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TREATY WITH AUSTRIA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

JULY 30, 1996.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 104–21]

The Committee on Foreign Relations to which was referred The Treaty Between the Government of the United States of America and the Government of the Republic of Austria on Mutual Legal Assistance in Criminal Matters, signed at Vienna on February 23, 1995, having considered the same, reports favorably thereon with two provisos 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 ratification.

I. PURPOSE

Mutual Legal Assistance Treaties (MLATs) provide for the sharing of information and evidence related to criminal investigations and prosecutions, including drug trafficking and narcotics-related money laundering. Both parties are obligated to assist in the investigation, prosecution and suppression of offenses in all forms of proceedings (criminal, civil or administrative). Absent a treaty or executive agreement, the customary method of formally requesting assistance has been through letters rogatory.

II. BACKGROUND

On February 23, 1995, the United States signed a treaty with Austria on mutual assistance in criminal matters and the President transmitted the Treaty to the Senate for advice and consent to ratification on September 6, 1995. In recent years, the United States has signed similar MLATs with many other countries as part of an effort to modernize the legal tools available to law en-

forcement authorities in need of foreign evidence for use in criminal cases.

State historically have been reluctant to become involved in the enforcement of foreign penal law.[1] This reluctance extended to assisting foreign investigations and prosecutions through compelling testimony or the production of documents. Even now, the shared interest in facilitating the prosecution of transnational crime is viewed as being outweighed at times by unwillingness to provide information to those with different standards of criminality and professional conduct.

Despite these hindrances, the need to obtain the cooperation of foreign authorities is frequently critical to effective criminal prosecution. Documents and other evidence of crime often are located abroad. It is necessary to be able to obtain materials and statements in a form that comports with U.S. legal standards, even though these standards may not comport with local practice. Also, assisting prosecutors for trial is only part of how foreign authorities may assist the enforcement process. Detecting and investigating transnational crime require access to foreign financial records and similar materials, while identifying the fruits of crime abroad and having them forfeited may deter future criminal activity. It is necessary to have the timely and discrete assistance of local authorities.

Still, it was not until the 1960s that judicial assistance by means of letters rogatory—requests issuing from one court to another to assist in the administration of justice [2]—were approved. Even then, the ability of foreign authorities to use letters rogatory to obtain U.S. assistance was not established firmly, in case law until 1975.[3] By this time, the United States had negotiated and signed a mutual legal assistance treaty with Switzerland, the first U.S. treaty of its kind. This treaty was ratified by both countries in 1976 and entered into force in January 1977. Since then, the United States has negotiated more than 20 additional bilateral MLATs, 14 of which are in force.[4]

Absent a treaty or executive agreement, the customary method of formally requesting assistance has been through letters rogatory. The Deputy Assistant Attorney General of the Criminal Division has summarized the advantages of MLATs over letters rogatory to the House Foreign Affairs Committee as follows:

> An MLAT or executive agreement replaces the use of letters rogatory. * * * However, treaties and executive agree-

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[1] E.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part IV, ch. 7, subch. A. Introductory Note and § 483, Reporters' Note 2 (1987); Ellis & Pisani, "The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis," 19 Int. Lawyer 189, 191–198 (discussing history of U.S. reluctance and evolution of cooperation) [hereinafter cited as Ellis & Pisani].

[2] See In re Letter Rogatory from the Justice Court, District of Montreal Canada, 523 F. 2d 562, 564–565 (6th Cir. 1975).

[3] Id. at 565–566.

[4] According to the August 4, 1995, Letters of Submittal accompanying the MLATs with Austria and Hungary, the United States has bilateral MLATs in force with Argentina, The Bahamas, Canada, Italy, Jamaica, Mexico, Morocco, the Netherlands, Spain, Switzerland, Thailand, Turkey, the United Kingdom concerning the Cayman Islands, and Urugay. MLATs not in force but ratified by the United States include those with Belgium, Columbia, and Panama. Signed but unratified MLATs include the five addressed in this report—those with Austria, Hungary, the Republic of Korea, the Philippines, and the United Kingdom—and one with Nigeria. Treaty Doc. 102–21, 104th Cong., 1st Sess. v (1992).

> ments provide, from our perspective, a much more effective means of obtaining evidence. First, an MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. Letters rogatory, on the other hand, are executed solely as a matter of comity. Second, an MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. Third, in an MLAT we have the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Fourth, our MLATs are structured to streamline and make more effective the process of obtaining evidence.[5]

Letters rogatory and MLATs are not the only means that have been used to obtain assistance abroad.[6] The United States at times has concluded executive agreements as a formal means of obtaining limited assistance to investigate specified types of crimes (e.g., drug trafficking) or a particular criminal scheme (e.g., the Lockheed investigations).[7] A separate. formal means of obtaining evidence has been through the subpoena power. Subpoenas potentially may be served on a citizen or permanent resident of the United States abroad or on a domestic U.S. branch of a business whose branches abroad posses the desired information.[8]

Additionally, the Office of International Affairs of the Criminal Division of the Department of Justice notes several informal means of obtaining assistance that have been used by law enforcement authorities in particular circumstances. These have included informal police-to-police requests (often accomplished through law enforcement personnel at our emphassies abroad), requests through interpol, request for readily available documents through diplomatic channels, and taking depositions of voluntary witnesses. Informal means also have included "[p]ersuading the authorities in the other country to open 'joint' investigations whereby the needed evidence is obtained by their authorities and then shared with us." The Justice Department also has made "treaty type requests that, even though no treaty is in force, the authorities in the requested country have indicated the will accept and execute. In some countries (e.g., Japan and Germany) the acceptance of such request is governed by domestic law; in others, by custom or precedent."[9]

Like letters rogatory, executive agreements, subpoenas, and informal assistance also have their limitations compared to MLATs. Executive agreements have been restricted in scope and application. Foreign governments have strongly objected to obtaining records from within their territories through the subpoena power.[10]

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[5] "Worldwide Review of Status of U.S. Extradition Treaties and Mutual Legal Assistance Treaties: Hearings Before the House Committee on Foreign Affairs," 100th Cong., 1st Sess. 36–37 (1987) (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division).
[6] U.S. Dept. of Justice, United States Attorneys' Manual §§ 9–13.520 et seq. (October 1, 1988).
[7] *Id.* at § 9–13.523.
[8] *Id* at § 9–13.525.
[9] *Id* at § 9–13.524.
[10] *Id.* at § 9–524.

There is not assurance that informal means will be available or that information received through them will be admissible in court.

III. SUMMARY

A. GENERAL

Mutual legal assistance treaties generally impose reciprocal obligations on parties to cooperate both in the investigation and the prosecution of crime. Most, but no all. MLATs have covered a broad range of crimes with not requirement that a request for assistance relate to activity that would be criminal in the requested State. The means of obtaining evidence and testimony under MLATs also range broadly. MLATs increasingly are extending beyond vehicles for gathering information to include ways of denying criminals the fruits and the instrumentalities of their crimes.

B. SECTION-BY-SECTION SUMMARY

1. Types of proceedings

MLATs generally call for assistance in criminal investigations and proceedings. This coverage often in broad enough to encompass all aspects of a criminal prosecution, from investigations by law enforcement agencies to grand jury proceedings to trial preparation following formal charges to criminal trail. Most recent MLATs also cover civil and administrative proceeding—forfeiture proceedings, for example—related to at least some types of prosecutions, most frequently those involving drug trafficking. However, the scope of some MLATs has been more circumscribed than the proposed treaty.

The Austria Treaty calls for assistance "in connection with the investigation and prosecution of offenses [which at the time of request are within the jurisdiction of the Requesting State], and in related forfeiture proceedings." (art. 1). Separately, the treaty states that requests are to be made on behalf of authorities that are responsible for investigating or prosecuting crimes. Investigations conducted by agencies that may refer matters for criminal prosecution are to be considered penal proceedings (art. 2).

Limitations on assistance

All MLATs except various types of requests from the treaty assistance provisions. For example, judicial assistance typically may be refused if carrying out a request would prejudice the national security or other essential interest of the Requested State. Requests related to political offenses usually are excepted, as are requests related to strictly military offenses. Unlike the extradition treaties, dual criminality—a requirement that a request relate to acts that are criminal in both the Requested and Requesting States—generally is not required. Nevertheless, some treaties do contain at least an element of a dual criminality standard. Additionally, some treaties go beyond military and political offenses to also except requests related to certain other types of crimes. Requests related to tax offenses at times have been restricted in an MLAT to offenses that are connected to other criminal activities. Before a request is denied, a Requested State generally is required

to determine whether an otherwise objectionable request may be fulfilled subject to conditions.

