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TREATY WITH HUNGARY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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

REPORT

[To accompany Treaty Doc. 104–20]

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 Hungary on Mutual Legal Assistance in Criminal Matters, signed at Budapest on December 1, 1994, 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 December 1, 1994, the United States signed a treaty with Hungary on mutual assistance in criminal matters and the President transmitted the Treaty to the Senator 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.

States 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 Urugray. MLATs not in force but ratified by the United States include those with Belgium, Colombia, 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 possess 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 embassies abroad), requests through Interpol, requests 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 they will accept and execute. In some countries (e.g., Japan and Germany) the acceptance of such requests 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

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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.

records from within their territories through the subpoena power.[10] There is no 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 not all, MLATs have covered a broad range of crimes with no 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 criminal the fruits and the instrumentalities of their crimes.

B. SUMMARY OF PRIMARY PROVISIONS

1. Types of proceedings

MLAts generally call for assistance in criminal investigations and proceedings. This coverage often is 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 trial. Most recent MLATs also cover civil and administrative proceedings—forfeiture proceedings, for example—related to at least some types of prosecutions, most frequently those involving drug trafficking. However, the scope of some MLATs have been more circumscribed than the proposed treaty.

The Hungary Treaty states that the parties shall provide mutual assistance "in connection with the prevention, investigation and prosecution of offenses, and in proceedings related to criminal matters" (art. 1).

2. Limitations of 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. Re-

[10] Notwithstanding foreign objections, unilateral methods such as issuing subpoenas on domestic branches may actually have promoted the negotiation of MLATs. According to one commentator, "the principal incentive for many foreign governments to negotiate MLATs with the United States was, and remains, the desire to curtail the resort by U.S. prosecutors, police agents, and courts to unilateral, extraterritorial means of collecting evidence from abroad." E. Nadelmann, Cops Across Boarders: The Internationalization of U.S. Criminal Law Enforcement 315 (1993) [hereinafter cited as Nadelmann].

quests 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 Hungary Treaty, assistance may be denied if a request relates to a political offense. 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 the sovereignty, national security or other essential interest of the requested State. A final reason for denying assistance is that it fails to comply with requirements for form and contents. 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 circuity 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; (3) a description of the evidence or other assistance being sought; and (4) the purpose for which the assistance is 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 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.

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[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).

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 typically 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 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 request 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 Re-

questing State, the person nevertheless must testify and objections are to be noted for later resolution by authorities in the Requesting State. The Hungary MLAT (art. 8) expressly recognizes that a person whose testimony is compelled may raise objections based on the law of the Requested State and that these objections are to be resolved by the local judicial authorities.

With respect to questioning a witness by a person specified in the request, the proposed MLAT with Hungary 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 service provisions of the MLAT under consideration is broader than some of those under MLATs currently in force. Provisions under some earlier MLATs 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.

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 proposed 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 per-

sons 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. 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 makes some express provision for immunity from process and prosecution for individuals appearing in the Requesting State in accordance with a treaty request. The Hungary MLAT (art. 12) leaves immunity, which can apply to all acts committed prior to departure from the requested State, to the discretion of the requesting State without requiring that the scope of immunity be set out in the request. 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 Hungary 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 dis-

closed 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.

Location of persons or items

In whole or in part, MLAT requests most often require the Requested States 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 even 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, MLATs 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 responded:

[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.

There are no legal challenges to any of our existing MLATs. It is the position of the Department of Justice that the MLATs are clearly and unquestionably constitutional.

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.

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 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 ahead, 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:

> One 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 prosecutor 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 now 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 HUNGARY

On December 1, 1994, the United States and the Republic of Hungary signed the Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). 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.

The Treaty is a major step forward in the formal law enforcement relationship between the United States and Hungary. 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.

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

Article 1—Scope of obligation to provide assistance

Paragraph 1 provides for assistance "in connection with the prevention, investigation, and prosecution of offenses, and in proceedings related to criminal matters." By this provision, the negotiators specifically agreed to provide Treaty assistance at any stage of a criminal matter. For the United States, this includes not only police-to-police cooperation before a crime is committed, a grand jury investigation, a criminal trial and a sentencing proceeding, but also 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. The Treaty also covers any proceeding, whether labeled civil or administrative, that relates to a 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 crime (e.g., drug trafficking) or for disgorgement pro-

ceedings brought by an administrative agency (e.g., the Securities and Exchange Commission) to recover the profits from illegal practices.

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

Paragraph 3 specifies that the principle of dual criminality—the obligation of the Requested State to provide assistance only when the criminal conduct committed in the Requested State would also constitute a crime if committed in the Requested State—is generally inapplicable. 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. The negotiators discussed at length the applicability of paragraph 3 when the United States makes requests to Hungary for searches and seizures pursuant to article 15. The negotiators agreed that when no dual criminality exists, the Requesting State may not suggest a particular means of compelling the evidence, except in rare instances. As a general rule, therefore, the Requested State must rely on article 8, which contemplates the use of subpoenas rather than searches and seizures to execute requests seeking the compulsion of items including but not limited to documents, records and articles of evidence. (Article 8, which is discussed more thoroughly later in this analysis, provides for the taking of testimony or evidence in the Requested State.)

