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EXTRADITION TREATY WITH THE REPUBLIC OF CHILE

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

REPORT

[To accompany Treaty Doc. 113–6]

The Committee on Foreign Relations, to which was referred the Extradition Treaty Between the United States of America and the Republic of Chile, signed at Washington on June 5, 2013 (Treaty Doc. 113–6), having considered the same, reports favorably thereon with one declaration 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 advice and consent to ratification.

CONTENTS

I. PURPOSE

The purpose of the Extradition Treaty with Chile (hereafter "the Treaty") is to impose mutual obligations to extradite fugitives at the request of a party subject to conditions set forth in the Treaty.

II. SUMMARY AND DISCUSSION OF KEY PROVISIONS

The United States is currently a party to over 100 bilateral extradition treaties, including a treaty with Chile which was signed on April 17, 1900, and entered into force on June 26, 1902 (hereafter the "1900 treaty").

The treaty before the Senate is designed to replace, and thereby modernize, the century-old extradition treaty with Chile. It was signed in June 2013 and submitted to the Senate on September 14,

2014. In general, the Treaty follows a form used in several other bilateral extradition treaties approved by the Senate in recent years. It contains two important features which are not in the 1900 treaty. First, the Treaty contains a "dual criminality" clause which requires a party to extradite a fugitive whenever the offense is punishable under the laws of both parties by deprivation of liberty for a maximum period of more than one year. This provision replaces the list of offenses specifically identified in the 1900 treaty. This more flexible provision ensures that newly-enacted criminal offenses are covered by the Treaty, thereby obviating the need to amend it as offenses are criminalized by the Parties.

Second, the Treaty provides for extradition of nationals. Specifically, Article 3 states that extradition "shall not be refused on the ground that the person sought is a national of the Requested State." This contrasts with Article V of the 1900 treaty, which does not obligate a party to extradite its nationals. Many countries of Latin America have, historically, refused to extradite nationals. The United States, by contrast, does extradite its nationals, and has long attempted to convince extradition partners to do likewise.

The Treaty contains another provision worth noting. Consistent with U.S. policy and practice in recent years, the Treaty narrows the political offense exception. The political offense exception (an exception of long-standing in U.S. extradition practice) bars extradition of an individual for offenses of a "political" nature. The Treaty with Chile retains the political offense exception in Article 4(1), but provides that certain crimes shall not be considered political offenses, including murder, sexual assault, kidnapping or other crimes of violence, or offenses for which both parties have an obligation to extradite under a multilateral agreement, such as illicit drug trafficking or terrorism offenses.

The Treaty contains a provision related to the death penalty. Under Article 6, when extradition is sought for an offense punishable by death in the Requesting State and is not punishable by death in the Requested State, the Requested State may refuse extradition unless the Requesting State provides an assurance that the person sought for extradition will not be executed. This provision is found in many U.S. extradition treaties, as many treaty partners do not impose the death penalty under their laws, and object to its application to fugitives whom they extradite to the United States.

Finally, the terms of Article 16 Rule of Specialty clearly bar onward extradition unless the Requested state consents to the onward extradition or surrender. Furthermore, in his transmittal message of the Treaty to the Senate, the President reinforces this important protection by stating:

> Article 16(2) provides that a person extradited under the Treaty may not be the subject of onward extradition or surrender for any offense committed prior to extradition, unless the Requested Party consents. This provision would preclude the Chile from transferring to a third State or an international tribunal a fugitive that the United States surrendered to the Chile, unless the United States consents.

III. Entry Into Force and Termination

Under Article 22, the Treaty enters into force upon the exchange of the instruments of ratification. Under Article 23, either party may terminate the treaty on written notice; termination will be effective six months after the date of such notice.

IV. 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. The Committee considered the Treaty on June 23, 2016, and ordered it favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the Treaty subject to the declaration set forth in the resolution of advice and consent to ratification.

V. Committee Comments

The Committee recommends favorably the Treaty with Chile. It modernizes a treaty that is over a century old, and provides a more flexible "dual criminality" provision which will incorporate a broader range of criminal offenses than is covered under the current treaty with Chile.

VI. Explanation of Extradition Treaty With Chile

What follows is a technical analysis of the Treaty prepared by the Departments of State and Justice.

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

The Extradition Treaty between the Government of the United States and the Government of the Republic of Chile ("Treaty") replaces an outdated extradition treaty between the countries signed in 1900.

The following is an article-by-article description of the provisions of the Treaty:

ARTICLE 1—OBLIGATION TO EXTRADITE

Article 1 obligates each Party to extradite to the other persons sought by the Requesting State for prosecution or for imposition or service of a sentence for an extraditable offense

ARTICLE 2—EXTRADITABLE OFFENSES

This Article defines extraditable offenses. Under Article 2(1), an offense is extraditable if it is punishable under the laws of both States by deprivation of liberty for a period of more than one year or by a more severe penalty. This formulation is consistent with the modern "dual criminality" approach. The new Treaty eliminates the requirement, found in the 1900 Extradition Treaty, that the offense be among those listed in the treaty. The dual criminality formulation obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the

laws of both States and ensures a comprehensive coverage of criminal conduct for which extradition may be sought.

