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EXTRADITION TREATY WITH PERU

OCTOBER 17, 2002.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 107–6]

The Committee on Foreign Relations, to which was referred the Extradition Treaty Between the United States of America and the Republic of Peru, signed at Lima on July 26, 2001 (Treaty Doc. 107–6), having considered the same, reports favorably thereon with one understanding and one condition 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.

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I. PURPOSE

The purpose of the Extradition Treaty with Peru (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 Peru which was signed in 1899, and entered into force in 1901 (31 Stat. 1921) (hereafter the "1899 treaty").

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The treaty before the Senate is designed to replace, and thereby modernize, the century-old extradition treaty with Peru. It was signed in July 2001 and submitted to the Senate on May 8, 2002.

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 1899 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 1899 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 III 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 1899 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 several other provisions 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 Peru retains the political offense exception in Article IV(2), but provides that certain crimes shall not be considered political offenses, including murder or other crimes of violence against a Head of State (or his family) of either party, genocide, 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, in Article IV(5), allowing the executive authority of the Requested State to refuse extradition if the person sought would be tried or punished under "extraordinary criminal laws or procedures in the Requesting State." This provision was included at the insistence of the United States, based on concerns at the time of the negotiations over inadequate due process in cases before Peru's special terrorism tribunals. Negotiators for the two parties understood that the language is paragraph 5 was specifically intended to refer to proceedings before these tribunals. According to testimony received from the State Department, these concerns have been "assuaged considerably" since the negotiations, due to the departure of former President Fujimori and subsequent reforms to the Peruvian legal system.

Finally, the Treaty contains a provision related to the death penalty. Under Article V, 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 ob-

ject to its application to fugitives whom they extradite to the United States.

III. Entry Into Force and Termination

Under Article XIX, the Treaty enters into force upon the exchange of the instruments of ratification. 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 public hearing on September 19, 2002, receiving testimony from representatives of the Departments of State and Justice (S. Hrg. 107–721). The Committee considered the Treaty on October 8, 2002, 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 understanding and the condition set forth in the resolution of advice and consent to ratification.

V. Committee Comments

The Committee recommends favorably the Treaty with Peru. 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 Peru.

According to the State Department's most recent human rights report, "confidence among the Peruvian public in the judiciary is low," and that although the Constitution of Peru provides for an independent judiciary, in practice the judiciary "has been subject to interference from the executive" and is also subject to corruption. The State Department has testified that since the downfall of the Fujimori government in November 2000, Peru has taken steps to correct deficiencies in its judicial system, including by increasing salaries for judges and abolishing an executive committee which former President Fujimori used to influence the judiciary. The State Department testimony noted that under U.S. extradition law and practice, once a fugitive is found extraditable by a U.S. court, the Secretary of State makes the final decision on extradition. As part of that review, the Secretary "takes into account any information available that may affect the defendant's ability to receive a fair trial." The Committee expects that, until judicial reforms have been solidified in Peru, the Secretary will give close scrutiny to all extradition cases to ensure that the defendant is likely to receive adequate due process protections.

Following negotiation of the Rome Statute on the International Criminal Court in 1998, the Committee recommended, in the consideration of extradition treaties, that the Senate include in its resolutions of advice and consent an understanding stating that the Rule of Speciality would bar the retransfer of a fugitive to the International Criminal Court without the consent of the United States. This understanding also provides that the United States would not provide such consent unless it becomes a party to the Court under Article II of the U.S. Constitution. The Rome Statute

has now entered into force. The Committee again recommends inclusion of such an understanding. The Committee notes, in this regard, that earlier this year Congress enacted legislation barring U.S. cooperation with the Court, including extradition (Title II of the Supplemental Appropriations Act for Fiscal Year 2002, P.L. 107–206).

Finally, the Committee notes that the State Department expects that parental child abduction will be an extraditable offense under the Treaty. The Committee strongly urges the Departments of Justice and State to seek extradition in such cases with Peru.

VI. Explanation of Extradition Treaty with Peru

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 Peru

On July 26, 2001, the United States signed a new Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Peru to replace a century-old treaty currently in force between them.[1] The new Treaty will be implemented in both the United States and Peru under the procedural framework of existing domestic extradition laws[2] without the need for any new implementing legislation.

