>

Subparagraph (c) provides an alternative method for authenticating evidence in an extradition proceeding, by permitting such evidence to be admitted if it is authenticated in any manner acceptable by the law of the Requested State. For example, there may be information in the Requested State itself which is relevant and probative to extradition. The Requested State would be free under subparagraph (c) to utilize that information if it is admissible under the ordinary rules of evidence in the Requested State. Moreover, subparagraph (c) should insure that relevant evidence, which would normally satisfy the evidentiary rules of the Requested State, is not excluded at the extradition hearing because of an inadvertent error or omission in the authentication process.

#### ARTICLE 10—LANGUAGE

All documents submitted by the Requesting State in support of an extradition request shall be in the English language. While there are three recognized languages in Sri Lanka (Singhalese, Tamil and English), the Sri Lankan delegation agreed that it would submit only documents prepared or translated into English to the United States and that extradition documents submitted by the United States in English would be acceptable, and if translation into one of the other Sri Lankan languages is required, it would be done by Sri Lankan authorities at their expense.

#### ARTICLE 11—PROVISIONAL ARREST

This article describes the process, known as provisional arrest, by which a fugitive in one country may be arrested and detained before the formal extradition request supported by the full set of documents is completed and submitted by the Requesting State.

Paragraph 1 provides that a request for provisional arrest may be made through the diplomatic channel but that in exceptional cases of unusual urgency requests may also be transmitted directly between the U.S. Justice Department and the Sri Lankan Ministry of Justice and that INTERPOL facilities may also be used to transmit such requests. Provisional arrest requests transmitted other than through the diplomatic channel will normally be confirmed by a diplomatic note.

Paragraph 2 lists the information that the Requesting State must provide in its request for provisional arrest. Supporting documentation is not required.

<sup>24</sup> See, Sri Lanka Extradition Act § 14(2).

<sup>25</sup> See, Title 18, United States Code, Section 3190.

Paragraph 3 states that the Requesting State must be advised promptly of the outcome of its application and the reason for any denial.

Paragraph 4 provides that the fugitive may be discharged from custody if the executive authority of the Requested State does not receive a fully documented extradition request within sixty days of the provisional arrest. When the United States is the Requested State, the “executive authority” for the purposes of paragraph 4 would include the Secretary of State or the U.S. Embassy in Sri Lanka.<sup>26</sup>

Although the person arrested according to this article may be released from custody if a fully documented extradition request is not received within sixty days, Paragraph 5 establishes that the fugitive may be rearrested and the extradition proceedings continued when the formal, documented request is presented at a later date.

#### ARTICLE 12—DECISION AND SURRENDER

This article requires the Requested State to promptly notify the Requesting State through the diplomatic channel of its decision regarding the extradition request. If extradition is denied in whole or in part, the Requested State must provide the reasons for the denial. The Requested State shall also provide any pertinent judicial opinions if the Requesting State so requests. If the extradition request is granted, the article requires that the Contracting States agree on a time and place for the surrender of the fugitive.

Pursuant to Paragraph 4, if the fugitive is not removed from the territory of the Requested State within the time prescribed by the law of the Requested State, the person may be discharged from custody and the Requested State may subsequently refuse to extradite for the same offense. U.S. law provides the possibility of discharge from custody of persons who are not surrendered within two calendar months of the finding of extraditability,<sup>27</sup> or of the conclusion of any litigation challenging that finding,<sup>28</sup> whichever is later. The Sri Lanka Extradition Act provides that extradition shall not occur “until the expiration of a period of fifteen days commencing on the day on which the court order for his committal is made; and if an application for habeas corpus is made to the Supreme Court, so long as proceedings on that application are pending.”<sup>29</sup> In Sri Lanka, following a finding of extraditability by the Court, the government may issue a warrant ordering the fugitive to be extra-

<sup>26</sup> See, *United States v. Wiebe*, 733 F.2d 549 (8th Cir. 1984); *United States v. Clark*, 470 F. Supp. 976 (D. Vt. 1979). The Sri Lankan Extradition Act provides for holding persons in custody for a “reasonable time.” The Sri Lankan delegation informed the U.S. delegation that, in the case of a challenge by a provisionally arrested person, Sri Lankan authorities should have no difficulty convincing a Sri Lankan court that a period of incarceration of 60 days prior to the submission of the formal extradition request is a “reasonable time.” Moreover, the Sri Lankan delegation pointed out that Section 3 of the Extradition Act permits modifications necessary to implement extradition treaties so long as the treaties create no direct conflict with the Act “thus the 60 day period in the Treaty would constitute a permissible modification of the “reasonable time” provision in the Act.

<sup>27</sup> Title 18, United States Code, Section 3188 provides that, after two calendar months, any U.S. court, upon application may discharge from custody a person so committed, unless sufficient cause is shown why such discharge should not take place.