Article 2(2) further defines an extraditable offense to include an attempt or a conspiracy to commit, or participation in the commission of, an extraditable offense, if the offense of attempt, conspiracy, or participation is punishable under the laws of both States by deprivation of liberty for a period of more than one year or by a more severe penalty. Under the broad term of "participation," the Treaty covers such offenses as aiding, abetting, counseling, or procuring the commission of an offense, at whatever stage of development of the criminal conduct and regardless of the alleged offender's degree of involvement.

Additionally, Article 2(3) identifies a number of situations in which an offense will be extraditable despite potential differences in the criminal laws of both States. For instance, an offense shall be extraditable whether or not the laws of the Requesting and Requested States place the acts constituting the offense within the same category of offenses or describe the offense by the same terminology. In addition, an offense involving tax fraud, customs duties, and import/export controls shall be extraditable regardless of whether the Requested State provides for the same sort of taxes, duties, or controls. This provision also makes explicit that an offense is extraditable where U.S. federal law requires the showing of certain matters merely for the purpose of establishing U.S. federal jurisdiction, including interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce; this clarifies an important issue for the United States in seeking extradition for certain crimes.

Article 2(4) addresses issues of territorial jurisdiction and requires the parties to grant extradition if the offense for which extradition is requested has been committed in whole or in part in the territory of the Requesting State. With regard to offenses committed outside the territory of the Requesting State, extradition shall be granted if the laws of the Requested State provide for the punishment of such an offense committed outside its territory under similar circumstances. If the laws of the Requested State do not so provide, the Requested State may still grant extradition at its discretion.

Article 2(5) prescribes that, if extradition is granted for an extraditable offense, it shall also be granted for any other offense specified in the request even if the latter offense is punishable by a maximum of one year's deprivation of liberty or less, provided that all other requirements for extradition are met.

Article 2(6) provides that, where the extradition request is for service of a sentence of imprisonment, extradition may be denied if, at the time of the request, the remainder of the sentence to be served is less than six months.

ARTICLE 3—NATIONALITY

Article 3 establishes that extradition and surrender shall not be refused based on the nationality of the person sought.

ARTICLE 4—POLITICAL AND MILITARY OFFENSES

Article 4 governs political and military offenses as a basis for the denial of extradition. As is customary in extradition treaties, extra-

dition shall not be granted if the offense for which extradition is requested is a political offense.

Article 4(2) enumerates offenses that shall not be considered to be political offenses, including murder, manslaughter, serious sexual assault, and kidnapping.

Notwithstanding Article 4(2), Article 4(3) provides that extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated.

Under Article 4(4) the competent authority of the Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law. Desertion would be an example of such an offense.

ARTICLE 5—PRIOR PROSECUTION

Article 5 addresses instances in which an individual has previously been prosecuted for the offense for which extradition is requested. Article 5(1) precludes extradition of a person who has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Under Article 5(2), a person shall not be considered to have been convicted or acquitted where the authorities of the Requested State: (a) have decided not to prosecute the person sought for the acts for which extradition is requested; (b) have decided to discontinue any criminal proceedings against the person for those acts; or (c) are still proceeding against the person sought for those acts.

ARTICLE 6—PUNISHMENT

Article 6 addresses punishment. When an offense for which extradition is sought is punishable by death under the laws of the Requesting State but not under the laws of the Requested State, under Article 6(1) the Requested State may grant extradition for the person sought on the condition that the death penalty shall not be imposed, or if imposed that it shall not be carried out. Except in instances in which the death penalty applies, Article 6(2) precludes the Parties from imposing conditions or refusing extradition on the basis that the penalty for the offense is greater in the Requesting State than in the Requested State.

ARTICLE 7—LAPSE OF TIME

Article 7 provides that only the laws of the Requesting State regarding lapse of time shall be considered for purposes of deciding whether or not to grant extradition. The Requesting State's certification that the statute of limitations has not run is binding on the Requested State.

ARTICLE 8—EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

Article 8 specifies the procedures and documents required to support a request for extradition. Article 8(1) prescribes that all extradition requests be submitted through the diplomatic channel. Among several other requirements, Article 8(3) establishes that extradition requests must be supported by such information as would provide a reasonable basis to believe that the person sought committed the offense(s) for which extradition is requested. Notably,

this language mirrors the probable cause standard applied in U.S. criminal law.

ARTICLE 9—TRANSLATION

Article 9 requires that all documents that the Requesting State submits pursuant to the Treaty must be accompanied by a translation into the language of the Requested State, unless otherwise agreed.

ARTICLE 10—ADMISSIBILITY OF DOCUMENTS

Article 10 sets out the procedures for certification and admissibility of documents.

