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MUTUAL LEGAL ASSISTANCE TREATIES WITH AUSTRALIA, BARBADOS, BRAZIL, CZECH REPUBLIC, ESTONIA, HONG KONG, ISRAEL, LATVIA, LITHUANIA, LUXEMBOURG, POLAND, TRINIDAD & TOBAGO, VENEZUELA, ANTIGUA & BARBUDA, DOMINICA, GRENADA, ST. KITTS & NEVIS, ST. LUCIA, AND ST. VINCENT & THE GRENADINES

OCTOBER 14 (legislative day, OCTOBER 2), 1998.—Ordered to be printed

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

REPORT

[To accompany Treaty Docs. 105–6; 105–11; 105–12; 105–22; 105–23; 105–24; 105–27; 105–34; 105–37; 105–38; 105–40; 105–41; 105–42; 105–44; 105–47; and 105–52.]

The Committee on Foreign Relations, to which was referred the Agreement between the Government of the United States of America and the Government of Hong Kong on Mutual Legal Assistance in Criminal Matters, with Annex, signed in Hong Kong on April 15, 1997 (Treaty Doc. 105–6); the Treaty Between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg on Mutual Legal Assistance in Criminal Matters, and related exchange of notes, signed at Washington on March 13, 1997 (Treaty Doc. 105–11); the Treaty Between the United States of America and the Government of the Republic of Poland on Mutual Legal Assistance in Criminal Matters, and related exchange of notes, signed at Washington on July 10, 1996 (Treaty Doc. 105–12); the Treaty Between the Government of the United States of America and the Government of Trinidad and Tobago on Mutual Legal Assistance in Criminal Matters, signed at Port of Spain on March 4, 1996 (Treaty Doc. 105–22); the Treaty Between the Government of the United States of America and the Government of Barbados on Mutual Legal Assistance in Criminal Matters, signed at Bridgetown on February 28, 1996 (Treaty Doc. 105–23); the Treaties Between the Government of the United States of America and the Governments of Four Countries Comprising the Organization of Eastern Caribbean States: Antigua and Barbuda, signed at St. John's on October 31, 1996; Dominica, signed at

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Roseau on October 10, 1996; Grenada, signed at St. George's on May 30, 1996; St. Lucia, signed at Castries on April 18, 1996 (Treaty Doc. 105–24); the Treaty Between the Government of the United States of America and the Government of Australia on Mutual Assistance in Criminal Matters, and related exchange of notes, signed at Washington on April 30, 1997 (Treaty Doc. 105–27); the Treaty Between the United States of America and the Republic of Latvia on Mutual Legal Assistance in Criminal Matters, signed at Washington on June 13, 1997, and an exchange of notes signed the same date (Treaty Doc. 105–34); the Treaty Between the Government of the United States of America and the Government of St. Kitts and Nevis on Mutual Legal Assistance in Criminal Matters, signed at Basseterre on September 18, 1997, and a related exchange of notes signed at Bridgetown on October 29, 1997, and February 4, 1998 (Treaty Doc. 105–37); the Treaty Between the Government of the United States of America and the Government of the Republic of Venezuela on Mutual Legal Assistance in Criminal Matters, signed at Caracas on October 12, 1997 (Treaty Doc. 105–38); the Treaty Between the Government of the United States of America and the Government of the State of Israel on Mutual Legal Assistance in Criminal Matters, signed at Tel Aviv on January 26, 1998, and a related exchange of notes signed the same date (Treaty Doc. 105–40); the Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 16, 1998 (Treaty Doc. 105–41); the Treaty Between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, signed at Brasilia on October 14, 1997 (Treaty Doc. 105–42); the Treaty Between the Government of the United States of America and the Government of Saint Vincent and the Grenadines on Mutual Legal Assistance in Criminal Matters, and a Related Protocol, signed at Kingstown on January 8, 1998 (Treaty Doc. 105–44); the Treaty Between the United States of America and the Czech Republic on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 4, 1998 (Treaty Doc. 105–47); the Treaty Between the Government of the United States of America and the Government of the Republic of Estonia on Mutual Legal Assistance in Criminal Matters, signed at Washington on April 2, 1998, and an exchange of notes dated September 16 and 17, 1998 (Treaty Doc. 105–52), having considered the same, reports favorably thereon, each with one understanding, one declaration and 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 resolutions of ratification.

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I. Purpose

Bilateral mutual legal assistance treaties are intended to establish a formal basis for cooperative law enforcement efforts.

II. Background

Nineteen mutual legal assistance treaties (MLATs) were submitted to the Senate during the 105th Congress. They include agreements with Hong Kong; Luxembourg; Australia; Venezuela; Israel; Brazil; several of the island nations of the Caribbean (Trinidad and Tobago, Barbados, Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines); as well as several countries in Eastern Europe (Poland, Estonia, Latvia, Lithuania, and the Czech Republic).

The United States already has twenty MLATs in force. Although each of the treaties currently before the Senate has its own distinctive features, the treaties follow a common format and as a group exhibit more similarities than differences.

III. Summary

A. GENERAL

The treaties generally are arranged in twenty articles. Some have a few more; some a few less. They cover essentially the same matters in essentially the same order, frequently using virtually the same terminology. They are typically aligned as follows with articles on:

- the scope of assistance of the Treaty, in the form a general statement of purpose and a general inventory of the kinds of assistance available;
- identification of the Central Authorities responsible for administration of the Treaty;
- the limitations on assistance available at the discretion of the Central Authority in particular types of cases;
- the form and contents required of any request for assistance under the Treaty;
- the general responsibilities and prerogatives of those called upon to execute requests under the Treaty;
- how the costs associated with a particular request are to be allocated;
- the limitations of use or disclosure of any evidence or information secured pursuant a Treaty request;
- the procedure for hearings conducted at the behest of a foreign country to take testimony or evidence in the Requested State;
- the circumstances under which the Parties are to have access to information found in the records of government agencies of other countries;
- the procedure for inviting witnesses to travel abroad and give testimony in the Requesting State;

- the provisions for the transfer of persons in custody (prisoners) from one country to the other to permit them to participate in foreign proceedings;
- the pledge of each Party to devote their best efforts in response to a request for the location or identification of a particular person or item;
- the commitment of each Party for the service of documents related to a Treaty request;
- the agreement to execute a search and seizure upon request of a Treaty partner;
- provisions for the return of property transferred to another country pursuant to a Treaty request;
- bilateral assistance in forfeiture proceedings and in proceedings concerning restitution and criminal fines;
- compatibility with other arrangements, that is, the fact that the Treaty is not intended to preempt other legal grounds for cooperative law enforcement efforts;
- consultation among the agencies responsible for implementation of the Treaty; and
- the particulars of ratification, termination and effective dates.

B. KEY PROVISIONS

1. Scope of Assistance

The first article in each of the Treaties before the Senate address the scope of the assistance available under the Treaty. The article usually consists of four components: a statement of purpose, an inventory of some of types of assistance available under the agreement, a statement on dual criminality, and disclaimer of any intent to give the defendant additional rights.

2. Central Authorities

Article 2 of the Treaties vests the principal prosecutorial authorities, frequently the Attorneys General, with the responsibility for Treaty administration. In the United States, the Attorney General has designated the Assistant Attorney General for the Criminal Division to act as the Central Authority for all MLATs. That official has in turn authorized any of the Deputy Assistant Attorneys General, the Director of the Division's Office of International Affairs, or any of the Office's Deputy Directors to exercise the prerogatives of the Central Authority for the United States. Most countries follow a similar delegation pattern.

Other articles of the Treaties give the Central Authorities and their subordinates considerable discretion over Treaty administration, but Article 2 offers one valuable tool—it allows them to deal directly with one another. This makes it possible to respond to requests quickly and to make adjustments cognizant of prosecutorial and other law enforcement needs. A number of countries see both the Treaty and this law enforcement-to-law enforcement feature as a welcome alternative to some of the diplomatic irritants that may accompany self-help or informal requests for assistance. A possible disadvantage of this approach may be an occasional loss of overall coordination of a country's overseas endeavors.

3. Limitation on Assistance

Article 3 of the Treaties, in most instances, bestows two general powers upon the Central Authorities. It permits them to approve or disapprove certain types of requests and it allows them to reshape requests that they have been empowered to deny.

With an occasional exception, the Treaties allow the Central Authorities to accept or refuse a request related to a political offense or to purely military offense (misconduct that does not amount to a civilian crime, such as desertion) or a request that fails to meet the specifications for petitions under the Treaties.

Each of the Treaties also has an "essential interests" clause that affords Central Authorities considerable leeway. Their exact wording varies from authority to deny a request whose execution "would prejudice the sovereignty, security, ordre public, or similar essential interests of the Requested State" to the power to deny a request whose execution "would prejudice the security or similar essential interests of the Requested State."

The words "sovereignty," "security", "public order," and "essential interests" in other contexts may each call to mind some distinct collection of interests. Circumstances that have once been recognized as within the scope of one essential interests clause are likely to be subsequently claimed under others. In the past "essential interest" clauses have been understood to permit a country that had abolished capital punishment as a sentencing alternative to deny assistance in a capital case. Other abolitionist countries may well claim the clause to deny Treaty assistance in a capital case unless the United States agrees that the death penalty will not be used in the particular case. A comparable fate may await an American request related to criminal conduct occurring within the territory of the Requested State and under circumstances where it would consider our exercise of jurisdiction "extraterritorial and objectionable."

On the other hand, the United States may claim the discretion of the essential interest clause should it be asked to assist in a foreign investigation or prosecution of conduct that in the United States would be constitutionally protected.

4. Form and Content of Requests

Treaty requests must be in writing, although in emergency situations they may be presented orally and confirmed in writing within 10 days or whatever time period the Central Authorities agree upon. In the Treaties with countries where English is not the principal language, requests must be submitted in the language of the Requested State unless otherwise agreed.

The requests must indicate (a) what assistance is being sought, (b) the purposes for which it is being sought, (c) the name of the authority conducting the investigation, prosecution or proceeding to which the request relates, and (d) background information, ordinarily including an identification and perhaps a copy of the substantive criminal laws to which the request is related. The description of the first three of these demands is virtually identical in all of the Treaties. The specifications for the background information that must accompany any Treaty request is most commonly phrased as "a description of the subject matter and nature of the

investigation, prosecution, or proceeding, including the specific criminal offenses that relate to the matter." Others are not dramatically different, but frequently call for a bit more information, probably to ensure compliance with restrictions elsewhere in their Treaties.

The final component of the article dealing with form and content outlines the informational requirements for specific types of requests, the whereabouts of individuals or items whose identification has been requested and the like, which will described below in the context of the particular types of requests.

5. Execution of Requests

The fifth Article of each of the Treaties deals with seven issues related to the performance of Treaty requests, usually employing boilerplate language:

- general obligations of the Central Authorities;
- representation of the foreign country placing the request;
- the law governing the manner in which requests will be answered;
- the obligation when a request relates to a matter pending in both countries;
- confidentiality requirements;
- the rights of the Requesting State to be informed of the status of performance on their requests; and
- the rights of the Requesting State to be informed of the outcome of the execution of their requests.

6. Cost

The Treaties handle associated costs primarily as incidental to domestic law enforcement responsibilities. The country providing assistance is expected to bear the expense. Requesting countries are responsible for the costs of translations, transcriptions, expert witness fees, and the expenses associated with the foreign travel of witnesses. This approach prevents countries from claiming reimbursement for excessive costs to discourage requests or to mask a refusal to provide assistance. In exceptional cases, however, the Parties may agree to share costs and to modify the assistance provided for fiscal reasons.

7. Limitations on Use

Article 7 of the treaties contains the second confidentiality element—the use and disclosure of evidence and information produced under the Treaties. Most of the Treaties allow the Central Authorities of the country providing evidence or information under the Treaty to prohibit its use in other investigations, prosecutions, or proceedings without their consent or until after it has been publicly disclosed as a consequence of the use for which it was intended. The Israeli Treaty and several of those with Caribbean nations feature the same confidentiality requirements, but impose them without regard to whether or not they are requested. The U.S. Treaty with Luxembourg stipulates that even if publicly disclosed in the course of the proceedings for which it was provided and even if confidentiality has not previously been requested, information or evidence secured under the Treaty may not be used in a case involv-

ing a purely military offense, a political offense, a capital offense, or a tax offense without the consent of the country that provided the information or evidence.

All the Treaties permit the country that provides evidence or information under their provisions to impose conditions preserving its confidentiality and restricting its use and disclosure.

8. Testimony and Evidence in the Requested State

The Treaties provide that, "a person [found] in the Requested State from whom testimony or evidence is requested ... shall be compelled, if necessary, to appear and testify or produce items, including documents and records." The country requesting the testimony or evidence may ask for, and is entitled to receive, advanced notice of the time and place of execution of its request. Individuals specified in the request are entitled to attend and either to question the witness or to submit questions to be asked.

Foreign witnesses called to testify or produce evidence abroad under the Treaties are entitled to claim the benefits of any privileges, immunities and incapacities recognized by our law. The most obvious of these—beyond the evidentiary privileges recognized by the federal courts, and probably by the state courts in the case of any request initiated at the behest of one of the several States of the United States—are those guaranteed by the Constitution, most notably the Fourth and Fifth Amendments. Although under a few Treaties the law of the forum State applies as well, witness claims of immunity, privilege or incapacity are governed by the law of the nation that seeks the witness's testimony. In the case of claims under the laws of the Requesting State, the evidence is taken and matter referred for resolution in the Requesting State. A claim of privilege or immunity cannot be vindicated in an overseas proceeding conducted under the Treaties, because they call for the evidence to be taken nonetheless and for the claims to be resolved after the fact in the United States. The available remedies may be limited to post facto suppression of any tainted evidence or a protective order issued by an American court and directed against the federal or state government prior to the foreign proceeding.

The Treaties call for authentication of evidence taken overseas, typically by use of appended forms, and declare evidence authenticated under the Treaties for admissibility purposes in the courts of the Treaty States.

9. Government Records

The Treaties divide governmental information available under their provisions into two categories, publicly available information (which must be provided upon request) and information available to judicial and law enforcement personnel but not to the general public (which may be provided upon request).

The Technical Analyses accompanying these treaties have noted that the provision permits access by the law enforcement and tax enforcement authorities of our MLAT Treaty partners to tax information held by the Internal Revenue Service (IRS) just as access is available to federal law enforcement officials. The general rule is subject to individual limitations found in Treaties, like those

with Israel and Luxembourg, that have special tax investigation requirements and restrictions.

10. Appearance Outside the Requested State

Foreign witnesses cannot be compelled to travel to the United States to testify, and vice versa, but as the Treaties observe they may be invited to do so. The invitations are extended by the nation in which the witness is found. The country seeking assistance must indicate the extent to which the witnesses' expenses will be paid. These elements are common to all of the Treaties. There is greater diversity over the extent of safe conduct offered and over the permissible range of assistance. The majority allow invitations for invitees "to appear before the appropriate authority of the Requested State," a sufficiently imprecise phrase to accommodate both narrow or sweeping interpretation. It could be construed to mean no more than testimony in judicial proceedings. It could be alternatively interpreted to include testimony before any tribunal, judicial or administrative, and/or any form of assistance including but not limited to testimony.

11. Transfer of Persons in Custody

The Treaties anticipate situations where prisoners are sought as participants in proceedings in another country either by the country in which they are imprisoned or by the country in which the proceedings are to be held. The Treaties overcome the dual problem that the country where the proceedings are to be conducted will frequently be unwilling to allow foreign officials to maintain custody of a prisoner within its territory but will lack the authority under their laws to accept custody on their own.

With the consent of the prisoner and each of the States, the Treaties allow a transfer of custody to provide law enforcement assistance. The Treaties uniformly authorize the receiving State to accept custody, instruct the receiving State to return the prisoner without the necessity of extradition, and credit the prisoner with time spent in the receiving State. The Czech, Lithuanian, Latvian and Luxembourg Treaties also authorize transfers to the third countries. Most of the Treaties do not mention safe conduct guarantees for transferred prisoners; the Treaties with Hong Kong, Israel, Lithuania, Australia and the Czech Republic do.

12. Location or Identification of Persons or Items

The Parties pledge their best efforts to ascertain the location or identity of persons or items upon request. Effective use of a MLAT or an extradition treaty often begins by finding an overseas fugitive or locating and identifying a witness or a custodian of bank records or other physical evidence resident in another country. The form and content articles of the Treaties instruct requesting States to provide such information as to the location and identification of the persons or items as they can.

