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TREATY WITH PANAMA ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

MAY 5 (legislative day, MAY 1), 1995.—Ordered to be printed

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

REPORT

[To accompany Treaty Doc. 102–15]

The Committee on Foreign Relations, to which was referred the Treaty Between the United States of America and the Republic of Panama on Mutual Assistance in Criminal Matters, With Annexes and Appendices, signed at Panama on April 11, 1991, having considered the same, reports favorably thereon, and recommends that the Senate give its advice and consent to ratification thereof subject to two provisos as set forth in this report and the accompanying resolution of ratification.

PURPOSE

The Treaty Between the United States of America and the Republic of Panama on Mutual Assistance in Criminal Matters, With Annexes and Appendices, hereinafter "The Treaty," provides 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).

BACKGROUND

On April 11, 1991, the United States signed a treaty with the Republic of Panama on mutual assistance in criminal matters and the President transmitted the Treaty to the Senate for advice and consent to ratification on October 24, 1991. In recent years, the United States has signed similar mutual legal assistance treaties (MLATs) with many other countries as part of an effort to modernize the legal tools available to law enforcement authorities in need of for-

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eign evidence for use in criminal cases. There are twelve mutual legal assistance treaties currently in force in the U.S.

Negotiation of the Treaty spanned several years and talks were renewed almost immediately after the restoration of a democratic government to Panama and the entry into office of the elected government of Guillermo Endara in December, 1989. Early drafts of the Treaty were vigorously opposed by the banking and legal communities in Panama, apparently because they feared it would neutralize the benefits of the bank confidentiality laws which have enabled Panama to attract money in competition with other offshore financial centers in the region, such as the Bahamas and the Cayman Islands.

In late March, 1991, the United States and Panama agreed to renew negotiations on a treaty using a draft text essentially identical to the mutual legal assistance treaty which the United States signed with the Bahamas in 1989. An "understanding" was prepared to accompany the draft Treaty and clarify its terms. The negotiations were successfully concluded, and as a result, the mutual assistance Treaty, with the "understanding" included as an annex, was signed April 11, 1991. The Legislative Assembly of Panama approved the mutual assistance treaty on July 15, 1991, at a special session convened by President Endara exclusively for that purpose. President Endara signed the law ratifying the Treaty on July 22, 1991, and it was published July 25, 1991 in the "Official Gazette."

MAJOR PROVISIONS

MLATs generally impose reciprocal obligations on parties to cooperate both in the investigation and the prosecution of crime. MLATs are increasingly extending beyond their role as vehicle for gathering information to include ways of denying criminals the "fruits and instrumentalities" of their crimes. This includes such things as money or other valuables either used in the crime or purchased or obtained as a result of the offense. Below are key provisions of this Treaty.

Article 1 sets out the obligations of the Parties to mutually assist in the investigation, prosecution, and suppression of covered offenses and in related proceedings. This article makes clear that all requests are to be executed in accordance with the laws of the Requested State.

Article 3 permits a Requested State to deny assistance if: (1) the request relates to a political offense, (2) execution of the request would prejudice the security or essential interests of the Requested State, (3) the evidence relates to a trial of a person for an offense for which the person has previously been acquitted, convicted, or otherwise put in jeopardy, (4) there are substantial grounds to believe that the request would facilitate prosecution on account of race, religion, nationality, or political opinion, or (5) there is a lack of sufficient evidence that a crime has been committed and that the information sought relates to the offense.

Article 8 prohibits a requesting State from using evidence or information provided under the Treaty, or any information derived from information or evidence provided under the Treaty, for pur-

poses other than those stated in the request unless the Requested State consents.

Article 9 permits a State to compel a person in the Requested State to testify and produce documents there. Such persons are compelled to provide testimony or evidence over objections that the testimony would be improper under the law of the Requesting State. Such objections are to be noted for later resolution of authorities in the Requesting State.

Article 11 does not permit the compelled appearance of a person in a Requesting State for testimony regardless of whether the person is in custody or out of custody. A witness may be invited to appear and the Requested State is to inform the Requesting State promptly of the invited witness' response.

Article 14 sets out forfeiture assistance provisions. This MLAT goes beyond merely requiring a State to inform the other party to the Treaty when proceeds of criminal offenses are believed to be there, but does limit notification obligations to fruits and instrumentalities of "serious offenses such as drug trafficking."

Article 16 provides for assistance in locating a person described in a request, requiring each party make its best efforts. The Treaty limits assistance to locating persons who are needed in connection with the investigation, suppression, or prosecution of a covered offense.

COMMITTEE COMMENTS

The Committee on Foreign Relations recommends Senate advice and consent to ratification of the Treaty with Panama on Mutual Assistance in Criminal Matters. If ratified, the Treaty will be an effective legal tool to assist both Governments in the prosecution of a wide variety of modern criminals, including members of drug cartels, "white collar criminals," and terrorists. However, the Committee supports a proviso, as provided in all other MLATs with Latin American countries, that makes clear that the United States must deny any request for assistance by the Panamanian Government when a senior government official with access to the information provided under the Treaty is engaged in or facilitates the production or distribution of illegal drugs. To permit a request for assistance under such circumstances would undermine the purpose and effectiveness of the Treaty. The resolution of ratification also contains a proviso that states that the Treaty does not require or authorize legislation or action prohibited by the United States Constitution.

The Treaty covers a broad range of offenses, except pure cases of tax evasion. Narcotics-related money laundered or tax cases involving unreported income acquired through drug trafficking are considered offenses under the Treaty. The Parties agree to mutual assistance in the investigation, prosecution and suppression of specified offenses and in all related proceedings. The Treaty provides for various forms of assistance, including the provision of documents, records and evidence; the execution of requests for search and seizure; the immobilization of forfeitable assets; and the obtaining of witness testimony. The Treaty does not provide for assistance in response to requests from private or other third parties.

The use of MLATs as a means of international legal assistance is propelled by an explosion of transnational crime, particularly illegal drug trafficking. Crime, in part conducted abroad and culminating in the United States, as well as certain types of acts, such as terrorism, committed wholly abroad against U.S. interests and nationals, has given rise to a need for expanded U.S. criminal jurisdiction. The Committee notes that as law enforcement increasingly is focused on activities and assets abroad, the limitations of traditional methods of obtaining evidence, such as letters rogatory, and other assistance in foreign countries are more apparent.

The Committee supports ratification of the Treaty as a positive step to bring to justice criminals that act transnationally to harm U.S. interests and nationals. Panama is a major transhipment point for cocaine destined for the United States and Europe. Panama continues to be a haven for narcotics related money laundering because of its numerous banks and trading companies, dollar-based economy, and traditional laissez-faire attitude toward the movement of money. The Government of Panama has taken strides to combat crime in these areas, criminalizing drug-related money laundering, mandating reporting of suspicious transaction reporting, and extending cash transaction reporting obligations to non-financial institutions. This Treaty will be an important step in further soliciting the strengthening Panamanian cooperation in combatting narco-trafficking and money laundering. The Committee therefore recommends that the Senate grant early advice and consent to ratification.

COMMITTEE ACTION

The Committee on Foreign Relations held three public hearings to consider ratification of the Treaty. On May 6, 1992, in a hearing before the Subcommittee on Terrorism, Narcotics and International Operations, testimony was received from R. Grant Smith, Principal Deputy Assistant Secretary, Bureau of International Narcotics Matters at the Department of State, and David Kriskovich, Director of the International Criminal Investigative and Training Assistance Program at the Department of Justice. On April 20 and 21, 1994, the Subcommittee heard testimony during two days of hearings in tandem with testimony regarding recent developments in transnational crime affecting U.S. law enforcement and foreign policy.

The Committee considered the Convention at its business meeting on May 2, 1995, and voted by voice vote with a quorum present to report it favorably to the Senate for its advice and consent.

