Department of Justice

STATEMENT OF

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BEFORE THE

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UNITED STATES SENATE

ENTITLED

“TREATIES”

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Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on the extradition and mutual legal assistance agreements between the United States and the European Union (EU), the instruments that implement them at the bilateral level with each EU Member State, and a mutual legal assistance treaty with Malaysia. These historic treaties directly advance the interests of the United States in fighting terrorism and transnational crime.

At the outset, I wish to note that the decision to proceed with the negotiation of law enforcement treaties such as these is made jointly by the Departments of State and Justice, after careful consideration of our international law enforcement priorities. The Departments of Justice and State also participated together in the negotiation of each of these treaties, and we worked closely with the Department of the Treasury, the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC) in negotiating the articles of the U.S.-EU Mutual Legal Assistance Agreement that relate to their respective functions. We join the Department of State and these other agencies today in urging the Committee to report favorably to the Senate and recommend its advice and consent to ratification.

The Departments of Justice and State have prepared and submitted to the Committee detailed analyses of the mutual legal assistance and extradition treaties in the Letter of Submittal. In my testimony today, I will concentrate on why these extradition and mutual legal assistance treaties are important instruments for United States law enforcement agencies engaged in investigating and prosecuting terrorism and other serious criminal offenses.

My colleague from the Department of State, Ms. Biniaz, has already touched upon the principal benefits flowing from the U.S.-EU Agreements. I will go into greater detail in

describing the objectives of the United States in negotiating the agreements with the EU, and the provisions that resulted.

The U.S.-EU Extradition Agreement and its Bilateral Implementing Instruments

With respect to the extradition agreement, at this moment, prior to the entry into force of the U.S.-EU Agreement and bilateral implementing treaties with the 27 EU Member States, the oldest of our existing extradition treaties with EU Member States are 100 years old or older (Slovenia, which dates to 1901 and Portugal, signed in 1908). Ten others signed in the 1920's through 1970's (Bulgaria, the Czech Republic, Denmark, Finland, Greece, Romania and the Slovak Republic) also contain a significant number of antiquated provisions. As a result, one of the principal negotiating objectives of the United States was to arrive – in a single negotiation – at an extradition treaty governing EU Member States that would eliminate obsolete provisions in favor of more effective, modern provisions.

At the same time, many of our existing bilateral extradition treaties with EU Member States were more modern treaties that did not require major revision, and which already reflected the particular needs of the U.S. and the Member State concerned. What is more, the existing bilateral extradition treaties had been negotiated individually with each Member State and, naturally, were not identical; some contained variations that were more progressive than others. Therefore, another negotiating objective for the United States was to ensure that the process of negotiating with the European Union as a whole did not result in provisions that, while reaching consensus among all EU Member States, who were being consulted regularly during the

negotiation, might undermine stronger existing provisions between the United States and some Member States.

The third principal objective was to obtain agreement with the European Union on provisions that would represent advances over the provisions of even our most modern bilateral extradition treaties with Member States. I will discuss the manner in which these objectives were reached in turn.

The updating of our oldest extradition treaties was accomplished in large part by replacing out-of-date provisions with more modern formulations contained in the U.S.-EU Agreement. In particular, the oldest treaties define extraditable offenses by reference to a list of crimes enumerated in the treaty itself. Such an approach limits extradition for newly emerging forms of criminality that the United States has a strong interest in pursuing, such as antitrust offenses, cybercrime and environmental offenses. Through application of the Agreement and the subsequently concluded implementation instruments that directly amend the bilateral treaties, these old provisions are replaced by modern "dual criminality" provisions. This means that the obligation to extradite applies to all offenses that are punishable in both countries by a maximum term of imprisonment of more than one year; which is a significant improvement since extradition will be possible in future with respect to the broadest possible range of serious offenses, without the need to repeatedly update treaties as new forms of criminality are recognized. The dual criminality provision also contemplates extradition for extraterritorial offenses. For the United States, extraterritorial jurisdiction is important in two areas of particular concern: drug trafficking and terrorism.

The Extradition Agreement also incorporates a variety of procedural improvements that update not only the oldest extradition treaties, but also a number of more recent treaties that do not already contain such provisions. For example, the Agreement contains a "temporary surrender" provision, which allows a person found extraditable, but already in custody abroad on another charge, to be temporarily surrendered for purposes of trial. Absent temporary surrender provisions, we face the problem of delaying the fugitive's surrender, sometimes for many years, while the fugitive serves out a sentence in another country. During this time, the case against the fugitive becomes stale, and the victims await vindication for the crimes against them.

The Extradition Agreement also allows the fugitive to waive extradition, or otherwise agree to immediate surrender, thereby substantially speeding up the fugitive's return in uncontested cases. It provides for transit of prisoners through the United States and EU Member States, a provision that can be of great practical importance where a surrendered fugitive must be transported to the United States from a country in Africa or Asia and commercial airlines only offer flights transiting Europe, or where the surrendered fugitive is being transported from Latin America to a European Union Member State through the United States. It also streamlines the channels for seeking "provisional arrest" – the process by which a fugitive can be immediately detained while the documents in support of extradition are prepared, translated and submitted through the diplomatic channel – and the procedures for supplementing an extradition request that already has been presented.