13. Service of Documents

The MLAT procedure can be used to serve subpoenas issued under section 1783 of Title 28 of the U.S. Code on Americans in other countries, unless foreign law expressly prohibits service. Ex-

cept for the Treaties with Australia, Hong Kong, and Israel, however, the service-of-document articles are subservient to the other Treaty provisions for they may be employed only "to effect service of any document related in whole or in part to any request for assistance made by the Requesting State under the provisions of" the Treaties.

Beyond a pledge of best efforts, the Treaties commit the Parties to provide advance notice in connection with any documents calling for an appearance abroad. They also demand that the country serving the documents provide evidence of service in the manner requested.

14. Search and Seizure

The search and seizure articles in the Treaties are similarly uniform. They require execution of any request accompanied by information sufficient to satisfy the legal requirements of the country in which execution is to occur. They generally feature an authentication procedure designed to satisfy American legal requirements for admissibility of evidence. Finally, each of the Treaties has a provision authorizing conditions for the protection of third party interests in the property. The search and seizure article is followed in each of the Treaties by an article empowering the country executing the search and seizure to call for the return of the ultimate transferred property.

Broadly cast as "search and seizure" provisions, the Treaty articles are rather clearly limited to searches and seizures of property; they neither authorize nor anticipate the search for nor the seizure of individuals.

15. Forfeiture Assistance

Forfeiture varies from one jurisdiction to another and as a consequence MLAT forfeiture provisions vary a great deal from one Treaty to the next. The laws of some countries demand conviction as a condition of forfeiture. Others permit confiscation only after a criminal charge has been filed against the property owner. Many nations define the range of crimes upon which a forfeiture may be based more narrowly than we do. Some consider direct proceeds forfeitable, but not property purchased with direct proceeds. Still others allow confiscation only as a consequence of crimes committed within their jurisdiction and do not permit confiscation based solely on the presence of crime-tainted property within their jurisdiction. Any of these differences may complicate a foreign response to an American request for the forfeiture assistance.

The Treaties' forfeiture assistance articles are similar. In agreements characterized most by their generalities, the forfeiture articles are perhaps the least revealing and perhaps the most likely rendered diverse by the particulars of the domestic laws that induce the frequent references to "to extent permitted by its laws."

16. Fine Collection and Restitution

The Treaties in most instances include only passing references to fine collection and restitution: "The Contracting Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumen-

talities of offenses, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions." The Israeli and Czech Treaties have more extensive if only slight less cryptic citations to restitution and fine collection. Their reluctance to enforce foreign restitution and fine orders probably reflects the limitations of their domestic laws, which may be representative of the domestic laws of the other nations as well.

IV. Entry Into Force and Termination

A. ENTRY INTO FORCE

The Treaties generally provide for the entry into force of the treaty either on the date of, or shortly after, the exchange of instruments of ratification.

B. TERMINATION

The Treaties generally provide for the Parties to withdraw from the Treaty by means of written notice to the other Party. Termination would take place six months after the date of notification. Some of the treaties make clear that requests for assistance prior to notification of termination shall be honored.

V. Committee Action

The Committee on Foreign Relations held a public hearing on the proposed Treaties on September 15, 1998. The Committee considered the proposed Treaties on October 14, 1998 and ordered the proposed Treaties favorably reported with the recommendation that the Senate give its advice and consent to the ratification of each of the proposed Treaties subject to one understanding, one declaration, and two provisos.

VI. Committee Comments

The Committee on Foreign Relations recommends favorably the proposed Treaties. On balance, the Committee believes that the proposed Treaties are in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. Several issues did arise in the course of the Committee's consideration of the Treaties, and the Committee believes that the following comments may be useful to the Senate in its consideration of the proposed Treaties and to the State Department.

A. RESTRICTION ON USE OF ASSISTANCE TO AID INTERNATIONAL CRIMINAL COURT

On July 17, 1998 a majority of nations at the U.N. Diplomatic Conference in Rome, Italy, on the Establishment of an International Criminal Court voted 120–7, with 21 abstentions, in favor of a treaty that would establish an international criminal court. The court is empowered to investigate and prosecute war crimes, crimes against humanity, genocide and aggression. The United States voted against the treaty.

Each of the Resolutions of Ratification accompanying the Mutual Legal Assistance Treaties prohibits any assistance provided to any of the Treaty partners from being transferred to or otherwise used

to assist the International Criminal Court agreed to in Rome, Italy. This restriction would be vitiated in the event that the United States ratifies the treaty, pursuant to the Constitutional procedures as contained in Article II, section 2 of the United States Constitution.

This understanding makes clear that both Parties understand that information shared with a Party by the United States pursuant to the MLAT will not to be forwarded to the international court. The Committee understands that the terms of the Treaties will not give the United States, as Requested State, total control over the Requesting State's use of assistance provided under the Treaty. For instance, under the article on use limitations, information provided under the Treaty that has become public in the Requesting State may be used for any purpose. The Committee does expect and intend, however, that the United States will exercise its rights under the Treaty to prevent any assistance or information that we have provided to be transferred to the International Criminal Court.

Members of the Committee are concerned that the Treaties could become conduits for assisting the International Criminal Court, even if the United States is not a party to the court. This provision would ensure that this does not happen so long as the treaty creating the criminal court has not entered into force for the United States.

B. USE OF TREATIES TO AGGRESSIVELY PURSUE INTERNATIONAL PARENTAL KIDNAPING

On October 1, 1998, the Committee on Foreign Relations convened a hearing to consider U.S. Responses to International Parental Kidnaping. The Attorney General, Janet Reno, testified before the Committee, as did four parents whose children were abducted or wrongfully retained in international jurisdictions. The parents recounted their frustration with the current level of U.S. Government assistance in seeking the return of their children.

Although the Attorney General pointed to limitations in the ability of the U.S. Government to resolve many cases of international parental abduction, she also recognized that the United States could do better in assisting in the return of abducted children and pledged to take steps to improve coordination between the Departments of State and Justice. She also indicated that an interagency working group, which has been studying this issue during the past year, will produce a report in January with recommendations for improvements in U.S. policy regarding international parental kidnaping.

As this working group completes its work, the Committee expects that one area related to these treaties that the working group should comment upon is the current practice of the exchange of information under MLATs and other means related to the crime of international parental kidnaping. Under current practice these treaties provide for cooperation between law enforcement officials. The Committee believes that care should be given to ensure that these treaties be useful tools for attaining information and other cooperation that will assist in the return of abducted or wrongfully retained children. The Committee anticipates that the Justice De-

partment will consider renouncing treaties in the event that the Central Authority of a Party consistently fails to adequately provide assistance under the Treaty. The Committee is especially concerned that the proposed Treaty with Austria be monitored to ensure cooperation in the exchange of information related to international parental kidnaping.

The State and Justice Departments have testified that these treaties are essential in order to ensure that criminals do not evade prosecution. This same principle should be true for the crime of parental kidnaping in violation of the 1993 International Parental Kidnaping Act. The Committee expects, therefore, that State and Justice Department officials will seek cooperation in all cases unless it will hinder U.S. law enforcement efforts. The Committee also expects that State and Justice Department officials will raise this issue in the course of negotiation of all bilateral law enforcement treaties and in other bilateral diplomatic exchanges.

VII. Explanations of Proposed Treaties

The following are the article-by-article technical analysis provided by the Departments of State and Justice regarding the mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and Antigua and Barbuda on Mutual Legal Assistance in Criminal Matters

On October 31, 1996, the United States signed a treaty with Antigua and Barbuda 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking in the eastern Caribbean, where Antigua and Barbuda is a regional leader.

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. Antigua and Barbuda has its own mutual legal assistance laws in place for implementing the Treaty, and does not anticipate enacting new legislation. [1]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as

[1] "An Act to make provision with respect to the scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in Antigua and Barbuda and to make provision concerning mutual assistance in Criminal Matters between Antigua and Barbuda and countries other than Commonwealth countries" (18 February 1993), hereinafter "Antigua Mutual Assistance Act, 1993." Since there are some differences between the Treaty and Antiguan law, it is anticipated that Antigua will issue regulations under Section 30, which will "direct that [the] Act shall apply in relation to [the United States] as if it were a Commonwealth country, subject to such limitations, conditions, exceptions or qualifications (if any) as may be prescribed . . ." in order for the terms of the Treaty to prevail.

of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of criminal offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Antigua and Barbuda, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the Government the proceeds of illegal drug trafficking may be civil in nature;[4] such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The second paragraph's list of kinds of assistance is not intended to be exhaustive, a fact which is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 makes it clear that there is no general requirement of dual criminality for cooperation. Thus,

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[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Antigua and Barbuda under the Treaty in connection with investigations prior to charges being filed in Antigua and Barbuda. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1992). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed, and it draws no distinction between cases in which charges are already pending, are "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "... except where otherwise provided by this Treaty," a phrase which refers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality before executing a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Antigua and Barbuda criminal law differ, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy, drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848), offenses under the racketeering statutes (Title 18, United States Code, Section 1961-1968), money laundering, crimes against environmental protection laws, and antitrust violations.

While the Treaty does not require dual criminality in general, Antigua and Barbuda's delegation did raise questions about assistance in one area in which the criminal laws of the Parties differ. Since Antigua and Barbuda has no income tax legislation, it suggested that the Treaty restrict mutual assistance in tax cases, noting that such restrictions are contained in the United States' mutual legal assistance treaty with the United Kingdom regarding the Cayman Islands. The United States delegation was unwilling to agree that this Treaty be so limited, because criminal tax matters are often used to pursue and prosecute major criminals such as drug traffickers and organized crime figures. It was agreed that Article 1(4) should specify that "[t]his treaty is intended solely for mutual legal assistance in criminal matters between the Parties as set forth in paragraph (1) above," thereby emphasizing that the Treaty applies only to criminal tax matters. At Antigua and Barbuda's request, diplomatic notes were exchanged at the time that the Treaty was signed indicating the Parties' agreement that Antigua and Barbuda may interpret Article 1 to exclude assistance under the Treaty for civil and administrative income tax matters that are unrelated to any criminal matter.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] that states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Antigua and Barbuda by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evi-

[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[6] United States v. Johnpoll, 739 F.2d 702 (2d Cir. 1984).

dence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Antigua and Barbuda on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Antigua and Barbuda Central Authority would make all requests emanating from officials in Antigua and Barbuda. The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] Paragraph 2 also states that the Attorney General of Antigua and Barbuda or a person designated by the Attorney General will serve as the Central Authority for Antigua and Barbuda.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that

[7] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

the Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph (1)(b) 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 U.S. investigation or prosecution.[8]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. In the course of the negotiations, the Antigua and Barbuda delegation expressed its view that in very exceptional and narrow circumstances the disclosure of business or banking secrets could be of such significant importance to its Government (e.g., if disclosure would effectively destroy an entire domestic industry rather than just a specific business entity) that it could prejudice that State's "essential public interests" and entitle it to deny assistance.[9] The U.S. delegation did not disagree that there might be such extraordinary circumstances,

[8] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[9] The Antigua and Barbuda view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty. *See* Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

but emphasized its view that denials of assistance on this basis by either party should be extremely rare.

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense.[10] It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Finally, Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State. This provision was deemed necessary under the law of Antigua and Barbuda,[11] and is similar to clauses in other United States mutual legal assistance treaties.[12]

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[13] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form

[10] Sections 19(2)(a) and 19(2)(b), Antigua Mutual Assistance Act 1993.
[11] Section 19(2)(e), Antigua Mutual Assistance Act 1993.
[12] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).
[13] 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.

must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Antigua and Barbuda. Rather, it is anticipated that when a request from Antigua and Barbuda requires compulsory process for execution, the Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty. [14]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Antigua and Barbuda, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

[14] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[15] and provides, that "[r]equests shall be executed in accordance with the internal laws and procedures of the Requested State, except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a Treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and authorities in Antigua and Barbuda in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[16] Antigua and Barbuda law currently contains no similar provision. Thus, documents assembled in Antigua and Barbuda in strict conformity with Antigua and Barbuda procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Antigua and Barbuda.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist

[15] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 12.
[16] Title 18, United States Code, Section 3505.

unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article (2)(b). Therefore, Paragraph 5 of Article 5 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 might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Re-

[17] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 5(5).

questing State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[18] Article 6 states that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

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[18] *See e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

The Antigua and Barbuda delegation expressed concern that information it might supply in response to a request by the United States under the Treaty not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. Brady v. Maryland, 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure and the provision of the Constitution under which such disclosure is required shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with Paragraph 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting State to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Antigua and Barbuda authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions

during the taking of testimony under this article. Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Antigua and Barbuda is guaranteed the right to invoke any of the testimonial privileges (i.e., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[19] A witness testifying in Antigua and Barbuda may raise any of the similar privileges available under the law of Antigua and Barbuda.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[20]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such

[19] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[20] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 17, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 8(4).

requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Antigua and Barbuda under this article in appropriate cases.[21] Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appear-

[21] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

ance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought. Paragraph 1 provides that the witness shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation and room and board. When the witness is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while he is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the Treaty with Antigua and Barbuda, the Central Authority merely reports whether safe conduct has been extended. This is because in Antigua and Barbuda only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Antigua and Barbuda under Article 3 of the Treaty) cannot do so. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understand that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that any safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so. For the United States, the "competent authorities" for these purposes would be the Central Authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has been able to arrange for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[22]

[22] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Mur-*

Continued

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the U.S.-Switzerland Mutual Legal Assistance Treaty,[23] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[24]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[25]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the persons stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a person under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require the person's consent for return to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information.

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phy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[23] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 13, art. 26.

[24] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial. It is also consistent with Section 24, Antigua Mutual Assistance Act 1993.

[25] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State.[26] The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requested State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. This is consistent with Antigua and Barbuda law,[27] and identical provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[28] This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Antigua and Barbuda will have to be supported by a showing of probable cause for the search. A United States request to Antigua and Barbuda would have to satisfy the corresponding evi-

[26] This is consistent with Section 21, Antigua Mutual Assistance Act 1993.

[27] Section 25, Antigua Mutual Assistance Act 1993.

[28] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, Netherlands v. Van Aalst, Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984). Antigua's courts, too, have the power to execute such requests under Section 22, Antigua Mutual Assistance Act 1993.

dentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requested State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requesting State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication at trial leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some other reason to do so aside from authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[29]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Antigua and Barbuda in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 of the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central

[29] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 20; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Antigua and Barbuda, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[30] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[31] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada, and there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[32] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty pro-

[30] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[31] Title 18, United States Code, Section 1956(c)(7)(B).

[32] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

vides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[33]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[34] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Antigua and Barbuda law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[35] It is anticipated

[33] In Antigua and Barbuda, unlike the U.S., the law does not currently allow for civil forfeiture. However, Antigua and Barbuda law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Antigua and Barbuda to confiscate the defendant's property.

[34] *See* Title 18, United States Code, Section 981 (i)(1).

[35] *See e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 29, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of The Treaty Between the United States of America and Australia on Mutual Assistance in Criminal Matters

On April 30, 1997, the United States signed a treaty with Australia on Mutual 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 with Australia is expected to be especially useful to the United States in its efforts to combat organized crime, transnational terrorism, international drug trafficking, and other offenses.

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. Australia has its own mutual assistance laws in place for implementing the Treaty, and does not anticipate enacting new legislation. [1]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

[1] Mutual Assistance in Criminal Matters Act (1987), as amended, hereinafter "Mutual Assistance Act."

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Australia, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[4] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Paragraph 3 contains a standard provision in United States mutual legal assistance treaties[5] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Australia by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

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[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Australia under the Treaty in connection with investigations prior to charges being filed in Australia. Prior to the 1996 amendment of Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment effectively overruled these decisions by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This interpretation poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] See 21 U.S.C. § 881; 18 U.S.C. § 1964.

[5] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), *cert. denied,* 469 U.S. 1075 (1984).

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Australia on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Australian Central Authority would make all requests emanating from officials in Australia.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[6] Paragraph 2 also states that for Australia the Central Authority shall be the Attorney General of Australia or the person designated by Australia's Governor General to be the Minister responsible for the administration of the legislation relating to mutual legal assistance in criminal matters.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

Article 3 specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph 1(a) permits the Requested State to deny the request if it relates to a political offense, and Article 3(1)(b) permits denial if the request involves an offense under military law which would not be an offense under ordinary criminal law. These restrictions are similar to those found in other mutual legal assistance treaties. The Central Authorities no doubt will employ jurisprudence similar to that used in the extradition treaties to determine what are "political offenses."

Paragraph 1(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or essential interests of that State. All United States mutual legal assistance treaties permit the Requested State to decline to execute a request which would prejudice its essential interests.