ARTICLE-BY-ARTICLE ANALYSIS

ARTICLE 1—OBLIGATION TO ASSIST

The first article of the Treaty provides for assistance in all matters involving the investigation, prosecution, and suppression of offenses and in proceedings connected therewith. The term "offenses" is defined in Article 2 of the Treaty, and further defined in the Annex. That definition must be kept in mind in reading this paragraph. The Treaty could be invoked in matters where no criminal prosecution or investigation is pending, such as a civil forfeiture

proceeding involving assets acquired through a criminal offense covered by the treaty.

The second paragraph of the article lists the major types of assistance specifically considered by the negotiators of the treaty. Each of the items listed in the second paragraph is the subject of an article later in the treaty which describes in detail the procedure and conditions for that kind of assistance. Thus, the second paragraph serves as something of a "table of contents" to much of the remainder of the treaty. This list of types of assistance, however, is not intended to be exhaustive, as indicated by the word "include" in the first clause, and by subsection 2(i), which permits assistance for any other matter mutually agreed upon by the Contracting Parties.

The third paragraph provides that the Treaty is solely a statement of the rights and obligations between the Government of the United States and the Government of the Republic of Panama, and that the treaty is not intended to be utilized by individuals or nongovernmental entities in either State. Thus, private parties may not invoke the treaty in order to obtain evidence from the other country. Both negotiating delegations agreed that the purpose of this treaty is to enhance the effectiveness of criminal law enforcement authorities, not to provide alternative methods of evidence gathering for others, such as criminal codefendants or litigants in civil matters. In this regard, it is anticipated that any efforts by civil litigants to obtain evidence from Panama for use in civil cases will continue to be made by letters rogatory.[1] The phrase "or third parties" was included in the second sentence because the Panamanian delegation wanted the treaty to show clearly that it is not a vehicle by which states who are not parties to it can obtain access to evidence from one or the other of the Contracting States. Thus, the United States could not ask Panama under the treaty to provide evidence for use by a third country.

The fourth paragraph provides that all requests shall be executed "in accordance with and subject to the limitations of the laws of the Requested State". The delegations made it clear that the primary purpose of this provision is to recognize the Constitutional limitations of the Contracting States. The Panamanian authorities stated that the treaty is subject to all the limitations of Panamanian domestic law, but there is nothing in the treaty which is in direct conflict with Panamanian law.

Panama currently has no law specifically addressing the execution of requests under a treaty of this kind. However, Panamanian officials stated that the treaty will become Panamanian law, with full force and effect, immediately upon its entry into force, and that no implementing legislation is needed or anticipated, because the treaty contains all the authority needed to give it immediate effect. This is reflected in paragraph 3 of the Annex to the treaty, which states:

> This treaty provides the necessary legal authority to carry out and fully implement all of its provisions to their fullest scope (to the extent this legal authority does not al-

[1] See Article 18(1), which specifically provides that the treaty does not affect or disturb other methods of international assistance.

> ready exist) for all competent authorities within the Governments of the respective Contracting States; provided however, that as indicated in Article 1(4) nothing herein is intended to affect the constitutional provisions of either State.

No implementing legislation is needed or anticipated for the United States.

ARTICLE 2—DEFINITIONS

Article 2 defines the term "offenses" as used in the treaty. The definition of this term clarifies the scope of the obligation to assist, and hence of the treaty itself.

The first paragraph of Article 2 states that "offenses" includes all conduct punishable as a crime under the laws of both the Requesting and Requested States. Extradition treaties frequently condition the surrender of fugitive criminals on a showing of "double criminality," and this paragraph is to be interpreted by both Parties in much the same manner as an extradition treaty provision. In extradition cases, "double criminality" can exist even when the countries call the crime by different names, or place the crime in different categories, or penalize it by different punishments. The double criminality rule "does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of liability shall be coextensive, or in other respects the same . . ."[2] The test is whether the conduct which is believed to have been committed in the requesting state would constitute some criminal offense if committed in the requested state.[3] Thus, the double criminality test, properly applied, would permit assistance in many United States offenses which appear not to have exact statutory counterparts in Panama.[4] The Parties will give a liberal interpretation to Article 2(1)(a) in order to aid one another in as many cases as possible.

One common problem in this area was specifically discussed during the negotiations with the Bahamas, and the language used in the U.S.-Bahamas Treaty to address it is also used in the treaty with Panama. Certain United States federal offenses are described in statutes which call for proof of certain elements (such as use of the mails or interference with interstate commerce) to establish jurisdiction in the federal counts. Foreign judges generally have no similar requirement in their own criminal law (since few countries have the kind of federal system we do), and on occasion have denied extradition of fugitives on this basis. This problem should not

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[2] *Collins* v. *Loisel,* 259 US 309, 312 (1922); *Brauch* v. *Raiche,* 618 F.2d 843 (1st Cir. 1980). See also In Re Suarez-Mason, 694 F. Supp. 676 (N.D. Cal. 1988); *United States* v. *Carlos Lehder-Rivas,* 668 F. Supp. 1523 (M.D. Fla. 1987).

[3] *United States* v. *McCaffery* [1984] 2 All E.R. 570; *Req.* v. *Governor of Pentonville Prison, ex Parte Budlong and another* [1980] 1 All E.R. 701; *Shapira* v. *Ferrandina,* 478 F.2d 894 (2d Cir. 1973).

[4] For example, "racketeering" in violation of Title 18, United States Code, Section 1962, is a crime which does not have a precise counterpart in Panamanian statutory law. However, racketeering charges always involve a pattern of criminal activity including two or more "predicate acts" of criminal behavior. Panamanian authorities asked to assist us under the treaty in a racketeering case will be expected to look to the predicate acts allegedly committed by the offender and, if those acts would be criminal in Panama, the double criminality rule will have been satisfied. Similarly, United States laws on insider trading have no exact counterpart in Panama's laws, but the United States was assured that treaty assistance would be granted if the conduct of the offender would be treated as fraud in Panama.

occur under Article 2(1)(a) of this treaty, since it is understood that the Requested State will disregard elements of an offense required solely for the purpose of establishing federal jurisdiction[5] and will not be misled by mere differences in the terminology used in defining the offense under the laws of each country.

Representatives of the United States and Panama discussed Article 2(1)(a) of the treaty in some detail, and it appears that most major criminal prosecutions in the United States except pure tax cases would qualify for assistance under the double criminality test, properly applied.

However, Panamanian and United States laws do differ significantly in some respects, and for this reason strict adherence to the double criminality rule alone might render assistance unavailable to the Requesting State in some areas in which no public policy in the Requested State would call for such a restriction. Therefore; in order to accommodate each country's investigative and prosecutive needs, the treaty permits assistance to be granted in five specific areas without regard to double criminality. For crimes which fall within these categories, it is enough that the conduct under investigation "arises from, relates to, results from, or otherwise involves" a crime punishable by more than one year's imprisonment in the Requesting State.

The phrase "arises from, relates to, results from, or otherwise involves" is intentionally broad. It includes crimes such as attempting or conspiring to commit an offense on the list as well as actually committing such an offense; it also includes racketeering charges which rely upon a listed offense as a predicate offense, or tax crimes involving funds acquired through the commission of a listed offense, if the conditions of Article 2(2) are met.

Article 2(1)(b) lists five kinds of crimes for which double criminality is unnecessary:

1. *Crimes relating to illegal narcotics trafficking.* Panama has extensive anti-drug trafficking legislation, and it appears that most significant criminal narcotics investigations or prosecutions in the United States would fall comfortably within Article 2(1)(a). However, due to the importance of the treaty in reinforcing bilateral anti-narcotics efforts, this provision insures that double criminality will not be a barrier to cooperation. In the annex which accompanies the treaty, the parties state that, "The traffic in drugs is a serious problem to both countries, and it is intended that this treaty will be a valuable tool to enhance investigations aimed at halting these offenses. Both the United States and Panama are parties to the Single Convention on Narcotic Drugs, 1961 as amended by the 1972 Protocol, which obliges the signatories to provide assistance to each other in narcotics investigations. The obligation undertaken here is consistent with that set out in these multilateral conventions, since neither the Single Convention nor the Amending Protocol conditions the obligation to provide assistance on double criminality."