The Office of International Affairs, Criminal Division, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, prepared the following technical analysis of the new Treaty based on their participation in its negotiation.

Article I—Obligation to Extradite

Article I of the Treaty contains a standard provision obligating the United States and Peru to extradite to each other persons whom the authorities in the Requesting State have charged with, found guilty of, or sentenced for an extraditable offense. By referring to persons wanted "in" the Requesting State, the obligation to extradite applies to fugitives from federal, state, or local justice. This article also makes clear that such obligation extends not only to persons charged with or sentenced for such offenses, but also to persons who have been found guilty but have fled prior to sentencing. Moreover, the negotiating delegations intended that "charged" persons include those who are sought for prosecution for an extraditable offense based on an outstanding warrant of arrest, regardless of whether such warrant was issued pursuant to an indictment, complaint, information, affidavit, or other lawful means for initiating an arrest for prosecution under the laws in Peru or the United States.

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[1] Signed at Lima November 28, 1899; entered into force February 22, 1901; 31 Stat. 1921; TS 288; 10 Bevans 1074.

[2] For the United States, this is Title 18, United States Code, Section 3184 *et seq.* For Peru, this is the Law of Extradition (Ley de Extradicion, Ley No. 24710 (1987)).

ARTICLE II—EXTRADITABLE OFFENSES

This Article contains standard guidelines for determining which offenses are extraditable. As a general rule, it defines extraditable offenses as those for which the laws of both countries provide a maximum potential penalty of more than one year in prison.[3] In addition to this broad definition, the Article makes clear that extradition shall be granted for conspiring or attempting to commit, or otherwise participating in,[4] the commission of an extraditable offense. Moreover, in determining whether the crime would be punishable under its laws, the Requested State—looking only to the underlying criminal conduct for which extradition is sought—is required to disregard differences in the two countries' categorization of, or terminology used to describe, the offense, as well as certain federal jurisdictional elements, such as use of the mail or telephone, that are peculiar to United States federal law. Finally, this Article provides that, when extradition has been granted for an extraditable offense, it shall also be granted for other less serious offenses 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.

Paragraph 3(c) of this Article is particularly important in ensuring that transnational and extraterritorial crimes are extraditable. By providing that an offense will be extraditable regardless of where it was committed, this provision will allow the United States to obtain extradition for violations of U.S. law—including terrorist offenses—initiated or orchestrated from abroad, even if committed entirely outside the territory of the United States, and even if Peruvian law would not recognize jurisdiction over such offenses under the same circumstances.

ARTICLE III—EXTRADITION OF NATIONALS

Article III provides that extradition shall not be refused on the ground that the person sought is a national of the Requested State. For many years, Peruvian law expressly prohibited the extradition of Peruvian nationals.[5] When Peru updated its extradition law in 1987, this prohibition was omitted, but neither the 1987 law nor the 1899 U.S.-Peru extradition treaty provide any affirmative basis for the extradition of Peruvian nationals.[6] This Article now provides such an affirmative obligation and will ensure the ability of the United States to extradite fugitives from Peru regardless of their nationality.

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[3] During the negotiations, the Peruvian delegation indicated that, under Peruvian law, key offenses such as drug trafficking (including CCE), money laundering, terrorism, and organized criminal activity (RICO), as well as certain tax, export, and environmental crimes, would meet the requirements of Article II(1) and thus be extraditable offenses.

[4] 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* 18 U.S.C §§2 and 3.

[5] Article 3(1) of Extradition Law of October 23, 1888: "Extradition will not be granted in any case . . . [w]hen the individual whose extradition has been requested is a Peruvian citizen by birth or is a citizen naturalized before the act was committed which motivated the petition for extradition."

[6] Article V of the 1899 treaty states that "[n]either of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this treaty."

ARTICLE IV—BASES FOR DENIAL OF EXTRADITION

This Article sets forth several bases under which the Requested State may deny extradition. For the most part, it contains standard treaty language that has been drawn as narrowly as possible in order to comport with the treaty's overarching goal of facilitating, rather than hindering, extradition in the vast majority of cases.