In the Austria Treaty, if a request concerns activity that is not criminal in the Requested State, the Requested may refuse to issue a court order for a search and seizure or other coercive measure. This may limit obtaining assistance with respect to certain extraterritorial crimes, among other activity. At the same time, a Requested State is to make every effort to approve a search and seizure or similar request and such assistance is required where there is reasonable suspicion that conduct that would be a crime if committed in its jurisdiction has taken place (art. 1(3)).

Assistance is not to be refused in fiscal cases on the ground that the offense relates to a tax or a regulation of a type not imposed or adopted by the Requested State (art. 1(4)). However, assistance may be denied if a request relates to a political offense, and assistance also may be denied if it relates to a military offense not normally punishable under criminal law. Another basis for refusing assistance is that execution of a request would prejudice national security or other essential interest (art. 3). Before assistance may be denied, the parties are to consult to consider whether assistance may be given subject to conditions (art. 3).

3. Transmittal of requests

Requests under MLATs are conveyed directly through designated Competent Authorities, which in the United States has been the Criminal Division of the Justice Department. The time and paperwork saved in thereby bypassing the courts and diplomatic channels are among the main advantages of MLATs. For example, a report by the Criminal Justice Section of the American Bar Association has stated that the circuitry of the channel for transmitting letters rogatory and evidence obtained under them often effectively frustrates use of letters rogatory as a means of obtaining assistance.[11]

The provisions on the form and contents of requests are contained in article 4 of the respective treaties. All five of the MLATs under consideration require that a request for assistance under an MLAT be in writing, except in urgent situations (in which case a request must be confirmed in writing later, typically within 10 days). Among the information usually to be included in a request are (1) the name of the authority conducting the investigation, prosecution, or proceeding to be assisted by the request; (2) a detailed description of the subject matter and nature of the investigation, prosecution, or proceeding to which the request relates, including, under all of the treaties other than the UK treaty, a description of the pertinent offenses; and (3) a description of the evidence or other assistance being sought.

To the extent necessary and possible, other information that may facilitate carrying out the request also is to be provided, including, for example, information on the whereabouts of information or persons sought or a description of a place or person to be searched and of objects to be seized. Additional information may include lists of

[11] American Bar Association, Criminal Justice Section, Report (No. 109) to the House of Delegates 3 (1989 Annual Meeting in Honolulu) (hereinafter cited as ABA Report).

questions to be asked, a description of procedures to be followed, and information on allowances and expenses to be provided to an individual who is asked to appear in the Requesting State.

4. Execution of requests

Under the proposed treaties the Competent Authority of a Requested State is to execute a request promptly or, when appropriate, transmit the request to authorities having jurisdiction within the Requested State to execute it. The competent authorities of the Requested State are to do everything in their power to execute the request.

Article 5 of the proposed MLAT provides that requests are to be executed in accordance with the laws of the Requested State, unless the treaties provide otherwise. At the same time, the method of execution specified in a request is to be followed unless the laws of the Requested State prohibit it. As is typical in other MLATs the proposed treaty provides that the judicial authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request. The Austria Treaty expressly states that the courts are to have the same power to issue orders as they have with respect to domestic investigations and prosecutions.

The Central Authority of a Requested State may postpone or place conditions on the execution of a request if execution in accordance with the request would interfere with a domestic criminal investigation or proceeding, jeopardize the security of a person, or place an extraordinary burden on the resources of the Requested State.

At the request of a Requesting State, a Requested State is to use its best efforts to keep a request and its contents confidential. If a request cannot be executed without breaching confidentiality, the Requested State shall so inform the Requesting State, and the Requesting State then is given the option to proceed nonetheless. (Provisions on keeping information provided to a Requesting State confidential are discussed below.)

Requested States generally bear the costs of executing a request other than expert witness fees; interpretation, transcription, and translation costs; and travel costs for individuals whose presence is Requested in the Requesting State or a third State.

5. Types of assistance

In conducting a covered proceeding, a Requesting State commonly may obtain assistance from a Requested State that includes (1) the taking of testimony or statements of persons located there; (2) service of documents; (3) execution of requests for searches and seizures; (4) the provision of documents and other articles of evidence; (5) locating and identifying persons; and (6) the transfer of individuals in order to obtain testimony or for other purposes. Also, mutual legal assistance treaties increasingly have called for assistance in immobilizing assets, obtaining forfeiture, giving restitution, and collecting fines.

Taking testimony and compelled production of documents in Requested State

The proposed MLAT permits a State to compel a person in the Requested State to testify and produce documents there. Persons specified in the requested are to be permitted to be present and usually have the right to question the subject of the request directly or have questions posed in accordance with applicable procedures of the Requested State. If a person whose testimony is sought objects to testifying on the basis of a privilege or other law of the Requesting State, the person nevertheless must testify and objections are to be noted for later resolution by authorities in the Requesting State. The Austria MLAT (art. 8) specifically provides that a person who gives false testimony in the Requested State may be punished in accordance with its criminal laws.

With respect to questioning a witness by a person specified in the request, the proposed MLAT with Austria contains a broad right to question (art. 8).

Service of documents

Under an MLAT, a Requesting State may enlist the assistance of the Requested State to serve documents related to or forming part of a request to persons located in the Requested State's territory. This obligation generally is stated as a requirement of the Requested State to "use its best efforts to effect service" (art 14).

The treaties require that documents requiring a person to appear before authorities be transmitted by a certain time-usually stated as "a reasonable time." The proposed Austria MLAT (art. 14) states that if a national of the Requested State (or a person who has "equal status thereto") does not respond to a subpoena to appear in the Requesting State as a witness or expert that individual shall not be subject to any penalty or other coercive measure.

The service provisions of the MLAT under consideration is broader than some of those under MLATs currently in force. Provisions under some earlier MLAT's provide that a Requested State has discretion to refuse to serve a document that compels the appearance of a person before the authorities of the Requesting State.

Searches and seizures

MLATs compel that an item be searched for and seized in the Requested State whenever a Requesting State provides information that would be sufficient to justify a search and seizure under the domestic law of the Requested State. The MLAT authorizes conditioning or otherwise modifying compliance to assure protection of third parties who have an interest in the property seized. The proposed MLAT contains procedures and forms for verifying the condition of an item when seized and the chain of individuals through whose hands the item passed. These provisions state that no other verification is necessary for admissibility in the Requesting State.

In addition to showing that a search and seizure would be justified under the law of the Requested State, the Austria MLAT (art. 15) requires a showing that the item could have been compelled to be produced were it located in the Requesting State.

Provision of documents possessed by the Government

MLATs provide a variety of means for obtaining documents abroad. Two means—compelled production in a Requested State by an individual there and search and seizure—have been mentioned. Additionally, a Requesting State generally may obtain publicly available documents. In its discretion, a Requested State may provide a Requesting State documents in its possession that are not publicly available if the documents could be made available to domestic authorities under similar circumstances. The MLAT contains a provision allowing authentication under the Convention Abolishing the Requirement of Legalization of Foreign Public Documents.

Testimony in Requesting State

MLATs do not require the compelled appearance of a person in a Requesting State, regardless of whether the person is in custody or out of custody in the Requested State. Under provisions on persons not in custody, a Requesting State may ask a Requested State to invite a person to testify or otherwise assist an investigation or proceeding in the Requesting State. A request to invite a witness generally is accompanied by a statement of the degree to which the Requesting State will pay expenses. The proposed Austria MLAT (art. 10) provides for advances of funds to witnesses. A Requested State is required to invite the person Requested to appear in the Requesting State and to inform that State promptly of the invited witness's response.

A person in custody may not be transferred to a Requesting State under an MLAT unless both the person and the Requested State consent. A Requesting State is required to keep a person transferred in custody and to return the person as soon as possible and without requiring an extradition request for return. Persons transferred receive credit for time spent in custody in the Requesting State.