2. *Theft;*

[5] See *United States* v. *Herbage,* 850 F.2d 1463 (11th Cir. 1988); *United States* v. *McCaffery,* supra note 4.

3. *A crime of violence.* In the annex which accompanies the treaty, the Parties state that this language was intended to cover "Crimes of violence, such as bank robbery, extortion, or terrorism-related crimes," like the similar language in the U.S.-Bahamas Treaty;

4. *Fraud or the use of fraud, including the obtaining of money or property by false pretenses, representations, or promises and including the commission of embezzlement, and all conduct which has the effect of defrauding the government or its citizens or the ability to conduct their affairs free from fraud, false statements and deceit.* The annex explains: "This subparagraph would include mail or wire fraud, most securities laws violations involving fraud or fraudulently obtained profits . . ." However, the annex also makes it clear that "the subparagraph would not include tax evasion cases not related to other offenses covered by this Treaty . . ." The treaty with the Bahamas requires assistance in investigations or prosecutions involving the operators of large scale tax shelter frauds,[6] but it is not clear from the negotiations with Panama whether the treaty with Panama requires similar assistance, and it is anticipated that such requests will be assessed on a case by case basis;

5. *Violations of a law of one of the contracting states relating to currency or other financial transactions as an integral element contributing to the commission of any offense within the meaning of the foregoing provisions of this paragraph.* Since the fight against money laundering is a major United States law enforcement priority, it was important that the treaty provide for assistance in money laundering investigations. The annex states: "This subparagraph should cover most violations of Title 31, United States Code, and is focussed on crimes involving money laundering or other violations of the currency or financial transaction reporting laws which contribute to drug trafficking or other offenses." It is important to note that money laundering is treated as a crime for which double criminality is not necessary, because at present Panamanian law only covers the laundering of drug proceeds,[7] while United States money laundering legislation is much more extensive. The Panamanian authorities assured the United States that this clause permits Panama to provide assistance in United States investigations of the laundering of money derived from any crime covered by the Treaty, even in circumstances in which there would be no money laundering prosecution possible under current Panamanian law. However, the United States request must show that the money allegedly laundered was obtained from an offense covered by the Treaty, either under Article 2(1)(a)'s "double criminality" or Article 2(1)(b)'s

[6] These, or course, are the cases in which gullible victims are persuaded by fraud artists to pay money for "investments" which are advertised as having been structured to result in the victims' avoiding or substantially reducing his federal income tax. Then the offenders often simply pocket the money, and provide the victim with fraudulent documents purporting to reflect the investment. Since the Internal Revenue Service usually disallows any tax benefits based on participation in the scheme, the victim actually loses twice—he loses the money he paid to the tax shelter promoter to invest on his behalf, and he also fails to obtain the tax benefits for which he paid.

[7] Law 23 of December 30, 1986.

exceptions to double criminality.[8] An investigation into the laundering of money acquired through a tax offense unrelated to any other crime would fall within the exclusion in Article 2 (2).

Article 2(2), like Article 3(1) of the U.S.-Cayman Treaty and Article 2(2) of the U.S.-Bahamas Treaty, permits denial of assistance when the matter is one which relates directly or indirectly to the regulation of taxes, including the imposition, calculation, and collection of taxes. The annex states: "The subparagraph specifically notes that exceptions to this restriction exist where the monies involved in the tax matter were derived from any activity covered by Article 2(1)(a) or 2(1)(b). For example, a criminal tax prosecution in the United States involving unreported income acquired through illegal drug trafficking could qualify as an offense for which assistance could be provided under the Treaty."

Article 2(3) defines the kinds of proceedings in aid of which treaty requests can be made.

Article 2(3)'s first subparagraph states that criminal trials in either country, or pretrial motions in connection with such trials, may be the basis for request for assistance.

The second subparagraph states that United States grant jury proceedings can be the basis of requests. The corresponding legal process in Panama is called a preliminary investigation, and the subparagraph specifies that these too can be the basis of treaty requests.

Article 2(3)(c) states that the Treaty will be available in judicial or administrative hearings involving the forfeiture of the fruits or instrumentalities of drug trafficking. This is fully consistent with the provisions of Article 14 of the treaty, which is discussed in more detail below.

Under United States law, there are some civil or administrative proceedings which could impose sanctions on an offender in connection with a criminal matter in the United States. For instance, the Securities and Exchange Commission can order a securities trader to disgorge unlawfully obtained profits, or surrender stock obtained in violation of the law; the Commodities Futures Trading Commission can bar a trader from the United States commodities market; and any United States court can order restitution to the victims of an offense. The United States believes that the imposition of sanctions of this kind sometimes can be as important in deterring unlawful activities as criminal prosecution. Therefore, Articles 2(2)(d) and 2(2)(e) permit the Central Authority, in his discretion, to apply the treaty to a request involving proceedings of this kind.

Both delegations agreed that the provisions of Article 2 generally do not authorize assistance to investigations in either Contracting State which are not being pursued by prosecutorial authorities. This is consistent with all other United States mutual legal assistance treaties, and reflects the fact that the courts in the United

[8] The Panamanian delegation stated that it is not necessary that the money launderer actually knew that the money was the fruit of a crime covered by the treaty so long as the money is in fact the result of such a crime.

States have ruled that United States law does not permit such assistance.[9]

ARTICLE 3—LIMITATIONS ON COMPLIANCE

Article 3(1) specifies classes of cases in which assistance may be refused under the Treaty.

Article 3(1)(a), like the similar provision in other treaties of this kind, permits assistance to be refused if the assistance would prejudice the security or "essential public interests" of the Requested State. The United States intends to apply this provision sparingly, and views "essential public interests" as those ancillary to national security. The Panamanian delegation agreed, but did point out that in exceptional cases the phrase could include essential interests unrelated to national military or political security. It is clearly understood that "public interest" will not be interpreted in a manner to convert the treaty's mandatory provisions into discretionary ones, and that the need to nurture bank confidentiality, standing alone, will not be cited as the kind of "essential public interest" authorizing a denial of assistance.

This provision would be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. One fundamental purpose of the Treaty is to enhance law enforcement cooperation, and attaining that purpose would be hampered if sensitive law enforcement information available under the Treaty were to fall into the wrong hands. Recent cases in various countries demonstrate that Government officials are not immune to the temptation posed by the enormous profits offered by criminal syndicates or drug traffickers. The United States Central Authority would invoke Article 3(1)(a) to decline to provide sensitive or confidential drug related information pursuant to a request under this Treaty whenever it determines, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who will have access to the information is engaged in or facilitates the production or distribution of illegal drugs and is using the request to the prejudice of a United States investigation or prosecution.[10]

Article 3(1)(b) permits the Central Authority of the Requested State to deny a request if it relates to a political offense. Similar restrictions are found in other mutual legal assistance treaties.

Article 3(1)(c), like Article 3(1)(c) of the U.S.-Bahamas Treaty, permits the Requested State to deny a request if the evidence requested is to be used to try a person in the Requesting State on a charge for which that person has already been acquitted or convicted in that State, or a charge for which the person was in jeop-

[9] See In Re Letter of Request to Examine Witnesses From the Court of Queen's Bench of Manitoba, Canada, 59 F.R.D. 625 (N.D. Cal. 1973), aff'd 488 F.2d 511 (9th Cir. 1973).