<sup>28</sup> *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); see, also, *Barrett v. United States*, 590 F. 2d 624 (6th Cir. 1978).

<sup>29</sup> See, Sri Lanka Extradition Act § 11(2).

dited.<sup>30</sup> In addition, in Sri Lanka a person may apply to the Supreme Court for his release upon the expiration of a two month period commencing at the conclusion of the fifteen day waiting period described above, or at the conclusion of a one month period commencing on the day on which a warrant for extradition was issued.<sup>31</sup>

#### ARTICLE 13—TEMPORARY AND DEFERRED SURRENDER

A person sought for extradition may be already facing prosecution or serving a sentence in the Requested State. Article 13 provides under appropriate circumstances for the temporary surrender of such persons. This article also provides a means for the Requested State to defer extradition in such circumstances until the conclusion of the proceedings against the person and the full execution of any punishment imposed.<sup>32</sup>

Paragraph 1 provides for the temporary surrender of a person “for the purpose of prosecution” in the Requesting State who is being prosecuted or is serving a sentence in the Requested State. “The purpose of prosecution” could include the temporary transfer of a person to stand trial or to enter a plea of guilty, or receive a sentence. A person temporarily transferred pursuant to the Treaty shall be kept in custody by the Requesting State and returned to the Requested State at the conclusion of the proceedings in the Requesting State. The Contracting States shall determine the conditions of the fugitive’s return to the Requested State. Such temporary surrender furthers the interests of justice by allowing a trial of the person sought while evidence and witnesses are more likely to be available, thereby increasing the likelihood of a successful prosecution. Such a transfer may also be advantageous to the person sought in that it: (1) facilitates resolution of the charges; (2) permits the concurrent serving of sentences in the Requesting and Requested States; (3) allows for a defense while favorable evidence is fresh and more readily available. Current Sri Lankan law does not permit temporary surrenders. Consequently, the words, “subject to its laws” are included in the paragraph to provide for such surrender should Sri Lankan law be changed.

Paragraph 2 provides that the Requested State may also postpone the extradition proceedings against a person who is being prosecuted or serving a sentence in the Requested State until the conclusion of the prosecution or the full execution of the punishment which has been imposed.<sup>33</sup>

#### ARTICLE 14—REQUESTS FOR EXTRADITION MADE BY SEVERAL STATES

Article 14 addresses the situation when requests are made by different countries for extradition of the same person. The article

<sup>30</sup> See, Sri Lanka Extradition Act § 12 (1).

<sup>31</sup> See, Sri Lanka Extradition Act § 13(1).

<sup>32</sup> This is a discretionary provision exercisable by the Requested State only; it does not create any right which a fugitive may exercise.

<sup>33</sup> Under United States law and practice, the Secretary of State makes this decision. *Koskotas v. Roche*, 740 F. Supp. 904 (D. Mass. 1990), *aff’d*, 931 F.2d 169 (1st Cir. 1991). The United States may elect to extradite a fugitive prior to the completion of a sentence. *U.S. v. Buekes*, 888 F. Supp. 465 (EDNY 1995).

grants the executive authority of the Requested State the authority to determine which country will receive the fugitive. For the United States, the Secretary of State makes this decision.<sup>34</sup> In Sri Lanka, such decisions are made by the Minister of Justice.<sup>35</sup>

#### ARTICLE 15—SEIZURE AND SURRENDER OF PROPERTY

This article permits the seizure by the Requested State, and surrender to the Requesting State, of all property relating to the offense for which extradition is requested, to the extent permitted by the law of the Requested State.<sup>36</sup> Examples of such property include, but are not limited to, articles, instruments, objects of value, and documents. Article 15 also provides that these articles may be so surrendered even if extradition cannot be effected due to the death, disappearance, or escape of the fugitive.

Paragraph 2 states that the Requested State may condition its surrender of property upon satisfactory assurances that the property will be returned as soon as practicable, or may defer surrender if the property is needed as evidence in the Requested State.

Pursuant to Paragraph 3, the rights of third parties in surrendered property shall be duly respected.