The proposed MLAT make some express provision for immunity from process and prosecution for individuals appearing in the Requesting State in accordance with a treaty request. Under the proposed Austria MLAT (art. 11), immunity extends to (1) civil suits to which the witness could not be subjected but for presence in the Requesting State and (2) prosecution or punishment for acts committed before the witness's departure from the requested State. Immunity from process and prosecution expires if the person appearing in the Requesting State stays beyond a designated period after the person is free to leave or if the person appearing voluntarily reenters the requesting State after leaving.

Immobilization of assets and forfeiture

The proposed MLAT contains a forfeiture assistance provision. A Requesting State is permitted to enlist the assistance of a Requested State to forfeit or otherwise seize the fruits or instrumentalities of offenses that the Requesting State learns are located in the Requested State. A Requested State, in turn, may refer information provided it about fruits and instrumentalities of crime to its authorities for appropriate action under its domestic law and report back on action taken by it.

More generally, the MLATs require the parties to assist each other to the extent permitted by their respective laws in proceedings on forfeiting the fruits and instrumentalities of crime. To the extent permitted in domestic law, the Austria MLAT (art. 17) also requires assistance in (1) providing restitution to crime victims and (2) collecting criminal fines. The proposed MLAT provides that forfeited proceeds are to be disposed of under the law of the Requested State, and if that law permits, forfeited assets or the proceeds of their sale may be transferred to the Requesting State.

Limitations on use

To address potential misuse of information provided, MLATs restrict how a Requesting State may use material obtained under them. States at times have raised concerns that MLATs could be used to conduct "fishing expeditions," under which a Requesting State could obtain information not otherwise accessible to it in search of activity it considers prejudicial to its interests. Requested States also are concerned that its own enforcement interests may be compromised if certain information provided by them is disclosed except as is compelled in a criminal trial. As a result, the MLAT contains a provision requiring information be kept confidential and limited in use to purposes stated in the request.

Article 7 of the proposed MLAT allows the Requested State to place confidentiality and use restrictions on information and other material. Typically, a Requested State may require that information or evidence not be used in any investigation, prosecution, or proceeding other than that described in the request. Requested States also may request that information or evidence be kept confidential, and Requesting States are to use their best efforts to comply with the conditions of confidentiality. Nevertheless, once information or evidence has been made public in a Requesting State in the normal course of the proceeding for which it was provided, it may be used thereafter for any other purpose.

Regarding confidentiality and use limits, the Austria MLAT requires prior consent of the Requested State, even if that State did not affirmatively request limits on use, in using material obtained in relation to a fiscal offense for any purpose other than related customs, excise, and tax proceedings.

Location of persons or items

In whole or in part, MLAT requests most often require the Requested State to locate a person or item. The proposed MLAT requires the Requested State's "best efforts" in locating the person or item.

6. MLATs and Defendants

International agreements frequently confer benefits on individuals who are nationals of the State parties. Investment and immigration opportunities, tax benefits, and assistance in civil and commercial litigation are but some of the advantages an individual may enjoy under an international agreement. Nevertheless, it is clear that MLATs are intended to aid law enforcement authorities only.

The resulting disparity between prosecution and defendant in access to MLAT procedures has led some to question the fairness and event the constitutionality of MLATs denying individual rights. (The constitutional provisions most immediately implicated by denying a defendant use of MLAT procedures are the fifth, sixth, and fourteenth amendments.) At the core of the legal objections is the belief that it is improper in our adversarial system of justice to deny defendants compulsory process and other effective procedures for compelling evidence abroad if those procedures are available to the prosecution.[12]

Those opposing defendant use of MLAT procedures fear that States would not enter into MLATs if it meant making information available to criminals. Also, MLAT do not preclude accused persons from using letters rogatory to obtain evidence located in the territory of treaty partners, even though the non-mandatory nature of letters rogatory may result in difficulties in obtaining evidence quickly.

In its response to a question for the record by Senator Helms on this issue the State Department stated:

> There are no legal challenges to any of our existing MLATs. It is the position of the Department of Justice that the MALTs are clearly and unquestionably constitutional.
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> In 1992, Michael Abbell, then-counsel to some members of the Cali drug cartel, did suggest to the Committee that MLATs should permit requests by private persons such as defendants in criminal cases. To our knowledge, no court has adopted the legal reasoning at the core of that argument.
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> The Department of Justice believes that the MLATs before the Committee strike the right balance between the needs of law enforcement and the interests of the defense. The MLATs were intended to be law enforcement tools, and were never intended to provide benefits to the defense bar. It is not "improper" for MLATs to provide assistance for prosecutors and investigators, not defense counsel, any more than it would be improper for the FBI to conduct investigations for prosecutors and not for defendants. The Government has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and therefore does not need the same tools.
>
> None of the MLATs before the Senate provide U.S. officials with compulsory process abroad. None of the treaties require the treaty partner to compel its citizens to come to the United States, and none permit any foreign Government to compel our citizens to go abroad. Rather, the MLATs oblige each country to assist the other to the extent permitted by their laws, and provide a framework for that assistance. Since the Government does not obtain

[12] In its 1989 report on MLATs, the Criminal Justice Section of the American Bar Association both strongly supported MLATs and also recommended that "every future MLAT should expressly permit criminal defendants to use the treaty to obtain evidence from the Requested country to use in their defense if they can make a showing of necessity to the trial court." ABA Report at 8.

compulsory process under MLATs, there is nothing the defense is being denied.

The MLATs do not deprive criminal defendants of any rights they currently possess to seek evidence abroad by letters rogatory or other means. The MLATs were designed to provide solutions to problems that our prosecutors encountered in getting evidence from abroad. There is no reason to require that MLATs be made available to defendants, since many of the drawbacks encountered by prosecutors in employing letters rogatory had largely to do with obtaining evidence before indictment, and criminal defendants never had those problems.

Finally, it should be remembered that the defendant frequently has far greater access to evidence abroad than does the Government, since it is the defendant who chose to utilize foreign institutions in the first place. For example, the Government often needs MLATs to gain access to copies of a defendant's foreign bank records; in such cases, the defendant already has copies of the records, or can easily obtain them simply by contacting the bank.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

The Treaty enters into force upon exchange of instruments of ratification.

B. TERMINATION

The Treaty will terminate six months after notice by a Party of an intent to terminate the Treaty.

V. Committee Action

The Committee on Foreign Relations held a public hearing on the proposed treaty on Wednesday, July 17, 1996. The hearing was chaired by Senator Helms. The Committee considered the proposed treaty on July 24, 1996, and ordered the proposed treaty favorably reported with two provisos by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed treaty.

VI. Committee Comments

The Committee on Foreign Relations recommended favorably the proposed treaty. The Committee believes that the proposed treaty is in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. In 1996 and the years head, U.S. law enforcement officers increasingly will be engaged in criminal investigations that traverse international borders. The Committee believes that attaining information and evidence (in a form that comports with U.S. legal standards) related to criminal investigations and prosecutions, including drug trafficking and narcotics-related money laundering, is essential to law enforcement efforts.

To cite an example of how an MLAT can benefit the U.S. justice system, the Committee notes the response by the State Department to Chairman Helms' question for the record regarding how the U.S. has made use of the MLAT with Panama after its 1995 ratification:

> Once recent case from the Southern District of Texas serves as an example of the usefulness of the treaty in the prosecution of financial crimes. In that case, the Assistant U.S. Attorney urgently needed bank records from Panama to verify the dates and amounts of certain money transfers of the alleged fraud proceeds in order to corroborate the testimony of a principal witness. The U.S. requested the records only a short time before they were needed in the trial, and we were pleased that Panamanian authorities produced the records promptly. The records were described by the prosecutors as "the crowning blow" to arguments raised by the defense and indispensable to the Government's ultimate success in the trial.

The Committee believes that MLATs should not, however, be a source of information that is contrary to U.S. legal principles. To attempt to ensure the MLATs are not misused two provisos have been added to the Committee's proposed resolution of ratification. The first proviso reaffirms that ratification of this treaty does not require or authorize legislation that is prohibited by the Constitution of the United States. Bilateral MLATs rely on relationships between sovereign countries with unique legal systems. In as much as U.S. law is based on the Constitution, this treaty may not require legislation prohibited by the Constitution.

The second proviso—which is no legally binding in 11 United States MLATs—requires the U.S. to deny any request from an MLAT partner if the information will be used to facilitate a felony, including the production or distribution of illegal drugs. This provision is intended to ensure that MLATs will never serve as a tool for corrupt officials in foreign governments to gain confidential law enforcement information from the United States.