Paragraph 4, a standard provision in United States mutual legal assistance treaties, expresses the clear intention of the negotiators that the Treaty is solely for government-to-government mutual legal assistance. The negotiators explicitly agreed that the Treaty is not available for use by private counsel representing criminal defendants or 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 Hungary by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided thereunder.

Article 2—Central authorities

Paragraph 1 requires that each Contracting Party designate a "Central Authority" to "make and receive" Treaty requests. Although the Central Authorities exercise differing degrees of control and responsibility over the preparation of such requests (as to both form and content), only the Central Authorities may "make" the requests.

The Central Authority for the United States makes requests to Hungary on behalf of competent federal, state and local authorities in the United States (i.e., authorities statutorily charged with the responsibility of investigating criminal activity for the purpose of criminal prosecution or referral for criminal prosecution). Likewise,

only the Central Authorities "receive" requests. Requests not made by and transmitted through the Treaty channel are not considered Treaty requests and are not entitled to execution pursuant to the Treaty.

Paragraph 2 provides that the Attorney General or such persons designated by the Attorney General act as 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.[13]

For Hungary, the Minister of Justice and the Chief Public Prosecutor, or persons designated by them, act as dual Central Authorities. This dual arrangement for Hungary reflects the importance and independence of the Office of the Chief Public Prosecutor ("the Public Prosecutor's Office) in the Hungarian criminal justice system. Both the Hungarian Constitution and the Hungarian Criminal Code of Procedure designate distinct and separate responsibilities to the Ministry of Justice and the Public Prosecutor's Office. The Public Prosecutor's Office is responsible for handling requests to and from foreign authorities for assistance in criminal matters at the investigative stage, while the Ministry of Justice is responsible for handling these requests at the prosecutive stage.

The Hungarian Criminal Code of Procedure specifically states that "[i]n cases of legal assistance in criminal matters, the authorities of investigation will communicate with foreign authorities through the Chief of the Public Prosecutor and the Hungarian courts through the Ministry of justice."[14] (The "authorities of investigation" refer to police and prosecutors.) As a result, the Public Prosecutor's Office will submit requests, on behalf of the police and prosecutors, to the United States when seeking evidence on pre-indictment matters, and the Ministry of Justice will submit requests, on behalf of Hungarian courts, to the United States in post-indictment matters.

The United States, on the other hand, will submit all Treaty requests directly to the Hungarian Ministry of Justice. The Ministry of Justice will determine whether to coordinate execution of the request of whether to have the Public Prosecutor's Office execute the request. If the Ministry of Justice determines that the Public Prosecutor's Office should execute the request, it will forward the request to that office for execution. This procedure will protect the United States Central Authority from having to make determination as to which Hungarian Central Authority the request should be sent. In summary, although the concept of dual Central Authorities is somewhat unique among our treaty partners in the mutual assistance filed, no practical problems with implementation of the Treaty are anticipated because of the extremely close coordination between the Public Prosecutor's Office and the Ministry of Justice.

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[13] 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 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).

[14] Hungarian Criminal Code of Procedure, art. 394, ¶ 3.

Paragraph 3 provides that the Central Authorities may communicate directly with one another for purposes of making and executing requests.

Article 3—Limitations on assistance

Paragraph 1 specifies that the Central Authority of the Requested State may deny a request for assistance if the request relates to a political or military offense. In addition, the Requested State may deny a request for assistance if its execution would prejudice the security or similar essential interests of the Requested State or if the request does not comply with the provisions of article 4. (Article 4, discussed later herein, provides requirements for the form and content of Treaty requests.) These restrictions are similar to those typically found in United States mutual legal assistance treaties. The negotiators anticipated that this provision will be invoked in the rarest and most extreme circumstances; the juxtaposition of "similar essential interests" with "security" is intended to convey the concept of substantial national importance.

Because the decision to deny assistance lies with the Central Authority, the Attorney General is to work closely with Department of State and other relevant agencies in determining whether to execute a request that involves "security of similar essential interests."

Paragraph 2 imposes an obligation on the Central Authorities to consult before the Requested State may deny assistance. The consultation is designed to explore whether the Requested State could provide 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, and that the Requesting State either would agree to accept the conditions or the Requested State would deny the request. Once the Requesting State accepts assistance subject to 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 denying a request pursuant to paragraph 1. Although notification usually occurs after the consultations pursuant to paragraph 2, the Central Authority of the Requesting State may so advise the Central Authority of the Requested State prior to the consultations.

Article 4—Form and contents of requests

Paragraph 1 requires that Treaty requests be in writing, except that the Central Authority of the Requested State may accept a request in another form "in urgent situations." An example of the kind of "urgency" the negotiators considered would be efforts to block the imminent transfer of drug proceeds from the Requested State to a third country. If the Central Authority of the Requested State accepts an oral request, the Requesting State must provide a written request within ten days unless the Central Authority of the Requested State specifies otherwise.

Paragraphs 2 and 3 similar to provisions in other United States mutual legal assistance treaties specifying the contents of a re-

quest.[15] Paragraph 2 lists information that is required in every case both for evaluation and execution of the 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 execution will entail.