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[6] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

The ground for denial of assistance would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

In general, the phrase "essential interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph 1(c) 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 U.S. investigation or prosecution.[7]

Section 8 of Australia's Mutual Assistance Law contains mandatory and discretionary bases for denying mutual assistance requests.[8] Australia considers these bases for denial to be express

[7] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[8] Section 8(1) states that Australia's Attorney General must deny an assistance request if, in his opinion: (a) it relates to the prosecution or punishment of a person for an offense of a political character; (b) there are substantial grounds for believing that the request is made to prosecute or punish the person for an offense of a political character; (c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice to a person due to the person's race, sex, religion, nationality, or political opinions; (d) the request relates to a person for an act or omission that would be an offense under military law but not an offense under ordinary criminal law if it had occurred in Australia; (e) granting the request would prejudice Australia's sovereignty, security, or national interests, or the essential interests of an Australian state or territory; (f) the request relates to prosecution for an offense for which the person has already been acquitted or pardoned in the foreign state, or has undergone the punishment for the offense in the foreign state; or (g) the foreign state is not a third State to which the Mutual Assistance in Criminal Matters Act applies. Section 8(2) of the Act states that the Attorney General may deny an assistance request if: (a) it relates to conduct which, if it occurred in Australia, would not be an offense; (b) it relates to conduct which occurred outside of the requesting state, and a similar act or omission occurring outside Australia in similar circumstances would not have constituted an Australian offense; (c) it relates to conduct which, if it had occurred in Australia, would have constituted an offense, but the person responsible could not be prosecuted by reason of lapse

statutory limitations on its Central Authority's ability to execute requests, and firmly believes that Australia has an "essential interest" in enforcing this aspect of its laws. Therefore, it was agreed that Australia may cite Article 3(2) to deny a request from the United States if that request would be subject to denial under Section 8 of Australia's law, as that law read on the date that the Treaty was signed. An exchange of diplomatic notes accompanying the treaty describes the understanding of the Parties on this matter.

The delegations also discussed an Australian proposal to limit assistance in death penalty cases. Australia has abolished the death penalty, and as a matter of policy it declines to provide assistance to other nations if the person under investigation might receive the death penalty in that other state. The mutual assistance treaties that Australia is negotiating with its Asian neighbors contain restrictions on assistance in death penalty cases,[9] and Australia felt that similar restrictions should be contained in this Treaty. The U.S. delegation was not willing to foreclose cooperation in this class of serious cases. Negotiations nearly broke down over this issue, but finally it was agreed that if Australian law explicitly made the possible imposition of the death penalty a basis for denying assistance, Australia could treat that legal prohibition as an "essential interest" under Article 3(1)(c). In September, 1996, Australia's Parliament enacted the "Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996," amending Section 8 of the Mutual Assistance in Criminal Matters Act 1987 to expressly require denial of requests in death penalty cases. Australian officials assured the U.S. that as a practical matter assistance would be provided in most death penalty cases, especially at the pre-indictment stage. The fact that Australia is required by law to limit mutual assistance in capital cases and Australia's concessions on the practical implementation of the law persuaded the U.S. delegation to accept, reluctantly, this undesirable limitation on the scope of Treaty assistance.

Extradition treaties sometimes condition the surrender of fugitives upon a showing of "dual criminality", i.e., proof that the facts underlying the offense in the Requesting State would also constitute an offense had they occurred in the Requested State. Most mutual assistance treaties do not require dual criminality for cooperation, and many such treaties expressly state that assistance may be provided even when the facts under investigation in the Requesting State would not be a crime in the Requested State. However, Section 8 of Australia's mutual legal assistance law permits assistance to be denied if dual criminality is lacking, and hence dual criminality may be deemed an "essential interest" under Article 3 of this treaty. During the negotiations, the United States delegation received assurances from the Australia delegation that assistance would be available under the Treaty to U.S. investigations of major crimes such as drug trafficking, terrorism, organized crime

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of time or any other reason; (d) providing assistance would prejudice an Australian criminal investigation; (e) providing assistance might prejudice the safety of any person in or outside of Australia; or (f) providing assistance would impose an excessive burden on the resources of Australia, its States, or Territories.

[9] Australia's neighbors sometimes execute Australian citizens for possessing small amounts of drugs.

and racketeering, money laundering, tax fraud or tax evasion, and crimes against environmental laws.

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[10] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Trea-

[10] 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.

ty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Australia. Rather, it is anticipated that when a request from Australia requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[11]

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 provides that "[r]equests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there may be significant differences between the procedures which must be followed by United States and Australia authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair

[11] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

opportunity to test its authenticity.[12] Australia law currently contains no similar provision. Thus, documents assembled in Australia in strict conformity with Australian procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Australia.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

The Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[13] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires

[12] Title 18, United States Code, Section 3505.

[13] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.- Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, art. 5(5).

a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[14] Article 6 states that the Requesting State will pay fees of expert witnesses, translation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. For instance, the Requested State may wish to cooperate with the investigation in the Requesting State but choose to limit

[14] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 13, art. 6.

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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act.

It was understood that in some cases the Requested State may not deem a "best efforts" undertaking sufficient to protect its interests, and it may require more comprehensive assurances or deny the request, if the Treaty contains a basis for doing so. For example, currency transaction reports (CTR) are confidential in Australia, and were the United States to seek access to CTRs in the possession of the Australian Government, and Australia felt the "best efforts" commitment in Article 7(2) were insufficient, it could exercise discretion under Article 9(2) to deny the request.

The Australian delegation indicated that use limitations would be imposed only in exceptional cases, or in cases in which Australian law enforcement authorities themselves would be subject to use and disclosure limitations. The United States delegation assured the Australian delegation that the United States would not seek information from Australia on a broader basis than Australian authorities could obtain that information.

The Australian delegation expressed particular concern that information it might supply in response to a request by the United States under the Treaty not be subject to disclosure under the Freedom of Information Act. It was agreed that this clause of the Treaty, as drafted, would mean that a Freedom of Information Act request for information provided under the Treaty would be denied.

Paragraph 3 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that an Australia authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TAKING EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom evidence is sought shall be compelled, if necessary, to appear and testify or produce documents, records, or other articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 1, when read together with Article 5(3), ensures that no person will 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 request from Australia is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[15] A witness testifying in Australia may raise any of the similar privileges available under Australian law.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions, either directly or through a local legal representative, during the taking of testimony under this article. Paragraph 4 requires that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[16] Paragraph 5 states that documents, records, and articles of evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating business records in a manner similar to Title 18, United States Code, Section 3505.[17] It is understood that this paragraph provides for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United

[15] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[16] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *Supra* note 13, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 13, art. 8(4).

[17] Title 18, U.S. Code, Section 3505(c)(2), requires that an attestation of foreign business records be sworn to or affirmed on penalty of criminal punishment for false statement or false attestation in the foreign state. Australia assured the U.S. that the making of a false statement on Form A before an Australian judicial authority would be punishable as a criminal offense in the Australian state or territory where made. See, e.g., Secs. 327 and 330, Crimes Act 1900 (Australian Capital Territory); Secs. 317, 327, and 330, Crimes Act 1900 (New South Wales); Secs. 96, 97, 99, and 119, Criminal Code (Northern Territory); Secs. 123, 124, 193, and 194, Criminal Code (Queensland).

States, this paragraph is self-executing, and does not need implementing legislation.

Paragraph 5 provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance or materiality) would still have to be satisfied in each case.

Paragraph 6 states that evidence may also be authenticated by any other form or manner prescribed by either Central Authority. It is anticipated that this provision will be of particular value in Australian requests, and United States requests for evidence to which Title 18, United States Code, Section 3505 is inapplicable. In such cases, the Central Authority will state the manner of authentication for the evidence sought.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available documents, records, or information in the possession of government departments and agencies in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax in-

formation" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Australia under this article in appropriate cases.[18]

Paragraph 3 states that documents provided under this article may be authenticated by the official in charge of maintaining them through the use of Form B appended to the Treaty, and if authenticated in this manner, the evidence shall be admissible in evidence in the courts of the United States. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44 of the Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible," but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

Paragraph 4 states that documents provided under this article may also be authenticated by any other form or manner prescribed by either Central Authority. In such cases, the Central Authority will state the manner of authentication for the evidence sought.

ARTICLE 10—ASSISTANCE IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall request the consent of persons who are located in its territory to travel to the Requesting State to appear as a witness in the Requesting State or assist in investigations, prosecutions, or proceedings in the Requesting State. It shall notify the Requesting State of such person's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

The article further provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting fed-

[18] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

eral inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[19]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[20] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[21]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is needed for purposes of assistance under this Treaty may be transferred to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[22]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph 3(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph 3(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Paragraph 3(e) requires that if the sending State advises the receiving State that the person sought is no longer required to be held in custody, the person transferred shall be released from custody and be treated as a person who appeared voluntarily in the Requesting State pursuant to Article 10.

ARTICLE 12—SAFE CONDUCT

Paragraph 1 provides that a person who is in the Requesting State pursuant to Articles 10 or 11 shall not be served with process, or be detained or subjected to any restriction of personal lib-

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[19] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[20] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 10, art. 26.

[21] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

[22] *See also* United States v. King, 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

erty by reason of acts or convictions which preceded the witness' departure from the Requested State. It is understood that this provision does not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Article 12(2) states that the safe conduct guaranteed in this article expires twenty five days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if he leaves the territory of the Requesting State and thereafter voluntarily returns to it. This safe conduct period is longer than that prescribed in other mutual legal assistance treaties because of the significant distance between the United States and Australia and the difficulties of travel arrangements.

ARTICLE 13—LOCATION OR IDENTIFICATION OF PERSONS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons is limited to persons that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons sought.

ARTICLE 14—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers at the request of the Requesting State. Similar provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[23] This article creates a formal framework for handling such requests.

Article 15 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Australia will have to be supported by a showing of probable cause for the search. A United States request to Australia would have to satisfy the corresponding evidentiary standard there.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized article shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the United States, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the article to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[24]

ARTICLE 16—RETURN OF EVIDENCE

This article provides that any item provided under the Treaty must be returned to the Requested State when no longer needed for the relevant investigation, prosecution, or proceeding. This would normally be invoked only if the Central Authority of the Requested States requests it, normally at the time the item is provided to the Requesting State. It is anticipated that unless original records, or items of significant intrinsic value are involved, the Re-

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[23] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (Search warrant issued February 24, 1984).

[24] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 17; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 14; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jul. 3, 1986.

quested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 17—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Australia in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

Paragraph 1 provides that upon request, each Central Authority shall endeavor to locate, trace, restrain, freeze, seize, forfeit, or confiscate the proceeds and instrumentalities of crime, to the extent it is permitted to do so by its law. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Pursuant to Paragraph 1, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Australia, they could be seized under Title 18, United States Code, Section 981, in aid of a prosecution under Title 18, United States Code, Section 2314,[25] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the United States since these offenses are predicate offenses under U.S. money laundering laws.[26] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[27] The United

[25] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[26] Title 18, United States Code, Section 1956(c)(7)(B).

[27] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

States delegation expects that Article 17 of the Treaty will enable this legislation to be even more effective.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[28] Paragraph 2 is consistent with this framework, and will enable a Contracting Party having control of forfeited or confiscated proceeds or instrumentalities to transfer such property or the proceeds of its sale to the other Party at the former's discretion and to the extent permitted by its laws.

Paragraph 3 satisfies a requirement of Australian law by providing that where the Requesting State seeks the enforcement of a court order restraining, forfeiting, confiscating, or otherwise immobilizing proceeds of crime located in the Requested State, the request shall be accompanied by the original signed order, or a copy thereof, and in either case should bear the seal of the Central Authority of the Requesting State.

ARTICLE 18—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international treaties or arrangements. Article 18 also provides that the Treaty shall not prevent recourse to any assistance available under the internal laws of either country. Thus, the Treaty would leave the provisions of United States and Australian law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[29]

ARTICLE 19—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will share those ideas with one another. 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[30] It is anticipated that the

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[28] See Title 18, United States Code, Section 981 (i)(1).

[29] *See e.g.,* the U.S.-Australia Agreement on the Procedures for Mutual Assistance in Administration of Justice in connection with the Lockheed Aircraft Corporation Matter, signed at Washington September 13, 1976, 27 U.S.T. 3424, T.I.A.S. 8372.

[30] See, e.g., U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 14, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 24, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 24, art. 18.

Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 20—ENTRY INTO FORCE AND TERMINATION

Paragraph 1 contains the procedure for the entry into force of the Treaty. Since Australia approval process for treaties of this kind is different from that in the United States, and the approval of Parliament is not necessary, there will not be instruments of ratification. Instead, the Treaty will enter into force when the Contracting Parties exchange written notification that they have complied with their respective requirements for entry into force.

Paragraph 2 provides that the Treaty shall apply to any request presented pursuant to it, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 3 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and Barbados on Mutual Legal Assistance in Criminal Matters

On February 28, 1996, the United States signed a treaty with Barbados 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking in the eastern Caribbean, where Barbados is a regional leader.

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. Barbados has its own mutual legal assistance laws in place for implementing the Treaty, and does not anticipate enacting new legislation. [1]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

[1] "An Act to make provision with respect to the scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in Barbados, and to make provision concerning mutual assistance in criminal matters between Barbados and countries other than Commonwealth countries" (2nd April 1992), hereinafter "Barbados Mutual Assistance in Criminal Matters Act, 1992."

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Barbados, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[4] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article, however, makes it clear that there is no general requirement of dual criminality under this Treaty for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "[e]xcept as otherwise provided in this Treaty," a phrase which re-

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[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Barbados under the Treaty in connection with investigations prior to charges being filed in Barbados. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

fers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Barbados criminal law differ significantly, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances from the Barbados delegation that assistance would be available under the Treaty to the United States investigations of key crimes such as drug trafficking, fraud, money laundering, tax offenses, antitrust offenses, and environmental protection matters.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Barbados by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Barbados on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Barbadian Central Authority would make all requests emanating from officials in Barbados.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] Paragraph 2 also states that the Attorney Gen-

[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[6] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

[7] 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

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eral of Barbados or a person designated by the Attorney General will serve as the Central Authority for Barbados.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph 1(b) 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,

No. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

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 U.S. investigation or prosecution.[8]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. However, Barbados' delegation stressed that in exceptional circumstances the disclosure of business or banking secrets could be of such significant importance that it could prejudice that State's "essential public interests." For example, if the disclosure of particular business records in responding to a United States request for assistance could substantially prejudice an entire industry, such as the offshore banking or reinsurance industries, which is of special importance to the Barbadian economy, an "essential public interests" denial might be appropriate. It should be noted that this provision is bilateral, and in similar circumstances could be used by the United States to prevent a similar prejudice to its essential public interests. The Barbadian view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty.[9]

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense.[10]It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Finally, Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State. This provision was deemed necessary under Barbadian law,[11] and is similar to clauses in other United States mutual legal assistance treaties.[12]

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[13] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu

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[8] This is consistent with the Senate resolution of advice and consent to ratification, *e.g.,* of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). See also Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[9] Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

[10] *See* Section 18(2)(a) and 18(2)(b), Barbados Mutual Assistance Act, 1992.

[11] Section 18(2)(d), Barbados Mutual Assistance Act, 1992.

[12] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).

[13] 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.

of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Barbados. Rather, it is anticipated that when a request from Barbados requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[14]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Barbados, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[15], and provides, that "[r]equests shall be executed in accordance with the internal laws and procedures of the Requested State, except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the

[14] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[15] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 12.

extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Barbados authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[16] Barbados law currently contains no similar provision. Thus, documents assembled in Barbados in strict conformity with Barbadian procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Barbados.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts. Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter

[16] Title 18, United States Code, Section 3505.

and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 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 might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[18] Article 6 does, however, oblige the Requesting State to pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

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[17] This provision is similar to language in other United States mutual legal assistance treaties. See e.g., U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 5(5).

[18] *See, e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

The Barbados delegation expressed particular concern that information supplied by Barbados in response to United States requests must receive real and effective confidentiality, and not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. Brady v. Maryland, 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Barbados authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Barbados is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[19] A witness testifying in Barbados may raise any of the similar privileges available under Barbadian law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[20]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially simi-

[19] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[20] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 17, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 8(4).

lar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance, and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to pro-

vide tax return information to Barbados under this article in appropriate cases.[21]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph l provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while he is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the Treaty with Barbados, the Central Authority merely reports whether safe conduct has been extended. This is because in Barbados only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Barbados under Article 3 of the Treaty) cannot do so. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Request-

[21] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Parties to provide tax return information in appropriate circumstances.

ing State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so. For the United States, the "competent authorities" for these purposes would be the Central Authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[22]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[23] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[24]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[25]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

Once the receiving State has agreed to assist the sending State's investigation or proceeding pursuant to this article, it would be in-

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[22] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[23] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 13, art. 26.