ARTICLE 11—PROVISIONAL ARREST

Article 11 establishes the possibility of and procedures for requesting the provisional arrest of the person sought pending presentation of the formal extradition request. Article 11(2) specifies the information that must accompany a provisional arrest request. Article 11(4)–(5) sets out procedures to be followed if the Requesting State is unable to provide the formal extradition request within the specified time period.

ARTICLE 12—DECISION AND SURRENDER

Article 12 requires the Requested State to promptly notify the Requesting State of its decision on an extradition request. Under Article 12(2), if the Requested State denies extradition, it must provide an explanation of the reasons for the denial.

ARTICLE 13—DEFERRED AND TEMPORARY SURRENDER

Article 13 addresses deferred and temporary surrender of the person sought. Under Article 13(1), if extradition has been authorized, but the person sought is being proceeded against or is serving a sentence in the Requested State, the Requested State may defer the surrender of the person sought until the proceedings have been concluded or the sentence has been served. Alternatively, the Requested State may temporarily surrender the person to the Requesting State for the purpose of prosecution. Article 13(3) requires the person temporarily surrendered to be kept in custody while in the Requesting State and to be returned to the Requested State at the conclusion of proceedings.

ARTICLE 14—REQUESTS FOR EXTRADITION MADE BY SEVERAL STATES

Pursuant to Article 14, if the Requested State receives extradition requests for the same person from more than one State, either for the same offense or for different offenses, the competent authority of the Requested State shall determine to which State, if any, it will surrender that person. Additionally, this Article sets forth a non-exclusive list of factors to be considered by the Requested State in making its decision.

ARTICLE 15—SEIZURE AND SURRENDER OF ITEMS

Article 15 provides that, subject to certain conditions, the Requested State may seize and surrender to the Requesting State all items that are connected with the offense for which extradition is

sought or that may be required as evidence in the Requesting State.

ARTICLE 16—RULE OF SPECIALTY

Article 16 sets forth the rule of specialty, which prohibits a person extradited under the Treaty from being detained, tried, or punished in the Requesting State, except for any offense for which extradition was granted, or a differently denominated offense that is based on the same facts, carries the same or lesser penalty and is extraditable or is a lesser included offense. The rule of specialty does not bar such actions against the extradited person if the offense is committed after the extradition of the person, or the competent authority of the Requested State consents to the person's detention, trial or punishment for that offense. Article 16(2) provides that a person extradited under the Treaty may not be the subject of onward extradition or surrender for any offense committed prior to extradition, unless the Requested State consents. This provision would preclude Chile from transferring to a third State or an international tribunal a fugitive that the United States surrendered to Chile, unless the United States consents.

ARTICLE 17—SIMPLIFIED EXTRADITION AND WAIVER OF EXTRADITION PROCEEDINGS

Article 17 allows the Parties to conduct a simplified extradition procedure when the person sought consents to extradition or waives extradition before a judicial authority. Notably, the rule of specialty protections in Article 16 do not apply if the person sought waives extradition.

ARTICLE 18—TRANSIT

Article 18 governs the transportation of a person being extradited between a party and a third State through the other Party's territory.

ARTICLE 19—REPRESENTATION AND EXPENSES

Article 19 requires the Requested State to advise, assist, appear in court on behalf of, and represent the interests of the Requesting State in any proceedings arising out of an extradition request. Additionally, the Requested State must bear all expenses incurred in that State in connection with the extradition proceedings, except for expenses related to translation and transportation of the person surrendered.

ARTICLE 20—CONSULTATION

Article 20 provides that the U.S. Department of Justice and the Chilean Office of the Public Prosecutor may consult with each other directly in connection with individual cases and in furtherance of efficient implementation of the Treaty.

ARTICLE 21—APPLICATION

Article 21 establishes that the Treaty shall only apply to offenses committed after the Treaty's entry into force.

ARTICLE 22—RATIFICATION AND ENTRY INTO FORCE

Article 22 notes that the Treaty is subject to ratification and shall enter into force upon the exchange of the instruments of ratification. Article 22(3) provides that, upon entry into force, the Treaty shall supersede the 1900 Extradition Treaty with respect to all requests involving offenses committed on or after the date of the Treaty's entry into force. The 1900 Extradition Treaty shall continue to govern requests for extradition relating to offenses committed before the date of the Treaty's entry into force.

ARTICLE 23—TERMINATION

Under Article 23, either Party may terminate the Treaty by giving written notice to the other Party through the diplomatic channel. The termination shall be effective six months after the date of such notice. Nevertheless, extradition requests made before the termination becomes effective shall be governed by the Treaty until final resolution of the request.

VII. TEXT OF THE 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 Government of the United States of America and the Government of the Republic of Chile, signed at Washington on June 5, 2013 (Treaty Doc. 113–6), subject to the declaration of section 2.

SEC. 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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