Paragraph 3 outlines the kinds of information that must be provided "[t]o the extent necessary and possible." Depending on the assistance requested, certain additional information may be necessary and 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 necessary. A "list of questions to be asked of the 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 each Contracting Party to perform diligent efforts in promptly executing Treaty requests. If the Central Authority is not competent to execute a request, it promptly must transmit the request to a competent authority for execution.

For Hungary, the Ministry of Justice first determines whether it or the Public Prosecutor's Office is the competent authority to coordinate the execution of the request. The appropriate Central Authority then determines whether the request complies with the terms of the Treaty and whether its execution would prejudice the security or other essential interests of Hungary. If the request merits execution, the appropriate Central Authority transmits the request to an appropriate competent authority for that purpose.

The procedure is similar for the United States, except that the United States Central Authority usually transmits 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 a competent authority selected by the Central Authority to take such action as is necessary and within its power to execute the request. In Hungary, execution of requests almost exclusively falls 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 Hungary requires compulsory process for execution, it is anticipated that the competent authority in the United States will issue the necessary compulsory process itself[16] or will ask other competent authorities to do so. Competent authorities for

[15] 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. —.

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

both Contracting Parties are bound to do "everything in their power" to execute the requests.

Paragraph 1 also authorizes the "judicial authorities" of each Contracting Party to "issue subpoenas, search warrants, or other orders necessary to execute" requests made under the Treaty. For Hungary, "judicial authorities" contemplates both the courts and the public prosecutors, as both the courts and the public prosecutors have the power to issue subpoenas and search warrants. In the United States, "judicial authorities" only refers to the courts, as only the courts have the power to issue subpoenas and search warrants. In the United States, judicial authorities (i.e., courts) will be called upon to exercise their authority pursuant to an application for execution of a request.[17] Typically, the court appoints and authorizes a commissioner to issue subpoenas in executing the request. The court may also instruct the commissioner to appear before the court to request orders to enforce the subpoenas or searches and seizures, to the extent that "probable cause" exists, or to freeze the proceeds of a crime.

Paragraph 2 reconfirms that the Central Authority of the Requested State must 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, typically a federal prosecutor, to present the matter to a court. Thereafter, the prosecutor represents the United States in acting to fulfill its obligations under the Treaty by executing the request. Upon receiving the court's appointment as a commissioner, the prosecutor acts as the court's agent in fulfilling the court's responsibility to do "everything in its power" to execute the request. In short, a prosecutor who requires the use of compulsory measures must act in conjunction with a court.

The procedure for executing Treaty requests in Hungary is different. If the request falls under the competence of the Ministry of Justice, the Ministry of justice transmits the request to the appropriate court which will execute the request. If the request falls under the competence of the Public prosecutor's Office, that office assigns the request to a prosecutor, who will execute the request. The prosecutor has authority to order compulsory process, such as requiring a witness to appear to provide testimony, without having to obtain authority from a court. In other words, unlike in the United States, a prosecutor in Hungary possesses the same authority to compel testimony or the production of documents as Hungarian courts. A Hungarian prosecutor therefore may execute a foreign request seeking compulsory process without the assistance of Hungarian courts.

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 dis-

[17] The Treaty is intended to be self-executing for the United States; no new legislation is necessary to carry out the obligations undertaken.

cussed the procedures applicable in the respective Contracting Parties in executing requests for legal assistance and agreed to accommodate any specific procedures requested by the other to the extent permitted under the laws of the Requested State or as discussed with respect to specific Treaty provisions.[18]

Paragraph 4 contemplates the situation in which execution of a request would interfere with an "ongoing criminal investigation, prosecution, 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 of the request or to execute the request subject to conditions agreed upon with the Requesting State to protect the Requested State's investigation, prosecution or proceeding. This provision does not permit denial of assistance, which is covered separately under article 3 and elsewhere in the Treaty.[19] 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. Accordingly, the Requesting State will not be seriously disadvantaged by having to wait for the evidence until the conclusion of the investigation, prosecution or proceeding in the Requested State. When the Central Authority of the Requested State permits execution under specified conditions, and the Requesting State agrees to the conditions, it 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 the fact that a request was made and the contents of the 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 so that the Requesting State may consider withdrawing the request rather than risk jeopardizing its investigation, prosecution or proceeding by disclosure.

Paragraph 6 obligates the Central Authority of the Requested State to respond to "reasonable" status inquiries. "Reasonable" is not defined; the negotiators believed that the Central Authorities will develop a practical method of providing current information on a timely basis.

Paragraph 7 obligates the Central Authority of the Requested State to notify the Central Authority of the Requesting State of the outcome of the execution of a request. Usually, this will occur at the time 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 any reasons therefor. In the context of this paragraph, a "denial" is a failure of the system to successfully execute the request, not a denial under article 3, for which notification is already required by article 3(3). When a denial consists of

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[18] See, e.g., U.S.-Hungarian Mutual Legal Assistance Treaty, Dec. 1, 1994, art. 8, T.I.A.S. No. —.