VII. Explanation of Proposed Treaty

The following is the Technical Analysis of the Mutual Legal Assistance Treaty submitted to the Committee on Foreign Relations by the Departments of State and Justice prior to the Committee hearing to consider pending MLATs.

TECHNICAL ANALYSIS OF THE MLAT BETWEEN THE UNITED STATES OF AMERICA AND AUSTRIA

On February 23, 1995, the United States and the Republic of Austria signed the Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). The Treaty is a major step forward in the formal law enforcement relationship between the two countries. In recent years, the United States has signed similar treaties with a number of countries as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases.

It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title

28, United States Code, Section 1782. Austria has its own mutual legal assistance law [13] and does not anticipate enacting new implementing legislation.

The following technical analysis of the Treaty was prepared by the United States delegation that conducted the negotiations.

Article 1—Scope of assistance

Paragraph 1 provides for assistance "in connection with the investigation and prosecution of offenses, the punishment of which at the time of the request for assistance would fall within the jurisdiction of judicial authorities of the Requesting State, and in related forfeiture proceedings." [14] For the United States, this includes a grand jury investigation, a criminal trial, a sentencing proceeding, and an administrative inquiry by an agency with investigative authority for the purpose of determining whether to refer the matter to the Department of Justice for criminal prosecution. It also includes any proceeding, whether labeled criminal, civil or administrative, that relates to the criminal investigation or prosecution for which assistance is requested. Thus, the Treaty may be invoked to provide assistance for civil forfeiture proceedings against instrumentalities or proceeds of a crime (e.g., drug trafficking) or for disgorgement proceedings brought by an administrative agency (e.g., the United States Securities and Exchange Commission) to recover profits from illegal practices.

The requirement that the matter must "fall within the jurisdiction of the judicial authorities" was included at Austria's request so that assistance under the Treaty is only available to judicial authorities in Austria, not to administrative authorities such as those with jurisdiction over Austrian traffic offenses.

Paragraph 2 lists the types of assistance specifically considered by the United States and Austrian delegations. Most of the items are described in greater detail in subsequent articles. The list is not exhaustive, as is indicated by the phrase "assistance shall include" in the paragraph's chapeau and is reinforced by the phrase in item (i) "any other form of assistance not prohibited by the laws of the Requested State."

Paragraph 3 specifies that the principle of dual criminality is generally inapplicable. Dual criminality obligates the Requested State to provide assistance only when the criminal conduct committed in the Requesting State also constitutes a crime if committed in the Requested State. In other words, the obligation to provide assistance upon request arises irrespective of whether the offense for which assistance is requested is a crime in the Requested State.

Paragraph 3, however, does give the Requested State discretion to deny a request for assistance if dual criminality does not exist and the execution of the request would require a court order for search and seizure or other coercive measures. The Austrian dele-

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[13] "Federal Law of December 4, 1979, Regarding Extradition and Judicial Assistance in Criminal Matters," Bundesgesetzblatt No. 529/1979 ("Austrian Mutual Assistance Law").

[14] Unlike some United States mutual legal assistance treaties, the Treaty is silent regarding assistance in the "prevention" of crimes (i.e., anticipation of criminal activity). This was intentional on the party of the negotiators, who did not intend the Treaty to cover police-to-police cooperation before a crime is committed. The delegations agreed that must of what is included in the concept of "prevention" is indeed covered under the Treaty as an "attempt" to commit a crime.

gation requested this limitation because it is required by Austria's law [15] and constitution. Paragraph 3 obligates the Requested State to "make every effort to approve a request for assistance requiring court orders or other coercive measures" and obligates the Requested State to grant such assistance if, using the standard of "reasonable suspicion," the conduct described would also constitute a crime under the laws of the Requested State. The delegations anticipate that only on extremely rare occasions will the dual criminality requirement prevent the granting of requested assistance.

Paragraph 4 mandates that assistance may not be refused with respect to fiscal offenses without regard for the differences in the kinds of taxes or duties or regulations imposed by each Contracting Party.

Paragraph 5, a standard provision in United States mutual legal assistance treaties, expresses the intention of the negotiators that the Treaty is primarily for government-to-government assistance. The Austrian delegation indicated that under its legal system, courts are required to seek evidence to assist defense counsel as well as prosecutors. The Austrian Central Authority therefore will make such requests to the United States under the Treaty. The United States delegation stated that the United States Central Authority ordinarily does not make treaty requests on behalf of defense counsel. The negotiators agreed that the Treaty is not available for use by private counsel representing civil litigants as a means of evidence-gathering in criminal or civil matters. Private litigants in the United States may continue to obtain evidence from Austria by letters rogatory, an avenue of international assistance left undisturbed by the Treaty. Similarly, the Treaty is not intended to create any right in private persons to suppress or exclude evidence provided under the Treaty.

Article 2—Central Authorities

Paragraph 1 requires that each Contracting Party designate a "Central Authority." The Attorney General "or such persons as the Attorney General designates" constitute the Central Authority for the United States, as is customary with all United States mutual legal assistance treaties. The Attorney General has delegated these responsibilities to the Assistant Attorney General in charge of the Criminal Division.[16] For Austria, the Minister of Justice, or persons designated by the Minister of Justice, act as the Central Authority.

Paragraph 2 provides that the Central Authority will "make and receive" Treaty requests on behalf of its authorities which by law are responsible for investigations or prosecutions related to criminal matters. This includes competent criminal investigative authorities at the federal, state, and local levels in the United States. This paragraph makes it clear that investigations conducted by an agency with jurisdiction to refer matters for criminal prosecution

[15] See Austrian Mutual Assistance Law § 51(1).

[16] 28 C.F.R. § 0.64–1. The Assistant Attorney General for the Criminal Division has in turn delegated this authority to the Deputy Assistant Attorneys General and to the Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 58, 44 Fed. Reg. 18,661 (1979), as amended at 45 Fed. Reg. 6,541 (1980); 48 Fed. Reg. 54,595 (1983). That delegation subsequently was extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

shall be considered "penal proceedings," and hence covered by the Treaty. This definition allows the Central Authority of the United States to make requests to Austria on behalf of authorities such as the Securities and Exchange Commission and the Commodities Futures Trading Commission, even though these agencies are not usually viewed as criminal investigative authorities, since these agencies are statutorily charged with the responsibility to investigate criminal activity for purposes of referral for criminal prosecution.

Paragraph 3 obligates the Central Authority of the Requesting State not to make requests if the offense "would not have serious consequences" in the Requesting State, or when execution of the request would require assistance from the Requested State that would be "disproportionate to the sentence expected upon conviction." For example, Austria occasionally has used letters rogatory to seek assistance from the United States in cases involving traffic accidents or other relatively minor criminal matters that do not always justify the burden imposed on law enforcement by a formal request for international assistance. Paragraph 3 was intended to discourage the Requesting State from making such requests under the Treaty.

Paragraph 4 provides that the Central Authorities shall communicate directly with one another for purposes of the Treaty. Requests that are not made by and transmitted through the Treaty channel are not considered Treaty requests and are not entitled to execution pursuant to the Treaty.

Article 3—Limitations on assistance

Paragraph 1 specifies that a request for assistance may be denied if the request relates to a political or military offense. In addition, the Requested State may deny a request for assistance if the request "would prejudice the security or similar essential interests of the Requested State." These restrictions are similar to those typically found in United States mutual legal assistance treaties. The negotiators anticipated that this provision will be invoked only in the most rare and extreme circumstances; the phrase "security or other essential interests" is intended to convey a concept of substantial national importance. The delegations agreed that the term "essential interests" is intended narrowly to limit the class of cases in which assistance may be denied. The fact that a Requesting State's prosecution would be inconsistent with public policy if brought in the Requested State is not a sufficient reason to deny assistance. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy.

It was agreed, however, that "essential interests" may include interests unrelated to national, military or political security, and that this clause may be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose is to enhance law enforcement cooperation. The attainment of that goal would be hampered if sensitive law enforcement information available under the Treaty were to fall into the "wrong hands." Accordingly, the United States Central Authority may invoke para-

graph 1(c) to decline to provide sensitive or confidential drug-related information pursuant to a Treaty request whenever it determines, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who would have access to the information is engaged in or facilitates the production or distribution of illegal drugs and is using the request to the prejudice of a United States investigation or prosecution.[17]

Similarly, the Austrian delegation indicated that Austria likely would invoke the "essential interests" clause to deny United States requests that would oblige Austria to assist in matters that could result in capital punishment. The Austrian constitution prohibits the death penalty, and Austria is firmly opposed to assisting or contributing to the implementation of capital punishment. The Austrian delegation stated that such denials would only occur if the evidence requested from Austria is the only evidence available in the case and hence would lead directly to the conviction and execution of the offender.