[10] This is consistent with the sense of the Senate as expressed in its advice and consent to ratification of the mutual legal assistance treaties with Argentina, Uruguay, Spain, and Jamaica, on July 2, 1992, and with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. See Cong Rec 13884, October 24, 1989. See also Mutual Legal Assistance Treaty Concerning the Cayman Islands: Report by the Comm. on Foreign Relations, 100th Cong., 2nd Sess. 67 (1988) (Testimony of Deputy Assistant Attorney General Mark M Richard).

ardy of being convicted, as jeopardy is defined in the law of the Requesting State.

Article 3(1)(d), also inspired by the U.S.-Bahamas Treaty, permits a request to be denied if the Central Authority determines that there are substantial grounds for believing that granting the assistance would facilitate the prosecution or punishment of the person identified in the request on account of his race, religion, nationality, or political opinions. This provision was of special importance to Panama, because it has a multiracial society and because the free expression of political opinion was ruthlessly suppressed under General Manuel Noriega's dictatorship. The United States understands the term "on account of" to limit the application of this provision to cases in which the race, religion, or political opinion of the offender is the governing motive for the prosecution, as opposed to the desire to punish criminal offenses. Where a request to the United States Central Authority will ask the Department of State to assist in determining whether the request should be denied on this basis.

Article 3(1)(e) is based on Article 3(2)(c) of the U.S.-Cayman Treaty and Article 3(1)(e) of the U.S.-Bahamas Treaty, and permits the Central Authority of the Requested State to deny a request if it finds that the request fails to contain reasonable grounds to believe that a crime was committed, or that the information sought in the request is not relevant to that crime, or that the requested information is not in the territory of the Requested State. The phrase "reasonable grounds to believe" is not the equivalent of a prima facie case, and it certainly is not intended to require either State to prove the guilt of the suspects beyond a reasonable doubt. Since many requests will be made at the investigative stage, it is unreasonable to oblige the Requesting State to prove the case before the evidence has been assembled against the suspects. The phrase "reasonable grounds to believe" also does not equate to the "probable cause" requirement in United States law for the issuance of a search or arrest warrant. Rather, the phrase was intended to require only that each State support each request with a precise, rational explanation for its belief that a crime covered by the Treaty has occurred or will occur. This will usually involve describing facts indicating the offense has occurred, and setting forth the justification for seeking the evidence. This provision thereby assures the Requested State that the request is not a "fishing expedition." It is anticipated that neither State will allow challenges to the credibility of statements in the request, nor demand that the Requesting State supply "evidence" or affidavits to support the request. Instead, the Central Authority of the Requested State has the discretion to reject a request if it is convinced that the information in the request (which is presumed to be true) fails to make out a case for producing the evidence.

Finally, Article 3(1)(f) permits the Central Authority to deny assistance if the request does not conform to the Treaty. This would include requests which fail to contain all of the requisite information.

Article 3(2) is similar to Article 3(2) of the U.S.-Swiss Treaty, and permits the Requested State to impose appropriate conditions on its assistance in lieu of denying a request outright. For example,

either State might request information from the other which could be used either in a routine criminal prosecution or in a prosecution not covered by the Treaty. This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. It is anticipated that the Requested State would notify the Requesting State of proposed conditions before actually delivering the evidence, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If it does accept the evidence, it must respect the conditions specified by the Requesting State with respect to the evidence.

Article 3(3) states that a request for assistance need not be executed immediately where execution would interfere with an investigation or legal proceeding in progress in the Requested State. The Central Authority of the Requested State will determine when to apply this provision. The Central Authority of the Requested State may, in its discretion, take such preliminary action as it deems advisable to obtain or preserve evidence which might otherwise be lost before the conclusion of the investigation or legal proceeding taking place in that State. If this is done, the Requesting State should not be seriously disadvantaged by having to wait until the conclusion of the proceedings in the Requested State.

Article 3(4) effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the reason for denying or postponing execution of the request. Thus, when a request is refused or only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This will eliminate misunderstandings which can arise in the operation of the Treaty, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—CENTRAL AUTHORITIES

Article 4 of the Treaty provides that each State shall designate a "Central Authority." The United States Central Authority will make requests to Panama on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States, and Panama's Central Authority will make all requests emanating from the authorities there. It is understood that some discretion will be exercised by the Central Authority of the Requesting State as to the form and content of requests, and as to the number and priority of requests. The Central Authority of the Requested State is responsible for receiving each request from the other, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Article 4(2) provides that the Attorney General will be the Central Authority for the United States, as is the case under all United States mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual

assistance treaties to the Assistant Attorney General in charge of the Criminal Division under 28 C.F.R. § 0.64–1.[11]

Article 4(3) states that the Minister of Government and Justice of Panama will serve as the Central Authority for Panama. Panamanian authorities said that the Minister of Government and Justice will review requests from the United States under the treaty and forward them to the Panamanian Attorney General or other competent authority for prompt execution. The Panamanian authorities explained that in Panama the Attorney General is not a part of the executive branch of Government, and hence is not politically accountable to the President in the same way that the Minister of Government and Justice is accountable. For this reason, the Panamanian Government believes it is appropriate that it be the Minister of Government and Justice, not the Attorney General, who considers and exercises the discretionary bases for denial of requests outlined in Article 3. Once the request has passed this policy level review by the Minister of Government and Justice, it generally will be the function of the Attorney General to make the actual arrangements for execution of the request when compulsory process is necessary to carry out a request. In other instances, the Ministry envisions sending requests directly to the appropriate Panama Government office for execution (e.g., to the Public Registry for corporate records checks, or the Technical Judicial Police for criminal records checks).

ARTICLE 5—CONTENTS OF REQUESTS FOR MUTUAL ASSISTANCE

This article is similar to Article 29 of the U.S.-Swiss Treaty, which, in turn, is based on Article 14 of the European Convention on Mutual Assistance in Criminal Matters.[12]

The first paragraph requires that requests be made in writing if compulsory process—judicial subpoenas, search warrants, or the like—are necessary for execution, or if the Requested State has indicated that a written request is necessary. In an emergency, an oral request could be made, but it must be confirmed in writing "forthwith."

Article 5(2) lists information which is deemed crucial to efficient operation of the agreement, and so must be included in each request. Article 5(3) outlines the kinds of information which should be provided "to the extent necessary and possible." In keeping with the intention of the parties that requests be as simple and straightforward as possible, there is no requirement under the Treaty that a request be legalized or certified in any particular manner.

Because this article of the Treaty is based on Article 5 of the U.S.-Bahamas treaty, no specific mention is made of the language in which the requests are to be presented by the parties. However, the language issue was discussed by the negotiators, and it was mutually agreed by Panama and the United States that requests for assistance under the treaty will be submitted in the language

[11] The Assistant Attorney General for the Criminal Division has in turn redelegated his authority to the Deputy Assistant Attorneys General and to Director of the Criminal Division's Office of International Affairs. Directive No. 81, 44 FR 18661, March 29, 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, December 6, 1983.

[12] Council of Europe Convention No. 30 (United States not a party) 472 UNTS 185.

of the Requested States unless, in exceptional circumstances, the parties agree otherwise.

ARTICLE 6—EXECUTION OF THE REQUEST

The first paragraph of Article 6 requires each State to promptly undertake diligent efforts to execute a request. The Central Authority which receives a request will first review the request and immediately notify the Central Authority of the Requesting State if it is of the opinion that the request does not comply with the treaty's terms. If the request does satisfy the treaty's requirements and the assistance sought can be provided by the Central Authority itself, the request will be fulfilled without delay. If the request meets the treaty's requirements but execution requires action by some other agency in the Requested State, the Central Authority will see to it that the request is promptly transmitted to the correct agency for execution. Where the United States is the Requested State, it is anticipated that most requests will be transmitted to federal investigators, prosecutors, or judicial officials for execution. However, a request may be transmitted to state officials for execution if the Central Authority deems it proper to do so.