[19] See, e.g., U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994, art. 9(2), T.I.A.S. No. —.

the refusal of a judicial authority in the Requested State to execute a request that qualifies for assistance under the Treaty, the Central Authority of the Requested State is obliged to act. The United States Central Authority will recommend that the appropriate authorities within the Department of Justice, who are responsible for appealing adverse judicial decisions to higher courts, appeal the denial. Similarly, both the Hungarian Minister of Justice and the Chief Public Prosecutor will recommend that authorities within their respective departments who are responsible for appealing adverse judicial decisions (of both courts and prosecutors) appeal the denial to a higher judicial authority.

Article 6—Costs

This article obligates the Requested State to pay all costs "relating to" or ordinarily associated with the execution of a request, with the exception of those enumerated in the article: (1) fees of expert witnesses; (2) translation, interpretation and transcription costs; and (3) specified travel expenses. Costs "relating to" execution include costs normally incurred in transmitting a request to the executing authority, notifying witnesses and arranging for their appearances, producing copies of evidence and conducting a proceeding to compel execution of the request.

The negotiators agreed that costs "relating to" execution do not include, for example, expenses associated with the travel of investigators, prosecutors, defense counsel or judicial authorities to question a witness or take a deposition in the Requested State pursuant to article 8(3). Moreover, the negotiators agreed that the costs associated with securing a videotape of a witness's testimony or of a proceeding, or with other technological means of preserving evidence (e.g., costs of "transcription") are to be paid by the Requesting State. In addition, the negotiators specifically agreed that interpretation services will be paid for by the Requesting State. The need for interpretation services might arise, for example, if a Requesting State invites a witness in the Requested State to travel to the Requesting State to provide testimony, and the witness refuses. The Requesting State then might ask the Requested State to conduct a deposition, which would involve a court reporter, an interpreter and a translator. The negotiators anticipated that these services will be paid for by the Requesting State.

Article 7—Limitations on use

Paragrah 1 concerns the rule of specialty, the principle that a Requesting State may use assistance provided under a treaty only for the purposes for which it was requested and provided. However, in the Treaty, this rule is discretionary: the rule of specialty does not apply unless the Requested State invokes it. As a practical matter, this is not very important inasmuch as the Treaty does not contain a dual criminality requirement for granting assistance. The Central Authority of the Requested State "may require" that any evidence or information it provides to the Requesting State "not be used in any investigation, prosecution, or proceeding" other than that for which it was requested unless the Requested State gives prior con-

sent.[20] This provision may be used, for example, when a Requesting State asks for assistance to prove theft of government property and espionage. Unless the Requested State imposes the limitation, the Requesting State may use the assistance in an espionage case even though the Requested State could have denied assistance requested for that purpose as a political offense exception pursuant to article 3.

Paragraph 2 permits the Central Authority of the Requested State to ask that specific information or evidence furnished in response to a request be kept confidential or be used subject to specified conditions.[21] The delegations agreed that "best efforts" is not a guarantee, however, as certain situations will require that evidence be disclosed. For example, United States law requires the disclosure to defense counsel of evidence exculpatory to the accused.[22] This is consistent with the overall purpose of the Treaty—the production of evidence for trial—which would be frustrated if the Requested State permits the Requesting State to see valuable evidence but imposes restrictions on its use. In the event that the United States is required to disclose evidence obtained under the Treaty after having assured Hungary it would use its best efforts to maintain its confidentiality, the United States must consult with the government of Hungary prior to disclosure in order to devise a method of disclosure acceptable to both Contracting Parties.

Paragraph 3 provides that once information or evidence becomes publicly available 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" would protect confidentiality up to the point that it is maintained by the courts in the Requesting State. However, as the primary purpose of the Treaty is to provide evidence for the prosecution of offenses, some evidence that the Requested State asked be kept confidential may be revealed to the public when introduced at trial or otherwise disclosed as part of related judicial proceedings (e.g., for the United States, as part of the plea or sentencing process).

Article 8—Testimony or evidence in the Requested State

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

Paragraph 1 obligates the Requested State to compel persons to appear and testify or to produce evidence requested by the Requesting State. Judicial authorities in both Contracting Parties have the power to compel testimony and the production of documents from individuals and companies in connection with both domestic and foreign proceedings. In the United States, a prosecutor asks a court for an appointment as a commissioner with the authority to execute subpoenas on behalf of the foreign authority. In

[20] This language is similar to a provision present in the U.S.-Netherlands Treaty. June 12, 1981, art. 11(2), T.I.A.S. No. 10734, 1359 U.N.T.S. 209.

[21] 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 Requested State to use, its "best efforts" to maintain confidentiality with respect to a request and its contents.

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

Hungary, public prosecutors issue "letters of citation" ordering the individual to provide the testimony or documents. These letters of citation have the same force as a United States subpoena issued by a judge. Nevertheless, the Hungarian delegation agreed that if United States authorities specifically requested that the "letter of citation" be issued by a Hungarian court rather than a public prosecutor, the Hungarian authorities could and would comply with this request.

With regard to compelling the production of bank records on behalf of a foreign government, the process in the United States is the same as that for compelling testimony or documents, as described above. In Hungary, however, the process is slightly different. Hungarian law specifies that a public prosecutor may compel the production of bank records by sending the bank an official letter,[23] which is different in form and content from a "letter of citation." The effect of it, however, is the same as that of a "letter of citation." Upon receipt of the official letter, the bank is required by law to comply with the request for the production of documents.