[24] It is also consistent with Sections 10 and 23, Barbados Mutual Assistance Act, 1992, and with Title 18, United States Code, Section 3508.

[25] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

appropriate 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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State.[26] The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. This is consistent with Barbados law,[27] and identical provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Re-

[26] This is consistent with Barbados law. See Section 20, Barbados Mutual Assistance Act, 1992.

[27] Section 24, Barbados Mutual Assistance Act, 1992.

quested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782,[28] and Barbados' courts have the power to execute such requests, under Section 21 of the Barbados Mutual Assistance Act 1992.[29] This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Barbados will have to be supported by a showing of probable cause for the search. A United States request to Barbados would have to satisfy the corresponding evidentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[30]

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[28] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

[29] *See,* In the Matter of the Issuance and Execution of A Search Warrant at Premises in Barbados and the Removal of Certain Articles Documents and Property Belonging to Applicants; TC Interglobe Services, BAJ Marketing, Triple Eight Int'l Services, BLC Services, Facton Services vs. Attorney General, No. 1177 of 1996 in the High Court of Justice, Civil Division, Barbados (search warrant issued July 12, 1996).

[30] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 20; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991;

The Barbados delegation explained that it is the long-standing policy of its Government to permit only Barbadian law enforcement officials to be present and participate at the execution of the search of a private home, and hence it would not be able to extend permission for United States officials to be present and participate in the execution of a request to Barbados for a such a search and seizure under Article 14 of the Treaty.

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Barbados in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Barbados, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[31] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[32] Thus, it is a violation of United States criminal law to launder the pro-

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U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

[31] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[32] Title 18, United States Code, Section 1956(c)(7)(B).

ceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[33] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[34]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[35] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the

[33] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[34] In Barbados, unlike the U.S., the law does not currently allow for civil forfeiture. However, Barbados law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Barbados to confiscate the defendant's property.

[35] *See* Title 18, United States Code, Section 981 (i)(1).

proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Barbados law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[36]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[37] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

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[36] *E.g.*, the U.S.-Barbados Agreement for the Exchange of Information With Respect to Taxes, Nov. 3, 1984, T.I.A.S. 11203.

[37] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 30, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

Technical Analysis of the Treaty Between the United States of America and Brazil on Mutual Legal Assistance in Criminal Matters

On October 14, 1997, the United States signed a treaty with Brazil on Mutual Legal Assistance in Criminal Matters ("the Treaty").[1] 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 officials in need of foreign evidence for use in criminal cases.

The Treaty is expected to be a valuable weapon for the United States in its efforts to combat organized crime, international drug and firearms trafficking, money laundering, large-scale international fraud, and other serious offenses.

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. Brazil has its own mutual legal assistance legislation,[2] but it anticipates the enactment of new or additional legislation for implementing the Treaty.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 provides for assistance in all matters involving the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators agreed that the term "investigations" includes grand jury proceedings in the United States, similar proceedings in Brazil, and all other legal measures taken prior to the filing of formal charges in either State.[3] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including

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[1] In English, the title of the convention reads "Treaty," but the Brazilian delegation insisted, for reasons of Brazilian practice in the terminology used to classify different types of international agreements, that the Portuguese language text of the document use the term "Acordo," or "Agreement," rather than "Tratado," or Treaty. Both delegations agreed that the document is subject to advice and consent by each nation's legislature before ratification and entry into force. *See* Article 20.

[2] Decree of Law No. 3689 of 3 Oct. 1941, and Government Decree No. 20, 14 August 1990.

[3] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Brazil under the Treaty in connection with investigations prior to charges being filed in Brazil. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Unified Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law Rev. 772 (1991). The better view seems to be that Section 1782 does not contemplate such restrictions. The 1996 amendment to Section 1782 effectively overruled these decisions, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, or are "imminent," or "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

such matters as bail and sentencing hearings.[4] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[5] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this Article makes it clear that there is no requirement of dual criminality under this Treaty for cooperation, except with respect to assistance or cooperation in connection with searches, seizures and forfeitures. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State. However, if the request relates to a search, seizure, or forfeiture, the Central Authority of the Requested State must first determine whether the act to which the request relates is punishable as an offense under the laws of the Requested State. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[6] During the negotiations, the United States delegation received assurances from the Brazil delegation that assistance would be available under the Treaty to the United States in investigations of all major criminal matters, including: narcotics trafficking, terrorism, organized crime and racketeering, money laundering (notwithstanding the fact that money laundering is not a crime in Brazil yet), fraud, Export Control Act violations, child exploitation or obscenity, tax offenses, antitrust offenses, and crimes against the environment or endangered species.

Paragraph 4 contains a unique provision that reads:

"The Parties recognize the particular importance of combating serious criminal activities, including money laundering and the illicit trafficking in firearms, ammunition and explosives. Without limitation to the scope of assistance established in this Article, the Par-

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[4] One United States court has interpreted Title 28, United States Code, Section 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This interpretation poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting Party. Since this paragraph of the treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[5] Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

[6] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

ties shall provide each other with assistance in such matters in accordance with this Treaty."

This paragraph was included to underscore the Treaty's applicability to two major law enforcement problems (without prejudice, of course, to its applicability to other offenses). The large scale fraud and money laundering, particularly in public corruption matters, was highlighted recently in the case of Jorgina Maria de Freitas Fernandes, a Brazilian citizen who stole $34 million from Brazil's social security system and moved to Florida with the money.[7] The disturbing extent to which drug traffickers and other criminals in Brazil have obtained access to high-powered firearms manufactured in the U.S. is also a major problem. Brazilian authorities are moving to establish liaison with FinCEN on money laundering and have already begun working closely with the Bureau of Alcohol, Tobacco, and Firearms, via the U.S. Embassy, on arms trafficking cases, and the mutual legal assistance treaty could be used to authenticate evidence obtained through these channels.

Paragraph 5 is a standard provision in United States mutual legal assistance treaties[8] which states that the Treaty is intended solely for government to government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend to civil matters. Private litigants in the United States may continue to obtain evidence from Brazil by letters rogatory, an avenue of international assistance which this treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence thereunder.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each party establish a "Central Authority" for transmission and reception of treaty requests. The Central Authority of the United States would make all requests to Brazil on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States.[9] The Brazilian Central Authority would make all requests emanating from officials in Brazil.

The Central Authority for the Requesting Party will exercise discretion as to the form and content of requests, and also to the number and priority of requests. The Central Authority of the Requested Party is responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and insuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the author-

[7] In the case, the Government of Brazil hired a private law firm, which located the missing money and won a judgment against Fernandes in Dade County, Florida, Circuit Court for $123 million (including treble damages).

[8] *United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), *cert. denied.,* 469 U.S. 1075 (1984).

[9] The title of the Treaty in English refers to "Mutual Legal Assistance," but the Brazilian delegation insisted, for stylistic reasons, that the title in Portuguese read "Assistencia Judiciaria." The U.S. delegation was concerned that the Portuguese might falsely suggest that the Treaty is limited to assistance to judicial authorities, but the Brazilian delegation assured the U.S. delegation that Article 2 makes it clear that assistance is available under the Treaty to prosecutors, investigators, and other members of the criminal law enforcement community.

ity to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[10] Article 2(2) of the Treaty also states that the Brazilian Ministry of Justice will serve as the Central Authority for Brazil.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty.[11] It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty.

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[10] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

[11] Brazilian law currently requires that foreign requests for assistance be transmitted through diplomatic channels to the Justice Ministry. Article 783-784, Codigo de Processo Penal. The Brazilian delegation assured the U.S. delegation that new legislation would be enacted in Brazil to authorize direct communication of requests between the Central Authorities.

For example, 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. Therefore, the United States Central Authority may invoke paragraph 1(b) 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 U.S. investigation or prosecution. [12]

It was also agreed that "essential interests" permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty, [13] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

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[12] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884 (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[13] U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 26, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within thirty days unless the Central Authority of the Requested State agrees otherwise. Requests must be in the language of the Requested State unless otherwise agreed.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Brazil. Rather, it is anticipated that when a request from Brazil requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty. The third sentence in Article 5(1) reads "[t]he courts of the Requested State shall issue subpoenas, search warrants, or other orders necessary to execute the request."[14] This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests.

[14] This paragraph of the Treaty, thus, specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Brazil's Ministry of Justice, which will be its Central Authority under the Treaty, currently lacks the power to represent the U.S. before Brazilian courts in mutual legal assistance treaty matters. Therefore, the Brazilian delegation assured the U.S. delegation that until such time as appropriate legislation is in place enabling such representation, the Brazilian Government's Central Authority will hire private attorneys to represent the U.S. when our mutual legal assistance requests are presented to Brazilian courts. This will require the appropriation of funds, though, and cannot begin before fiscal year 1998.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty [15], and provides, that "[r]equests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Brazilian authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity. [16] Brazilian law currently contains no similar provision. Thus, documents assembled in Brazil in strict conformity with Brazilian procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Brazil.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations

[15] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989.
[16] Title 18, United States Code, Section 3505.

could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "a description of the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 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 might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

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[17] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.- Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistace Treaty, *supra* note 6, art. 5(5).

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[18] Article 6 does, however, oblige the Requesting State to pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept confidential or be used only subject to terms and conditions it may specify. 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. 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.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. Brady v. Maryland, 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in§§rticle 7 shall preclude the use or disclosure of information to

[18] *See, e.g.*, U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6, art. 6.

the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once information or evidence obtained under the Treaty has been revealed to the public in a manner consistent with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(5), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Brazilian authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article. Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Brazil is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[19] A witness testifying in Brazil may raise any of the similar privileges available under Brazilian law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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

[19] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[20]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication by means of the form appended to the Treaty.[21] Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance, and materiality) would still have to be satisfied in each case.

ARTICLE 9—OFFICIAL RECORDS

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision is necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in fu-

[20] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), TIAS No. 10734, 1359 UNTS 209; U.S.- Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, Supra note 17, art. 7(2); U.S.-Philippines Mutual egal Assistance Treaty, *supra* note 6, art. 8(4).

[21] Brazilian authorities told the U.S. delegation that a person in Brazil who made a false statement in connection with these authentication certificates would be subject to prosecution under Art. 342 of Brazil's penal code.

ture investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Brazil under this article in appropriate cases.[22]

Paragraph 3 states that documents provided under this article may be authenticated by the officials in charge of maintaining them through the use of a form appended to the Treaty. No further authentication is required. If authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—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. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 of the Treaty, and Article 10(1) provides that the witness shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, room, and board. When the witness is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State may, in its discretion, determine that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction

[22] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

of personal liberty while he is in the Requesting State. The 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 any other crime committed while in the Requesting State. Since the decision to offer such safe conduct may have to be made by the prosecutor or the judge responsible for the potential criminal charges, not by the Central Authority alone, the Central Authority may need to consult with other officials regarding any proposal to offer safe conduct under this paragraph. With this fact in mind, the paragraph requires that the Central Authority of the Requesting State promptly inform the Central Authority of the Requested State "whether such safe conduct shall be extended."

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or when he leaves the territory of the Requesting Party and thereafter returns to it. However, the Central Authority of the Requesting State may, in its discretion, extend the safe conduct up to fifteen days.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[23]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[24] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[25]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another

[23] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[24] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 13, art. 26.

[25] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other Sates whose testimony is needed at a federal criminal trial.

country to be present at a deposition being taken there in connection with the case.[26]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

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[26] *See also* United States v. King, 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. Identical provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782,[27] and Brazil's courts have the power to execute such requests. This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Brazil will have to be supported by a showing of probable cause for the search. A United States request to Brazil would have to satisfy the corresponding evidentiary standard there, which is roughly the same.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the description of the item, and the integrity of its condition.

This paragraph also provides that the certificates describing continuity of custody (such as that set forth in Form C appended to the Treaty) will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the

[27] *See e.g.*, United States ex Rel. Public Prosecutor of Rotterdam, Netherlands v. Van Aalst, Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[28]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents, records, or items furnished under the Treaty must be returned to the Requested State as soon as possible. This would normally be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Brazil in combating narcotics trafficking. One significant strategy in this effort is action by authorities in both States to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Brazil, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[29] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are

[28] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 6; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 20; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17; U.S.- U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994

[29] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

predicate offenses under U.S. money laundering laws.[30] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act, Title 21, United States Code, Section 853) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[31] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[32]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the

[30] Title 18, United States Code, Section 1956(c)(7)(B).

[31] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[32] In Brazil, unlike the U.S., the law does not currently allow for civil forfeiture. However, Brazilian law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Brazil to confiscate the defendant's property.

United States and the foreign country, and be approved by the Secretary of State.[33]

Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER TREATIES

This article states that assistance and procedures provided by this treaty shall not prevent either Party from granting assistance to the other under other applicable international agreements. Article 17 also provides that the Treaty shall not prevent recourse to any assistance available under the internal laws of either country, or pursuant to any applicable bilateral agreement or practice. Thus, the Treaty would leave the provisions of United States and Brazilian law on letters rogatory completely undisturbed, and would not alter any pre-existing executive agreements concerning investigative assistance.[34]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[35] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this paragraph.

ARTICLE 19—APPLICATION

Article 19 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements, and similar provisions are found in most of the United States' extradition treaties.

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[33] *See* Title 18, United States Code, Section 981 (i)(1).

[34] *See E.g.,* U.S.-Brazil Agreement on Cooperation in the Field of Control of Illicit Traffic of Drugs, with Annex, July 19, 1983, TIAS 10756; U.S.-Brazil Mutual Cooperation Agreement for Reducing Demand, Preventing Illicit Use and Combating Illicit Production and Traffic of Drugs, September 3, 1986, TIAS 11382.

[35] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 28, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 6, art. 18.

ARTICLE 20—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification.

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

Paragraph 3 states that the Parties may amend this Treaty by mutual agreement, and any such amendment shall enter into force upon a written exchange of notifications between the Parties, through the diplomatic channel, that all domestic requirements for its entry into force have been completed.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and the Czech Republic on Mutual Legal Assistance in Criminal Matters Signed February 4, 1998

On February 4, 1998, the Attorney General of the United States and the Ambassador of the Czech Republic signed a Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with other 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 with the Czech Republic is a major advance in the formal law enforcement relationship between the two countries, and is expected to be a valuable weapon for the United States in its efforts to combat transnational terrorism, international drug trafficking, and Russian organized crime.

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 Czech delegation advised that under Czech jurisprudence, the terms of the Treaty would take precedence over silence in Czech domestic law, and, in case of a conflict between the Treaty and future Czech domestic law, the Treaty would control.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 provides for assistance "for criminal proceedings, including investigations to verify the commission of offenses, to gather evidence of offenses, and to prosecute offenses, the punishment of which, at the time of the request for assistance, would fall within the jurisdiction of the judicial authorities of the Requesting State."

By this phrase the negotiators specifically agreed to provide treaty assistance at any stage of a criminal matter.[1] The Czech negotiators explained that under the Czech law, there exists an investigative stage both before and after indictment. This phrase will allow the Czech authorities to secure assistance at both of these investigative stages, as well as later during the prosecution stage. For the United States, this includes not only police-to-police cooperation before a crime is committed, a grand jury investigation, a criminal trial, or 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.[2]

Paragraph 2 lists the types of assistance specifically considered by the negotiators. Most of the items are described in greater detail in subsequent articles. The list is not exhaustive, as indicated by the phrase "assistance shall include" in the paragraph's chapeau and reinforced by the phrase in item (i), which states that assistance shall include "providing any other assistance consistent with the laws of the Requested State." Paragraph 3 specifies that the principle of dual criminality is generally inapplicable. Dual criminality obligates the Requested State to provide assistance only when the criminal conduct committed in the Requesting State would also constitute a crime if committed in the Requested State. In other words, the obligation to provide assistance upon request arises irrespective of whether the offense for which assistance is requested is a crime in the Requested State. However, the paragraph lists an exception to the rule: where execution of the request would require a court order, the Requested State may, in fact, decline to provide assistance in the absence of dual criminality. Even so, the paragraph obligates the Requested State to "make every effort to approve a request for assistance requiring such a court order" and to grant such a request if, using the standard of "reasonable suspicion," the conduct described would also constitute a crime under the laws of the Requested State. The delegations anticipate that

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[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist the Czech Republic under the Treaty in connection with investigations prior to charges being filed in Czech Republic. Prior to the 1996 amendments of Title 28, United States Code, Section 1782, some U.S. courts interpreted that section to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment to the statute eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

only on extremely rare occasions will the dual criminality requirement prevent the granting of requested assistance.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[3] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from the Czech Republic by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

Paragraph 1 requires that each Contracting State shall "seek and obtain assistance" under the Treaty through their respective Central Authorities.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[4] The Central Authority for the Czech Republic will be the Office of the Prosecutor General and the Ministry of Justice.[5] This dual Central Authority arrangement reflects the importance and independence of the Office of the Prosecutor General in the Czech Republic criminal justice system. Both the Czech Constitution and the Czech Criminal Code designate distinct and separate responsibilities and duties to the Office of the Prosecutor General and the Ministry of Justice. The Prosecutor's Office is responsible for handling requests to and from foreign authorities for assistance in criminal matters at the investigation stage, while the Ministry of Justice is responsible for handling requests to and from foreign authorities for assistance in criminal matters at the prosecution stage. The Czech delegation informed the United States delegation that, in practice, the U.S. Central Authority could send all requests to the Office of the Prosecutor General since most foreign requests fall within the investigative stage. If the request falls under the jurisdiction of the Czech Ministry of Justice, however, the Office of

[3] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

[4] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

[5] Similarly, Article 2(2) of the U.S.-Hungary Mutual Legal Assistance Treaty, signed Dec. 1, 1994, entered into force March 18, 1997 (——— UST ———), provides that the Hungarian Minister of Justice and Office of the Chief Public Prosecutor will serve as a dual Central Authority.

the Prosecutor General will promptly forward the request to the Ministry of Justice for execution.