Paragraph 1(a) contains standard "double jeopardy" or non bis in idem language prohibiting extradition if the person sought has been convicted or acquitted in the Requested State for the same offense for which extradition is requested.[7] This provision 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. In addition, this provision makes clear that extradition will not be precluded by the fact that the Requested State's authorities have declined to prosecute, or have discontinued criminal proceedings against, the person sought for the same offense for which extradition is requested.

Paragraph 1(b) of this Article prohibits extradition if the prosecution or punishment for the offense for which extradition is sought is barred by the statute of limitations of the Requesting State. This language is an improvement over provisions applying the Requested State's statute of limitations, like that contained in the 1899 extradition treaty in force between the United States and Peru.[8] From the modern viewpoint of the United States, the Requested State's statute of limitations should have no relevance to offenses committed against the laws of the Requesting State. Like many countries throughout the world, Peruvian law includes time limitations not only within which a person must be prosecuted, but also within which a sentence must be served. Unlike the United States, all offenses, even murder, are subject to prescriptive periods, which correspond to the maximum applicable penalty for the offense, but which in no case exceed 30 years. Moreover, although Peruvian law sets forth certain circumstances under which the running of the prescription period is interrupted, it is not, as under United States law, met simply upon the filing of an indictment or suspended for such time as the defendant remains a fugitive. Accordingly, the inapplicability of the Peruvian statute of limitations to offenses that are the subject of U.S. extradition requests should significantly limit potential grounds for denial of extradition.

Paragraph 2 of this Article sets forth a standard political offense exception to extradition. The language used in this Article is typical in that it does not attempt to define what constitutes a political offense, leaving it to the courts of the Requested State to determine, based solely on domestic law, whether a particular extradition request should be denied on this basis.[9] This Article, however, does set forth certain offenses that are not to be considered

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[7] 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 ground that the person sought has been convicted or acquitted in a third State.

[8] Article VII of the 1899 Treaty.

[9] Generally, United States law recognizes two categories of political offenses: (1) "pure" political offenses, such as treason, sedition and espionage, which are directed solely against the integrity of the State; and (2) in more limited circumstances, certain so-called "relative" political offenses, i.e., those containing elements of common crimes, but which are committed as means to political ends or closely linked with political events.

political offenses. These include: (1) a violent crime against the Head of State of the United States or Peru or members of their families; (2) terrorism, genocide, drug trafficking, and other offenses as defined in multilateral conventions to which both the United States and Peru are parties;[10] and (3) a conspiracy or attempt to commit, or participation in any of the above offenses.

Paragraph 3 states that extradition shall not be granted if the executive authority of the Requested State determines that the extradition request was politically motivated. This provision applies when the offense for which extradition has been requested does not fall within the definition of a political offense, but it is shown that the extradition request is for the actual purpose of punishing the person sought for political reasons. Under U.S. law and practice, a claim that the extradition request was politically motivated, unlike a claim involving the political offense exception, falls outside the scope of judicial review and is exclusively for the executive branch (i.e., the Secretary of State) to consider and decide.

Paragraph 4 of this Article is a standard provision stating that the Requested State may refuse extradition if the request relates to an offense under military law that would not be an offense under ordinary criminal law, such as desertion or disobedience of orders. This provision makes clear that the decision whether to grant or refuse an extradition request based on a military offense is one exclusively in the discretion of the executive branch.

Paragraph 5 of this Article gives the executive authority of the Requested State discretion to deny an extradition request when the person sought will be or has been tried under extraordinary laws or procedures in the Requesting State. This provision was included at the instance of the United States based on concerns at the time of the negotiations over due process issues in cases that were brought before Peru's special terrorism tribunals. Since the negotiations, those concerns have been assuaged considerably by the departure of former president Fujimori, subsequent reforms to the Peruvian legal system and the decline in the use of such special terrorism tribunals in Peru. In fact, some cases originally tried in special terrorism tribunals have been retried recently in the civilian court system. In any event, because it is discretionary, this provision is designed to give the executive branch of the Requested State sufficient flexibility so as not to frustrate the treaty's primary goal of bringing fugitives to justice. In the rare case in which this provision might apply, the Requested State could nevertheless agree to extradition, for example, upon being satisfied that the Requesting State has adopted adequate procedures to safeguard the due process rights of the accused.

