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MUTUAL LEGAL ASSISTANCE TREATY WITH THE  
REPUBLIC OF KAZAKHSTAN

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SEPTEMBER 13, 2016.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 114-11]

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and the Republic of Kazakhstan on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 20, 2015 (Treaty Doc. 114-11), having considered the same, reports favorably thereon with one declaration, as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

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I. PURPOSE

The Treaty between the United States of America and the Republic of Kazakhstan on Mutual Legal Assistance in Criminal Matters (the “MLAT with Kazakhstan” or “Treaty”) is one of a series of modern mutual legal assistance treaties that have been negotiated by the United States and is designed to provide a formal basis for mutual cooperation between the United States and the Republic of Kazakhstan on law enforcement matters so as to enhance the ability of the United States to investigate and prosecute crimes.

## II. BACKGROUND

In order for the United States to successfully prosecute criminal activity that is transnational in scope, it is often necessary to obtain evidence or testimony from a witness in another country. While U.S. federal courts may issue subpoenas to U.S. nationals overseas, they lack the authority to subpoena foreign nationals found in other countries or the authority to subpoena evidence in a foreign country. In addition, effectuating service of a subpoena to U.S. persons abroad may prove difficult.

In the absence of an applicable international agreement, the customary method for obtaining evidence or testimony in another country is via a “letter rogatory,” which tends to be an unreliable and time-consuming process. The term “letter rogatory” is generally used to refer to a formal communication in writing that is sent by a court in which an action is pending to a court in a foreign country, requesting that certain evidence or the testimony of a person within the latter’s jurisdiction be formally obtained for use in the requesting court’s pending action. The State Department advises that the letter-rogatory process can often take a year or more and, unless undertaken pursuant to an international agreement, compliance is a matter of judicial discretion. Furthermore, the scope of foreign judicial assistance might also be limited by domestic information-sharing laws, such as bank and business secrecy laws, or be confined to evidence relating to pending cases rather than preliminary, administrative, or grand jury investigations conducted prior to the filing of formal charges. Execution of letters rogatory is usually carried out under the judicial norms of the responding country. However, responding country norms may be insufficiently compatible with U.S. law such that the resulting evidence is rendered inadmissible in a U.S. court. Mutual Legal Assistance Treaties (“MLATs”) are designed to overcome these and similar problems.

MLATs are international agreements that establish a formal, streamlined process by which governments may gather information and evidence in other countries for use in criminal investigations and prosecutions. The U.S. is currently a party to several dozen MLATs. While the specific provisions of MLATs vary, they generally obligate treaty partners to take steps on behalf of a requesting treaty partner when certain conditions are met. MLATs typically contain provisions concerning the sharing of collected information between parties, the location and identification of persons and potential witnesses within the parties’ territories, the taking of depositions and witness testimony, and the serving of subpoenas *duces tecum* on behalf of a requesting treaty party.<sup>1</sup> Such provisions provide for the easier acquisition of evidence and testimony than via letters rogatory and do so in a manner designed to be compatible with the admissibility requirements of the requesting State’s courts. MLATs also typically contain provisions concerning the allocation of costs between parties, the form and content of requests for legal assistance, the designation of national law enforcement agencies or officials responsible for treaty administration, and

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<sup>1</sup>A subpoena *duces tecum* is a specific form of subpoena, also called a “subpoena for the production of evidence.” It is a subpoena issued by a court ordering the parties named to appear and to produce tangible evidence for use at a hearing or trial.

the grounds for which a treaty party may refuse to provide legal assistance. Increasingly, MLATs have been used as a tool to combat terrorism.

The Kazakhstan MLAT is the first such treaty between the United States and the Republic of Kazakhstan. In the absence of this Treaty, there is no obligation to provide assistance to the United States and thus this Treaty would substantially enhance the ability of the United States to investigate and prosecute crimes for which such assistance is necessary. A detailed paragraph-by-paragraph analysis of this treaty may be found in the Letter of Submittal from the Secretary of State to the President on this instrument, which is reprinted in full in Treaty Document 114-11. What follows is a brief summary of some key provisions.

### III. MAJOR PROVISIONS

As with most MLATs, the MLAT with the Republic of Kazakhstan generally obligates the parties to assist each other in criminal investigations, prosecutions, and related law enforcement proceedings, as well as civil or administrative proceedings such as forfeiture proceedings that may be related to criminal matters. Article 1(3) provides a non-exhaustive list of assistance to be rendered by each Party, which includes the taking of evidence, such as testimony, documents, records and items or things, on a requesting party's behalf by way of judicial process; conducting searches and seizures; effecting service of judicial documents; sharing certain obtained information or evidence with a requesting State; freezing and forfeiting assets or property; permitting the transfer of persons in custody to the requesting party for testimony or other assistance; and other agreed-upon forms of assistance not prohibited by the laws of the Requested State.

Article 1(4) provides that, with the exception of where it is specifically required by the laws of the Requested State, "dual criminality" is not a prerequisite for assistance under the Treaty.

Article 3 sets forth a list of circumstances under which a requested State may deny legal assistance to the requesting State. Some of the grounds listed are commonly found in MLATs to which the United States is a party, such as the ground in Article 3(1)(b) permitting the denial of a request when it would prejudice the requested State's sovereignty, security, public order, or other essential interest. In accordance with Article 3(3), a request for assistance under the MLAT with the Republic of Kazakhstan may be refused when it relates to an offense punishable by a deprivation of liberty for less than one year or does not give rise to a significant material loss compared to the resources deemed required to provide the assistance. Before denying assistance under the provisions of Article 3, the Requested Party is obligated to consult with the Requesting Party to consider whether assistance can be given subject to such conditions as the Requested Party may deem necessary.