The decision to deny assistance under the Treaty lies with the Central Authorities. In the United States, the Attorney General's designees work closely with the Department of State and other relevant agencies in determining whether to execute requests that involve "security or similar essential interests."

Paragraph 2 imposes an obligation on the Central Authorities to consult one another before a request for assistance is denied. The consultation is designed to explore whether the Requested State could provide the assistance if protective conditions were put in place. If so, it is anticipated that the Requested State would grant the assistance under the specified conditions, which the Requesting State would agree to accept. Otherwise, the Requested State would deny the request. Once the Requesting State accepts assistance subject to the conditions, it is required to comply with the conditions.

Paragraph 3 requires that the Central Authority of the Requested State notify the Central Authority of the Requesting State of any reasons for denial of a request pursuant to paragraph 1. Although notification usually will occur after the consultation phase pursuant to paragraph 2, the Central Authority of the Requesting State may have so advised its counterpart prior to the consultation.

Article 4—Form and contents of requests

Paragraph 1 requires that a Treaty request be in writing, except that the Central Authority of the Requested State may, in its discretion, accept a request in another form "in urgent situations." An example of the kind of urgency foreseen by the negotiators would be a request to block the imminent transfer of drug proceeds from the Requested State to a third state. If the Central Authority of the Requested State accepts an oral request in an urgent situation, the

[17] This is consistent with the sense of the Senate as expressed in its advice and consent to ratification of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13,884 (1989) (treaty citations omitted). See also Staff of Senate Committee on Foreign Relations, 100th Cong., 2d sess., Mutual Legal Assistance Treaty Concerning the Cayman Island 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

Requesting State must provide a written request within ten days unless the Central Authority of the Requested State specifies otherwise. Paragraph 1 also provides that in "urgent situations," the Central Authorities may agree that a translation of the request and supporting documents be prepared in the Requested State at the expense of the Requesting State.

Paragraphs 2 and 3 are similar to articles in other United States mutual legal assistance treaties that specify the contents of a request.[18] Paragraph 2 lists information that is required in every case both for evaluation and execution of a request. The Central Authority of the Requested State must be able to determine from the request whether it falls within the scope of the Treaty and therefore should be executed. The Central Authority must also determine from the request what its execution will entail.

Paragraph 3 outlines the kinds of information to be provided in a request "[t]o the extent necessary and possible." Depending on the assistance requested, certain additional information also may be necessary or possible. For example, if the request asks that a witness appear and testify, a "description of the manner in which any testimony or statement is to be taken and recorded" is required. A "list of questions to be asked of a witness" may be possible, but not necessary.

In keeping with the intention of the negotiators that requests pass between the Central Authorities with as little administrative formality as possible, the Treaty contains no requirement that a request be legalized or certified.

Article 5—Execution of requests

Paragraph 1 requires that each Contracting Party execute requests from the other promptly. If the Central Authority is not competent to execute the request, it must promptly transmit the request to a competent authority for execution. For Austria, the Ministry of Justice, upon receipt of a request from the United States Central Authority, determines whether (1) the request complies with the terms of the Treaty, and (2) its execution would prejudice the security or other essential interests of Austria. If the request merits execution, the Austrian Central Authority transmits the request to a court or public prosecutor for that purpose. The procedure is similar for the United States, except the United States Central Authority usually will transmit the request to federal investigators, prosecutors, or agencies for execution. The United States Central Authority also may transmit a request to state authorities in appropriate circumstances.

Paragraph 1 further authorizes and requires the competent authority selected by the Central Authority to take such action as is necessary and within its power to execute the request. In Austria, execution of requests is almost exclusively within the province of the courts and the public prosecutors, whereas in the United States, execution can be entrusted to any competent authority in any branch of government, whether federal or state. Nevertheless, when a request from Austria requires compulsory process for exe-

[18] See, e.g., U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 29, 27 U.S.T. 2019, T.I.A.S. No. 8302, 1052 U.N.T.S. 61; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990, art. 4, T.I.A.S. No. eleven.

cution, it is anticipated that the competent authority in the United States will issue the necessary compulsory process itself,[19] or ask the competent judicial authorities to do so. The competent authorities in both Contracting Parties are bound to do "everything in their power" to execute requests.

Paragraph 2 states that the Central Authority of the Requested State shall arrange for requests from the Requesting State to be presented to the appropriate authority in the Requested State for execution. In practice, the Central Authority for the United States transmits the request with instructions for its execution to an investigative or regulatory agency, the office of a prosecutor, or another governmental entity. If execution requires the participation of a court, the Central Authority selects an appropriate representative, usually a federal prosecutor, to present the matter to a court. Thereafter, the prosecutor represents the United States and acts to fulfill its obligations to Austria under the Treaty by executing the request. Upon receiving the court's appointment as a commissioner, the prosecutor/commissioner acts as the court's agent in fulfilling the court's responsibility to do "everything in its power" to execute the request. Thus, the prosecutor may only seek compulsory measures after receiving permission from the court to do so.

The situation with respect to Austria is different. The Austrian Central Authority transmits the request to the appropriate court[20] with general advice regarding Austria's obligations under the Treaty and the general evidentiary and procedural requirements of the United States.

Paragraph 3 provides that all requests shall be executed in accordance with the laws of the Requested State except to the extent that the Treaty specifically provides otherwise. The negotiators discussed the procedures applicable in each Contracting Party in executing requests for legal assistance from the other, and agreed to accommodate any specific procedure requested by the other to the extent permitted under the law of the Requested State or under specific treaty provisions (e.g., article 8).

Paragraph 3 further authorizes the courts of each Contracting Party to issue orders to execute Treaty requests as would be authorized for domestic investigations and prosecutions. In Austria, the use of subpoenas is unknown. Austrian courts are expected to exercise their authority to do whatever is necessary to execute a Treaty request, including effecting the appearance of a witness (whether by court order or arrest), issuing and enforcing a search warrant, and seizing evidence. In the United States, courts usually will be called upon to exercise their authority by means of an application for execution of a request pursuant to the Treaty. This is also consistent with the provisions of Title 28, United States Code, Section 1782.[21] Typically, the court will appoint and authorize a commissioner to issue subpoenas in executing a Treaty request. The court may also instruct the commissioner to appear before the court to request orders to enforce the subpoenas, if necessary; for

[19] For example, the Securities and Exchange Commission has the power to issue compulsory process to obtain evidence to execute a request for assistance from certain foreign authorities.

[20] See Austrian Mutual Assistance Law § 55.

[21] The Treaty is intended to be self-executing for the United States; no legislation is necessary for United States courts to assist in performing United States obligations under the Treaty.

searches and seizures, to the extent that probable cause exists; or to freeze the proceeds of a crime.

Paragraph 3 also makes clear that the Treaty does not authorize the use in the Requested State of methods of execution that would be prohibited under its laws.

Paragraph 4 contemplates a situation in which execution of a request would interfere with an "ongoing criminal investigation or proceeding" (not an administrative or civil matter or a closed criminal matter) in the Requested State. This provision permits the Central Authority of the Requested State to postpone execution or to execute the request subject to conditions agreed upon with the Requesting State to protect the Requested State's investigation or proceeding. This provision does not permit denial of assistance, which is covered separately under article 3 or as specified elsewhere in the Treaty.[22]

When the Central Authority of the Requested State determines that it is appropriate to postpone execution of a request under this provision, it should take steps to obtain or preserve evidence that might otherwise be lost or destroyed before the conclusion of the investigation, prosecution, or proceeding taking place in the Requested State so that the Requesting State is not seriously disadvantaged by having to wait until the conclusion of the investigation, prosecution, or proceedings in the Requested State. If the Central Authority of the Requested State permits execution under specified conditions and the Requesting State agrees to the conditions, the Requesting State must comply with them.