The delegations discussed the penalties applicable for failure to comply with a subpoena in the United States and a "letter of citation" or an "official letter" in Hungary. In the United States, a person or company failing to comply with a subpoena may be fined and/or imprisoned. In Hungary, a person or company failing to comply with a "letter of citation," or a bank failing to comply with an official letter, may be subject to a fine or multiple fines in amounts considered substantial by Hungarian standards. Imprisonment, however, is not a penalty under Hungarian law for failure to comply with either a "letter of citation" or an official letter seeking compulsory measures.

The delegations agreed that as a general rule, both Contracting Parties will use paragraph 1, rather than article 15, to compel the production of documents, particularly in cases in which dual criminality does not exist.[24] Both delegations recognized that searches and seizures are serious compulsory measures affecting the rights of private individuals; the delegations therefore agreed that searches and seizures would be used as a last resort. Instead, the Requested State first will attempt to compel the production of documents, records and articles of evidence sought by the Requesting State by using subpoenas in the Unites States and "letters of citation" and official letters in Hungary.

Paragraph 2 requires the Central Authority of the Requested State to 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 the United States prosecutors sometimes rely heavily on deposition testimony when a witness is unwilling or unable to travel to the United States to testify at trial. With an assurance of receiving advance notice, however, a United States trial court can

[23] There is no technical term in Hungarian law for the official letter that a Hungarian public prosecutor sends to a bank to compel the production of bank records.

[24] See supra analysis of art. 1.

order that a deposition take place in Hungary on a date to be specified by Hungarian authorities; the United States court can even indicate a preferred date. The Hungarian authorities should attempt to accommodate the court and must notify the court sufficiently in advance of the depositions to permit the parties to be present.

Paragraph 3 guarantees that the persons "specified in a request" be allowed to be present during the execution of that request. For the United States, the persons so specified may include prosecutors, investigators, court reporters, translators, interpreters, defendants and defense counsel.

The presence of a stenographer 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 of the testimony (as is the practice in civil law jurisdictions). A verbatim transcript permits the trier of fact to analyze testimony provided under circumstances resembling the testifying of a witness who appears in person.

For Hungary, the persons so specified include the public prosecutor and/or police authorities, if the case is in the investigative stage, or the judge or someone designated by the judge, if the case is in the prosecutive stage. It is possible in theory that if a Hungarian judge designates the public prosecutor to travel to the United States for the taking of a deposition which a defense counsel also wants to attend, the judge might designate the defense counsel to attend also. The Hungarian negotiators indicated that in practice, however, the judge would designate only a prosecutor to travel to the United States for the purpose of participating in depositions.[25]

In keeping with the desire of United States courts to preserve out-of-court testimony in a manner resembling, as closely as possible, testimony in a proceeding in the United States, both delegations agreed that a request may also specify the presence of video technicians. Hungarian law, however, has not addressed whether a Hungarian judge has the authority to order a witness to submit a videotaped deposition if the witness is unwilling to do so. Moreover, even if the witness is willing to submit to a videotaped deposition, the Hungarian judge may not be willing to conduct the deposition as a videotaping is completely foreign to the Hungarian judicial process.

In the United States, the presence of the defendant and defense counsel at a deposition accords the defendant the opportunity to confront and question an adverse witness. Neither delegation foresaw any problems in accommodating the requirements of the right to confrontation.

Paragraph 4 permits a witness whose testimony or evidence is sought to assert those claims of privilege, immunity or incapacity that are available under the law of either Contracting Party. The executing authority in the Requested State, however, may rule only on those claims made under the law of the Requested State. The executing authority notes those claims made under the law of the

[25] Article 1(4) specifically prohibits defense counsel from using the provisions of Treaty to present requests to the United States. An example is a request that defense counsel be permitted to attend an interview scheduled in the United States. The Hungarian delegation, however, explained that defense counsel may ask a Hungarian judge for permission to travel to the United States. As a practical matter, however, a Hungarian judge will not authorize defense counsel to travel to the United States to attend interviews.

Requesting State but defers to the appropriate authority in the Requesting State to rule on the merits. The taking of testimony or evidence therefore can continue in the Requested State without delaying or postponing the proceeding whenever issues involving the law of the Requesting State arise. Both Contracting Parties recognize the privilege of a witness against self-incrimination. Hungary, unlike the United States, also recognizes the privilege of a nuclear family member not to testify against the defendant. In addition, Hungary also recognizes a privilege for bankers; however, if a public prosecutor orders the production of bank records, the bank cannot refuse because an order from a public prosecutor overcomes the banker's privilege.

Paragraph 5 is intended primarily for the benefit of the United States. The United States evidentiary system requires that evidence that is to be introduced in a legal proceeding be authenticated as a precondition to admissibility. 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 were primarily concerned with business records. In order to ensure the United States that business records provided by Hungary pursuant to the Treaty can be authenticated in a manner consistent with United States law, the negotiators crafted "Form A," which follows the language of Title 18, United States Code, Section 3505. If the Hungarian authorities properly complete, sign and attach Form A to documents produced, a United States judge may admit the records into evidence without the testimony of a witness as to the authenticity of the documents. The process for admissibility provided by this paragraph constitutes an exception to the hearsay rule; it extends only to authenticity, not to relevance or materiality. Whether the evidence is admitted is a determination within the province of the judicial authority presiding at the trial.

