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MUTUAL LEGAL ASSISTANCE TREATIES WITH GERMANY AND JAPAN (TREATY DOCS. 108–27 and 108–12)

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

REPORT

[To accompany Treaty Docs. 108–27 and 108–12]

The Committee on Foreign Relations, to which was referred the Treaty between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, signed at Washington on October 14, 2003, and a related exchange of notes (Treaty Doc. 108–27), and the Treaty between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters, signed at Washington on August 5, 2003 (Treaty Doc. 108–12), having considered the same, reports favorably thereon and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of advice and consent to ratification.

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I. PURPOSE

Both Treaties are designed to provide a formal basis for mutual cooperation between the respective parties on law enforcement matters and are expected to enhance the ability of U.S. law enforcement to investigate and prosecute a variety of offenses.

II. Background

The Treaties are the latest in a series of mutual legal assistance treaties ("MLATs") negotiated by the United States over the past few decades. The United States currently has MLATs in force with over 50 countries. Along with extradition treaties, MLATs provide a formal means for facilitating and expanding cooperative law enforcement efforts with other nations.

Both Treaties addressed by this report were signed during the administration of President George W. Bush and submitted by President Bush to the Senate during the 108th Congress.

III. Summary of Key Provisions of the Treaties

Detailed article-by-article discussions of the Treaties may be found in the Letters of Transmittal from the Secretary of State to the President, which are reprinted in full in Treaty Documents 108–27 and 108–12. A summary of the key provisions of the Treaties is set forth below.

A. General

Although these two Treaties each have distinctive features, as with existing U.S. mutual legal assistance treaties they follow a common format and cover essentially the same matters, often with only minor variations in style and language. The major articles address the following:

- The scope of assistance of the Treaty, in the form of a general statement of purpose and a general inventory of the kinds of assistance available;
- Identification of the Central Authorities responsible for administration of the Treaty;
- The limitation on assistance available at the discretion of the Central Authority in particular types of cases;
- The form and contents required of any request for assistance under the Treaty;
- How the costs associated with a particular request are to be allocated;
- The limitations on use or disclosure of any evidence or information obtained pursuant to a Treaty request;
- The procedure for taking testimony or evidence in the requested party at the behest of a treaty partner;
- The agreement, and any conditions thereon, to execute a search and seizure upon request of a Treaty partner;
- Provisions for the return of property transferred to the Treaty partner;
- The circumstances under which the parties are to have access to information found in the records of government agencies of the other party;
- The procedure for inviting witnesses to travel abroad and give testimony in the territory of the requesting party;

- The provision for the transfer of persons in custody (prisoners) between the parties to permit them to participate in foreign proceedings; and
- Assistance in forfeiture proceedings.

B. KEY PROVISIONS

1. Scope of Assistance

These Treaties address assistance provided in connection with the investigation and prosecution of criminal offenses, as well as in certain related proceedings. Each Treaty would make assistance available for certain administrative investigations, such as those by the Securities and Exchange Commission or the Federal Trade Commission, as well as those by U.S. state authorities, when meeting the standards contained in the relevant Treaty.

Under Article 1(1) of the Treaty with Germany, the parties are to provide assistance in connection with investigations and proceedings relating to regulatory offenses under German antitrust law, as well as to criminal investigations and proceedings relating to other regulatory offenses to the extent that they may lead to court proceedings or be referred for criminal prosecution in the requesting party and would constitute criminal offenses in the requested party. Article 1(3) of the Treaty with Japan permits the parties to provide assistance in connection with administrative investigations of suspected criminal conduct in such cases and upon such conditions as the requested party deems appropriate. The requesting party would have to certify that the authority conducting the investigation has statutory or regulatory authority for the administrative investigation of facts that could constitute criminal offenses, and that the evidence sought will be used in the requesting party in an investigation, prosecution or other proceeding in criminal matters, including the decision of whether to prosecute.

2. Central Authorities

Each Treaty requires the two parties to designate Central Authorities to make and receive requests under the Treaty. Article 2 of the Treaty with Germany designates the Attorney General or a person designated by the Attorney General as the Central Authority for the United States, and the Federal Ministry of Justice as the Central Authority for Germany. It also permits, in cases of urgency, for requests to be communicated directly between the Ministries of Justice of the Laender or the Federal Cartel Office of Germany and the U.S. Central Authority. In addition, article 1(3) of the Treaty with Germany recognizes state and federal entities named in an Appendix to the Treaty as competent authorities for purposes of generating requests for assistance within each party or for executing incoming requests for assistance.

Article 2 of the Treaty with Japan designates the Attorney General or a person designated by the Attorney General as the Central Authority for the United States, and the Minister of Justice or the National Public Safety Commission or persons designated by them as the Central Authorities for Japan. The dual designation of Central Authorities by Japan was necessitated by the lines of jurisdiction of the two entities. A related exchange of notes between the

parties, submitted for the information of the Senate, clarifies that Japan's Ministry of Justice will serve as the Japanese Central Authority with respect to all requests made by the United States, while the Japanese Central Authority for Japanese requests is to be determined by the source of the request within Japan. Because the Minister of Justice will be the Central Authority for all requests made by the United States, the dual designation is not expected to affect the ability of the United States to obtain assistance under the Treaty. Moreover, the two Japanese entities will establish a mechanism to avoid duplicative requests and to facilitate efficient and speedy provision of assistance.