Paragraph 5 requires that the Requested State use its "best efforts" to safeguard any confidentiality requested by the Requesting State with respect to both the fact that a request was made and the contents of that request. If the Requested State cannot execute the request without disclosing the information in question (as may occur if execution requires a public judicial proceeding in the Requested State), the Central Authorities must consult one another so that the Requesting State may consider withdrawal of the request so as not to risk jeopardizing its investigation, prosecution, or proceeding by possible disclosure.

Paragraph 6 obligates the Central Authority of the Requested Stated to notify the Central Authority of the Requesting State of the outcome of the execution of a request. Customarily, this occurs when the assistance requested is provided. When the request is only partially executed, or is wholly unexecuted, the Central Authority of the Requested State must notify the Central Authority of the Requesting State of the reasons therefor.

Article 6—Costs

This article obligates the Requested State to pay all costs relating to the execution of a request except for fees of expert witnesses; translation, interpretation, and transcription costs; and specified travel expenses. Costs "relating to" execution refers to costs typically incurred in transmitting a request to the executing authority, notifying witnesses and arranging for their appearances, producing

[22] See, e.g., U.S.-Austria Mutual Legal Assistance Treaty, Feb. 23, 1995, art. 9(2), T.I.A.S. No. ———.

copies of the evidence, conducting a proceeding to compel execution of a request, etc. The negotiators agreed that the costs "relating to" execution that are to be borne by the Requested State do not include expenses associated with the travel of investigators, prosecutors, counsel for the defense, or judicial authorities, for example, to question a witness or to take a deposition in the Requested State pursuant to article 8(3).

Article 7—Limitations on use

Paragraph 1 provides that the Central Authority of the Requested State "may require" that any evidence or information that the Requested State provides to the Requesting State "not be used in any investigation, prosecution, or proceeding" other than that which the request concerns, unless the Requested State gives prior consent.[23] The Austrian negotiators made clear that the discretionary limitation on use imposed by this sentence of article 7 likely would be invoked very rarely. One example in which this clause might be invoked is a request for production of records that would disclose sensitive business secrets. In such a case, assistance would be granted on condition that there be no further use of the information or evidence without prior of the Requested State.

Paragraph 1 also creates a different rule for cases in which assistance is granted for fiscal offenses. In such cases, any evidence or information obtained under the Treaty can be used only for the investigation, prosecution, or proceeding described in the request, or in a related customs duty, excise or tax proceeding. The information or evidence cannot be used for purposes other than the aforementioned without prior consent of the Requested State. In other words, the Central Authority of the Requested State does not have the discretion to impose or not impose use limitations on evidence obtained in fiscal offenses, as the Treaty automatically imposes such limitations. The Requesting State is permitted to use such evidence in related fiscal cases without limitation, though, and the Central Authority can give its consent to use of information in such cases for an unrelated purpose.

Paragraph 2 authorizes the Central Authority of the Requested State to request that particular information or evidence furnished in a specific case be kept confidential or be used subject to specific conditions.[24] The delegations agreed that "best efforts" is not a guarantee, as certain situations require that evidence be disclosed. For example, United States law requires the disclosure to defense counsel of discovery evidence that is exculpatory to the accused.[25] This is consistent with the overall purpose of the Treaty, the production of evidence for trial, which would be frustrated if the Requested State could let the Requesting State see valuable evidence while preventing the Requesting State from using the evidence. In the event the United States is required to disclosed evidence that was obtained under the Treaty pursuant to assurances it would remain confidential, the United States would consult in advance with

[23] This provision is similar to one present in the United States-Netherlands Treaty, June 12, 1981, art. 11, T.I.A.S. No. 10734, 1359 U.N.T.S. 209.

[24] This confidentiality is different from that discussed in article 5(5), which authorizes the Central Authority of the Requesting State to ask for, and requires the Requesting State to use, "best efforts" to maintain confidentiality with respect to a request and its contents.

[25] *Brady* v. *Maryland,* 373 U.S. 83 (1963).

Austria in order to fashion a method of disclosure acceptable to both Contracting Parties.

Paragraph 3 provides that once information or evidence becomes public in the Requesting State in accordance with the Treaty, it may thereafter be used for any purpose. The negotiators expected that the good faith exercise of "best efforts" will protects confidentiality up to the point that it is maintained by the courts in the Requesting State. However, since the primary purpose of the Treaty is to provide evidence for the prosecution of offenses, some confidential evidence may become public when introduced as evidence at trial or otherwise disclosed as part of related judicial proceedings. An example is when the information is publicly disclosed as part of the sentencing process in the United States.

Article 8—Testimony of evidence in the Requesting State

Articles 8 through 17 describe specific types of assistance available pursuant to the Treaty, all of which are similar to provisions in other United States mutual legal assistance treaties. Article 8 requires that each Contracting Party permit the taking of testimony and evidence on behalf of the other.

Paragraph 1 obligates the Requesting State to compel persons to appear and testify or produce evidence requested by the Requesting State. Judicial authorities of both Contracting Parties have the power to compel testimony or documents from individuals or companies in connection with both domestic and foreign proceedings. The criminal laws of both Contracting Parties contain provisions that sanction the production of false evidence.

Paragraph 1 explicitly states that the criminal laws in the Requesting State shall apply when a person in the Requesting State provides false evidence in execution of a request. The negotiators expected that if any falsehood is made in execution of a request, the Requesting State may ask the Requested State to prosecute the person for perjury, and should provide the Requested State with the information or evidence needed to prove the falsehood.

Paragraph 2 requires that upon request, the Central Authority of the Requested State must notify the Central Authority of the Requesting State "in advance" of the date and place of the taking of testimony. Although the time period "in advance" is undefined, the negotiators understood that each Contracting Party will attempt to accommodate the needs of the other in this regard.

Advance notice is of particular importance to the United States because United States authorities sometimes rely heavily on deposition testimony when a witness is unwilling or unable to come to the United States to testify at trial. With assurance of advance notice, a United States trial court can order that a deposition take place in Austria on a date to be specified by Austrian authorities; the United States court may even indicate a preferred date. The Central Authorities will attempt to accommodate the court and will notify the court sufficiently in advance of the depositions in order to permit the parties to be present.

Paragraph 3 guarantees that the persons "specified in a request" will be allowed to be present during the execution of the request. For the United States, the persons so specified might include pros-

ecutors, investigators, court reporters, translators, interpreters, defendants, and defense counsel.

The presence of a stenographer at a deposition generally is critical to preserve testimony of witnesses as United States practice is to introduce into evidence a verbatim transcript of out-of-court testimony rather than a summary or abbreviated form (as is the practice in civil law jurisdictions). The United States practice in part is intended to permit the trier of fact to receive the transcribed testimony under conditions as similar as possible to hearing the testimony in person.

The presence of the defendant and defense counsel is important under United States law in order for a defendant to have an opportunity to confront and question adverse witnesses. Neither delegation foresaw any problem in accommodating the needs of confrontation under both legal systems.

Paragraph 4 permits a witness whose testimony or evidence is sought to assert claims of privilege,[26] immunity, or incapacity available under the laws of the Requesting State. The executing authority of the Requested State notes these claims but defers to the appropriate authority in the Requesting State to decide them on the merits. The taking of testimony or evidence therefore can continue in the Requested State without delay whenever issues involving the law of the Requesting State arise.

Paragraph 5 is primarily for the benefit of the United States. In the United States, evidence that is to be used as proof in a legal proceeding must be authenticated. This paragraph provides that evidence produced in the Requested State pursuant to article 8 may be authenticated by an "attestation." Although the provision is sufficiently broad to include the authentication of "any items produced * * * pursuant to this Article," the negotiators focused on and were primarily concerned with business records. In order to ensure that business records provided by Austria pursuant to the Treaty can be authenticated in a manner consistent with existing United States law, the negotiators crafted "Form A," which follows the language of Title 18, United States Code, Section 3505, the statute concerning foreign business records authentication. Paragraph 5(a) provides that Austrian authorities must properly complete, sign, and attach Form A to executed documents so that records may be admitted into evidence in the United States without the appearance of a witness at trial.

In the event that a witness refuses to complete Form A, paragraph 5(b) provides for use of "protocol containing the essential information" that is otherwise included in Form A. Paragraph 5(c) provides for use of a "document" containing the essential information required by the Requesting State. This provision is intended to accommodate potential changes in United States evidentiary law without changing the Treaty. Pursuant to paragraph 5(c), the Requesting State makes its requirements for certification known in the request, and such procedures should be followed to the extent possible under the law of the Requested State.