Article 9—Official records

Paragraph 1 obligates each Contracting Party to furnish to the other copies of publicly available materials in the possession of a "governmental or judicial authority." For the United States, this includes executive, judicial and legislative units at the federal, state and local levels. For Hungary, this includes the executive and legislative units at the central and local government levels, as well as their judiciary units. In Hungary, the term "government" only refers to the central government, not the local government as well. The local government is referred to as the "administrative" unit. Therefore, in order to ensure that this provision covers both central and local governments in Hungary, the Hungarian text of the Treaty specifically mentions "governmental and administrative unit or judicial authority,"[26] while the term "governmental and judicial authority," which is intended to include both central and local governments in Hungary, remains in the English text. In Hungary, unlike in the United States, the term "government" does not in-

[26] In the Hungarian text of the Treaty, the term "governmental" is translated as "Kormanyzati es Kozigozgatasi" ("government and administration").

clude the judiciary. Thus, the negotiators agreed to specifically refer in this article to both "governmental" and "judicial" authority.[27]

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. These authorities are public prosecutors and judicial authorities in Hungary and competent law enforcement and judicial authorities in the United States.

The requirement that a Requesting State's access to government records that are not publicly available be to the same extent as that of law enforcement personnel in the Requested State is critical because some United States statutes limit disclosure of government information to certain United States law enforcement authorities for specific purposes. The negotiators intended to broaden such 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 its treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Hungary through the Treaty when, with respect to a criminal investigation or prosecution, the Hungarian 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).[28] Of course, if domestic law enforcement authorities are not entitled under any conditions to gain access to a particular non-public record, the other Contracting Party cannot expect to secure it pursuant to a Treaty request.

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[27] The delegations agreed to title article 9 "Official Records" instead of "Records of Government Agencies" to make it clear that this article is intended to cover records of central and local governments as well as records of the judiciary.

[28] As an illustration, a Hungarian request for tax returns to be used in a non-tax criminal investigation in accordance with Title 26, United States Code, Section 6103(i)(1)(A), must specify that the Hungarian law enforcement authority is:

> personally and directly engaged in—
>
> (i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Hungarian criminal statute (not involving tax administration) to which Hungary is or may be a party,
>
> (ii) any investigation which may result in such a proceeding, or
>
> (iii) any Hungarian proceeding pertaining to enforcement of such a criminal statute to which Hungary is or may be a party.
>
> 26 U.S.C. § 6103(i)(1)(A).

The request must be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns, as is specified under Title 26, United States Code, Section 6103(i)(1)(B). In accordance with this law, before issuing such an order, the judge or magistrate must find that:

> (i) there is reasonable cause to believe, based upon information believe to be liable, that a specific criminal act has been committed,
>
> (ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and
>
> (iii) the return or return information is sought exclusively for use in a Hungarian criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained,

under the circumstances, from another source.

> 26 U.S.C. § 6103(i)(1)(B).

In other words, Hungarian law enforcement authorities seeking tax returns are treated as if they were United States law enforcement authorities; they undergo the same access procedures under which they are held to the same standards.

Because non-public government records may contain sensitive information that does 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 at all.

Paragraph 3 adopts the Convention Abolishing the Requirement of Legalization for Foreign Public Documents,[29] to which the United States and Hungary are signatories, as the means of authenticating government or official records. For the United States, this furthers our treaty practice of streamlining the authentication process for foreign official records. As a result, official records produced by Hungary pursuant to a Treaty request that are authenticated by the "apostille" as required by the Convention are self-authenticating, thus creating an additional form of self-authentication under Rule 902 of the Federal Rules of Evidence.

Article 10—Invitation to appear in the Requesting State

This article provides that the Requested State "shall invite" a person located in its territory to travel to the Requesting State to "appear before the appropriate authority" in the Requesting State. The intention is to establish a formal mechanism for inviting, not compelling, an appearance. The United States typically seeks a person's appearance as a witness for testifying before a grand jury or at trial. However, the text is written to permit an invitation to appear for any purpose deemed necessary or useful by the Requesting State.

When the United States asks that Hungary invite a person to appear in the United States, the United States Central Authority first obtains a subpoena or other similar document addressed to the person. The United States requests that the Hungarian Ministry of Justice or the Chief Public Prosecutor ask the person invited to comply with the provisions of the subpoena or other document. As Hungary is requested merely to issue an invitation, the person invited is free to decline without punishment and also shall not be subject to any penalty for failing to appear after agreeing to do so. This does not preclude the United States from using other channels for service of a document (such as a subpoena issued under Title 28, United States Code, Sections 1783–1784) on a United States citizen or resident located in Hungary. A subpoena may provide for sanctions for failure to appear in the United States as directed by the subpoena.

The Hungarian negotiators explained that as Hungarian evidentiary rules of evidence are flexible, in most cases, Hungarian courts will not request that witnesses in the United States travel to Hungary to provide testimony for trial; rather, Hungarian courts most likely will be satisfied with the testimony of the witness obtained by a United States court pursuant to a commission or as otherwise provided (e.g., by a voluntary witness statement under penalty of perjury in the United States).

