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TREATY WITH MALAYSIA ON MUTUAL LEGAL ASSISTANCE

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

REPORT

[To accompany Treaty Doc. 109–22]

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and Malaysia on Mutual Legal Assistance in Criminal Matters, signed at Kuala Lumpur on July 28, 2006 (Treaty Doc. 109–22), 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 Malaysia on Mutual Legal Assistance in Criminal Matters (the "MLAT with Malaysia" 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 Malaysia on law enforcement matters so as to enhance the ability of the United States to investigate and prosecute crimes.

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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. 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. 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.[1] 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 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 Malaysia MLAT is the first such treaty between the United States and Malaysia. Under Malaysian law, in the absence of this

[1] 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.

Treaty, there is no obligation to provide assistance to the United States in investigations prior to the initiation of court proceedings, 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 109–22. What follows is a brief summary of some key provisions.

III. MAJOR PROVISIONS

As with most MLATs, the MLAT with Malaysia 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(2) 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; executing 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 temporary transfer of persons in custody to the requesting party; and other agreed-upon forms of assistance.

Article 3 sets forth an extensive 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)(f) permitting the denial of a request when it would prejudice the requested State's sovereignty, security, public order, or other essential interest; and the political offense exception in Article 3(1)(a).

Some of the grounds listed in Article 3 for denying assistance are not commonly found in MLATs to which the United States is a party. For example: the MLAT with Malaysia would expressly permit the denial of assistance when there are substantial grounds for believing that a request was made for the purpose of investigating, prosecuting, or punishing a person on account of the person's race, religion, sex, ethnic origin, nationality, or political opinions;[2] the Treaty would permit the denial of requests relating to the investigation or prosecution of a person for an offense in a case in which that person has already been convicted or acquitted by a court in the requested State for the same offense;[3] and the Treaty would

[2] *See* Article 3(1)(c). A similar ground for denying assistance can be found in Article 3(1)(b) of the Treaty between the United States and South Korea on Mutual Legal Assistance in Criminal Matters, Treaty Doc. 104–1, approved by the Senate on August 2, 1996. *See also* Article 3(1)(d) of the Treaty with the Bahamas on Mutual Assistance in Criminal Matters, Treaty Doc. 100–17, approved by the Senate on October 24, 1989 (assistance may be denied by the Requested State on the grounds that "there are substantial grounds leading the Central Authority of the Requested State to believe that compliance would facilitate the prosecution or punishment of the person to whom the request refers on account of his race, religion, nationality or political opinions.").

[3] *See* Article 3(1)(d). A similar ground for denying assistance can be found in Article 10(1)(c) of the Treaty between the United States and the Kingdom of the Netherlands on Mutual Assist-

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permit the denial of assistance on the grounds that the offense does not appear to be of "sufficient gravity"[4] or relates to an item of "insufficient importance"[5] to an investigation. According to the State Department, the negotiators of the MLAT with Malaysia believe that these grounds for refusal would rarely, if ever, be employed.[6]

Finally, in accordance with Article 3(1)(e) a request for assistance under the MLAT with Malaysia may be refused when it relates to an act or omission that, if it had occurred in the requested State, would not constitute an offense punishable by either a deprivation of liberty for a period of at least one year or a more severe penalty. According to the State Department, although the United States generally does not impose a "dual criminality" requirement upon mutual legal assistance requests, Malaysian law prohibits the providing of assistance in support of an investigation or prosecution of an offense that is not recognized in Malaysia.[7] The State Department has indicated, however, that a review by negotiators of the criminal codes of the United States and Malaysia "revealed broad areas of commonality . . . establishing that a dual criminality refusal ground would not unduly restrict the ability of U.S. authorities to obtain assistance."[8]

Article 3 additionally includes provisions designed to limit the use of grounds for refusing assistance. Article 3(2) refers to a non-exclusive list in the Annex of offenses that satisfy the treaty's dual criminality requirement and for which assistance shall not be refused pursuant to Article 3(1)(e), as described above. Article 3(3) states that "[a]ssistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters."

Articles 4 and 5 prescribe the form and contents of requests under the Treaty. Article 6 generally obligates both Parties' competent authorities to promptly execute requests; to respond within a reasonable period of time to reasonable inquiries by the competent authority of the requesting State; and to promptly inform the competent authority of the requesting state of the outcome of the execution of a request. Articles 8–17 set forth in detail the procedures to be employed in the case of specific types of requests for legal assistance. Article 19, 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, with certain exceptions. This allocation of costs is common in MLATs to which the United States is a party.

IV. Entry Into Force

In accordance with Article 22, this Treaty shall enter into force upon the exchange of instruments of ratification between the United States and Malaysia. Once in force, however, the Treaty shall apply to all requests presented between the Parties regard-

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ance in Criminal Matters, together with an exchange of notes, Treaty Doc. 97–16, approved by the Senate on December 2, 1981.

[4] *See* Article 3(1)(h).

[5] *See* Article 3(1)(i).

[6] *See* the Secretary of State's Letter of Submittal, Treaty Doc. 109–22 at p. VIII.

[7] *Id.* at p. VII.

[8] *Ibid.*

less of when the acts or omissions constituting the offense occurred.[9]

V. IMPLEMENTING LEGISLATION

This treaty, which is self-executing, will be implemented by the United States in conjunction with applicable federal statutes, including 18 U.S.C. § 1782. No additional legislation is needed for the United States to fulfill its obligations under this Treaty.

VI. COMMITTEE ACTION

The committee held a public hearing on this Treaty on May 20, 2008. Testimony was received from Susan Biniaz, Deputy Legal Adviser at the Department of State and Bruce Swartz, Deputy Assistant Attorney General in the Criminal Division at the Department of Justice. A transcript of this hearing is annexed to Executive Report 110–12.

On July 29, 2008, 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 Malaysia, which would enhance law enforcement cooperation between the United States and Malaysia, 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.

A. AMENDMENTS TO THE ANNEX

In an effort to provide certainty to U.S. and Malaysian authorities seeking assistance, an Annex was included that provides a non-exclusive list of offenses for which the Parties have already established that dual criminality exists. In accordance with Article 3(2) of the MLAT with Malaysia, a request that relates to an offense identified in the Annex cannot be refused for a lack of dual criminality pursuant to Article 3(1)(e) of the Treaty. A similar Annex was included in the 1993 Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters.[10]

An amendment simply adding an offense, or several offenses, to the Treaty's Annex that both Parties have established meets the dual criminality requirement should not, in the normal course, rise to the level of an amendment that requires the advice and consent of the Senate. If, however, an amendment to the Annex goes beyond the addition of an offense or offenses that both Parties have established meet the dual criminality requirement, the committee expects the executive branch to consult with the committee in a timely manner in order to determine whether advice and consent is necessary.

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[9] *See* Article 22(3).
[10] Treaty Doc. 104–1.

B. RESOLUTION

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 Malaysia 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 [11] and with the historical practice of the committee in approving mutual legal assistance treaties.[12] 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, *Medellín* 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 Malaysia on Mutual Legal Assistance in Criminal Matters, signed at Kuala Lumpur on July 28, 2006 (Treaty Doc. 109–22), subject to the declaration of section 2.

SECTION 2. DECLARATION

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

This Treaty is self-executing.

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[11] Treaty Doc. 109–22 at p. V (stating that "The [MLAT with Malaysia] is self-executing . . . .").

[12] 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]it 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.").