Paragraph 2 provides that the U.S. Central Authority will "make" requests on behalf of federal, state, and local "prosecutors, investigators with criminal law enforcement jurisdiction, and agencies and entities with specific statutory or regulatory authority to refer matters for criminal prosecution" in the United States. The Czech Central Authority will make requests on behalf of Czech prosecutors and courts.

Paragraph 3 specifies that the Central Authority for the Requesting State shall use its "best efforts" not to make a request if, in its view: (a) the request is based on offenses that do not have serious consequences; or (b) the extent of the assistance to be requested is unreasonable in view of the sentence expected upon conviction. This provision is intended to give the Central Authorities a firm basis on which to refuse to submit a request on behalf of a competent authority because of the insignificance or inappropriateness of the request.

Paragraph 4 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or Interpol channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—DENIAL OF ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law applicable generally. Similar provisions appear in many other U.S. mutual legal assistance treaties.

During negotiations, the Czech delegation informed that they do not have a separate military code; rather, military law is covered in a section of the single Czech criminal code dealing with "ordinary criminal law." The delegations understand this provision to provide that a Requested State will have discretion to deny a request under this provision only when there exists a certain criminal conduct that would be an offense under military law, but would not be an offense under ordinary law. For example, showing disrespect to a senior military officer would be a purely military offense and, thus, a basis on which the Requested State would have discretion to deny assistance. On the other hand, if a military officer murders another military officer, this would be a military offense as well as an offense under ordinary law and, thus, the Requested State would not have discretion to deny assistance under this provision. As a practical matter, the negotiating delegations noted that they anticipate that this provision will rarely, if ever, be used as a basis for denial of a request.

Paragraph (1)(b) permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph 1(c) permits the Central Authority of the Requested State to deny a request if execution would prejudice the sovereignty, security, order public, or similar essential interests of that State. The negotiators anticipate that this provision will be invoked in the rarest and most extreme circumstances. The Czech delegation could not think of a request within recent memory denied on the basis of sovereignty or security. The term "order public" appears in other mutual legal assistance treaties but is not commonly used by the United States; however, the Czech delegation was more comfortable with the term, commonly used in European conventions, and intended that it cover matters that affect the social fabric of the nation, such as, for example, requiring (or denying a request to require) a witness of a certain religion to take an oath that is contrary to the practice of that religion. The phrase "similar essential interests" is intended to convey a concept of substantial national importance. In the United States, because the decision to deny assistance lies with the Central Authority, the Attorney General will work closely with the Department of State and other relevant agencies in determining whether to execute a request that involves "sovereignty, security, order public, or similar essential interests."

Paragraph (1)(d) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[6] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM, CONTENT, AND LANGUAGE OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in

[6] U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 26, 27 UST 2019, TIAS No. 8302, 1052 UNTS 61.

another form in "urgent situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. Paragraph 1 also requires that the Treaty request, including any attachments, be in the language of the Requested State, unless otherwise agreed. The last sentence of Paragraph 1 states that the Requested States has no obligation to translate a response to a request, including any attachments.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. If the Central Authority is not competent to execute the request, it must promptly transmit the request to a competent authority for execution.

For the Czech Republic, the Central Authority will determine whether (1) the request complies with the terms of the Treaty, and (2) its execution would prejudice the sovereignty, security, or other essential interests of the Czech Republic. If the request merits execution, the Central Authority will transmit the request to an appropriate department within the Office of the Prosecutor General or the Ministry of Justice for that purpose. The procedure is similar for the United States, except the United States Central Authority normally will transmit the request to federal investigators, prosecutors, or agencies for execution. The United States Central Authority also may transmit a request to state authorities in circumstances it deems appropriate.

Paragraph 1 further requires the competent authorities of the Requested State, including courts, shall do "everything in their power" to execute the requests. This sentence also specifically authorizes and requires a Court of the Requested State to take such action as is necessary and within its power to execute the request. In the Czech Republic, courts, as well as public prosecutors, are empowered under Czech law to issue orders, including subpoenas and search warrants, that are necessary to execute the request. In the Czech Republic, execution of requests will be almost exclusively within the province of the Office of the Prosecutor General, Ministry of Justice, and the courts, whereas in the United States, execution can be entrusted to any competent authority in any branch of government, federal or state. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from the Czech Republic. Rather, it is anticipated that when a request from the Czech Republic requires compulsory process for execution, the United States Department of Justice would ask a federal court to

issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[7]

Paragraph 2 reconfirms that, when necessary, the Central Authority of the Requested State shall arrange for requests from the Requesting State to be presented to the appropriate authority in the Requested State for execution. In practice, the Central Authority for the United States will transmit the request with instructions for 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 will select an appropriate representative, generally a federal prosecutor, to present the matter to a court. Thereafter, the prosecutor will represent the United States, acting to fulfill its obligations to the Czech Republic under the Treaty by executing the request. Upon receiving the court's appointment as a commissioner, the prosecutor/commissioner will act as the court's agent in fulfilling the court's responsibility to do "everything in [its] power" to execute the request. In short, the prosecutor may only seek permission from a court to exercise the court's authority in using compulsory measures if he receives permission from the court to do so.

The situation with respect to the Czech Republic is different. The U.S. Central Authority will transmit all requests to either the Czech Republic Office of the Prosecutor General or the Ministry of Justice. If the case is in the investigative stage, the Office of the Prosecutor General will assign the request to an appropriate department within that office. Public prosecutors in the Czech Republic have authority to order compulsory process, including, but not limited to, requiring a witness to appear to provide testimony, issuing subpoenas to compel the production of documents or other evidence, and ordering a search and seizure. The exercise of this authority by Czech prosecutors does not require the consent of a court. In other words, unlike in the United States, a Czech prosecutor may execute a foreign request seeking compulsory process without the assistance of the Czech courts.

If the request to the Czech Republic relates to an indicted case, the Office of the Prosecutor General of the Czech Republic will transmit the request to the Ministry of Justice for forwarding to an appropriate court with general advice regarding the Czech Republic's treaty obligation and the general evidentiary and procedural requirements of the United States.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[8], and provides, that "[a] request shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States,

[7] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[8] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989.

the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Czech Republic authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[9] The law of the Czech Republic currenontains no similar provision. Thus, documents assembled in the Czech Republic in strict conformity with Czech procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in the Czech Republic.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the nature and stage of the proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[10] If the Requested State canxecute the request without dis-

[9] Title 18, United States Code, Section 3505.

[10] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance

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closing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

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) the fees of experts; (2) the costs of interpretation, translation, and transcription; and (3) the allowances and expenses related to travel of persons traveling outside the local judicial district in the Requested State for the convenience of the Requesting State or pursuant to Articles 11, 12, and 13.

Costs "relating to" execution means the costs normally incurred in transmitting a request to the executing authority, notifying witnesses and arranging for their appearances, producing copies of the evidence, conducting a proceeding to compel execution of the request, etc. The negotiators agreed that costs "relating to" execution to be borne by the Requested State do not include expenses associated with the travel of investigators, prosecutors, counsel for the defense, or judicial authorities to, for example, question a witness or take a deposition in the Requested State pursuant to Article 9(3), or travel in connection with Articles 11, 12, and 13.

Paragraph 2 of this article provides that if it becomes apparent during the execution of a request that complete execution of a request would require extraordinary expenses, then the Central Authorities shall consult to determine the terms and conditions under which execution may continue.

ARTICLE 7—LIMITATIONS ON USE

Article 7 states that the Central Authority of the Requested State may require that the Requesting State not use any information or evidence obtained under this Treaty other than in the pro-

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Treaty, Nov. 9, 1982, art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, art. 5(5).

ceeding described in the request without the prior consent of the Central Authority of the Requested State.

Article 7 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under this article. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

ARTICLE 8—ALTERATION OF CONDITIONS

Paragraph 1 states that nothing in Article 8 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance. If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. [11]

Paragraph 1 further requires that the Requested State use its "best efforts" to permit modification of a request for the purpose of disclosure. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it. In fact, where the condition is imposed pursuant to Article 8, the disclosure shall be allowed unless prohibited by the law of the Requested State.

Paragraph 2 states that once information or evidence obtained under the Treaty has been revealed to the public in accordance with Paragraph 1, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

The negotiators expect the good faith protection of confidentiality up to the point that the evidence is used in the prosecution of the offense for which it was provided; as a result, some previously confidential evidence may become public when introduced as evidence at trial or otherwise disclosed as part of related judicial proceed-

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

ings (e.g., for the United States, as part of the plea or sentencing process).

ARTICLE 9—EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom evidence is sought shall be compelled, if necessary, to appear and either testify or provide a statement, or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

In the United States, a prosecutor asks a U.S. court to appoint him as a commissioner empowering him to execute subpoenas on behalf of the foreign authority. The procedure in the United States as described is used regardless of whether the request concerns a matter at the investigative stage or a case that has been indicted. In the Czech Republic, the authority of the public prosecutor to issue subpoenas and to use other compulsory measures exists independently of the courts. Therefore, in the Czech Republic, where the request concerns a matter at the investigative stage and is handled by the Office of the Prosecutor General, the public prosecutor may use his power to issue subpoenas to compel the production of documents or other evidence on behalf of the foreign authority. Where the request concerns an indicted case and is handled by a court, the court uses its power to issue subpoenas to compel the production of documents or other evidence on behalf of the foreign authority.

The criminal laws in both States contain provisions that sanction the production of false evidence. The second sentence of Article 9(1) explicitly states that the criminal laws in the Requested State shall apply in situations where a person, other than an accused, in that State provides false evidence in execution of a request. The negotiators expect that were any falsehood made in execution of a request, the Requesting State could ask the Requested State to prosecute for perjury and provide the Requested State with the information or evidence needed to prove the falsehood. The Czech delegation advised that Section 175 of the Czech Penal Code provides that a person who provides false statements to a court, prosecutor, police, or investigating commission of the Czech Parliament may be subject to criminal punishment.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article. The Czech negotiators assured the U.S. delegation that a stenographer could be present at depositions in the Czech Republic. The presence of a stenographer is generally critical to preserve testimony of witnesses inasmuch as the 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. The United States practice is intended, among other things, to allow the trier of fact to receive testimony,

to the extent possible, as if the witnesses were present at the United States court proceeding.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[12]

Article 9(5) is primarily for the benefit of the United States. The United States evidentiary system requires that evidence that is to be used as proof in a legal proceeding be authenticated as a precondition to admissibility. This paragraph provides that evidence produced in the Requested State pursuant to Article 9 may be authenticated by an "attestation." Although the provision is sufficiently broad to include the authentication of "[e]vidence produced . . . pursuant to this Article," the negotiators focused on and were primarily concerned with business records. In order to ensure the United States that business records provided by the Czech Republic pursuant to the Treaty could be authenticated in a manner consistent with existing U.S. law, the negotiators crafted Form A to track the language of Title 18, United States Code, Section 3505, the foreign business records authentication statute. If the Czech authorities properly complete, sign, and attach Form A to executed documents, or submit Form B certifying the absence or non-existence of business records, a U.S. judge may admit the records into evidence without the appearance at trial of a witness. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence; whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 10—OFFICIAL RECORDS

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country. For the Czech Republic, this includes the executive, legislative, and judicial authorities at the central and regional government levels.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion to

[12] *See e.g.*, U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), TIAS No. 10734, 1359 UNTS 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 10, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 10, art. 8(4).

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 intended that the Central Authority of the Requested State will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters, and such assistance could include tax return information when appropriate. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to the Czech Republic under this article in appropriate cases.[13]

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[13] Under 26 U.S.C. § 103(i) information in the files of the Internal Revenue Service (generally protected from disclosure under 26 U.S.C. § 103) may be disclosed to federal law enforcement personnel in the United States for use in a non-tax criminal investigations or proceedings, under certain conditions and pursuant to certain procedures. The negotiators agreed that this Treaty (which provides assistance both for tax offenses and in the form of information in the custody of tax authorities of the Requested State) is a "convention ... relating to the exchange of tax information" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to the Czech Republic through this Treaty when, in a criminal investigation or prosecution, the authority of the Czech Republic on whose behalf the request is made can meet the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103(h) and (i). As an illustration, a request from the Czech Republic for tax returns to be used in a non-tax criminal investigation, in accordance with 26 U.S.C. 6103(i)(1)(A), would have to specify that the law of the Czech Republic enforcement authority is:

Personally and directly engaged in—

(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated criminal statute of the Czech Republic (not involving tax administration) to which the Czech Republic is or may be a party. (ii) any investigation which may result in such a proceeding, or (iii) any proceeding in the Czech Republic pertaining to enforcement of such a criminal statute to which the Czech Republic is or may be a party. (See 26 U.S.C. 6103(i)(1)(A).)

The request would have to be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns as specified at 26 U.S.C. 6103(i)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with 26 U.S.C. 6103(i)(1)(B), that:

(i) there is reasonable cause to believe, based upon information believed to be reliable, 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 criminal investigation in the Czech Republic or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

In other words, the law enforcement authorities of the Czech Republic seeking tax returns would be treated as if they were United States law enforcement authorities—undergo the same access procedure where they would be held to the same standards.

Paragraph 3 provides for the authentication of records produced pursuant to this Article by a government department or agency responsible for their maintenance. Such authentication is to be effected through the use of Form C appended to the Treaty. If the Czech authorities properly complete, sign, and attach Form C to executed documents, or submit Form D certifying the absence or nonexistence of such records, a U.S. judge may admit the records into evidence as self-authenticating under Rule 902(3) of the Federal Rules of Evidence. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence. Whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 11—APPEARANCE OUTSIDE THE REQUESTED STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State or a third State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State or a third State under this article is not mandatory, and the invitation may be refused by the prospective witness.

When the United States seeks to have the Czech Republic invite a person to appear in the United States or a third State, the United States Central Authority will send a letter of invitation through the Czech Republic Central Authority. The person invited is free to decline and shall not be subject to any penalty for doing so or for failing to appear after agreeing to do so. This does not preclude the United States from seeking under Article 14 service of a document such as a subpoena issued under Title 28, United States Code, Sections 1783-1784 and directed to a United States citizen or resident located in the Czech Republic, which subpoena may entail sanctions for failure to appear in the United States as directed by the subpoena.

Paragraph 2 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided. Paragraph 2 also provides that the person who agrees to travel to the Requesting State may request and receive an advance for expenses. The advance may be provided through the embassy or a consulate of the Requesting State.

Paragraph 3 provides assurances that an invited person who appears in the Requesting State pursuant to a request for assistance shall not be "prosecuted, detained, or subjected to any restriction of personal liberty" for acts committed prior to the invitee's leaving the Requested State. This provision does not protect against civil suits, prosecution, punishment, or restriction of personal liberty with respect to acts committed after departure from the Requested State. Any person appearing in the United States pursuant to a request under Article 11 or Article 12 will have such assurances un-

less the United States Central Authority specifies otherwise in the request inviting the person to appear.

Paragraph 4 terminates the safe conduct provided in paragraph 1 if, after the person with safe conduct is notified that his or her presence is no longer required, that person, although free to leave, remains in the Requesting State for seven days, or, having left, voluntarily returns.

ARTICLE 12—TEMPORARY TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[14]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[15] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[16]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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

[14] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye,* Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[15] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 6, art. 26.

[16] *See* Title 18, United States Code, Section 3508. *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

to the sending State as agreed. Therefore, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters. Paragraph 3(e) provides that, where the receiving State is a third state, the Requesting State shall make all arrangements necessary to meet the requirements of this paragraph.