Article 10 also requires the Requesting State to "indicate" the extent to which the expenses of a person invited will be "reimbursed." The language is intended to allow the Requesting State to specify

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

types of expenses (e.g., categories such as air transportation and accommodations) without providing specific amounts.

This article further obliges the Requested State to "promptly inform" the Central Authority of the Requesting State of the witness' response to the invitation to appear. The Treaty does not specify the means by which this communication should be made; the negotiators understood that prompt notification could be made either orally or in writing.

Article 11—Transfer of persons in custody

This article addresses requests for the appearance in the Requesting State of persons incarcerated in the Requested State. These persons are free to accept or decline the invitation to appear. Similar provisions common in United States mutual legal assistance treaties [30] have proved to be extremely useful. Moreover, the United States already has the statutory authority to seek the appearance of these witnesses even in the absence of a treaty provision: Title 18, United States Code, Section 3508 provides an independent legal basis for United States prosecutors to arrange for such transfers.

Paragraph 1 provides for the transfer of a person in custody to the Requesting State for "purposes of assistance." Typically, the United States seeks a person's appearance as a witness for testifying before a grand jury or at trial. However, the text permits 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 and the person in custody must consent. This provision will be particularly useful to the United States when a defendant in custody desires to be present at a deposition to be taken in Hungary.

Paragraph 3 provides express authority for, and imposes an obligation upon, the receiving State to maintain the person in custody until the purpose of the transfer is accomplished and to return the person transferred to the sending State. The person must consent only to the original transfer, not to be returned to the sending State. The negotiators agreed that the Contracting Parties would discuss the remaining period of incarceration of a person to be transferred before the transfer occurs.

Paragraph 3 further provides that the sending State need not initiate extradition proceedings to secure return of the person transferred. For the United States, this paragraph comports with Title 18, United States Code, Section 3508. This provision of the Treaty will be particularly helpful to the United States in the event that a person is transferred from Hungary to the United States and files a petition for habeas corpus in an attempt to prevent a return to Hungary in the absence of an extradition request. In ad-

[30] 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.

dition, the person transferred is to be credited in the sending State for the time in custody in the receiving State.

Article 12—Safe conduct

Paragraph 1 provides explicit assurances that a person must receive if transferred pursuant to article 10 or 11. These "safe conduct" assurances immunize the person transferred from (1) service of process, either criminal or civil, based on acts "which preceded his departure from the sending State," and (2) detention or any restriction of personal based on acts "which preceded his departure from the Requested State."

The Central Authority of the Requesting State, in its discretion, may determine that a person not be subject to these assurances. These assurances do not alter the receiving State's obligation to maintain a person in custody for those acts, if any, that resulted in the person's incarceration in the sending State. Also, these assurances do not protect against service, detention or compelled testimony in proceedings with respect to acts committed after departure from the sending State.

As an illustration, a person in custody in the sending State who consents to a transfer to the receiving State can expect to participate in execution of the Treaty request in the receiving State to the extent agreed to prior to the transfer. The person will remain in custody in the receiving State, free from concerns about any past activities in the receiving State, until the person's participation is completed and the person is returned to the sending State.

Paragraph 2 provides that safe conduct "shall cease 15 days" after the Central Authority of the Requesting State notifies the Central Authority of the Requested State that it no longer requires the presence of the person. In such instances, the Central Authorities may arrange for the release of a person in custody. If, after such release, the person voluntarily stays longer than 15 days from the time the person's presence is no longer required, the person does so without any safe conduct assurances

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) in relation to an investigation or proceeding covered by the Treaty. The negotiators contemplated that "best efforts" would vary depending on the information provided in the request, in accordance with article 4. When little information is provided—for example, when the request merely states that a potential witness may be located in the Requested State—the Requested State is not expected to exert much effort. 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 persons within its territory with any documents relating to an investigation, prosecution or other proceeding covered by the Treaty. "Best efforts" varies depending on the information provided in the request, in accordance with article 4. Service in the United States will be made by registered mail unless Hungary asks for

personal delivery, in which case service usually will be made by the United States Marshals Service. Service in Hungary typically will be made by mail, unless the United States specifies that some other form is necessary; Hungarian authorities typically will be able to accommodate such requests.

Paragraph 2 requires that a request for the service of a document requiring the appearance of a person before an authority in 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 has met the standard.

The negotiators agreed that the Requested State will attempt to find in favor of the Requesting State in applying the standard.

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

Article 15—Search and seizure

Judicial authorities [31] in Hungary 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 usually will be executed pursuant to article 8. In situations in which 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 Requesting State. Any physical evidence that can be useful to a criminal prosecution qualifies for search and seizure. The only limitations on search and seizure are those established by the laws 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 the United States to be able to execute a search and seizure on behalf of Hungary, the Hungarian request must provide information demonstrating "probable cause," as is required by the Fourth Amendment to the United States Constitution. The Hungarian request must contain facts, or be augmented by facts from a reliable source, that persuade a United States judicial authority that probable cause exists to believe that a crime has been or is being committed in Hungary and that particularly described evidence of the crime is located at a particularly described place to be searched in the United States.