[26] Both the United States and Austria recognize the privilege of a witness against self-incrimination.

The admissibility of evidence as referred to in this paragraph pertains only to the authenticity of the evidence, not to other requirements of admissibility such as relevance and materiality. Whether the evidence is in fact admitted is a determination within the province of the judicial authority presiding at the trial.

Article 9—Records of Government agencies

Paragraph 1 obligates each Contracting Party to furnish to the other copies of publicly available materials in the possession of "government departments and agencies or courts of the Requested State." For the United States, this includes executive, judicial, and legislative units at the Federal, state, and local levels. For Austria, such documents are under the control of the federal and state courts.

Paragraph 2 gives each Contracting Party discretion to furnish to the other copies of materials in its possession that are not publicly available "to the same extent and under the same conditions" as such copies would be available to the appropriate law enforcement or judicial authorities in the Requested State. This requirement is important because some United States statutes limit disclosure of government information to specific United States law enforcement authorities for certain purposes.

The intent of the negotiators is to broaden statutorily limited access to include foreign authorities entitled to assistance under the Treaty. For example, the negotiators agreed that the Treaty is a "convention" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide, tax returns and return information to Austria pursuant to the Treaty when, in a criminal investigation or prosecution, the Austrian authority on whose behalf the request is made meets the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103 (h) and (i). Of course, if no law enforcement authorities are entitled under any condition to gain access to a particular non-public record, a Contracting Party cannot expect access to it under the Treaty.

Because non-public government records may contain sensitive information that would not necessitate a denial of assistance pursuant to article 3(1), the Treaty gives each Contracting Party discretion not to provide them. It is anticipated that this discretion will be used sparingly, if it is used at all.

Paragraph 3 adopts the Convention Abolishing the Requirement of Legalization for Foreign Public Documents,[27] to which the United States and Austria are parties, as the means of authenticating government or official records. As a result, official records provided by Austria under the Treaty and accompanied by the apostille required by the Convention are self-authenticating, thus creating a form of self-authentication similar in effect to Rule 902 of the Federal Rules of Evidence.

[27] Oct. 5, 1961, 33 U.S.T. 883, T.I.A.S. No. 10072.

Article 10—Appearance in the Requesting State

Paragraph 1 provides that the Requesting State is permitted to request the appearance of any person to assist in "investigations or proceedings" in the Requesting State. It further provides that the Requested State shall extend an invitation to the person whose appearance is requested and obligates the Requested State to inform the Requesting State of the person's response. The intention is to establish a formal mechanism for inviting, not for compelling, an appearance for whatever purpose the appearance is requested. The United States typically will seek a person's appearance as a witness to testify before a grand jury or a grand jury or at trial. The text is written, however, to permit an invitation to appear for any purpose deemed necessary or useful by the Requesting State.

When the United States seeks to have Austria invite person to appear in the United States, the United States Central Authority sends a letter of invitation through the Austrian Ministry of Justice. The person invited is free to decline and shall not be subject to any penalty for doing so or for failing to appear after agreeing to do so. This does not preclude the United States from using other channels for service on a United States citizen or resident located in Austria of a document such as a subpoena issued under Title 28, United States Code, Sections 1783–84. This subpoena may entail sanctions for failure to appear in the United States as directed by the subpoena.

Paragraph 2 requires the Requesting State to "indicate" the extent to which the expenses of a person invited will be "reimbursed" by the Requesting State. It further provides that the person who agrees to travel to the Requesting State for this purpose may request and receive advance money for related expenses. The advance can be obtained from the embassy or consulate of the Requesting State.

Article 11—Safe conduct

Paragraph 1 provides explicit assurances that unless otherwise specified in the request, any witness or expert who appears in the Requesting State pursuant to a request for assistance shall not be "subject to any civil suit to which the person could not be subjected but for his appearance in the Requesting State." It also provides that such a person appearing in the Requesting State shall not be "prosecuted, punished, or subjected to any restriction of personal liberty" for acts committed prior to his leaving the Requested State. According to the Austrian delegation, its law requires that these conditions be met before Austria may serve an invitation to appear in the United States pursuant to a Treaty request.[28] These assurances do not protect the prospective witness from civil suits, prosecution, punishment or restriction of personal liberty with respect to acts committed after departure from the Requested State.

Paragraph 2 limits the safe conduct provided for in paragraph 1 to seven days. This period begins to run after the person is notified that the requested appearance is no longer required, and the person nevertheless remains in the Requesting State even though free to leave, or has voluntarily returned to the Requesting State.

[28] Austrian Mutual Assistance Law § 53.

This article is intended to apply both to persons who are transferred while in custody pursuant to article 12 and to those who are not incarcerated and wish to appear.

Article 12—Transfer of persons in custody

This article concerns requests for the appearance in the Requesting State of persons who are incarcerated in the Requested State. Similar provisions are common in United States mutual legal assistance treaties [29] and have proved to be extremely useful. The enactment of Title 18, United States Code, Section 3508 provides the legal basis for the United States to arrange for such transfer to the United States.

Paragraph 1 provides for the transfer to the Requesting State of a person in custody in the Requesting State for "purposes of assistance." The United States typically will seek a person's appearance as a witness to testify before a grand jury or at trial. The text as written, however, permits the issuance of an invitation to appear for any purpose deemed necessary or useful by the Requesting State. Before the transfer is granted, both the Central Authority of the Requested State and the person in custody must consent.

Paragraph 2 provides for the transfer of a person in custody in the Requesting State to the Requested State for "purposes of assistance." Both Central Authorities must agree and the person in custody must consent. This provision is particularly useful to the United States when a defendant in custody desires to be present at a deposition to be taken in Austria.

Paragraph 3(a) provides express authority for, and imposes an obligation upon, the receiving State to maintain the person transferred in custody until the purpose of the transfer is accomplished.

Paragraph 3(b) imposes an obligation upon the receiving State to return the person transferred to the sending State. The person must consent only to the original transfer; no consent is needed to return the person to the sending State.

Paragraph 3(c) provides that the sending State need not initiate extradition proceedings to secure return of the person transferred. This paragraph comports with Title 18, United States Code, Section 3508. Moreover, this provision is particularly helpful to the United States in the event that a person transferred from Austria to the United States files a habeas corpus claim seeking to avoid return to Austria in the absence of an extradition request.

Paragraph 3(d) ensures that the person transferred is credited in the sending State for the time spent in custody in the receiving State.

Article 13—Location or identification of persons or items

This article requires each Contracting Party to use its "best efforts" to locate or identify persons (e.g., witnesses) or items (e.g., evidence) "necessary for the execution of a request made under this Treaty." The Austrian negotiators made clear that this provision does not authorize the use of the Treaty as a means for locating a fugitive who would then become the subject of a request for ex-

[29] See, e.g., U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 26, 27 U.S.T. 2019, T.I.A.S. No. 8302, 1052 U.N.T.S. 61.

tradition. The negotiators contemplated that "best efforts" will vary depending on the information provided in the request in accordance with article 4. When little information is provided (e.g., when a request merely states that a potential witness may be located in the Requested State), the Requested State is not expected to do much. As the level of information increases, so does the obligation to search for the person or item.

Article 14—Service of documents

Paragraph 1 requires the Requested State to use its "best efforts" to serve documents on persons within its territory pursuant to a request for assistance under the Treaty. "Best efforts" will vary depending on the information provided in the request in accordance with article 4. The delegations agreed that the Treaty is intended to provide a method of providing service without ruling out other methods. For example, the Treaty does not take away Austria's ability to serve persons in the United States directly by mail.

In executing Austrian requests for service in the United States, service will be made by registered mail unless Austria asks for personal delivery, in which instance service typically will be made by the United States Marshals Service. Service in Austria usually will be made by mail, unless the United States specifies that another form is necessary, in which case Austrian authorities should be able to accommodate the request.

Paragraph 2 requires that a request for the appearance of a person before an authority of the Requesting State must be transmitted to the Requested State within a "reasonable time" before the scheduled appearance. The particular circumstances of each request determine whether the Requesting State meets this standard. It is understood that both Central Authorities will attempt to find in favor of the Requesting State in applying the standard.

Paragraph 3 requires that the Requested State return proof of service in the manner indicated by the Requesting State.