Paragraph 4 states that safe conduct for the transferred person may be provided for by the Central Authority of the receiving State under the same terms set forth in Article 11, subject to the conditions set forth in paragraph 3 of this article.

ARTICLE 13—TRANSIT OF PERSONS IN CUSTODY

Most modern extradition treaties provide for cooperation in the transit of persons being extradited,[17] although the extradition treaty currently in force between the United States and the Czech Republic is silent on this topic. Article 13 is not focused on the transit of extradited persons. Rather, this article provides a basis for mutual cooperation with respect to prisoners who are involved in a criminal investigation or prosecution other than as extradited fugitives (e.g., as witnesses appearing to testify or as defendants appearing to be present at a proceeding).

Paragraph 1 gives each Party the power to authorize transit through its territory of a person being transferred to the other Contracting State by a third state. Paragraph 2 obligates each Party to keep in custody a person in transit during the transit period. Requests for transit are to contain a description of the person being transported and a brief statement of the facts of the case for which the person is sought. Paragraph 3 allows each Party to refuse transit of its nationals.

Under this article, no advance authorization is needed if the person in custody is in transit to one of the Contracting States and is traveling by aircraft and no landing is scheduled in the territory of the other. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request if, in its discretion, it is deemed appropriate to do so. Where transit is granted, the person in transit shall be kept in custody until such time as the person may continue in transit out of the Requested State.

ARTICLE 14—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items

[17] *See, e.g.,* U.S.-Hungary Extradition Treaty, signed Dec. 1, 1994, entered into force March 18, 1997, art. 19; U.S.-Japan Extradition Treaty, signed March 3, 1978, entered into force March 26, 1980, art. 15 (31 UST 892, TIAS 9625); U.S.-Mexico Extradition Treaty, signed May 4, 1978, entered into force Jan. 25, 1980, art. 20 (31 UST 5059, TIAS 9656).

sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items in third countries. In all instances, the Requesting State is expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 15—SERVICE OF DOCUMENTS

Paragraph 1 creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. Identical provisions appear in several U.S. mutual legal assistance treaties.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by the Czech Republic to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested. Service in the Czech Republic typically will be made by mail, unless the United States specifies that some other form is necessary; Czech authorities typically will be able to accommodate such requests.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 16—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[18] This article creates a formal framework for handling such requests.

The negotiators agreed that requests for the production of physical evidence usually will be executed pursuant to Article 9. In situations in which a subpoena duces tecum or demand for production is inadequate, however, this article permits a search and seizure.

Article 16 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from the Czech Republic will have to be supported by a showing of probable cause for the search. A United States request to the Czech Republic would have to satisfy the corresponding evidentiary standard applicable there at the time of the request.

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[18] *See e.g.*, United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

When the Central Authority of the United States submits a request for search and seizure to one of the Central Authorities of the Czech Republic, the United States Central Authority may specify whether it wishes a Czech court or public prosecutor to issue the search and seizure order. Czech authorities can accommodate this request. If the United States request does not specify which Czech authority should execute the request, however, typically a Czech public prosecutor will issue the order and then engage the Czech police to conduct the search and seizure. Under Czech law, there is no need for Czech 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 proving that chain by certificates admissible in a judicial proceeding in the Requesting State. The Requested State is required to maintain a reliable record, from the time of a seizure, of the "identity of the item, the integrity of its condition, and the continuity 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 tracing the route of the item seized (and any change in 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 reason 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 not in serious question. For the Czech Republic, the chain of custody is not a significant factor in the admissibility of evidence.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[19]

ARTICLE 17—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 item, including a document, record, or article of evidence, provided by the Requested State pur-

[19] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990, art. 15(3); U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 12, art. 15(3); U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 10, art. 15(4); U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986, art. 15(3); U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994, *supra* note 5, art. 15(3); U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993, art. 15(3); U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991, art. 15(3); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 10, art. 15(3); U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990, art. 15(3); U.S.-U.K. Mutual Legal Assistance Treaty, Jul. 3, 1986, art. 15(4).

suant to the Treaty. The second sentence of this article provides that when a request for the return of an item is not made until after the transfer has already occurred, the Requesting State shall comply with the request to the extent feasible.

ARTICLE 18—FORFEITURE

A major goal of the Treaty is to enhance the efforts of both the United States and the Czech Republic in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

Paragraph 1 provides that, upon request, the Requested State shall use its best efforts to determine whether proceeds or instrumentalities of a crime, which might be forfeitable or seized, are located in the Requested State. The second sentence requires that the request state the grounds for believing that such proceeds or instrumentalities, in fact, are located in the Requested State. Finally, the last sentence of this paragraph requires that the Requested State inform the Requesting State of the results of its inquiry. Upon notification, the Central Authority of the Contracting Party in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. If the Contracting Party in which the proceeds or instrumentalities are located takes any action with regard to forfeiture and/or immobilization of the property, its Central Authority shall report to the other Central Authority on the action taken. The phrase "proceeds 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.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[20]

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 en-

[20] In the Czech Republic, unlike the U.S., the law does not currently allow for civil forfeiture. However, Czech law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for the Czech Republic to confiscate the defendant's property.

force 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.

Paragraph 3 gives discretion to the Requested State, to the extent permitted by its laws, to give effect to any final legal determination given in the Requesting State for the forfeiture of such proceeds or instrumentalities, or to initiate its own legal action for the forfeiture of such assets.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[21] Paragraph 4 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

The Czech Republic does not prohibit sharing and, thus, the Czech delegation stated that it thought that Czech authorities could share a percentage of forfeited proceeds with the United States on a case-by-case basis.

ARTICLE 19—RESTITUTION

This provision obligates the Contracting States to assist each other to the extent permitted by their laws to facilitate restitution. One type of assistance envisioned includes the transfer of items obtained through criminal activity.

ARTICLE 20—CRIMINAL FINES

This Article obligates the Contracting States to assist, to the extent permitted by their laws, in proceedings regarding criminal fines. The second sentence of this provision specifically states that such assistance is not intended to include the collection of criminal fines.

ARTICLE 21—COMPATIBILITY WITH OTHER TREATIES

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 also provides that the Treaty shall not be deemed to prevent recourse to any assistance available

[21] *See* Title 18, United States Code, Section 981 (i)(1).

under the internal laws of either country. Thus, the Treaty would leave the provisions of United States and Czech Republic law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 22—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[22] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 23—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

Paragraph 2 provides that the Treaty shall enter into force two months after the exchange of instruments of ratification.

Paragraph 3 provides that the Treaty shall apply to any request presented after its entry into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and Dominica on Mutual Legal Assistance in Criminal Matters

On October 10, 1996, the United States signed a treaty with Dominica 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational ter-

[22] *See, e.g.*, U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 10, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 10, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 19, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 19, art. 18.

rorism, and international drug trafficking in the eastern Caribbean, where Dominica is a regional leader.

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. Dominica has its own mutual legal assistance laws in place for implementing the Treaty, and does not anticipate enacting new legislation.[1]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre- charge proceedings in Dominica, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation,

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[1] "An Act to make provision with respect to the scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in Dominica, and to make provision concerning mutual assistance in criminal matters between Dominica and countries other than Commonwealth countries" (15 May 1990), hereinafter "Dominica Mutual Assistance Act, 1990." Since there are some differences between the Treaty and Dominican law, it is anticipated that Dominica will issue regulations under Section 29, which will "direct that [the] Act shall apply in relation to [the United States] as if it were a Commonwealth country, subject to such limitations, conditions, exceptions or qualifications (if any) as may be prescribed..." in order for the terms of the Treaty to be applied.

[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Dominica under the Treaty in connection with investigations prior to charges being filed in Dominica. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting Party. Since this paragraph of the treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[4] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact which is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this Article 1, however, makes it clear that there is no general requirement of dual criminality under this Treaty for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "[e]xcept as otherwise provided by this Treaty," a phrase which refers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Dominica criminal law differ somewhat, and a general dual criminality rule would make assistance unavailable in significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848), offenses under the racketeering statutes (Title 18, United States Code, Sections 1961-1968), money laundering, tax crimes, including tax evasion and tax fraud, crimes against environmental protection laws, and antitrust violations.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] that states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Dominica by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence pro-

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[4] *See* 21 U.S.C. 881; 18 U.S.C. 1964.

[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[6] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

vided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Dominica on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Dominican Central Authority would make all requests emanating from officials in Dominica.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] Paragraph 2 also states that the Attorney General of Dominica or a person designated by the Attorney General will serve as the Central Authority for Dominica.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Au-

[7] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

thority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke Paragraph (1)(b) 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 U.S. investigation or prosecution.[8]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. In the course of the negotiations, the Dominica delegation expressed its view that in very exceptional and narrow circumstances the disclosure of business or banking secrets could be of such significant importance to its Government (e.g., if disclosure would effectively destroy an entire domestic industry rather than just a specific business entity) that it could prejudice that State's "essential public interests" and entitle it to deny assistance.[9] The U.S. delegation did not disagree that there might be such extraordinary circumstances, but empha-

[8] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, October 24, 1989. *See* also Mutual Legal Assistance Treaty Concerning the Cayman Islands: Report by the Committee on Foreign Relations, 100th Cong., 2nd Sess. 67 (1988) (Testimony of Deputy Assistant Attorney General Mark M. Richard).

[9] The Dominica view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty. *See* Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

sized its view that denials of assistance on this basis by either party should be extremely rare.

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense.[10] It is anated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State. This provision was deemed necessary under Dominican law,[11] and is similar to clauses in other United States mutual legal assistance treaties.[12]

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[13] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form

[10] *See* Section 19(2)(a) and 19(2)(b), Dominica Mutual Assistance Act 1990.

[11] Section 19(2)(e), St. Dominica Mutual Assistance Act 1990.

[12] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).

[13] 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.

must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Dominica. Rather, it is anticipated that when a request from Dominica requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[14]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Dominica, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

[14] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty [15], and provides, "[r]equests shall be executed according to the internal laws and procedures of the Requested State, except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a Treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Dominica authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity. [16] Dominica law currently contains no similar provision. Thus, documents assembled in Dominica in strict conformity with Dominican procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Dominica.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures that must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded - - if the Requested State were to insist

[15] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 12.
[16] Title 18, United States Code, Section 3505.

unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting Party 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 might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Re-

[17] This provision is similar to language in other United States mutual legal assistance treaties. *See* e.g., U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 5(5).

questing State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[18] Article 6 states that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

[18] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

The Dominica delegation expressed concern that information it might supply in response to a request by the United States under the Treaty not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure and the provision of the Constitution under which such disclosure is required shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with Paragraph 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Dominica authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions

during the taking of testimony under this article. Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Dominica is guaranteed the right to invoke any of the testimonial privileges (i.e., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[19] A witness testifying in Dominica may raise any of the similar privileges available under Dominican law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[20]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance, and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article

[19] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[20] *See* e.g., U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 17, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 8(4).

states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Dominica under this article in appropriate cases.[21]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not man-

[21] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

datory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph 1 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while he is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the Treaty with Dominica, the Central Authority merely reports whether safe conduct has been extended. This is because in Dominica only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Dominica under Article 3 of the Treaty) cannot do so. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so. For the United States, the "competent authorities" for these purposes would be the Central Authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[22]

[22] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye,* Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[23] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[24]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[25]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual

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[23] U.S.-Switzerlanual Legal Assistance Treaty, *supra* note 13, art. 26.

[24] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial. It is also consistent with Sections 10 and 23, Dominica Mutual Assistance Act 1992.

[25] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State.[26] The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. This is consistent with Dominica law,[27] and identical provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782,[28] and the courts of Dominica have the power to execute such requests, under Section 21 of the Dominica Mutual Assistance Act 1992. This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Dominica will have to be supported by a showing of probable cause for the search. A United States request to Dominica would have to satisfy the corresponding evidentiary standard there, which

[26] This is consistent with Section 201, Dominica Mutual Assistance Act 1990.
[27] Section 25, Dominica Mutual Assistance Act 1990.
[28] *See e.g.*, United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[29]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Dominica in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the

[29] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 20; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.- Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Dominica, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[30] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[31] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[32] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the ar-

[30] This statute makes it annse to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[31] Title 18, United States Code, Section 1956(c)(7)(B).

[32] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

ticle is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[33]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[34] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Dominica law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[35]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[36] It is anticipated

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[33] In Dominica, unlike the U.S., the law does not currently allow for civil forfeiture. However, Dominica law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Dominica to confiscate the defendant's property.

[34] *See* Title 18, United States Code, Section 981 (i)(1).

[35] *See e.g.,* the U.S.-Dominica Agreement for the Exchange of Information With Respect to Taxes, signed at Washington October 1, 1987, entered into force May 9, 1988, T.I.A.S. 11543.

[36] *See e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 17, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 29, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and the Republic of Estonia on Mutual Legal Assistance in Criminal Matters

On April 2, 1998, the Attorney General of the United States and the Ambassador of the Republic of Estonia signed a Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). The Treaty with Estonia is the third mutual legal assistance treaty the United States has concluded with a republic of the former Soviet Union.

In recent years, the United States has signed treaties with a substantial 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 with Estonia is a major advance in the formal law enforcement relationship between the two countries and is expected to be a valuable weapon for the United States in its efforts to combat transnational terrorism, international drug trafficking, and Russian organized crime.

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 Estonian delegation advised that the Treaty would be self-executing in Estonia.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the state of that law at the time of the negotiations, to the best of the drafters* knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre- charge proceedings in Estonia, and other legal measures taken prior to the filing of formal charges in either State.[1] The negotiators also agreed that "investigations" includes administrative inquiries by agencies or entities with authority to investigate for the purpose of determining whether to refer matters to the Department of Justice for criminal prosecution.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[4] yet such proceedine covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Paragraph 3 specifies that the principle of double or dual criminality - - that the obligation of the Requested State to provide assistance only attaches where the criminal conduct committed in the

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[1] The requirement assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Estonia under the Treaty in connection with investigations prior to charges being filed in Estonia. Prior to the 1996 amendments to Section 1782, some U.S. courts had interpreted that Section to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] Although n critical as is assistance for grand jury investigations, the U.S. nonetheless relies on agencies and entities (e.g., the Internal Revenue Service, the Securities and Exchange Commission) to conduct administrative inquiries into potential criminal misconduct and, in appropriate instances, to refer the matters for criminal prosecution. The negotiators here, as did the negotiators for Latvia and for Lithuania, agreed that the U.S. could expect assistance in response to requests on behalf of such U.S. agencies and entities made for the purpose of determining whether to refer matters for criminal prosecution.

[3] United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters that are at the investigatory stage, or that are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

Requesting 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. During the negotiations, the Estonian delegation provided assurances that assistance would be available under the Treaty to the United States in criminal matters involving such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Sections 1961-1968); money laundering; terrorism; tax crimes, including tax evasion and tax fraud; crimes against environmental protection laws; antitrust violations; and alien smuggling.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties,[5] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Estonia by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

Article 2(1) requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Estonia on behalf of federal, state, and local prosecutors and other law enforcement authorities in the United States. The Estonian Central Authority would make all requests emanating from officials in Estonia.

Article 2(2) provides that the Attorney General or a person designated by the Attorney General shall be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[6] Article (2)(2) also provides that the Central Authority for the Republic of Estonia will be the Ministry of Justice or a person designated by the Minister of Justice.

Article 2(3) provides that the Central Authorities shall communicate directly with one another for purposes of making and executing requests. It is anticipated that such communication will be accomplished by telephone, telefax, or any other means, at the option of the Central Authorities.

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[5] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

[6] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph 1(b) permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases where assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other Government agencies to determine whether to execute a request that falls into this category.

The delegations agreed that the phrase "essential interests" is intended to limit narrowly the class of cases in which assistance may be denied. It is not enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example is a request involving prosecution by the Requesting State of conduct that occurred in the Requested State that is constitutionally protected in the Requested State.

The delegations further agreed that "essential interests" may include interests unrelated to national military or political security, and may be invoked if the execution of a request would violate essential interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose of the Treaty is to enhance law enforcement cooperation. The attainment of that goal would be hampered if sensitive law enforcement information available under the Treaty were to fall into the wrong hands. Accordingly, the United States Central Authority may invoke paragraph 1(c) to decline to provide sensitive or confidential drug-related information pursuant to a Treaty request whenever it determines, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who likely 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.[7]

[7] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and

Paragraph 1(d) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[8] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Requesting State might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph permits the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the grounds for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise, and the request shall be in the language or translated into the language of the Requested State unless otherwise agreed.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty that must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, first review it, then promptly notify the

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the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884 (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2d Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[8] 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.