#### ARTICLE 16—RULE OF SPECIALITY

Article 16 incorporates into the Treaty the principle known as the rule of speciality (or “specialty”), which is a standard component of U.S. and international extradition practice. Designed to insure that a fugitive surrendered for one offense is not tried in the Requesting State for other crimes, the rule of specialty prevents an extradition request from being used as a subterfuge to obtain custody of a person for trial or service of sentence on different charges that may not be extraditable or properly documented at the time that the request is granted.<sup>37</sup>

As a variety of exceptions to the rule have developed over time, this article codifies in the Treaty the internationally accepted formulation of the rule. Paragraph 1 provides that a person extradited under the Treaty may not be detained, tried or punished in the Requesting State except for (a) the offense for which extradition was granted, or a differently denominated offense based on the same facts, provided the offense is extraditable or is a lesser included offense; (b) an offense committed after the extradition; or (c) an offense for which the executive authority of the Requested State consents.<sup>38</sup>

Paragraph 1(c)(i) provides that before giving such consent, the Requested State may require the Requesting State to document its request as for a new extradition request under the Treaty. Paragraph 1(c)(ii) permits the Requesting State to detain the person for 90 days, or for a longer period authorized by the Requested State,

<sup>34</sup> *Cheng Na-Yuet v. Hueston*, 734 F. Supp. 988 (S.D. Fla. 1990) *aff’d*, 932 F.2d 977 (11th Cir. 1991).

<sup>35</sup> *See*, Sri Lanka Extradition Act §§ 8(1) & 12(5).

<sup>36</sup> Similar provisions are found in all recent U.S. extradition treaties.

<sup>37</sup> *See*, Sri Lanka Extradition Act § 17(2).

<sup>38</sup> In the United States the Secretary of State has the authority to consent to a waiver of the rule of specialty. *See, Berenguer v. Vance*, 473 F. Supp. 1195, 1199 (D.D.C. 1979). In Sri Lanka the Minister of Justice has the authority to consent to a waiver of the rule of specialty. Sri Lanka Extradition Act § 7(3)(c).

while the Requested State makes its determination on the application.

Paragraph 2 prohibits the Requesting State from surrendering the person to a third State or an international tribunal for a crime committed prior to his surrender without the consent of the Requested State.<sup>39</sup>

Paragraph 3 provides that the restrictions of paragraphs 1 and 2 shall not apply if the extradited person (1) leaves and returns to the Requesting State, or (2) does not leave the territory of the Requesting State within ten days of being free to do so, if the Requesting State is the United States, or within forty-five days of being free to do so, if the Requesting State is Sri Lanka. The longer period provided for departure from Sri Lanka prior to proceeding for additional offenses is the result of the forty-five day period set out in that country's domestic extradition law.<sup>40</sup>

#### ARTICLE 17—WAIVER OF EXTRADITION

Persons sought for extradition frequently elect to waive their right to extradition proceedings to expedite their return to the Requesting State. This article provides that when a fugitive consents to return to the Requesting State, subject to the laws of the Requested State,<sup>41</sup> the person may be returned without further proceedings. In such cases there would be no need for any further formal documentation or judicial proceedings.

If the person sought for extradition returns to the Requesting State before the signing of a surrender warrant or completion of the extradition process, the United States would not view the waiver of proceedings under this Article as an "extradition." U.S. practice has long been that the rule of specialty does not apply when a fugitive waives extradition and voluntarily returns to the Requesting State. The Sri Lankan delegation to the Treaty negotiation stated that the practice would be the same in Sri Lanka—the rule of specialty would not apply to fugitives who waive extradition and return voluntarily to the Requesting State.

#### ARTICLE 18—TRANSIT

Paragraph 1 gives each Contracting State the discretion to authorize transit through its territory of persons being surrendered to the other Contracting State by third States, and to hold such persons in custody during the period of transit.<sup>42</sup> Requests for transit, which are to be made through the diplomatic channel or directly between the U.S. Department of Justice and the Sri Lankan Ministry of Justice, or may be transmitted via INTERPOL, must con-

<sup>39</sup>This language makes clear, for example, that, consistent with the rule of specialty under international law, prior consent of the United States would be required if Sri Lanka proposed to transfer a person, extradited from the United States, to the International Criminal Court agreed to in Rome on July 17, 1998.

<sup>40</sup>See, Sri Lanka Extradition Act §§ 12(2) & 17(3).

<sup>41</sup>The Sri Lanka Extradition Act does not explicitly provide for such waivers, however, the Sri Lankan delegation expressed confidence that Sri Lankan law would permit fugitives wanted by U.S. authorities to consent to surrender, and that Sri Lankan authorities could keep such persons in custody and return them to the United States without the documents or proceedings required for a formal extradition. For fugitives in the United States who wish to waive extradition, the practice is to submit the waiver to the presiding judge who determines whether the fugitive is proceeding voluntarily.

<sup>42</sup>A similar provision is found in all recent U.S. extradition treaties.

tain a description of the person whose transit is proposed and a brief statement of the facts of the case which occasioned his surrender to the Requesting State.