To reach the second objective I mentioned – ensuring that the provisions of the U.S.-EU Agreement do not inadvertently weaken existing bilateral treaties which go farther than the provisions in the Extradition Agreement – U.S. negotiators carefully reviewed existing bilateral

treaties with Member States and drafted the scope provision of Article 3(1) to ensure that the substantive articles apply only in order to either replace outmoded provisions, add useful provisions to treaties that did not already have them, or be even more advantageous than the modern provisions currently in place. As to replacing outmoded provisions, for example, Article 3(1)(a) provides that Article 4's "dual criminality" requirement replaces the provisions of antiquated "list" treaties; dual criminality provisions in modern U.S. extradition treaties with EU Member States remain unaffected. As to adding useful provisions, for instance, Article 3(1)(f) adds the possibility of temporary surrender to those treaties that do not already permit it.

Finally, Article 3(1)'s terms provide that certain provisions that are more favorable than those found in our current treaties replace the prior formulation. For example, Article 10(2) provides that where an EU Member State receives a request for extradition from the United States as well as a request for surrender of the same fugitive from another EU Member State pursuant to the European Arrest Warrant, the EU Member State holding the fugitive shall make its determination as to which request should receive priority based on a consideration of all relevant factors, rather than giving automatic precedence to the request from the EU Member State. This was a very important point for the U.S., because many EU Member States do not extradite their nationals. Were the EU to decide that, as an internal matter, European Arrest Warrant requests from other Member States should receive priority over foreign extradition requests, a fugitive who is a national of another EU Member State could be surrendered to his country of nationality – even for less serious charges than those for which the U.S. might seek his extradition – and we would not be able to subsequently extradite him from the country of

nationality. This provision, in combination with Article 3(1)(g), makes clear that such a result would not be consistent with the international obligations set forth in the Agreement.

Another provision that represents an advance over many modern treaties is Article 7, which addresses transmission of documents following provisional arrest of a fugitive, an event that triggers a treaty deadline for receipt of the documents in support of extradition, which, if not met, will result in the fugitive's release. The Agreement provides that once the extradition documents have been received by the Member State's embassy in the U.S., the treaty deadline for receipt of the documents is considered satisfied. This is the same standard that the United States already applies when receiving extradition documents from other countries, and we will now benefit from the same treatment when we make extradition requests. Pursuant to Article 3(1)(d), this provision is added to all U.S. extradition treaties with EU Member States.

Lastly, Articles 3(1)(b) and 5(2) of the Agreement greatly simplify the authentication requirements for extradition documents to enable them to be admitted in evidence at extradition hearings. Over the years, the authentication requirements of extradition treaties, requiring extradition documents to be certified at embassies to permit them to be admitted in evidence in extradition hearings, had become increasingly time consuming to satisfy, to the point that doing so entailed some risk that the fugitive might be released or flee during the time it took to complete these requirements. The new U.S.-EU provision specifies that documents bearing the seal or certificate of the justice or foreign ministry of the State seeking extradition are admissible in extradition proceedings, thereby significantly streamlining the process, yet retaining sufficient assurance of the reliability of the documentation received.

Of course, in the case of Bulgaria, Estonia, Latvia, Malta, and Romania with whom we have negotiated completely new bilateral extradition treaties, the provisions of the U.S.-EU Extradition Agreement are incorporated. All five of these complete treaties also provide for the extradition of nationals, a U.S. negotiating priority.

The U.S.-EU Mutual Legal Assistance Agreement and its Bilateral Implementing Instruments

With respect to mutual legal assistance, the situation at the outset of negotiations was somewhat different from that of extradition. We have a Mutual Legal Assistance Treaty (MLAT) either signed or already in force with all but seven EU Member States (the seven being Bulgaria, Denmark, Finland, Malta, Portugal, the Slovak Republic, and Slovenia). Where we have not concluded an MLAT, cooperation is being provided pursuant to domestic mutual legal assistance statutes. The 20 MLATs signed or already in force are modern instruments, with the oldest being our 1981 treaty with the Netherlands. Thus, in the mutual legal assistance area, the principal objective was not to update out-of-date treaties, but rather to supplement our MLATs with new forms of cooperation not expressly provided for to date, and, in some cases, to provide more flexible and beneficial modalities in carrying out cooperation.

Accordingly, the U.S.-EU Agreement contains three new types of provisions not previously set forth in U.S. MLATs, meaning that, while these forms of assistance might be possible as long as the domestic law of the U.S. and the EU Member State do not prohibit the assistance, there was previously no specific obligation to make such assistance available.