When the Central Authority of the United States submits a request for search and seizure to one of the Central Authorities of Hungary, the United States Central Authority may specify whether it wishes a Hungarian court or public prosecutor to issue the search and seizure order; Hungarian authorities can accommodate this request. If the United States request does not specify which Hungarian authority should execute the request, however, typically Hungarian public prosecutor issues the order and then engages the Hungarian police to conduct the search and seizure. Under Hun-

[31] For Hungary, the term "judicial authorities" includes courts and public prosecutors. Both have equal power to compel testimony and the production of evidence in Hungary.

garian law, there is no need for Hungarian courts to be involved in the issuance of search and seizure orders. In fact, the practice is that search and seizure orders, as well as subpoenas, generally are issued by public prosecutors.

Paragraph 2 is designed to establish a chain of custody for evidence seized pursuant to a request and to provide a method for providing 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 "continuity of custody, identity of the item, and the integrity of its condition." This record takes the form of custodians' certificates. Each successive custodian prepares a certificate that, when joined with the other certificates from other custodians, provides a reliable record tracking the route of the item seized (and the integrity of its condition) from the Requested State to the judicial proceeding in the Requesting State at which it is introduced into evidence. If the judge in the Requesting State finds that the process is trustworthy, the judge may admit the evidence with the accompanying certificates as authentic. The judge is free to deny admission of the evidence in spite of the certificates if another reasons exists to do so aside from authenticity. For the United States, this provision is intended to limit the need to summon officials of the Requested State to testify at trial to situations in which the reliability of the evidence (its origin or condition) is in serious question. For Hungary, the chain of custody is not a significant factor in the admissibility of evidence.

Paragraph 3 permits the Requested State, as a matter of discretion, to protect the rights of third parties in the items seized. The negotiators intended that the Requested State, in using its discretion to impose conditions, would do so only to 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 return as soon as possible "any documents, records, or articles of evidence" provided by the Requested State pursuant to the Treaty.

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 considered this provision of particular importance to law enforcement efforts, especially in the war against narcotic drug trafficking. The modern trend in law enforcement is to focus more attention on the proceeds of crime and to actively 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 the location of proceeds of crime in the territory of the other. This 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 to the other Central Authority on the action taken.

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" and restitution to victims of crime. 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 limited obligation to assist in this regard is carefully crafted to require action only to the extent permitted by the laws 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 one Contracting Party to initiate legal proceedings on behalf of the other; the only obligation is 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 the appropriate authorities of that Contracting Party.

United States laws provide for the possibility of forfeiture of crime proceeds even before an accused person is identified. Similarly, Hungarian law provides for procedures whereby an item may be seized before an accused person is identified. This procedure is called an "objective procedure."

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

Paragraph 2 also provides for the possibility of temporarily restraining the disposition of criminal proceeds or instrumentalities. In Hungary, law enforcement authorities may freeze proceeds or assets pending the outcome of a criminal proceeding. For example, if a criminal proceeding is pending in the United States, and the Central Authority of the United States asks the Central Authority of Hungary to freeze assets in connection with this case, Hungarian law enforcement authorities will freeze assets until the criminal proceedings in the United States are completed. Afterwards, the victim may initiate a civil action in Hungary to recover the proceeds or instrumentalities.

Paragraph 3 concerns the disposition of forfeited proceeds or property. Such disposition shall be made in accordance with the laws of the Requested State. The Requested State may keep the forfeited assets or share them with the Requesting State.

The United States 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.[32] The amount transferred generally reflects the contribution of the foreign government in the law enforcement activity that led to the seizure or forfeiture under United States law. United States sharing statutes require that the transfer be authorized in an international agreement by the Attorney General or the Secretary of the Treasury and be agreed to by the Secretary of State. Article 17 is intended to authorize each Contracting Party to transfer forfeited assets or the proceeds thereof to the other Contracting Party pursuant to sharing statutes. Article 15 enables either Contracting Party to transfer forfeited assets to the other to the extent permitted by its laws.

Article 18—Compatability with other treaties, agreements, and 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 would become the mechanism of choice, they also recognized that competent authorities of either Contracting Party may continue to make requests in accordance with domestic laws, other bilateral treaties and agreements, and applicable multilateral conventions. The Treaty leaves the other mechanisms completely undisturbed.

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. Either Central Authority may initiate the consultations. The consultations usually will entail the discussion of specific requests, such as providing an opportunity for an exchange of information concerning the transmission and execution of requests. Experience has shown that as the Central Authorities work together, they become aware of various 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 the ratification, exchange of instruments of ratification and entry into force of the Treaty.

Paragraph 1 contains the standard treaty language setting forth the procedures for the ratification and exchange of the instruments of ratification.

Paragraph 2 is the standard provision that the Treaty shall enter into force immediately upon the exchange of instruments of ratification.

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[32] 18 U.S.C. § 981 (i)(1).

Paragraph 3 provides that the Treaty will be terminated six months from the date that a Contracting Party receives written notification from the other.

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 Hungary on Mutual Legal Assistance in Criminal Matters, signed at Budapest on December 1, 1994. 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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