The first paragraph also authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to use all legal means within its power to execute the request. The negotiators specifically discussed the fact that the Treaty—and this article in particular—provided all necessary legal authority (i.e., powers or affirmative authority to act) necessary for Panamanian officials to carry out obligations undertaken by the Panamanian Government in the Treaty. This understanding is addressed in paragraph 3 of the Annex.

This provision was not intended to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Panama. Rather, it is anticipated that when a request from Panama requires compulsory process for execution, the Department of Justice would ask a federal court to issue the necessary process or court order under 28 U.S.C. § 1782 and this treaty.

If execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested State shall arrange for the presentation of the request to that court or agency at no cost to the other State. Since the cost of retaining foreign counsel to present and process letters rogatory requests abroad is sometimes quite high, this provision for reciprocal legal representation should be a significant advance in bilateral legal cooperation. Should the Requested State choose to hire private counsel in connection with a particular request, it is free to do so.

ARTICLE 7—COSTS

Article 7 proceeds from the basic premise that the Requesting State should bear all expenses incurred in the execution of the request except for the costs of the presentation of its request to the appropriate authorities in the Requested State, which is provided at no cost pursuant to Article 6, and the ordinary expenses (such as filing fees and the like) connected with legal proceedings in the Requested State.

The United States expects that this Article will be applied in the same way as the corresponding article in the U.S.-Bahamas Treaty. During the negotiations with the Bahamas, a recurring problem in this area was specifically addressed: the cost of legal representation of witnesses. When United States authorities serve a subpoena in the United States to obtain testimony from an individual or institution here, the recipient of the subpoena is ordinarily entitled to no more than a modest stipend or "witness fee."[13] Of course, the witness is free to seek advice of legal counsel with respect to whether and how to respond. However, the witness has no constitutional or statutory right to call upon the United States Government to pay for such legal consultation.

On the other hand, the United States has occasionally asked individuals or institutions abroad to cooperate with one of our criminal investigations, and been told by the witness that the bank or business secrecy laws of the witness' country bar him from doing so unless certain steps are taken (such as obtaining the permission of the local courts). The United States routinely agrees to assist the witness in any appropriate way which does not involve paying legal fees associated with the matter.

During the negotiations with the Bahamas, the United States delegation was concerned because when the United States makes a request to another country for evidence through letters rogatory, and the courts in that country summon the individual or institution to provide the evidence, the witness sometimes insists that the United States should pay for consultation with counsel in connection with the summons. Both delegations agreed that it is unfair to call upon the Requesting State routinely to pay the legal expenses of witnesses responding to the Requested State's compulsory process issued pursuant to requests under the treaty. Where the witness is responding to a command from the court in his own country (rather than a request from a foreign government) to produce evidence or to provide testimony, the role (if any)[14] of witness counsel and payment of such counsel should be governed by the same rules which would apply in any other proceeding before that court. The fact that the local court's command is issued in aid of a foreign prosecution should not oblige the foreign government to pay expenses not ordinarily incurred in similar proceedings in the Requested State. Witnesses subpoenaed in the United States in connection with a foreign country's letters rogatory under 28 U.S.C. § 1782 do not receive reimbursement for the costs of counsel, and neither the United States Government nor any partners to the mutual legal assistance treaties now in force have ever suggested that the Requesting State bear such costs in connection with a request.

Based on these considerations, the U.S.-Bahamas Treaty provides that witness fees are not a cost for which the Requesting State is responsible under subsection 7(1) or 7(2). Article 7 of the U.S.-Panama Treaty is based on this language. Thus, it is clear that the treaty does not impose an obligation on the Requesting State to finance legal consultation, but does allow that State to

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[13] For example, under federal law a witness is currently entitled to $30 a day witness fee and up to $75 a day "subsistence." 28 U.S.C. § 1821.

[14] For an example of the kind of difficulties which can be encountered when counsel for witnesses are involved, see *Req.* v. *Rathbone, Ex p. Dikko,* [1985] 2 W.L.R. 375.

agree, on a case by case basis, to pay for "extraordinary expenses" in situations in which it deems it especially just and appropriate to do so.

ARTICLE 8—LIMITATIONS ON USE

The first paragraph of Article 8 requires that information provided under the treaty will not be used for any purpose other than that stated in the request under Article 5(2)(e) without the consent of the Central Authority of the Requested State.

The second paragraph requires that the State which has obtained evidence keep the evidence confidential. Under most United States mutual legal assistance treaties, conditions of confidentiality are imposed only when necessary, and are tailored to fit the circumstances of each particular case.[15] For instance, the Requested State may wish to cooperate with the investigation in the Requesting State but choose to limit access to information which might endanger the safety of an informant, or unduly prejudice the interests of persons not connected in any way with the matter being investigated in the Requesting State. However, this Treaty, like the U.S.-Bahamas Treaty, requires that *all* evidence provided in response to requests under the treaty must be kept confidential unless otherwise agreed.

The Supreme Court has held that in some circumstances it would violate the Constitution's due process guarantees for the Government to suppress evidence which is exculpatory to the accused.[16] For this reason, Article 8(2) contains an exception permitting the use of the information to the extent that it is needed for investigations or prosecutions forming part of the prosecution of the criminal offense described in the request. This is consistent with the overall purpose of the Treaty, which is the production of evidence for trial, and which would be frustrated if the Requested State could let the Requesting State see valuable evidence but impose restrictions preventing the Requesting State from using the evidence. In the event that disclosure of evidence obtained under the Treaty was required in a proceeding involving a matter other than that described in the request, the United States would be required to consult in advance with the Government of Panama in order to fashion a method of disclosure consistent with the requirements of both States.

It is anticipated that some United States requests for assistance may contain information which under our law must be kept confidential. For example, it may be necessary to set out information which is ordinarily protected by Rule 6e, Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation or proceeding," as required by Article 4(2)(b). Therefore, Article 8(5) of the treaty enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[17] If the Requested State cannot execute the request without disclosing the information in question (as may

[15] U.S.-Netherlands Treaty, Article 11(1); U.S.-Colombia Treaty, Article 8(2); U.S.-Italy Treaty, Article 8(1); U.S.-Canada Treaty, Article 9(1); and U.S.-Thailand Treaty, Article 7(3).

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

[17] It is quite similar to U.S.-Mexico Treaty Article 4(5); U.S.-Canada Treaty, Article IX(2); and U.S.-Italy Treaty, Article 8(2).

be the case if execution requires a public judicial proceeding in the Requested State), or for some reason this confidentiality cannot be assured, the treaty obliges the Requested State to so indicate, thereby giving the Requesting State an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by public disclosure of the information. This provision may be particularly important in requests made to Panama because it is not clear whether Panamanian financial institutions can disclose financial documents regarding a customer without prior notice to the customer even if the notice thwarts law enforcement objectives.

Once evidence obtained under the treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even cited or described in the press. When that occurs, it is practically impossible for the Central Authority of the Requesting State to continue to block the use of that information by third parties or other government agencies. Therefore, some United States mutual legal assistance treaties permit evidence obtained under the treaty to be used for any purpose after it has become public in a trial resulting from the proceedings described in the request.[18] However, Article 8(4), like the similar article in the U.S.-Bahamas Treaty and the U.S.-Cayman Treaty, states that once evidence obtained under the treaty has been made public in a proceeding forming part of the request, the evidence may be used if one of three exceptions apply.

First, under Article 8(4)(a), the evidence can be used for any purpose against persons who were convicted in a criminal trial for an offense covered by the treaty. For example, if evidence is provided under the treaty for use in a criminal trial for fraud, and the defendant is convicted of the offense, the evidence could be used by other government officials—including tax authorities—against the convicted person for any purpose, including assessing and collecting taxes due on the fraudulently obtained funds.