Paragraph 4 provides that a national of the Requested State or a person with status equal to that of a national will not be sanctioned for failure to respond to a summons to appear in the Requesting State and will not be subject to compulsory process to effect the appearance.

Article 15—Search and seizure

Judicial authorities in Austria and in the United States have the power to compel a person to appear and produce evidence. Therefore, the negotiators anticipated that requests for the production of physical evidence normally will be executed pursuant to article 8. In situations when a subpoena duces tecum or demand for production is inadequate, however, this article permits a search and seizure.

Paragraph 1 states that "any item, including but not limited to any document, record, or article of evidence," shall be subject to search and seizure in the Requested State. This language conveys the intention that any physical evidence that could be useful to a criminal prosecution qualifies for search and seizure. Search and seizure authority is limited by the law of the Requested State. In other words, the Requesting State must provide the Requested

State with "information justifying such action under the laws of the Requested State." For Austria, such information must include a statement that if the evidence were located in the Requesting State, an appropriate authority could compel production.

For the United States to be able to execute a request for search and seizure on behalf of Austria, the Austrian request must contain information demonstrating "probable cause" as required by the Fourth Amendment to the United States Constitution. The Austrian request must contain facts, or be augmented by facts from a reliable source, that will persuade a United States judicial authority that probable cause exists to believe that a crime has been or is being committed over which Austria has jurisdiction and that clearly described evidence of the crime is located at a clearly described place to be searched in the United States.

Paragraph 2 is designed to establish a chain of custody for evidence seized pursuant to a request and to provide a method for proving that chain by certificates admissible in a judicial proceeding in the Requesting State. The Requested State is required to maintain a reliable record, from the time of a seizure, of the "identity of the item, continuity of custody, and the integrity of its condition." This record takes the form either of "Form B," a custodian certificate which is appended to the Treaty, or a document that contains the essential information required by the Requesting State. Each successive custodian prepares a certificate which, when joined together with the other certificates from other custodians, provides a reliable trail tracing the item seized (and the integrity of its condition) in the Requested State to the judicial proceeding in the Requesting State in which it is to be introduced as evidence. If the judge in the Requesting State finds that the process is trustworthy, the judge may admit as authentic the evidence with the certificates. The judge is free to deny admission of the evidence in spite of the certificates if some other reason exists to do so aside from authenticity. For the United States, this provision is intended to limit the need to bring Austrian officials to the United States to testify to those situations when the reliability of the evidence (its origin or condition) is in serious question.

Paragraph 3 permits the Requested State, as a matter of discretion, to protect the rights of third parties in items seized. The negotiators intended that the Requested State, in using its discretion to impose conditions, should do so only to the extent "deemed necessary." This paragraph is not intended to serve as an impediment to the transfer of items seized.

Article 16—Return of items

This article requires that upon request by the Central Authority of the Requested State, the Central Authority of the Requesting State shall return as soon as possible "any documents, records, or articles of evidence" provided by the Requested State pursuant to the Treaty.[30]

[30] Cf. Austrian Mutual Assistance Law § 52.

Article 17—Assistance in forfeiture proceedings

This article is designed to permit assistance, to the extent permitted by the laws of both Contracting Parties, in the developing area of asset freezes, forfeitures, and restitution. The negotiators, therefore, considered this provision to be of particular importance to law enforcement efforts, especially in the war against narcotic drug trafficking. A modern trend in law enforcement is to focus attention on the proceeds of crime and actively to seek to ensure that the money, property, and other proceeds of crime are seized and confiscated by the government or returned to the victims of the crime.

Paragraph 1 provides that each Central Authority has discretion to notify the other regarding proceeds of crime located in the territory of the other. This is a notification provision only. Upon notification, the Central Authority of the Contracting Party in which the proceeds are located may take whatever action is appropriate under its law. If the Contracting Party in which the proceeds are located takes any action with regard to forfeiture and/or seizure of the property, its Central Authority shall report the action taken to the other Central Authority.

Paragraph 2 imposes an obligation upon each Contracting Party to assist the other in proceedings relating to the forfeiture of the "fruits and instrumentalities of offenses, restitution to victims of crime, and the collection of fines imposed as sentences in criminal prosecutions." The phrase "fruits and instrumentalities of offenses" includes money, securities, jewelry, automobiles, vessels, and any other items of value used in the commission of the crime or obtained as a result of the crime.

The obligation to assist is a limited one, carefully crafted to require action only to the extent permitted by the law of either Contracting Party. If the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or to enforce a judgment or forfeiture in the Requesting State, then the Treaty encourages the Requested State to do so. However, the obligation does not require a Contracting Party to initiate legal proceedings on behalf of the other, but only to assist the other with its proceedings. As suggested by paragraph 1, institution of forfeiture proceedings in a Contracting Party against assets located there remains a decision for its appropriate authorities. United States law provides for the possibility of forfeiture of the proceeds of crime even before a person has been accused of the crime. Similarly, Austrian law provides for procedures whereby an item may be seized in the absence of a named defendant.

With respect to restitution, the negotiators discussed whether the Contracting Parties can collect fines and make restitution to a victim. Specifically, the negotiators considered whether the Contracting Parties are able to move against assets of a person who defrauded a victim of money in order to make the victim whole. In both the United States and Austria, the victim may file a civil suit and may only seek the return of the actual fraud proceeds; the victim may not substitute an accused person's assets for the value of the fraud.

Paragraph 3 provides for the disposition of forfeited proceeds or property. Such disposition shall be in accordance with the law of

the Requested State. This provision also states that the Requested State may keep the forfeited assets or share them with the Requesting State.

United States law permits the transfer of forfeited property or a portion of the proceeds of the sale thereof to any foreign country that participated directly or indirectly in the seizure or forfeiture of the property.[31] The amount transferred generally reflects the contribution of the foreign government in the law enforcement activity that led to the seizure or forfeiture of the property under United States law. United States sharing statutes require that the transfer recommended by the Attorney General or the Secretary of the Treasury be authorized in an international agreement between the United States and the foreign country, and be agreed to by the Secretary of State. Article 17 is intended to authorize and provide for the transfer of forfeited assets or the proceeds of such assets to Austria pursuant to United States sharing statutes to the extent permitted by law.

Article 18—Compatibility with other treaties, agreements, or arrangements

This article is a standard treaty provision designed to protect alternative channels of assistance between the Contracting Parties. In other words, the Treaty is not the exclusive channel for seeking mutual legal assistance in criminal matters. Although the negotiators anticipated that once in operation, the Treaty will become the mechanism of choice, they also recognized that competent authorities in either Contracting Party may continue to make requests in accordance with their domestic laws, other bilateral treaties and agreements, and applicable multilateral conventions. The Treaty, therefore, leaves the other mechanisms undisturbed and available for use.

Article 19—Consultation

This article obliges the Contracting Parties to consult with one another for the purpose of improving the effectiveness of the Treaty's implementation. The Central Authorities of either Contracting Party may initiate the consultations. Consultations usually will entail the discussion of specific requests, such as an exchange of information on the transmission and execution of requests.

Experience has shown that as the Central Authorities of a treaty work together, they become aware of practical ways to make implementation of the treaty more effective and their own efforts more efficient. Periodic or regular consultations provide a forum for initiating improvements in the Treaty's implementation.

Article 20—Ratification, entry into force, and termination

This article concerns the procedures for ratification, exchange of instruments of ratification, and entry into force of the Treaty.

Paragraph 1 concerns the procedure for ratification and exchange of instruments of ratification.

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[31] E.g., 18 U.S.C. § 981(i)(1).

Paragraph 2 provides that the Treaty "shall enter into force on the first day of the third month following the month of the exchange of instruments of ratification."

Paragraph 3 states that once in force, the Treaty will be applicable to all offenses, regardless of when the offense occurred.

Paragraph 4 establishes that the Treaty will terminate six months from the date of receipt by one Contracting Party of written notification from the other Contracting Party.

VIII. TEXT OF THE RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of The Treaty Between the Government of the United States of America and the Government of the Republic of Austria on Mutual Legal Assistance in Criminal Matters, signed at Vienna on February 23, 1995. The Senate's advice and consent is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

> Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.
>
> Pursuant to the rights of the United States under this Treaty to deny requests which prejudice its essential public policy or interest, the United States shall deny a request for assistance when the Central Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this Treaty is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

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