Under Paragraph 2 no authorization is needed if the person in custody is being moved by air and no landing is scheduled in the territory of the other Contracting State. Should an unscheduled landing occur, a request for transit may be required at that time. The Treaty ensures that the person will be kept in custody until a request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

#### ARTICLE 19—REPRESENTATION AND EXPENSES

Paragraph 1 provides that in extradition proceedings under the Treaty, the Requested State shall advise, assist, appear in court and represent the interests of the Requesting State. Thus, Department of Justice attorneys will represent Sri Lanka in connection with its requests for extradition before U.S. courts, and the Attorney General of Sri Lanka will perform reciprocal services on behalf of the United States before Sri Lankan courts. Although under the Sri Lankan law their Attorney General technically appears as *amicus curiae* rather than in a formal representation role on behalf of the United States, the Sri Lankan delegation assured us that the Attorney General will provide full advocacy in support of our extradition requests at every stage in the Sri Lankan extradition proceedings.

Paragraph 2 provides that the Requested State will bear all expenses of extradition except those expenses relating to the ultimate transportation of a fugitive to the Requesting State and the translation of documents, which are paid by the Requesting State.

Paragraph 3 provides that neither Contracting State shall make a pecuniary claim against the other arising out of the arrest, detention, examination, or surrender of any fugitive. This includes any claim brought on behalf of the fugitive for damages, reimbursement or legal fees, or other expenses occasioned by the execution of the extradition request.

#### ARTICLE 20—CONSULTATION

This article provides that the Department of Justice and the Attorney General's Department of Sri Lanka may consult with each other regarding an individual extradition case or extradition procedures in general.

#### ARTICLE 21—APPLICATION

This article makes the Treaty retroactive. Consequently, requests for extradition for offenses committed before entry into force can be made under the Treaty.<sup>43</sup>

<sup>43</sup>This provision is standard in modern United States Extradition Treaties. See, e.g., U.S.-Jordan Extradition Treaty, signed at Washington March 28, 1995, entered into force July 29, 1995, art. 21.

## ARTICLE 22—RATIFICATION AND ENTRY INTO FORCE

Article 22 contains standard treaty language providing for ratification and the exchange of instruments of ratification as soon as possible. The Treaty shall enter into force immediately upon this exchange.

Paragraph 3 provides that when the Treaty enters into force, the 1931 Treaty will cease to have effect upon the Contracting States. However, if extradition documents have already been submitted to the courts of the Requested State at the time the Treaty enters into force, the 1931 Treaty will remain applicable to such proceedings, although Article 16 of this Treaty (addressing the Rule of Specialty) will apply.

## ARTICLE 23—TERMINATION

This Article contains standard treaty language describing the procedure for termination of the Treaty after its entry into force. Either Contracting State may terminate the Treaty at any time by giving written notice to the other Contracting State. The termination shall become effective six months after the date of the notice.

## VIII. TEXT OF THE RESOLUTIONS OF RATIFICATION

*Treaty with Belize:*

*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 Belize, signed at Belize on March 30, 2000 (Treaty Doc. 106-38), 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 OF EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 14 concerning the Rule of Specialty would preclude the resurrender of any person extradited to Belize from the United States to the International Criminal Court contemplated in the Statute adopted 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 Belize by the United States to said International Criminal Court unless the Statute 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) PROVISOR.— The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification:

SUPREMACY OF THE CONSTITUTION.—Nothing in this 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.

*Treaty with Paraguay:*

*Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of the Republic of Paraguay, signed at Washington on November 9, 1998 (Treaty Doc. 106-4), 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 OF EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article XV concerning the Rule of Specialty would preclude the resurrender of any person extradited to the Republic of Paraguay from the United States to the International Criminal Court contemplated in the Statute adopted 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 Paraguay by the United States to said International Criminal Court unless the Statute 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) PROVISOR.— The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification:

SUPREMACY OF THE CONSTITUTION.—Nothing in this 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.

*Treaty with South Africa:*

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of the Republic of South Africa, signed at Washington on September 16, 1999 (Treaty Doc. 106-24), 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 OF EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 18 concerning the surrender to a third State of an International Tribunal would preclude the resurrender of any person extradited to the Republic of South Africa from the United States to the International Criminal Court contemplated in the Statute adopted 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 South Africa by the United States to said International Criminal Court unless the Statute 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) PROVISIO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification:

SUPREMACY OF THE CONSTITUTION.—Nothing in this 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.

*Treaty with Sri Lanka:*

*Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the ratification of the Extradition Treaty between the Government of the United States of America and the Government of the Democratic Socialist Republic of Sri Lanka, signed at Washington on September 30, 1999 (Treaty Doc. 106-34), 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 OF EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT.—The United States understands that the protections contained in Article 16 concerning the Rule of Specialty would preclude the surrender of any person extradited to the Democratic Socialist Republic of Sri Lanka from the United States to the International Criminal Court contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the United States consents to such surrender; and the United States shall not consent to the transfer of any person extradited to the Democratic Socialist Republic of Sri Lanka by the United States to said International Criminal Court unless the Statute 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) PROVISIO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification:

SUPREMACY OF THE CONSTITUTION.—Nothing in this 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.