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[10] Examples of conventions to which this clause would apply at present include: the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, (done at New York, December 14, 1973; entered into force February 20, 1977 (28 UST 1975; TIAS 8532; 1035 UNTS 167)); the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) (done at The Hague December 16, 1970; entered into force October 14, 1971 (22 UST 1641; TIAS 7192)); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) (done at Montreal September 23, 1971; entered into force January 26, 1973 (24 UST 564; TIAS 7570)); the International Convention for the Suppression of Terrorist Bombings (done at New York December 15, 1997; entered into force for the United States July 26, 2002 (Treaty Doc. 106–6)); the International Convention for the Suppression of the Financing of Terrorism (done at New York December 9, 1999; entered into force for the United States July 26, 2002 (Treaty Doc. 106–49)); and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (done at Vienna December 20, 1988; entered into force November 11, 1990).

ARTICLE V—DEATH PENALTY

Paragraph 1 of this Article gives the Requested State the discretion 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 such penalty in the Requested State, unless the Requesting State provides an assurance that the person sought will not be executed. This is a common provision in U.S. extradition treaties with countries, like Peru, that insist on its inclusion based on the abolition or severe restriction of the death penalty under their laws. Peru's constitution prohibits the death penalty as a punishment for all crimes except terrorism and treason. [11]

Paragraph 2 of this Article provides that, aside from the death penalty, extradition cannot be denied nor subjected to conditions on the basis that the penalty for the offense is greater in the Requesting State than in the Requested State. This provision is designed to make clear that the Requested State cannot impose penalty-related conditions that are outside the scope of the express provisions in paragraph 1 of this Article. This provision was included at the request of the United States in response to a recent trend during which a number of countries sought assurances relating to sentences of life imprisonment, as well as those imposed for terms of years, when there was no basis in the applicable treaty for making such a demand.

ARTICLE VI—EXTRADITION PROCEDURES AND REQUIRED DOCUMENTS

This Article contains standard provisions setting forth the appropriate means of transmitting an extradition request and the required documentation and evidence to be submitted in support thereof.

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. Paragraph 5 allows the Requested State to seek, if necessary, supplemental information from the Requesting State within a designated period of time.

Among the documentation required in support of a request for the extradition of a person charged with, but not yet convicted of, a crime is evidence "sufficient to justify the committal for trial" of the person sought if the offense had been committed in the Requested State. This provision is consistent with fundamental extradition jurisprudence in the United States and will be interpreted by U.S. courts to require that Peru provide evidence sufficient to establish "probable cause" that an extraditable crime was committed by the person sought. The Peruvian delegation explained

[11] Article 140, Political Constitution of Peru (1993). With respect to these two offenses, this Article would not restrict extradition requests for comparable crimes punishable by death under U.S. law. *See* 18 U.S.C. §§2381 and 2331 *et seq.*

that, in accordance with Peruvian law, Peruvian courts would apply a comparable standard of proof to U.S. requests.

In regard to persons who already have been found guilty of the offense for which extradition is sought, no showing of probable cause is required. The Requesting State need provide only a copy of the judgment of conviction and such evidence establishing that the person sought is the person to whom the conviction refers.

ARTICLE VII—TRANSLATION AND ADMISSIBILITY OF DOCUMENTS

This Article contains a standard treaty provision requiring that all documents submitted in support of an extradition request be translated into the language of the Requested State (Spanish for Peru and English for the United States). It also provides that properly certified and authenticated documents accompanying an extradition request shall be accepted as evidence in extradition proceedings. [12]

ARTICLE VIII—PROVISIONAL ARREST

This Article contains standard language describing the process by which a person may be arrested and detained in the Requested State while the extradition documents required by Article VI are being prepared and translated in the Requesting State.

Provisional arrest serves the interests of justice by allowing for the apprehension of fugitives who, for example, pose a danger to the community or a risk of flight. Fleeing fugitives often do not stay in one place for any significant period of time, and frequently for less time than it takes to prepare and translate formal extradition documentation. Moreover, the ability to immediately arrest dangerous criminals obviates risks to the safety of the citizenry of the requested country by denying such criminals the opportunity to continue to engage in illegal activity while the full extradition documentation is being prepared.