Central Authority of the Requesting State if the request does not appear to comply with the Treaty's terms. Where the request satisfies the Treaty's requirements and the assistance sought can be provided by the Central Authority itself, the request will be fulfilled immediately. Where the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution. When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Estonia. Rather, it is anticipated that when a request from Estonia requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[9]

The third sentence in Article 5(1) authorizes the courts or competent authorities of the Requested State "to issue subpoenas, search warrants, or other orders necessary to execute the request." The term "competent authorities" refers to the fact that in Estonia, public prosecutors, as well as courts, are empowered under Estonian law to issue subpoenas, search warrants, or other orders necessary to execute requests. In Estonia public prosecutors almost exclusively will execute requests from the United States, whereas in the United States, execution can be entrusted to any appropriate competent authority in the executive or judiciary branch of government, federal or state. When a request from Estonia requires compulsory process for execution, it is anticipated that the competent executive authority in the United States will issue the necessary compulsory process itself,[10] or ask a court to do so.

Paragraph 2 reconfirms that the Central Authority of the Requested State shall arrange for requests from the Requesting State to be presented to the appropriate authority in the Requested State for execution. In practice, the Central Authority for the United States will transmit the request with instructions for 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 will select an appropriate representative, generally a federal prosecutor, to present the matter to a court. Thereafter, the prosecutor will represent the United States, acting to fulfill its obligations to Estonia under the Treaty by executing the request. Upon receiving the court's appointment as a commissioner, the prosecutor/commissioner will act as the

[9] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

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

court's agent in fulfilling the court's responsibility to do "everything in [its] power" to execute the request. In short, the prosecutor may only exercise the court's authority in using compulsory measures if he receives permission from the court to do so.

The situation with respect to Estonia is different. The U.S. Central Authority will transmit all requests to the Estonian Ministry of Justice, which will assign each request to an appropriate public prosecutor. Public prosecutors in Estonia have authority to order compulsory process, including, but not limited to, requiring a witness to appear to provide testimony, issuing subpoenas to compel the production of documents or other evidence, and ordering a search and seizure. The exercise of this authority by Estonian prosecutors does not require the consent of a court. In other words, unlike in the United States, a Estonian prosecutor may execute a foreign request seeking compulsory process without the assistance of the Estonian courts.

Paragraph 3 provides that requests shall be executed in accordance with the laws of the Requested State except to the extent that the Treaty provides otherwise. Thus, for example, the provision in Article 8(4) that claims of privilege under the law of the Requesting State are to be referred back to the courts of the Requesting State would take precedence over a contrary provision in domestic law. To illustrate, 28 U.S.C. 1782 permits, as a basis for not compelling testimony or production of evidence, deference to privileges legally applicable in a Requesting State. To the extent that this provision were considered to be in conflict with the Treaty, the Treaty provision would prevail.

The second sentence of Paragraph 3 makes clear that the Treaty does not authorize the use in the Requested State of procedures that would otherwise be unlawful in the Requested State.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing criminal investigation or proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceeding in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceeding or investigation.

It is anticipated that some United States requests for assistance may contain information that under United States law must be kept confidential. For example, it may be necessary to set out information that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of explaining "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). This paragraph enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[11] If the Requested State cannot execute

[11] This provision is similar to language in other United States mutual legal assistance treaties. See, e.g., U.S.- Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada

Continued

the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is delayed or postponed, the Central Authority of the Requested State must also explain the reasons to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

Article 6 obligates the Requested State to pay all costs relating to the execution of a request except for those costs enumerated in the article. The enumerated exceptions are: fees of experts; translation, interpretation and transcription costs; and allowances and expenses related to travel of persons traveling either in the Requested State for the convenience of the Requesting State or pursuant to Articles 10 and 11. This provision is consistent with similar provisions in other United States mutual legal assistance treaties. [12]

Costs "relating to" execution means the costs normally incurred in transmitting a request to the executing authority, notifying witnesses and arranging for their appearances, producing copies of the evidence, conducting a proceeding to compel execution of the request, etc. The negotiators agreed that costs "relating to" execution to be borne by the Requested State do not include expenses associated with the travel of investigators, prosecutors, counsel for the defense, or judicial authorities to, for example, question a witness or take a deposition in the Requested State pursuant to Article 8(3), or travel in connection with Articles 10 and 11.

Paragraph 2 of this article provides that if it becomes apparent during the execution of a request that complete execution of a request would require extraordinary expenses, then the Central Authorities shall consult to determine the terms and conditions under which execution may continue.

Mutual Legal Assistance Treaty, Mar. 18, 1985, art. 6(5); U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, art. 5(5).

[12] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, supra note 11, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, supra note 11, art. 6.

ARTICLE 7—LIMITATIONS ON USE

Under Article 4(2)(d), the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed. Under Article 7(1), the Central Authority of the Requested State may require that information provided under the Treaty be used only for the purpose stated in the request unless the Requested State provides its prior consent. If the Requested State limits the subsequent use of the information or evidence it provides, then the Requesting State must comply with the requirement.

Both delegations agreed that the Central Authority of the Requested State will not routinely require use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the use of the evidence.

Paragraph 2 authorizes the Requested State to request that the information or evidence it provides to the Requesting State be kept confidential. This paragraph operates in situations outside Article 3 where the Requested State has no basis to deny or limit assistance. For instance, the Requested State may wish to cooperate with the investigation in the Requesting State but to limit access to information that would unduly prejudice the interests of persons not connected with the matter being investigated. Paragraph 2 permits the request for confidentiality. If the Requesting State accepts the assistance with this condition, it is required to make "best efforts" to comply with it. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions that prevent the Requesting State from using it. If assistance is provided with a condition under this paragraph, the United States could deny public disclosure under the Freedom of Information Act.

Situations could arise in which the United States received information or evidence under the Treaty with respect to one case that was exculpatory of a defendant in another case and might be obliged to share the evidence or information with the defense. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 provides that nothing in Article 7 would preclude the use or disclosure of information or evidence to the extent that such information or evidence is exculpatory to a defendant in a criminal prosecution.

Paragraph 4 states that once information or evidence obtained under the Treaty has been revealed to the public "in the normal course of the proceeding for which it was provided," the Requesting State is free to use it for any purpose. Once so revealed to the public, it effectively becomes part of the public domain, a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting State to block the use of the information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Parties, and the invocation and enforcement of these provisions are left entirely to the

Parties. If a person alleges that a United States authority seeks to use information or evidence obtained from Estonia in a manner inconsistent with this Article, the person can so inform the Central Authority of Estonia for its consideration as a matter between the Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents and records. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

In Estonia, public prosecutors and courts each have the power to compel testimony or documents from individuals or entities in connection with both domestic and foreign proceedings. The authority of the public prosecutor to issue subpoenas and to use other compulsory measures exists independently of the courts. In the United States, a prosecutor asks that a federal district court appoint the prosecutor as a commissioner, thereby empowering the prosecutor to issue subpoenas on behalf of the foreign authority. Moreover, the prosecutor/commissioner must return to the court for enforcement in the event of noncompliance.

The second sentence of paragraph 1 provides that a person who gives false testimony, either orally or in writing, in execution of a request shall be subject to prosecution in the Requested State in accordance with the criminal laws of that State. The criminal laws of both the U.S. and Estonia contain provisions that sanction the production of false evidence. The negotiators expect that, with respect to a falsehood made in execution of a request, the Requesting State could ask the Requested State to prosecute and provide the Requested State with the information or evidence needed to prove the falsehood.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, which may include the defendant and defense counsel in criminal cases, shall be permitted by the Requested State to be present during the execution of a request and pose questions during the taking of testimony. Neither delegation foresaw a problem in accommodating the needs for confrontation under either system. Moreover, the Estonian negotiators also assured the U.S. delegation that a stenographer could be present at depositions in Estonia. The presence of a stenographer is generally critical to preserve testimony of witnesses inasmuch as the 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.

Paragraph 4 deals with claims of immunity, incapacity, and privilege based on the law of the Requesting State but raised in the Requested State. The immunities and privileges available to witnesses under the law of the Requested State are not affected by paragraph 4. No person will be compelled in the Requested State

to furnish information or evidence 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 request from Estonia, in addition to any applicable constitutional privilege (e.g., self-incrimination, to the extent applicable in the context of evidence being taken for foreign proceedings), may claim a testimonial privilege (e.g., attorney-client) legally recognized under United States law. Likewise, a witness testifying in Estonia may raise any of the similar privileges available under Estonian law. However, paragraph 4 does require that if a witness attempts to assert in the Requested State a privilege that is unique to the Requesting State, the Requested State will nonetheless take the requested 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 the privilege are best understood. A similar provision appears in many U.S. mutual legal assistance treaties.[13]

Paragraph 5 is primarily for the benefit of the United States. The United States evidentiary system requires that evidence that is to be used as proof 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 "[e]vidence produced . . . pursuant to this Article," the negotiators focused on and were primarily concerned with business records. In order to ensure the United States that business records provided by Estonia pursuant to the Treaty could be authenticated in a manner consistent with existing U.S. law, the negotiators crafted Form A to track the language of Title 18, United States Code, Section 3505, the foreign business records authentication statute. If the Estonian authorities properly complete, sign, and attach Form A to executed documents, or submit Form B certifying the absence or non-existence of business records, a U.S. judge may admit the records into evidence without the appearance at trial of a witness. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence. Whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 9—OFFICIAL RECORDS

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by an executive, legislative, or judicial authority in the Requested State.

Paragraph 2 provides that the Requested State may provide copies of any records, including documents or information in any form,

[13] *See, e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty; supra note 11, art. 7(2); U.S.- Philippines Mutual Legal Assistance Treaty, supra note 11, art. 8(4).

that are in the possession of an executive, legislative, or judicial authority in that State, but that are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities. The Requested State may in its discretion deny a request for records that are not publicly available entirely or in part.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters, and such assistance could include tax return information when appropriate. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Estonia under this article in appropriate cases.[14]

Paragraph 3 is primarily for the benefit of the United States. It provides for the authentication of records produced pursuant to this Article by an executive, legislative, or judicial authority responsible for their maintenance. Such authentication is to be effected through the use of Form C appended to the Treaty. If the Estonian authorities properly complete, sign, and attach Form C to executed documents, or submit Form D certifying the absence or non-existence of such records, a U.S. judge may admit the records into evidence as self-authenticating under Rule 902(3) of the Federal Rules of Evidence. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends

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[14] Under 26 U.S.C. 6103(i) information in the files of the Internal Revenue Service (generally protected from disclosure under 26 U.S.C. 6103) may be disclosed to federal law enforcement personnel in the United States for use in a non-tax criminal investigations or proceedings, under certain conditions and pursuant to certain procedures. The negotiators agreed that this Treaty (which provides assistance both for tax offenses and in the form of information in the custody of tax authorities of the Requested State) is a "convention . . . relating to the exchange of tax information" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Estonia through this Treaty when, in a criminal investigation or prosecution, the Estonian authority on whose behalf the request is made can meet the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103(h) and (i). As an illustration, an Estonian request for tax returns to be used in a non-tax criminal investigation, in accordance with 26 U.S.C. 6103(i)(1)(A), would have to specify that the Estonian 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 Estonian criminal statute (not involving tax administration) to which Estonia is or may be a party.

(ii) any investigation which may result in such a proceeding, or

(iii) any Estonian proceeding pertaining to enforcement of such a criminal statute to which Estonia is or may be a party. (*See* 26 U.S.C. 6103(i)(1)(A).)

The request would have to be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns as specified at 26 U.S.C. 6103(i)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with 26 U.S.C. 6103(i)(1)(B), that:

(i) there is reasonable cause to believe, based upon information believed to be reliable, 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 an Estonian criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

In other words, the Estonian law enforcement authorities seeking tax returns would be treated as if they were United States law enforcement authorities—undergo the same access procedure where they would be held to the same standards.

only to authenticity and not to relevance, materiality, etc., of the evidence. Whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 10—APPEARANCE OUTSIDE THE REQUESTED STATE

Paragraph 1 provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. The Central Authority of the Requested State shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the prospective witness may refuse the invitation.

Paragraph 2 concerns travel expenses, previously covered under Article 6. Normally such expenses include the costs of transportation, room, and board. Paragraph 2 also provides that the person who agrees to travel to the Requesting State may request and receive an advance for expenses. The advance may be provided through the embassy or a consulate of the Requesting State.

Paragraph 3 provides that the Central Authority of the Requesting State may, in its discretion, determine that a person appearing in the Requesting State pursuant to this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any acts or convictions that preceded the person's departure from the Requested State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 4 provides for expiration of the "safe conduct" seven days after notification between Central Authorities that the person's presence is no longer required. Paragraph 4 is intended to further provide that the Central Authority of the Requesting State may, in its discretion, extend this period ("for up to fifteen days if it determines that there is good cause to do so"). (The Treaty erroneously and inadvertently states that the Requested State may extend the "safe conduct," when what was intended was that the Requesting State may do so. This error is being corrected by means of an exchange of notes between the United States and Estonia.)

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

The need sometimes arises for a person in custody in one country to assist in a criminal matter—generally to give testimony—in another country. The country maintaining custody may be willing and able to "lend" the person provided the person is guarded while absent from the lending country and returned to that country when no longer needed in the other country. On occasion, the United States Justice Department has arranged for consenting federal in-

mates in the United States to be transported to foreign countries to assist in criminal proceedings.[15]

Paragraph 1 provides an express legal basis for cooperation by means of temporary transfers. Although the provision is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[16] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters,[17] paragraph 1 expands the geographic scope and the purpose for the transfer to authorize a transfer "outside the Requested State," which could also be to a third State.

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[18]

Paragraph 3(a) 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, unless otherwise authorized by the sending State.

Paragraph 3(b) provides that the receiving State must return the transferred person to the custody of the sending State as soon as circumstances permit or as otherwise agreed by the Central Authorities. The transferred person need not consent to the return to the sending State, only to the original transfer.

Paragraph 3(c) 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 Estonia to the United States and files a habeas corpus in an attempt to prevent a return to Estonia in the absence of an extradition request.

Paragraph 3(d) states that the person transferred will receive credit in the sending State for the time in custody in the receiving State.

Paragraph 3(e) provides that, where the receiving State is a third state, the Requesting State shall make all arrangements necessary to meet the requirements of this paragraph.

Paragraph 4 states that safe conduct for the transferred person may be provided for by the Central Authority of the receiving State under the same terms set forth in Article 10, except that the per-

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[15] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye,* Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[16] U.S.-Switzerlanual Legal Assistance Treaty, supra note 8, art. 26.

[17] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

[18] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

son shall be kept in custody for the offense for which the person is incarcerated in the sending State.

ARTICLE 12—TRANSIT OF PERSONS IN CUSTODY

Most modern extradition treaties provide for cooperation in the transit of persons being extradited,[19] although the extradition treaty currently in force between the United States and Estonia[20] is silent on this topic. Article 12 is not focused on the transit of extradited persons. Rather, this article provides a basis for mutual cooperation with respect to prisoners who are involved in a criminal investigation or prosecution other than as extradited fugitives (e.g., as witnesses appearing to testify or as defendants appearing to be present at a proceeding).

Paragraph 1 gives each Party the power to authorize transit through its territory of a person being transferred to or from the other State from or to a third State. Paragraph 2 obligates each Party to keep in custody a person in transit during the transit period. Requests for transit are to contain a description of the person being transported and a brief statement of the facts of the matter for which the person is traveling.

Under this article, no advance authorization is needed if the person in custody is in transit to one of the Parties and is traveling by aircraft and no landing is scheduled in the territory of the other. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request if, in its discretion, it is deemed appropriate to do so. Where transit is granted, the person in transit shall be kept in custody until such time as the person may continue in transit out of the Requested State.

ARTICLE 13—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article requires each 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, regarding the location of the person or item. 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.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items in third countries. In all instances, the Requesting State is expected to supply all available information about the last known location of the persons or items sought.

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[19] *See, e.g.,* U.S.-Hungary Extradition Treaty, Dec. 1, 1994, art. 19; U.S.-Japan Extradition Treaty, Mar. 3, 1978, art. 15, 31 U.S.T. 892, T.I.A.S. 9625.

[20] *See* U.S.-Estonia Extradition Treaty, Nov. 8, 1923, 43 Stat. 1849, TS 703, and the Supplementary Treaty of October 10, 1934, 49 Stat. 3190, TS 888.