Second, Article 8(4)(b) states that the evidence can be used without restriction for any criminal prosecution of a person for offenses falling within the treaty. This paragraph applies regardless of whether the requesting State secured a conviction of the person who was the defendant in the case upon which the initial request was based. For instance, if evidence is provided under the treaty for use in a criminal trial of Mr. A on securities fraud charges, and the evidence reveals that Mr. B also participated in the crime, the evidence may be freely used to prosecute Mr. B even if Mr. A is acquitted at trial. Similarly, if evidence were obtained in connection with one treaty offense (such as fraud), and the evidence discloses the commission of another treaty offense (such as murder), the evidence could be used by the Requesting State in a prosecution for that second treaty offense without violating this article, even if no prosecution ever took place for the crime on which the initial request was based.

Finally, Article 8(4)(c) authorizes the use of the evidence in civil or administrative proceedings related to the recovery of the unlawful proceeds of a criminal offense covered by the treaty from a per-

[18] See U.S.-Canada Treaty, Article XI(3).

son who has knowingly received them. The evidence may also be used in forfeiture to the government of the unlawful proceeds or instrumentalities of a criminal offense, or in collecting taxes or enforcing tax penalties resulting from knowingly receiving the proceeds of a criminal offense covered by the treaty. This is consistent with Article 14(2) of the treaty, which obliges the parties to assist one another in the forfeiture of criminally obtained assets, in securing restitution to the victims of crimes, and in enforcing sentences involving fines.

Under Article 18(3), the restrictions outlined in Article 8 are for the benefit of the parties to the treaty—the United States and Panamanian Governments—and the enforcement of these provisions is left entirely to the Parties.

ARTICLE 9—TESTIMONY IN THE REQUESTED STATE

Paragraph 1 of Article 9 states that the Requested State may compel a person within its jurisdiction to testify or produce documents or articles needed as evidence in the Requesting State. Paragraph 2 of the annex also points out that this Article may be used by either Contracting State to obtain currency transaction information from the other Contracting State in connection with offenses covered by the treaty.

The compulsion[19] contemplated by this article can be accomplished by subpoena (if the Requested State's law so provides) or any other means available under the law of that country. This provision, read together with Article 1(4), means that the procedure for executing a request under the treaty would have to be one which conforms to the laws of the Requested State. It should be stressed that it is the treaty that determines *whether* assistance is required, and local law should govern the very different (if equally important) question of *how* the assistance is provided.

This article, read together with Article 1(5), insures that no person would be compelled to furnish information if he has a right not to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a treaty request from Panama may invoke any of the testimonial privileges (such as attorney-client privilege, interspousal privilege, etc.) usually available in proceedings here, as well as the constitutional privilege against self-incrimination.[20] A witness testifying in Panama may raise any of the privileges available under Panamanian law.

Since the law is unclear on the extent to which a person in one country may stand on a privilege available only under the law of a foreign country, the treaty neither requires nor forbids the recognition in the Requested State of privileges existing only in the Requesting State. Article 9(2) does require that in cases in which a witness attempts to assert a privilege which does not exist under

[19] The use of the word "may" appears at first glance to allow each Party to treat the execution of requests for testimony or production of evidence as discretionary. That was not the intention of the negotiators. Rather, the word "may" was used in the treaty in order to make it clear that compulsory process is not required in every case. For instance, a witness may be perfectly willing to provide the needed testimony voluntarily, and the negotiators were concerned that using the word "shall" instead of "may" might appear to oblige the Requested State to issue a subpoena or other compulsory process even if it were not necessary. The treaty establishes a mandatory obligation to arrange the production of the requested testimony or evidence, leaving it to the Requested State's discretion whether to use compulsory process to meet that obligation.

[20] This is consistent with Title 28, United States Code, Section 1782.

the law in the Requested State, the authorities in the Requested State will take the desired evidence and turn it over to the Requesting State along with notice that it was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting State, where the scope of the privilege and the legislative and policy reasons underlying it are best understood.[21] A similar provision appears in many of our recent mutual legal assistance treaties.

The third and fourth paragraphs provide that all interested parties, including the defendant and his counsel in criminal cases, may be permitted to be present and, subject to the laws of the Requested State, shall be allowed to pose questions during the taking of testimony under this article.

Article 9(5) states that business records produced pursuant to the treaty shall be authenticated by having a custodian of the records or other qualified person complete, under oath, a certification in a specified form. A model of the form to be used by United States authorities excecuting a request from Panama is appended to the treaty as Form A(1); a form for Panamanian authorities to use in executing a request from the United States is appended at Form A(2). Thus, the provision establishes a procedure for authenticating foreign records in a manner essentially similar to that followed in Title 18, United States Code, § 3505 or § 29(c) of the Canada Evidence Act. It is understood that the last sentence of the article provides for the admissibility of authenticated documents evidence without additional foundation or authentication. With respect to both the United States and Panama, this paragraph is self-executing, and does not need implementing legislation.

ARTICLE 10—TRANSFERRING PERSONS IN CUSTODY FOR TESTIMONIAL PURPOSES

In some recent criminal cases, a need has arisen for the testimony at trial of a witness serving a sentence in another country. In some instances, the country involved was willing and able to "lend" the witness to the United States Government, provided the witness would be carefully guarded while here and returned at the conclusion of his testimony.[22] In one or two recent cases, the United States Government was able to arrange for federal inmates here to be transported to foreign countries to assist in criminal proceedings there. Paragraph 1 of Article 10 calls for mutual assistance in situations of this kind, and thereby provides a legal basis for cooperation in these matters. The paragraph is based on Article 26 of the U.S.-Swiss Treaty.

There have also been recent situations in which a person in custody in the United States in a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with the case.[23] The second paragraph of the article addresses this situation.

The article's third paragraph provides express authority for the receiving State to maintain the person in custody throughout his

[21] *Cf. R. & J. Dick Co.* v. *Bass*, 295 F. Supp. 758 (N.D. Ga. 1966); *Reg.* v. *Rathbone, Ex p. Dikko* [1985] 2 W.L.R. 375.

[22] Federal law provides for this situation. See Title 18, United States Code, Section 3508.

[23] See *United States* v. *King*, 552 F. 2d 833 (9th Cir. 1976).

stay there, unless the other State specifically authorizes release. The paragraph also authorizes the receiving State to return the person in custody to the other State, and provides that this return will occur as soon as circumstances permit, or as otherwise agreed, but in no event later than the date on which the person would expect to be released from custody in the State from which he was transferred. The transfer of a prisoner under this article requires the consent of the person involved and of both countries, but does not require the prisoner to consent again to his return to the Sate where the transfer began. Once the receiving State has agreed to assist the sending State's investigation or proceeding pursuant to this article, it would be inappropriate for the receiving State to hold the person transferred and require extradition proceedings before allowing him to return to the sending State as agreed. Therefore, the paragraph states that extradition proceedings will not be required before the return of the person transferred.

ARTICLE 11—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request the Requested State shall invite witnesses who are located in its territory and needed in the Requesting State to travel to the Requesting State to testify there if at all possible. Of course, the Requesting State would be expected to pay the expenses of such an appearance, and the treaty provides that the witness shall be informed of that fact, and of the amount and kind of allowances and expenses which the Requesting State will provide in a particular case. This information should be specified by the Requesting State in its request, pursuant to Article 5(3)(e). An appearance in the Requesting State under this article is not mandatory, and the prospective witness may refuse the invitation.

ARTICLE 12—SAFE CONDUCT

This article, like Article 27 of the U.S.-Swiss Treaty, provides that a person who is in the Requesting State to testify or for confrontation purposes pursuant to a request under Article 10 or 11 of the Treaty shall be immune from criminal prosecution, detention, or any restriction on personal liberty, or from the service of process in civil suit while he is in the Requesting State. This "safe conduct" is limited to acts or convictions which preceded the witness' departure from the Requested State. This provision does not prevent the prosecution of a person for perjury or other crimes committed while in the Requesting State.

The article's applicability to a person transferred under Article 10 is necessarily limited, since Article 10 requires that a person be kept in custody unless the State from which he was transferred has consented to his release.