This Article also contains certain provisions to protect against capricious or unjustified use of provisional arrest authority. For example, it provides that provisional arrest may be effected only under urgent circumstances, requires that a valid warrant for the fugitive's arrest or a finding of guilt or judgment of conviction exist in the Requesting State, and imposes a 60-day time limit within which the formal extradition documentation must be presented to the executive authority of requested country or the person sought may be released from custody. The Article also makes clear, however, that the release of the person sought because of a missed deadline will not preclude the re-arrest of, and re-commencement of extradition proceedings against, the person sought if the formal request and supporting documentation are received at a later date.

ARTICLE IX—DECISION ON THE EXTRADITION REQUEST AND SURRENDER OF THE PERSON SOUGHT

This Article contains standard language concerning the Requested State's obligation to notify the Requesting State of its deci-

[12] *See* Title 18, United States Code, Section 3190, for traditional means of authenticating extradition documentation. This provision also has the added flexibility of allowing the admissibility of documents that have been certified or authenticated in other ways accepted by the laws in the Requested State.

sion on an extradition request and to provide an explanation if the request is denied. It also contains standard provisions concerning arrangements for surrendering the person sought to authorities of the Requesting State and consequences if the Requesting State fails to remove the person within the required time.

ARTICLE X—DEFERRED AND TEMPORARY SURRENDER

In the event that the person sought by the Requesting State is being prosecuted or serving a sentence in the Requested State, this Article allows the Requested State to postpone the extradition proceedings and surrender of that person until the conclusion of its own prosecution or the completion of the service of any sentence imposed as a result thereof. As an alternative, the Requested State may temporarily surrender the person for prosecution in the Requesting State.

Under the terms of this Article, a person temporarily surrendered 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.

ARTICLE XI—CONCURRENT REQUESTS

When the Requested State has received an extradition request under this treaty, and also has received a request for the same person from one or more other countries, this Article sets forth standard factors to be considered by the Requested State in determining to which country it will surrender the person sought.

ARTICLE XII—SEIZURE AND SURRENDER OF PROPERTY

At the time of their arrest in the Requested State, persons are often in possession of property that is connected in some way to the offense for which extradition is sought. This Article allows such property to be surrendered to the Requesting State upon extradition, so that the property may be used as evidence at trial, returned to the victims, or otherwise disposed of appropriately. The Requested State, however, may condition the surrender of the property upon assurances from the Requesting State that such property will be returned to the Requested State as soon as practicable, and this Article provides that the rights of third parties in such property shall be respected.

ARTICLE XIII—RULE OF SPECIALITY

This Article contains standard provisions relating to the rule of speciality, which, in general terms, 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 ploy—for example, to obtain custody of a person for trial or service of sentence on different charges that would not be extraditable under the Treaty. Paragraph 1 of this article also sets forth several standard exceptions to the general rule which allow the Requesting State to pursue: (1) lesser included or differently denominated offenses based on the same facts as the crime for which extradition was granted;[13] (2) an offense committed after extradition;[14] or (3) any offense for which the Requested State gives consent.[15] 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.[16] Finally, paragraph 3 permits the detention, trial, or punishment of an extraditee for offenses other than those for which extradition 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 ten days of being free to do so.[17]

ARTICLE XIV—SIMPLIFIED PROCEDURE FOR SURRENDER

This Article contains a standard provision allowing, upon his or her consent, the expeditious surrender of the person sought to the Requesting State without further proceedings. Persons sought for extradition frequently elect to expedite their return to the Requesting State under such provisions in order to resolve the charges against them and to spend as little time as possible in custody in the Requested State. Expedited surrender also saves the judicial and law enforcement authorities of the Requested State the significant expense associated with prolonged extradition proceedings. In cases where a person has waived further proceedings, and along with them protections in the treaty and applicable extradition statutes, the process is not deemed an "extradition," and therefore the rule of speciality in Article XIII does not apply.

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[13] Allowing the Requesting State to proceed on such crimes does not offend the purpose of the rule of speciality, since the Requested State will have already considered the facts upon which both the original and the new charges are based and determined that the acts constituting the offenses are extraditable.

[14] The rule of speciality does not provide the defendant with any immunity for offenses committed after his or her surrender to the Requesting State.

