

MUTUAL LEGAL ASSISTANCE TREATY WITH BERMUDA

AUGUST 30 (legislative day, AUGUST 2), 2011.—Ordered to be printed

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

R E P O R T

[To accompany Treaty Doc. 111–6]

The Committee on Foreign Relations, to which was referred the Treaty between the Government of the United States of America and the Government of Bermuda Relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009 (the “Bermuda MLAT”) (Treaty Doc. 111–6), 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 purpose of the treaty is to formalize a U.S. mutual legal assistance relationship with Bermuda.

II. BACKGROUND

In order for the United States to successfully prosecute criminal cases with transnational aspects, 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 coun-

try. 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. 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 problems. MLATs are international agreements that establish a formal, streamlined process by which States 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, locating and identifying 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. Such provisions provide for more effective acquisition of evidence and testimony than 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.

Entry into force of the Bermuda MLAT would formalize the U.S.-Bermuda legal assistance relationship and create a binding international legal obligation on Bermuda and the United States to provide assistance covered by the treaty. The Bermuda MLAT closely resembles other legal assistance agreements approved by the Senate. Like other MLATs, the treaty would require each party, upon request, to assist in: obtaining testimony or other forms of evidence; executing searches and seizures; providing assistance in forfeiture proceedings; and permitting the temporary transfer of persons. The treaty also provides for denial of assistance under certain circumstances, and a consultation requirement to resolve differences over the treaty’s interpretation. The treaty is self-executing.

III. MAJOR PROVISIONS

A detailed paragraph-by-paragraph analysis of the treaty may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 111-6. Key provisions of the treaty are summarized below.

Scope of Assistance

As with most MLATs, the treaty generally obligates the parties to assist each other in criminal investigations, prosecutions, and re-

lated law enforcement proceedings, as well as civil or administrative proceedings that may be related to criminal matters, such as forfeiture proceedings. Article 1(2) of the treaty 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; 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.

Denial of Assistance

Article 3 of the treaty sets forth a list of circumstances under which a requested State may deny legal assistance to the requesting State. The majority of grounds listed are commonly found in MLATs to which the United States is a party, such as the ground in Article 3(1)(a) permitting the denial of a request when it would impair the requested State's sovereignty, or other essential interests, or would be contrary to public policy. The administration advises that Bermuda has indicated it intends to interpret this provision as permitting it to deny assistance in cases involving capital punishment. While the United States has acknowledged Bermuda's intention to interpret the provision in this manner, it is also the position of the United States, as with other countries where the same issue has arisen, that assistance should still be possible on a case-by-case basis through discussion with Bermuda in relevant cases. In response to a question from Senator Cardin concerning whether this provision would pose a significant hurdle to cooperation, Deputy Assistant Attorney General Bruce Swartz provided a written response for the record indicating that this issue "is not unique to Bermuda," that "a number of countries in Europe and other parts of the world have raised similar concerns about providing mutual legal assistance to the United States in cases potentially involving the death penalty," and that "in most cases the United States has been successful in resolving any concerns about the death penalty and obtaining the requested assistance."

Form and Content of Requests

Article 4 prescribes the form and contents of requests under the treaty. Pursuant to Article 4(1), a request for assistance must be in writing; however, there is no limit on the means by which written responses are transmitted, for example, by mail, fax, or e-mail.

Costs Associated with Assistance

Article 6 provides that the requested State must pay all costs relating to the execution of a request, with certain exceptions. For instance, where the requested party incurs expenses of an extraordinary nature that were unexpected and incurred through no fault of its own, the parties' Central Authorities shall consult to determine whether the requesting party shall pay some or all of these expenses. According to the State Department, the parties during negotiations discussed their understanding that the situations contemplated in Article 6(2)–(3) would occur rarely. These provisions on allocation of costs are common in MLATs to which the United States is a party.

Procedures To Be Employed

Articles 8–17 set forth in detail the procedures to be employed in the case of specific types of requests for legal assistance. Most of these provisions are similar to those in other MLATs entered into by the United States. A few provisions unique to the Bermuda MLAT are worth noting. First, most MLATs to which the United States is a party provide for the safe conduct of persons invited to appear before the authorities of the requesting party, when such persons are not in the custody of the requested party. Article 10(3) of the Bermuda MLAT provides that the Central Authority of the requesting party may, at its discretion, determine that a person whose appearance within its territory is requested shall not be subject to service of process, detention, or other restriction of liberty on account of acts or convictions preceding the person's departure from the requested party. Article 10(4) provides that the safe conduct described in Article 10(3) shall cease 15 days after the requesting party notifies the requested party that the person's presence is no longer required, or the person, having left the requesting party, thereafter voluntarily returns.

With regard to search and seizure assistance, under Bermudan evidentiary standards, there must be "reasonable grounds for suspecting" that an offense was committed before Bermuda could execute a search and seizure request made by the United States. Article 15(2) permits the requested party to refuse a request relating to conduct in which the powers of search and seizure would not be exercisable in the requested party's territory in similar circumstances. According to the State Department, Bermuda indicated during MLAT negotiations that under its domestic laws, the powers of search and seizure are not available with respect to tax crimes.

Treaty as First Resort

Article 18 of the Bermuda MLAT provides that neither party shall enforce any compulsory measure requiring action against a person located in the territory of the other party with respect to a matter where assistance could be granted under the MLAT, unless the party proposing enforcement has first attempted in good faith to obtain assistance pursuant to the treaty. This provision is fairly unusual in MLATs negotiated by the United States, with only a handful containing similar provisions. It should be noted that although this provision requires that a party first seek assistance under the MLAT through a formal request or preliminary consultation to assess the availability of assistance under the treaty, it does not preclude enforcement of a compulsory measure through other means when initial attempts to receive assistance under the treaty reveal that an MLAT request would be unsuccessful or result in a delay that has the potential to jeopardize the underlying law enforcement action.

IV. ENTRY INTO FORCE

The Treaty will enter into force on the date of the latter written notification by the Parties that they have completed their internal legal requirements for entry into force. For the United States, this means ratification after the advice and consent of the Senate. The

Treaty expressly applies to past conduct—that is, once in force, it shall apply to all requests between the Parties regardless of when the acts or omissions constituting the offense occurred.

V. IMPLEMENTING LEGISLATION

The Treaty is self-executing and will not require further implementing legislation.

VI. COMMITTEE ACTION

The committee held a public hearing on the Convention on June 7, 2011. Testimony was received from Bruce Swartz, Deputy Assistant Attorney General (Criminal Division) from the Justice Department, and Clifton M. Johnson, Assistant Legal Adviser for Law Enforcement and Intelligence at the Department of State. A transcript of the hearing is included as Annex 2 to Executive Report 112–1.

On July 26, 2011, the committee considered the Convention and ordered it favorably reported by voice vote, with a quorum present and without objection.

VII. COMMITTEE COMMENTS

The Committee on Foreign Relations believes that the MLAT with Bermuda, which would enhance law enforcement cooperation between the United States and Bermuda, would further U.S. efforts in fighting transnational crime, including money laundering and narco-trafficking. 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. DECLARATION ON THE SELF-EXECUTING NATURE OF THE TREATY

The committee has included one declaration in the recommended resolution of advice and consent. The declaration states that the Treaty is self-executing, as is the case generally with Mutual Legal Assistance Treaties. Prior to the 110th Congress, the committee generally included such statements in the committee's report, but in light of the Supreme Court decision in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the committee 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. TEXT OF 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 Bermuda Relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009 (the "Treaty") (Treaty Doc. 111–6), 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:

The Treaty is self-executing.