Article 4 prescribes the form and contents of requests under the Treaty. Article 5 generally obligates both Parties' competent authorities to promptly execute requests; and to promptly inform the competent authority of the requesting state of the outcome of the execution of a request. The requested State is under no obligation to provide translations of responsive materials, however. Article 6, which addresses the allocation of costs associated with providing

assistance, provides that the requested State must pay all costs relating to the execution of a request, unless it is a case where extraordinary expenses arise. This allocation of costs is common in MLATs to which the United States is a party.

Article 7 sets forth limitations on the usage or disclosure of information acquired pursuant to MLAT requests. The Central Authority of the requested State may ask that the requesting party refrain from using or disclosing information or evidence acquired under the MLAT for purposes other than the proceedings stated in the request; if such a request is made, compliance with the request is mandatory. However, nothing in Article 7 precludes, to the extent required under the constitution of the requesting party, the disclosure or use of information or evidence in a criminal proceeding.

Articles 8–16 set forth in detail the procedures to be employed in the case of specific types of requests for legal assistance. In Article 10, a person appearing in the requesting State shall not be subject to service of process or detention or any other form of deprivation of liberty for conduct that preceded entry into the territory. Such a person may not be obliged to provide assistance on any unrelated matter. Unless the Central Authority chooses to extend it, this guarantee of safe conduct only lasts seven days after the person is informed his presence is no longer required and he has not departed the territory despite his physical ability to do so, or if he departs the territory and later voluntarily returns.

Article 11 provides that, in the case of a transfer of someone in custody, the receiving party has the authority and obligation to keep the transferred person in custody, unless permitted by the sending party to do otherwise. Further, it must return the person back to the custody of the sending party as soon as circumstances permit, unless otherwise agreed between the parties. Article 14 makes provision for maintaining a chain of custody for seized evidence, certification of relevant officials obviating the need for further authentication to provide for admissibility in evidence in the courts of the requesting party.

Article 16 requires the requested State to assist the requesting State with measures to freeze or cause the forfeiture of assets that constitute or are derived from proceeds of a crime, whether directly or indirectly; are instrumentalities or intended to be used in the commission of a crime; or is equivalent in value to such property. The requirement to provide assistance arises with respect to both criminal conviction-based forfeitures and non-criminal forfeitures and other restraints of assets premised on underlying criminal conduct.

#### IV. ENTRY INTO FORCE

In accordance with Article 20, this Treaty shall enter into force upon the exchange of instruments of ratification between the United States and the Republic of Kazakhstan.

#### V. IMPLEMENTING LEGISLATION

This treaty, which is self-executing, will be implemented by the United States in conjunction with applicable federal statutes, in-

cluding 18 U.S.C. Sec. 1782. No additional legislation is needed for the United States to fulfill its obligations under this Treaty.

#### VI. COMMITTEE ACTION

The committee reviewed the Treaty at a briefing on May 23, 2016, at which representatives of the Departments of State and Justice were present. On June 23, 2016, the committee considered this treaty and ordered it favorably reported by voice vote, with a quorum present and without objection.

#### VII. COMMITTEE RECOMMENDATION AND COMMENTS

The Committee on Foreign Relations believes that the MLAT with the Republic of Kazakhstan, which would enhance law enforcement cooperation between the United States and Kazakhstan, would further U.S. efforts in fighting terrorism and transnational crime. Accordingly, the committee urges the Senate to act promptly to give advice and consent to ratification of this Treaty, as set forth in this report and the accompanying resolution of advice and consent.

The committee has included in its resolution of advice and consent one declaration, which is discussed below.

##### *Declaration*

The committee has included a proposed declaration in the resolution of advice and consent, which states that the MLAT with the Republic of Kazakhstan is self-executing. This declaration is consistent with statements made in the Letter of Submittal from the Secretary of State to the President on this instrument<sup>2</sup> and with the historical practice of the committee in approving mutual legal assistance treaties.<sup>3</sup> The Senate has rarely included statements regarding the self-executing nature of treaties in resolutions of advice and consent, but in light of the recent Supreme Court decision, *Medellin v. Texas*, 128 S.Ct. 1346 (2008), the committee has determined that a clear statement in the resolution is warranted. A further discussion of the committee's views on this matter can be found in Section VIII of Executive Report 110–12.

#### VIII. RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

*Resolved (two-thirds of the Senators present concurring therein),*

##### **SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION**

The Senate advises and consents to the ratification of the Treaty between the United States of America and the Republic of Kazakhstan on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 20, 2015 (Treaty Doc. 114–11), subject to the declaration of section 2.

<sup>2</sup>Treaty Doc. 114–11 at p. V (stating that “The [MLAT with Kazakhstan] is self-executing and will not require further implementing legislation.”).

<sup>3</sup>The committee has consistently expressed the view that mutual legal assistance treaties are self-executing. See, e.g., Exec. Rept. 107–15 at p. 6 (stating that “[i]t is anticipated that, for the United States, the [Mutual Legal Assistance Treaty with Belize] will be “self-executing.”); and Exec. Rept. 109–14 at p. 6 (stating that “[t]he committee notes that the provisions of the [Mutual Legal Assistance Treaties with Germany and Japan] are self-executing.”).

**SECTION 2. DECLARATION**

The advice and consent of the Senate under section 1 is subject to the following declaration:

The Treaty is self-executing.

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