3. Limitations on Assistance

Both Treaties contain provisions that describe the circumstances under which assistance may be refused. Article 3 of the Treaty with Germany provides that the parties may deny requests for assistance under the Treaty if execution of the request would prejudice their sovereignty, security, or other essential interests. Article 3 of the Treaty with Japan similarly provides that the parties may deny requests for assistance when they consider that execution of a request would impair their security or other essential interests. The Treaty with Japan also gives the parties the discretion to deny requests which they consider to be related to a political offense, or which they consider do not conform to the requirements of the Treaty. In addition, it allows the parties to deny a request for assistance where execution of the request would require a court warrant or other compulsory measure under the law of the requested party and the requested party considers that the conduct that is the subject of the investigation, prosecution or proceeding would not constitute a criminal offense under its laws.

4. Limitations on Use

As with other U.S. MLATs, the Treaties allow the Central Authority of the party providing evidence or information under the Treaty to prohibit its use in other investigations or prosecutions without that party's consent or until after it has been publicly disclosed as a consequence of the use for which it was intended. They also contain exceptions typical of such treaties that are designed to permit compliance with U.S. Constitutional obligations to turn over certain types of evidence or information to criminal defendants. Article 15 of the Treaty with Germany additionally provides that, unless specifically prohibited by the sending party at the time the evidence or information is provided, it may be used by the receiving party without prior consent: for any other purpose for which assistance would be available under the Treaty; for preventing the commission of serious crimes; or for averting substantial danger to public security. Each Treaty also includes confidentiality limitations that permit the party providing the evidence or information to insist that it be kept confidential or be used only subject to specified conditions.

Article 16 of the Treaty with Germany establishes separate rules for the confidentiality and use of information or evidence provided under the Treaty in connection with investigations or proceedings in antitrust cases. For instance, such information or evidence is to

be treated as confidential by the requesting party to the same extent as such information or evidence obtained under its domestic law, with disclosure limited to persons or authorities (including courts or administrative authorities) competent for prosecution of antitrust offenses. The article also provides that the information or evidence may be disclosed in public court proceedings or in judicial decisions unless the requested party objects, while limiting objections to exceptional cases.

5. Testimony and Evidence in the Requested Party

A primary purpose of the MLAT program is to permit the United States to obtain evidence from foreign jurisdictions in a form admissible in American courts. American courts usually do not have authority to subpoena foreign nationals living abroad. Even in cases where foreign requirements can be overcome, U.S. law imposes specific requirements that must be met before depositions can be taken overseas and the testimony subsequently introduced in criminal proceedings in this country. MLATs are designed to overcome these obstacles, in addition to meeting the practical and diplomatic challenges of taking depositions in a foreign country. Therefore, as with existing U.S. MLATs, these Treaties obligate the parties to call witnesses, using compulsory process if necessary.

6. Records of Government Agencies

Consistent with general U.S. MLAT practice, the Treaties divide governmental information available under their provisions into two categories, namely, publicly available information (which must be provided upon request) and information available to judicial and law enforcement personnel but not to the general public (which may be provided upon request).

7. Search and Seizure

Both Treaties require search and seizure requests to include information satisfying legal requirements for such measures under the law of the requested party. Article 11 of the Treaty with Germany further requires that the offense upon which the request is based be criminally punishable (or by a fine under German law) under the laws of both parties and that the request contain an order for seizure by a competent authority in the requesting state. Both Treaties feature an authentication procedure designed to satisfy U.S. legal requirements for admissibility of evidence. Finally, each Treaty has a provision authorizing conditions for the protection of third party interests in property.

8. Special Investigative Techniques

Article 12 of the Treaty with Germany allows for the parties to use certain types of special investigative techniques under the Treaty at the request of the other, including telecommunications surveillance. The provision makes clear, however, that such assistance may be provided only to the extent permitted by the requested party's domestic law. The Treaty covers legal assistance in criminal matters. Accordingly, the restriction in Article 12 that such surveillance be subject to "conditions prescribed by its domestic law" means that any surveillance that is conducted will be governed by

statutes authorizing such activity in criminal cases (currently, at the federal level, Title III of the Omnibus Crime Control and Safe Streets Act of 1968). The executive branch has testified that the United States does not have authority under U.S. law to conduct electronic surveillance based solely on collecting evidence of a foreign crime and would not be able to provide assistance in such cases. The provision was included at Germany's request and will allow the German government to respond at their federal level to requests for such techniques from the United States.

9. Implementation

The Committee notes that the provisions of the Treaties are self-executing. As with earlier U.S. MLATs, they will be implemented by the United States in conjunction with applicable federal statutes. Additionally, the Treaties contain provisions clarifying that they do not create any new, nor affect any existing, private right of action to exclude or suppress evidence or impede execution of a request.

IV. Implementing Legislation

No new implementing legislation is required for either Treaty. An existing body of federal laws will suffice to implement the obligations of the Treaties.

V. Committee Action

The committee held a public hearing on the two Treaties on November 15, 2005, in which it heard testimony from representatives of the Departments of State and Justice (a transcript of this hearing and questions and answers for the record may be found in S. Hrg. 109-342). On March 14, 2006, the committee considered the two treaties, and ordered them favorably reported by voice vote, with a quorum present and without objection, with the recommendation that the Senate give its advice and consent to their ratification.

VI. Committee Recommendation and Comments

The Committee on Foreign Relations believes that the two Treaties are useful instruments for facilitating international law enforcement cooperation and are thus in the interest of the United States. The committee urges the Senate to act promptly to give advice and consent to their ratification.

VII. Text of Resolutions of Advice and Consent to Ratification

TREATY WITH GERMANY

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

The Senate advises and consents to the ratification of the Treaty between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, signed at Washington on October 14, 2003, and a related exchange of notes (Treaty Doc. 108–27).

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

The Senate advises and consents to the ratification of the Treaty between the United States of America and Japan on Mutual Legal Assistance in Criminal Matters, signed at Washington on August 5, 2003 (Treaty Doc. 108–12).

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