[15] The consent exception to the rule of specialty recognizes that, as a Party to the Treaty, the Requested State has a right to waive certain of its benefits or privileges under the Treaty. The Requested State's consent, when no other exception applies, can prevent an injustice by allowing, for example, the prosecution of an extraditee who (the Requesting State does not discover until after extradition) was the perpetrator of a previously unsolved crime that was committed prior to the extradition from the Requested State and is completely separate and distinct from the offense for which extradition was sought. In the United States, the Secretary of State has the authority to consent.

[16] 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. It is expected that this provision also would apply to situations involving any international tribunal located in a third State. 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.

[17] This provision recognizes that an extraditee should not be allowed to benefit from the rule of speciality indefinitely and remain in or return to the Requesting State with impunity. In effect, if the extraditee chooses to return to or remain in the Requesting State, he or she relinquishes the benefits of the rule.

ARTICLE XV—TRANSIT

At times, law enforcement authorities escorting a surrendered person back to the State where he or she 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 a third State. This Article contains standard provisions authorizing such transits in 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.

ARTICLE XVI—REPRESENTATION AND EXPENSES

This Article provides that the Requested State shall advise, assist, appear in court on behalf of, and represent the interests of the Requesting State in extradition proceedings. Such representation ensures that the Requested State abides by its obligation under the Treaty to secure the return of every extraditable criminal to the Requesting State. By participating in the extradition proceedings, the governments also have the opportunity to shape extradition law and practice in a way that is beneficial to both themselves and their treaty partners. Pursuant to a February 15, 1990, exchange of diplomatic notes, the United States and Peru already provide representation to each other in extradition cases and, with this provision, intend to continue the current practice. In accordance with established practice, the Department of Justice will represent Peru in all aspects of extradition proceedings in the United States. Likewise, prosecutors from the Peruvian Public Ministry will represent the interests of the United States in such proceedings in Peru.

This Article also contains standard provisions regarding extradition-related expenses and pecuniary claims against the Parties.

ARTICLE XVII—CONSULTATION

This standard Article serves the interests of the United States by promoting close cooperation with our foreign counterparts on extradition issues. It allows the U.S. Department of Justice and Peruvian Ministry of Justice to consult with each other directly in connection with the processing of individual extradition cases and in furtherance of maintaining and improving procedures for the implementation of the Treaty.

ARTICLE XVIII—APPLICATION

This Article makes clear that the Treaty applies to offenses that occurred before, as well as after, it enters into force. The retroactive application of extradition treaties does not violate the ex post facto clause of the U.S. Constitution,[18] because extradition treaties do not criminalize any act. They merely provide a means by which persons who committed acts that were criminal offenses in both countries at the time of their commission can be held to answer for those offenses.[19] Provisions such as this Article ensure that large classes of criminals are not immunized from prosecution

[18] U.S. Const., art. I, §9, cl. 3.

[19] *See In re De Giacomo,* 7 F.Cas. 366 (C.C.N.Y. 1874); *See also* 4 Moore, A Digest of International Law 268 (1906).

and allowed impunity merely by virtue of the fact that they committed their offenses prior to the entry into force of a particular bilateral extradition treaty.

ARTICLE XIX—FINAL CLAUSES

This Article contains standard treaty provisions regarding the ratification, entry into force, and termination of the Treaty.

VII. TEXT OF RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

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

SECTION 1. ADVICE AND CONSENT TO RATIFICATION OF THE EXTRADITION TREATY WITH PERU, SUBJECT TO AN UNDERSTANDING AND A CONDITION.

The Senate advises and consents to the ratification of the Extradition Treaty Between the United States of America and the Republic of Peru, signed at Lima on July 26, 2001 (Treaty Doc. 107–6; in this resolution referred to as the "Treaty"), subject to the understanding in section 2 and the condition in section 3.

SEC. 2. UNDERSTANDING.

The advice and consent of the Senate under section 1 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 XIII concerning the Rule of Speciality would preclude the resurrender of any person extradited to the Republic of Peru from the United States to the International Criminal Court, unless the United States consents to such resurrender; and the United States shall not consent to any such resurrender unless the Statute establishing that Court has entered into force for the United States by and with the advice and consent of the Senate in accordance with Article II, section 2 of the United States Constitution.

SEC. 3. CONDITION.

The advice and consent of the Senate under section 1 is subject to the condition that nothing in the Treaty requires or authorizes legislation or other action by the United States that is prohibited by the Constitution of the United States as interpreted by the United States.

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