The first of these provisions is the identification of bank information pursuant to Article 4. While our existing MLATs already provide for the production of bank records needed in

money laundering, terrorism financing and many other kinds of investigations, as well as for the identification, freezing and forfeiture of proceeds of crime laundered through banks, MLATs do not currently provide a procedure for locating previously unidentified bank accounts, on the basis of, for example, the name and date of birth of the account holder. Authority to identify such banking information for terrorism and money laundering investigations was established for the United States in the USA PATRIOT Act of 2001, and for the European Union in its 2000 MLAT among EU Member States. The U.S. and EU both having established this power, we were able to formulate a provision that will facilitate the identification of such information in requests for cooperation made between us. Experience has shown that terrorists and money launderers often use U.S. and European banks for their purposes. Article 4, therefore, provides a powerful law enforcement tool that will greatly aid us in identifying where terrorists and money launderers are secreting their funds, following which we can take appropriate action using existing international cooperation treaties and laws. While the assistance the U.S. provides to EU Member States will – in accordance with the USA PATRIOT Act's limited grant of authority – be restricted to cases involving terrorism and money laundering activities, a number of EU Member States agreed to make this form of cooperation available to the U.S. with respect to an even broader range of criminal activities.

Second, Article 5 of the Agreement authorizes the establishment of joint investigative teams for purposes of coordinating closely in the ever increasing number of international terrorism and organized crime investigations that require simultaneous action in more than one country. While U.S. investigative agencies have long worked cooperatively with their foreign counterparts in investigations having international aspects, the extent of joint activity has at

times been limited absent this kind of provision. Once the Agreement enters into force, we will have a framework that will enable a fuller integration of investigative activities with our European partners where we deem it important to do so.

Finally, Article 6 facilitates the use of modern video-conferencing technology in criminal investigations and proceedings, authorizing its use for taking testimony or other investigative uses. Already in use regularly in domestic U.S. criminal cases for some pre and post-trial hearings, to take witness statements, and for other investigative actions, video-conferencing technology is used less frequently at the international level, where many countries have more limited experience with it. Its increased use will benefit the United States, by permitting investigative statements to be taken abroad, with investigators and prosecutors, or even incarcerated defendants in the U.S., being able to participate more meaningfully via use of video-conferencing technology if participation in person is not feasible. In this area as well, in the past, the United States has facilitated the taking of testimony via video link from witnesses in the United States for use in foreign criminal proceedings. However, absent a specific provision of this type, some EU Member States would not be able to authorize a video feed to the United States during witness questioning. This provision will therefore provide greater flexibility in international criminal cases.

I also mentioned that a number of provisions of the U.S.-EU Agreement provide more favorable modalities to be applied in carrying out cooperation than were previously available under some of our MLATs. I would like to mention the two principal articles in this regard, pertaining to administrative authorities and use limitations.

First, pursuant to Article 8 of the Agreement, the U.S. and EU Member States must provide assistance to regulatory agencies with statutory authority to conduct investigations with a view to referral for purposes of prosecution. To an increasing extent, federal agencies such as the SEC, the Commodity Futures Trading Commission, and the FTC are conducting the initial investigation in serious fraud cases. While some prior MLATs permit agencies such as these to receive assistance, some foreign law enforcement partners have declined to entertain requests which do not originate from criminal courts, prosecutors or criminal investigative agencies. As a result of this provision, U.S. regulatory agencies engaged in investigations that could result in referral to the Department of Justice for criminal prosecution will be entitled to cooperation from all EU Member States and, likewise, will be able to use the information obtained in their regulatory enforcement proceedings even if the case does not ultimately result in criminal referral. Of course, to the extent EU Member States have administrative components engaged in analogous investigations they will receive reciprocal cooperation.

Second, Article 9 of the MLAT allows the information and evidence provided in response to a mutual legal assistance request to be used, at a minimum, for any criminal investigation or proceeding, for the purpose of preventing immediate and serious threats to public security, and for use in the regulatory proceedings I just described. This formulation is an advance over some older use limitation formulations, which often set out a cumbersome procedure by which use was initially limited to the purposes set forth in the request, and permission for any other subsequent use had to be sought and granted. The new formulation recognizes that in cases involving immediate threats to public security, there is not sufficient time to ask permission for a different use, and there is no sound reason to deny permission where

the evidence and information provided is pertinent to other criminal conduct not known at the time the MLAT request was drafted.

Mutual Legal Assistance Treaty with Malaysia

In addition to the treaties with the EU, the Department of Justice urges the Committee to give favorable consideration to the Mutual Legal Assistance Treaty with Malaysia. Under Malaysian law, in the absence of this treaty, there is no obligation to provide assistance to the United States in investigations prior to the initiation of court proceedings. With the entry into force of the MLAT, there will be a mutual obligation to provide assistance similar to what is found in other U.S. MLATs.

Conclusion

In conclusion, Mr. Chairman, we appreciate the Committee's support in our efforts to strengthen the framework of treaties that assist us in combating international crime. For the Department of Justice, modern extradition and mutual assistance treaties are particularly critical law enforcement tools. Moreover, EU Member States are among our closest law enforcement partners, and we are seeing a continual increase in the number and complexity of mutual legal assistance requests flowing between us. To the extent that we can update our existing cooperation agreements and arrangements in a way that enables cooperation to be more efficient and effective, we are doing ourselves, and each other, a great service. Accordingly, we join the State Department in urging the prompt and favorable consideration of

these law enforcement treaties. I would be pleased to respond to any questions the Committee may have.