The second paragraph states that the safe conduct guaranteed in this article expires ten days after the person has been officially notified that his presence is no longer required, or if he leaves the Requesting State and thereafter returns to it.

ARTICLE 13—PROVIDING RECORDS OF GOVERNMENT AGENCIES

Article 13 serves to insure speedy access to government records, including records of the executive, judicial, and legislative units at the federal, state, and local levels in either country. The kinds of government information which will be most commonly sought from Panama will include records from the Registrar of Companies, the records of convictions in Panamanian courts, or documents from the files of the police or other investigative authorities. Panamanian requests to the United States for government documents are expected to fall generally in the same categories.

The first paragraph obliges each State to furnish to the other copies of publicly available records of a government agency. The term "government agency" includes executive, judicial, and legislative units at the federal, state, and local level in either country.

The second paragraph provides that the Requested State "may" share with its treaty partner copies of non-public information in government files. The article states that the Requested State may only utilize its discretionary authority to turn over information in its files "to the same extent and under the same conditions" as it would to its own law enforcement or judicial authorities. It is the intention of the negotiators that the Central Authority of the Requested State determine what that extent and what those conditions would be. This provision was made discretionary because government files in each State contain some information which would be available to investigative authorities in that State, but which would justifiably be deemed inappropriate to release to a foreign government. Examples of instances in which assistance might be denied under this provision would be where disclosure of the information is barred by law in the Requested State or where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information which was made available to the Requested State in return for a promise that it not be divulged to anyone.

The third paragraph states that documents provided under this article will be authenticated using a certificate in a form appended to the treaty. Thus, the authentication will be conducted in a manner similar to that required by Rule 902(3), Federal Rules of Evidence, and the records will be admissible into evidence without additional foundation or authentication.

The article refers to the provision of copies of government records, but the Requested State would not be precluded from delivering the original of the government records to the Requesting State, upon request, if the law in the Requested State permits it and if it is essential to do so.

ARTICLE 14—ASSISTING IN FORFEITURE PROCEEDINGS

A primary goal of the treaty is to enhance the efforts of both States in the war against narcotics trafficking. One major strategy in that drug enforcement effort by United States authorities is to seize and confiscate the money, property, and other proceeds of drug trafficking. Article 14, which is identical to Article 14 of the U.S.-Bahamas Treaty and similar to Article 17 of the U.S.-Canada Treaty, is designed to further that strategy.

The first paragraph authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of fruits or instrumentalities of a serious offense such as drug trafficking. The term "fruits and instrumentalities" would include things such as money or other valuables either used in the crime or purchased or obtained as a result of the offense.

Upon receipt of notice under this article, the Central Authority of the State in which the objects are located may take whatever action is appropriate under the law of the state. For instance, if the assets in question are located in the United States and are the fruit of a fraud in violation of Panamanian law, the assets could be seized in aid of a prosecution under 18 U.S.C. § 2314, or in anticipation of efforts by the lawful owner for the return of the assets. If the assets are located in Panama and are the fruit of a fraud in violation of United States law, it is expected that similar action could be taken pursuant to Panamanian law.[24] If the assets are the result of drug trafficking, it is anticipated that the parties will move quickly and expeditiously to freeze them and ensure confiscation.[25]

Title 18, United States Code, § 981(a)(1)(B) also allows the forfeiture to the United States of property "which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." The United States delegation expects that Article 14 of the treaty will permit full implementation of this legislation.[26]

Similarly, in Panama, Law 23 of December 30, 1981, permits the Panamanian Government to seize the proceeds of drug trafficking committed anywhere in the world.[27] Panamanian authorities have relied on this statute to freeze drug money in Panama when such funds were brought to its attention by United States law enforcement authorities. Article 14 of the treaty should permit United

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[24] For example, in 1978, about 900 members of the San Francisco-based "People's Temple" cult died when their leader, the Rev. Jim Jones, led them in a ritual of murder and mass suicide at the group's commune in Guyana. At the request of the United States Justice Department, the Panamanian Government froze $6 million in People's Temple assets on deposit in Panama, on the grounds that the funds were obtained from the cults' members by fraud. In 1980, these funds were turned over to the United States to distribute to the families of the victims and to reimburse the federal government for the expenses of returning the victims' bodies to the United States. Associated Press, February 29, 1980.

[25] Panama has signed and the United States has signed and ratified the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988 and entered into force for the United States, November 11, 1990, 28 I.L.M. 493 (March 1989). Article 3 of the Convention obliges the Parties to enact legislation to confiscate drug proceeds.

[26] The United States legislation is consistent with the laws in other States, such as Switzerland, Canada, and the United Kingdom, and the movement among States is toward legislation of this kind for use in drug enforcement.

[27] Article 6 of Law 23 amends Article 261 of the Panamanian Criminal Code to make it an offense to violate Panama's drug laws from abroad, or to conduct transactions in Panamanian territory "with proceeds deriving from such drug-related crimes." Article 25 of Law 23 states: "The investigations of crimes listed in Article 261 of the Criminal Code, as amended by this Law, can also be initiated in cooperation with or upon request by the State in which such crimes have been committed."

States and Panamanian authorities, working together, to utilize Law 23 even more effectively.

The second paragraph of Article 14 states that the parties to this treaty may aid one another in proceedings leading to the forfeiture of the proceeds of crime. The traditional rule was that no state is obliged to aid another in the execution of penal laws respecting enforcement of fines or forfeiture of criminal assets. However, this rule is gradually changing, at least where the foreign country's laws are designed to provide redress to individual victims, or where the foreign country has already perfected its title to the assets it claims.[28] Moreover, any country is free to assume a treaty obligation broader than a customary international obligation. In Article 14(2), the parties to this treaty agree to aid one another, on request, in proceedings leading to the forfeiture of illegally obtained assets, restoring illegally obtained funds or articles to their rightful owners, and the collection of fines imposed as sentences in criminal prosecutions.

Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or enforce a judgment of forfeiture or fine levied in the Requesting State, the treaty requires the Requested State to do so. The article does not mandate institution of forfeiture proceedings in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

United States law also permits the transfer of forfeited property or a portion of the proceeds of the sale thereof to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property.[29] The amount transferred will generally reflect the contribution of the foreign government to the law enforcement activity which led to the seizure or forfeiture of the property under United States law. United States sharing statutes require that the transfer be authorized in an international agreement between the United States and the foreign country, and be authorized by the Attorney General or the Secretary of the Treasury and agreed to by the Secretary of State. Article 14 is intended to authorize and provide for the transfers of forfeited assets or the proceeds of such assets to the other State under the new United States law because Article 14 enables either State to transfer forfeited assets to the extent permitted by their respective laws.

ARTICLE 15—SEARCH AND SEIZURE

It is sometimes in the interests of justice for one State to ask another to search for, secure, and deliver articles or objects needed in another State for use as evidence or for other purposes. United States courts execute such requests now under 28 U.S.C. § 1782,[30] and Article 15 of the treaty creates a reciprocal framework for handling such a request.

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[28] See, e.g., Mutual Assistance in Criminal Matters: A Commonwealth Perspective, prepared by Dr. David Chaikin and Commonwealth Secretariat for the meeting of Commonwealth Law Ministers, Colombo, Sri Lanka, February 14–18, 1985, pp. 32–34.

[29] Title 18, United States Code, § 981(i)(1).

[30] See e.g., *United States Ex Rel. Public Prosecutor of Rotterdam, Netherlands* v. *Richard Jean Van Aalst*, Case No. 84–67–Misc–018 (M.D. Fla., Orlando Div.) cited in Ellis and Pisani, supra note 1 at page 215.

Pursuant to Article 15(1)'s requirement that the request include "information justifying such action under the laws of the Requested State," a request to the United States from Panama ordinarily will have to be supported by probable cause for the search. A United States request to Panama would have to satisfy the corresponding evidentiary standard there. It is contemplated that the request would be carried out in strict accordance with the law of the country in which the search is being conducted.

Article 15(2) is designed to insure that a record is kept of articles seized and of articles delivered up under the treaty. This provision effectively requires that detailed and reliable information be kept regarding the condition of the article and the chain of custody between the time of seizure and the time of delivery to the Requesting State.

Article 15(2) also requires that the certificates prepared for this purpose will be admissible without additional authentication at trial in the Requesting State and is intended to avoid the burden, expense, and inconvenience to the Requested State of sending its officials to the Requesting State to provide authentication and chain of custody testimony each time evidence produced pursuant to this Article is used. The treaty's injunction that the certificates be admissible without additional authentication at trial leaves the trier of fact free to accord the certificate only such weight as it is due.

ARTICLE 16—LOCATION AND IDENTITY OF PERSONS

Article 16 provides that the Requested State is to ascertain the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) where such information is of importance in connection with an investigation or proceeding covered by the treaty. The treaty requires only that the Requested State make "best efforts" to locate the person sought by the Requesting State.

ARTICLE 17—SERVING DOCUMENTS

Article 17 creates an obligation on the Central Authority of the Requested State to arrange for or effect the service of summons, complaints, subpoenas, or other legal documents at the request of the Central Authority of the other State.

It is expected that when the United States is the Requested State, service will be made by registered mail (in the absence of any request by Panama to follow any specified procedure for service) and by the United States Marshal's Service in instances where personal service is requested.

It is anticipated that this article will facilitate service of subpoena on United States citizens, pursuant to Title 28, Section 1783. However, the first paragraph of the article does not oblige the Requested State to serve any subpoena which requires the attendance of a person in the Requested State at a proceeding before an authority or tribunal in the Requesting State where serving such subpoena would be impractical due to the location of the person. Since this provision is based on Article 17(1) of the U.S.-Bahamas Treaty, we assume that the Panamanian authorities were concerned that their resources would be severely taxed by efforts to effect such

service at remote locations in Panama. Therefore, we anticipate that where service is practicable—i.e., where the person is located in a metropolitan area—the request for service will be granted even if the subpoena calls for attendance in the Requesting State, just as it is under the U.S.-Bahamas Treaty.

In order to allow sufficient time for service to be effected and for the respondent to make arrangements for his appearance, Article 17(2) provides that where the document to be served calls for the appearance of a person in the Requesting State, the document ordinarily must be transmitted by the Requesting State for the Requested State at least thirty days before the scheduled appearance. Thus, if the United States were to ask Panama to serve a subpoena issued pursuant to Title 28, United States Code, Section 1783 on a United States citizen in Panama, the request would have to be submitted well in advance of the hearing or trial at which the respondent is expected to appear.

ARTICLE 18—COMPATIBILITY WITH OTHER TREATIES AND INTERNAL LAWS

The first paragraph states that assistance procedures provided by this Treaty shall not prevent either State from granting assistance under any other international agreement to which it may be a party. It also provides that the Treaty shall not be deemed to prevent recourse to any assistance available under the internal laws of either country. Thus, the Treaty leaves the provisions of United States and Panamanian law on letters rogatory completely undisturbed, and does not alter any preexisting agreements concerning investigative assistance, such as the Protocol Amending the Single Convention on Narcotics Drugs, 1961, done at Geneva March 25, 1972, and entered into force for the United States August 8, 1975 (26 U.S.T. 1439, T.I.A.S. 8118).

The second paragraph is based on Articles 3 and 4 of the U.S.-Canada Treaty and Article 18(2) of the U.S.-Bahamas Treaty. It provides that a State which needs assistance in a case covered by the Treaty must make a request for that assistance pursuant to the Treaty unless some other international agreement or arrangement applies. The Parties intend that the Treaty serve as the primary means by which evidence in one country would be made available to law enforcement authorities in the other in cases covered by the Treaty. However, Article 18(2) does not apply to matters not covered by the Treaty, such as cases and investigations involving purely tax matters, and in these areas the parties may pursue the needed evidence at any time by any legal means available, including the unilateral use of domestic judicial process.

Article 18(3) provides that the provisions of the Treaty do not give rise to any right on the part of a private person to impede execution of a request. Thus, an individual from whom records or testimony are sought would not be free to oppose the execution of the request by claiming that the request fails to comply with the Treaty's formal requirements (such as those specified in Article 5), or attempt to substitute his judgment for that of the Central Authority in deciding whether the substantive requirements of the Treaty (such as those in Article 3) have been met.

Article 18(3) further provides that the Treaty is not intended to create any right to suppress or exclude evidence obtained thereunder. Therefore, evidence obtained under the Treaty by one State from the other State should not be suppressed or excluded from use in judicial proceedings on the ground that the Requesting State's request failed to comply with the provisions of the Treaty. This provision is intended to avoid involving the Requesting State's courts in second-guessing the decision of the Requested State to honor the request in the first place.[31] If the person can point to a recognized basis in the ordinary law of the Requesting State for not executing the request or for exclusion of the evidence or for the Requesting State's courts to exclude the evidence, that issue can be decided exactly as it would otherwise be handled. It should be noted that this is a standard provision in our treaties,[32] and has limited applicability in Panama since that country's jurisprudence does not include any exclusionary rule.

ARTICLE 19—IMPROVEMENT OF ASSISTANCE

The first paragraph of the article encourages both parties to be aware of the opportunity presented by this agreement to insuring that other aspects of our bilateral relations benefit from the same kind of flexibility and mutual understanding that this Treaty reflects, particularly in the area of mutual legal assistance. For instance, it may be appropriate to consider initiating negotiations on assistance in civil matters.

The United States experience has shown that as the parties to a treaty of this kind work together over the years various practical ways to make the treaty more effective become evident. The second paragraph of the article calls upon the States to share those ideas with one another and encourages them to agree on the implementation of such measures. Practical measures of this kind might include methods of keeping each other informed of the progress of investigations and cases in which treaty assistance was utilized and using the treaty to obtain evidence which might otherwise be sought under other methods which might be less acceptable in the Requested State. Similar provisions are in the U.S.-Canada Treaty and the U.S.-Cayman Treaty.

ARTICLE 20—RATIFICATION AND ENTRY INTO FORCE

The penultimate article contains standard language concerning the procedure for exchange of the instruments of ratification, and the coming into force of the Treaty. As noted earlier, it is not anticipated that either Panama or the United States will need to enact any implementing legislation in order to bring the treaty into operation. Panama has completed its ratification process and is in a position to exchange instruments of ratification as soon as the United States Senate has given advice and consent to ratification, and the President has signed instruments of ratification for the United States.

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[31] See *United States* v. *Caramian,* 468 F.2d 1370 (5th Cir. 1972); *United States* v. *Marschner,* 470 F. Supp. 201, 202–203 (D. Conn. 1979).

[32] Ellis and Pisani, supra note 1, at 211–212, 221–222. See also *United States* v. *Johnpoll,* 739 F.2d 702 (2d Cir. 1984).

ARTICLE 21—DENUNCIATION

The final article contains the standard provision concerning the procedure for terminating the treaty. The requirement that either State give six months' written notice to the other of an intent to terminate the treaty is not unusual in a treaty of this kind, and is similar to the requirement contained in United States mutual legal assistance treaties with Switzerland, Turkey, the Netherlands, the Bahamas, and Canada.

ENTRY INTO FORCE

This Treaty shall enter into force upon the exchange of instruments of ratification by the Governments of the United States of America and the Republic of Panama.

TEXT OF 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 United States of America and the Republic of Panama On Mutual Assistance in Criminal Matters, With Annexes and Appendices, signed at Panama on April 11, 1991. 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 this Treaty requires or authorizes legislation, or other action, by the United States of America 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 or facilitates the production or distribution of illegal drugs.

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