ARTICLE 14—SERVICE OF DOCUMENTS

Paragraph 1 requires the Requested State to use its "best efforts" to effect service of any document related to any request for assistance made under the Treaty. "Best efforts" varies depending on the information provided in the request, in accordance with Article 4. It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Estonia to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 15—SEARCH AND SEIZURE

Where appropriate, the Requested State may search for, secure, and deliver items needed as evidence, or for other purposes, for the Requesting State. Article 5(1) authorizes United States courts to issue search warrants to obtain evidence requested by Estonia.

Article 15 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Estonia will have to be supported by a showing of probable cause for the search. A United States request to Estonia would have to satisfy the corresponding evidentiary standard in Estonia.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form E appended to this Treaty, the identity of the item, the continuity of custody, and any changes in its condition.

The article also provides that the certificates describing continuity of custody will be admissible in evidence in the Requesting State as proof of the truth of the matters set forth therein.

Paragraph 3 permits the Requested State, as a matter of discretion, to protect the rights of third parties in the item seized. The negotiators intended that the Requested State, in using its discretion to impose conditions, would do so only to the extent "deemed to be necessary." This paragraph is not intended to serve as an impediment to the transfer of items seized. This article is similar to provisions in many other United States mutual legal assistance treaties.[21]

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[21] *See, e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990, art. 15(3); U.S.-Bahamas Mutual Legal Assistance Treaty, supra note 13, art. 15(3); U.S.-Canada Mutual Legal Assistance Treaty, supra note 12, art. 15(4); U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986, art. 15(3); U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994, art. 15(3); U.S.- Korea Mutual Legal Assistance Treaty, Nov. 23, 1993, art. 15(3); U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991, art. 15(3); U.S.-Philippines Mutual Legal Assistance Treaty, supra note 11, art. 15(3); U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990, art. 15(3); U.S.-U.K. Mutual Legal Assistance Treaty, Jan. 6, 1994, art. 15(4).

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 item, including a document or record, provided by the Requested State pursuant to the Treaty. Both Parties anticipate that, unless original records or items of significant intrinsic value are involved, the Requested State will not usually request return of the item; however, both Parties recognize that this is a matter best left to development in practice.

ARTICLE 17—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Estonia in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Estonia, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[22] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the United States since these offenses are predicate offenses under U.S. money laundering laws.[23] Thus, it is a violation of U.S. criminal law to launder the proceeds of these foreign fraud or theft offenses when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for

[22] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[23] Title 18, United States Code, Section 1956(c)(7)(B).

a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States.

This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[24] The U.S. delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

Paragraph 3 will enable a Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Party, at the former's discretion and to the extent permitted by their respective laws.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[25]

Estonian law neither authorizes nor prohibits sharing and, thus, the Estonian delegation stated that Estonia could share a percentage of forfeited proceeds with the United States on a case-by-case basis.

ARTICLE 18—COMPATIBILITY WITH OTHER TREATIES

This article clarifies that assistance and procedures provided by this Treaty shall not prevent either Party from providing assistance under any other applicable international agreements. Article 18 also leaves intact the recourse to any assistance available under

[24] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances calls for the States that are parties to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[25] *See* Title 18, United States Code, Section 981 (i)(1).

the internal laws of either State. Thus, the provisions of United States and Estonia law on letters rogatory remain undisturbed, and the Treaty does not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 19—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[26] It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

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 provides that this Treaty shall enter into force upon the exchange of instruments of ratification.

Paragraph 3 provides that the Treaty will be terminated six months from the date that a Party receives written notification from the other. Similar termination provisions are contained in other United States mutual legal assistance treaties.

Technical Analysis of The Treaty Between The United States of America and Grenada on Mutual Legal Assistance in Criminal Matters

On May 30, 1996, the United States signed a treaty with Grenada 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking in the eastern Caribbean, where Grenada is a regional leader.

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

[26] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, supra note 11, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, supra note 12, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, supra note 21, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, supra note 21, art. 18.

Title 28, United States Code, Section 1782. Grenada plans to enact implementing legislation for the Treaty, as it currently has no specific mutual legal assistance law in force.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Grenada, and other legal measures taken prior to the filing of formal charges in either State.[1] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[2] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[3] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

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[1] The requirement assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Grenada under the Treaty in connection with investigations prior to charges being filed in Grenada. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, the Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[3] Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this Article 1, however, makes it clear that there is no general requirement of dual criminality under this Treaty. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "...except as otherwise provided by this Treaty," a phrase which refers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Grenada criminal law differ, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[4] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Section 1961-1968); money laundering; tax crimes, including tax evasion and tax fraud; crimes against environmental protection laws; and antitrust violations.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[5] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence-gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Grenada by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Grenada on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Grenadan Central Authority will make all requests emanating from officials in Grenada.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the

[4] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[5] *United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[6] Paragraph 2 also states that the Attorney General of Grenada or a person designated by the Attorney General will serve as the Central Authority for Grenada.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that "security" would include cases in which assistance might involve disclosure of information which is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute requests that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security,

[6] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph (1)(b) 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 U.S. investigation or prosecution. [7]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. In the course of the negotiations, the Grenada delegation expressed its view that in very exceptional and narrow circumstances the disclosure of business or banking secrets could be of such significant importance to its Government (e.g., if disclosure would effectively destroy an entire domestic industry rather than just a specific business entity) that it could prejudice that State's "essential public interests" and entitle it to deny assistance. [8] The U.S. delegation did not disagree that there might be such extraordinary circumstances, but emphasized its view that denials of assistance on this basis by either party should be extremely rare.

Paragraph (1)(c) permits the denial of a request if it was not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Finally, Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State.

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[7] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[8] Grenada's view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty. *See* Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

This provision is similar to clauses in other United States mutual legal assistance treaties.[9]

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty[10], and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to comply with the Treaty's terms. If the request does satisfy the Treaty's requirements and the assist-

[9] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).

[10] 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.

ance sought can be provided by the Central Authority itself, the request will be fulfilled immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

Where the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Grenada. Rather, it is anticipated that when a request from Grenada requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[11]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Grenada, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Article 5(2) is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[12], and provides, "[r]equests shall be executed according to the internal laws and procedures of the Requested State, except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under

[11] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[12] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 9.

the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a Treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Grenada authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[13] Grenada law currently contains no similar provision. Thus, documents assembled in Grenada in strict conformity with Grenadan procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Grenada.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Article 5(3) requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the

[13] Title 18, United States Code, Section 3505.

investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

It is anticipated that some United States requests for assistance may contain information that under our law must be kept confidential. For example, it may be necessary to set out information that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Article 5(5) enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[14] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other reason this confidentiality cannot be assured, the Treaty obliges the Requested Party to so indicate, thereby giving the Requesting Party an opportunity to withdraw the request rather than risk jeopardizing an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[15] Article 6, however, states that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

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[14] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 5(5).

[15] *See e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 6.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under Article 7(1). Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Article 7(2) requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

The Grenada delegation expressed concern that information it might supply in response to a request by the United States under the Treaty not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure and the provision of the Constitution under which such disclosure is required shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting State to block the use of that information by third parties.

It should be kept in mind that under Article 1(4) of the Treaty, the restrictions outlined in Article 7 are for the benefit of the parties (the United States and Grenada) and the invocation and enforcement of these provisions are left entirely to the parties. Where any individual alleges that an authority in Grenada is seeking to use information or evidence obtained from the United States in a manner inconsistent with this article, the recourse would be for the person to inform the Central Authority of the United States of the allegations, for consideration as a matter between the governments.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4, read together with Article 5(3), insures that no person will 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 request from Grenada is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal privilege) available in the United States, as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[16] A witness testifying in Grenada may raise any of the similar privileges available under Grenadan law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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

[16] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

and the legislative and policy reasons underlying the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[17]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of the article provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

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[17] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 14, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 8(4).

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Grenada under this article in appropriate cases.[18]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph 1 provides that the witness shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the witness is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while he is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the

[18] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

Treaty with Grenada, the Central Authority merely reports whether safe conduct has been extended. This is because in Grenada only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Grenada under Article 3 of the Treaty) cannot do so. The "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understand that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that the "safe conduct" extended pursuant to this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or when the person leaves the territory of the Requesting Party and thereafter returns to it voluntarily. However, the competent authorities of the Requested State may extend the safe conduct up to fifteen days if it determines that there is good cause to do so. For the United States, the "competent authority" for these purposes would be the Central Authority; for Grenada, the Director of Public Prosecutions would be the appropriate competent authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[19]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the U.S.-Switzerland Mutual Legal Assistance Treaty,[20] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[21]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to

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[19] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[20] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 10, art. 26.

[21] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

travel to another country to be present at a deposition being taken there in connection with the case.[22]

Paragraph 3 provides express authority for the receiving State to maintain the person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Article 11(3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph 3(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

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[22] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. Identical provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[23] This article creates a formal framework for handling such requests.

The article requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Grenada will have to be supported by a showing of probable cause for the search. A United States request to Grenada would have to satisfy the corresponding evidentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced pursuant to this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissi-

[23] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984). The courts of other states in the eastern Caribbean have the power to execute requests for such searches, too. *See, e.g.,* Section 21, Grenada Mutual Assistance Act 1992; Section 22, Dominica Mutual Assistance Act 1990.

ble without additional authentication at trial leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some other reason to do so aside from authenticity or chain of custody.

Paragraph 3 states that the Requested state may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be

transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[24]

ARTICLE 15—RETURN OF ITEMS

This procedural article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that the requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Grenada in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

Article 16 is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. The first paragraph authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Grenada, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[25] or be subject to a temporary restraining order in anticipation of a civil action for the return of

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[24] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 17; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.- Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.- Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.- Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.- Philippines Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

[25] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[26] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada, and there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[27] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization 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 permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Sec-

[26] Title 18, United States Code, Section 1956(c)(7)(B).

[27] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

retary of State.[28] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Grenada law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[29]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[30] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification.

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

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[28] *See* Title 18, United States Code, Section 981(i)(1).

[29] *E.g.,* the U.S.-Grenada Agreement for the Exchange of Information With Respect to Taxes, signed at Washington December 18, 1986, entered into force July 13, 1987 (TIAS 11410).

[30] *See e.g.*, U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 24, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4, art. 18. Article 19—Ratification, Entry Into Force, and Termination

Technical Analysis of The Agreement Between The Government of the United States of America and the Government of Hong Kong on Mutual Legal Assistance in Criminal Matters

On April 15, 1997, representatives of the Governments of the United States and Hong Kong signed the Agreement on Mutual Legal Assistance in Criminal Matters ("the Agreement").[1] In recent years, the United States has entered into similar treaties with many other 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.

Hong Kong reverted to the sovereignty of the People's Republic of China (PRC) on July 1, 1997, and is now known as the Hong Kong Special Administrative Region (HKSAR).[2] At the time this Mutual Legal Assistance Agreement was negotiated and signed, Hong Kong was a crown colony of the United Kingdom, which granted the Hong Kong Government an entrustment authorizing it to negotiate and enact this Agreement directly with the United States. In order to ensure that the Agreement would remain in force after 1997, a draft text of the Agreement was presented to the Joint Liaison Group (JLG), which is composed of representatives of both the British and Chinese Governments, and meets periodically to discuss issues related to the status of post-1997 Hong Kong. The JLG approved the commencement of negotiations, and the final text was approved by the JLG prior to signing. Thus, the PRC agreed, through the JLG, to permit Hong Kong to negotiate this Agreement, approved its final terms, and has indicated that it will continue beyond 1997. In addition, the Government of the PRC has provided the U.S. Government with a diplomatic note confirming that intention.

The Agreement was negotiated in three rounds, over the course of approximately one year. It is the fourth such agreement the United States has signed with a country or jurisdiction in Asia, and is a major advance for the United States in its efforts to combat transnational organized crime, terrorism, drug trafficking and other offenses.[3] The Agreement is also important for Hong Kong, as it reflects a formal commitment by the United States to assist in high priority investigations of financial crimes and other illicit activity.

It is anticipated that the Agreement will be implemented in the United States pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. No new implementing legislation will be needed. Hong Kong has enacted its own internal implementing legislation that will apply to requests under the Agreements.

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

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[1] Although styled an Agreement, for purposes of U.S. law the instrument will be considered a treaty and is therefore being submitted to the Senate for advice and consent to ratification.

[2] For convenience, the HKSAR will be referred to herein as Hong Kong.

[3] The U.S. also has Mutual Legal Assistance Treaties in force with Thailand, the Philippines and South Korea.

ARTICLE 1—SCOPE OF ASSISTANCE

This article provides for assistance "in connection with the investigation, prosecution, and prevention of criminal offences, and in proceedings related to criminal matters."

The negotiators specifically agreed that the term "investigation" includes grand jury proceedings in the United States and similar pre-charge proceedings in Hong Kong, as well as administrative criminal investigations and other legal measures taken prior to the filing of formal charges in either Party.[4] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[5] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Agreement need not be strictly criminal in nature. For instance, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[6] such proceedings are covered by the Agreement.

Paragraph 2 sets forth a list of the major types of assistance specifically considered by the negotiators. Most of the items listed in paragraph 2 are described in further detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signalled by the word "include" in the opening clause of the paragraph and is reinforced by the final subparagraph.

Paragraph 3 mandates that assistance shall not be refused with respect to "criminal offences related to taxation, customs duties, foreign exchange control, or other revenue matters," but assistance shall not be provided with respect to non-criminal proceedings related to such offenses.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[7] that states that the Agreement is intended solely for government-to-government mutual legal assistance. The Agreement is not intended to provide to private persons a means of evidence-gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Hong Kong by letters rogatory, an avenue of international assistance that the Agreement leaves undisturbed. Similarly, this paragraph provides that the Agreement is not intended to create any right in a private person to exclude or suppress evidence provided pursuant to the Agreement.

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[4] The requirement that assistance be provided under the Agreement at the pre-indictment stage is critical to the United States, as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether to file criminal charges. This obligation is a reciprocal one, and the United States must assist Hong Kong under the Agreement in connection with investigations prior to the filing of charges in Hong Kong.

[5] One United States court has interpreted Title 28, United States Code, Section 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. *See In re Letters Rogatory Issued by Director of Inspection of Gov't of India,* 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters at the investigatory stage and those matters customarily handled by administrative officials in the Requesting Party. Since this paragraph specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting Party, this paragraph accords courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[6] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

[7] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984).

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of requests made under the Agreement. The Central Authority for the United States makes all requests to Hong Kong on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Hong Kong Central Authority makes all requests initiated by officials in Hong Kong.

The Central Authority for the Requesting Party exercises discretion as to the form and content of requests, and the number and priority of requests. The Central Authority for the Requested Party is responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person authorized by the Attorney General acts as the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[8] Paragraph 2 also states that the Attorney General of Hong Kong or a person authorized by the Attorney General serves as the Central Authority for Hong Kong.

Paragraph 3 states that the Central Authorities shall communicate with one another directly. It is anticipated that such communication will be accomplished by telephone, telefax or by any other means acceptable to the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON PROVIDING ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Agreement.

Article 3 sets forth the circumstances under which the Requested Party may deny assistance under the Agreement. A request shall be denied if it impairs the sovereignty, security, or public order of the United States or the PRC; or if the Central Authority is of the opinion that granting the request would impair the Requested Party's essential interests,[9] or that the request for assistance relates to a political offense[10] or there are substantial grounds for believ-

[8] 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. 81, 44 Fed. Reg. 18,661 (1979), as amended at 45 Fed. Reg. 79,758 (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).

[9] The Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request which might fall in this category. A fundamental purpose of the Agreement is to enhance law enforcement cooperation, and that interest would be hampered if sensitive law enforcement information available under the Agreement were to fall into the wrong hands. Therefore, the United States Central Authority would decline to provide sensitive or confidential drug related information pursuant to a request under the Agreement 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. This is consistent with the sense of the Senate as expressed in its advice and consent to ratification of the other mutual legal assistance treaties. *See, e.g.,* Cong Rec 13884, October 24, 1989. *See also* Mutual Legal Assistance Treaty Concerning the Cayman Islands: Report by the Committee on Foreign Relations, 100th Cong., 2nd Sess. 67 (1988) (Testimony of Deputy Assistant Attorney General Mark M Richard).

[10] Similar restrictions are found in other mutual legal assistance treaties.

ing the request was made for the purpose of prosecuting, punishing, or otherwise proceeding against a person on account of the person's race, religion, nationality, or political opinions.

The Central Authority will also refuse assistance for certain crimes if it determines that dual criminality does not exist. Article 3(1)(d) provides that the Central Authority shall refuse assistance if it is of the opinion that the acts or omissions alleged would not have constituted a criminal offense if they had taken place within the jurisdiction of the Requested Party, or would not constitute in the Requesting Party any of the offenses described in the Annex to the Agreement. The Annex to the Agreement describes a number of major offenses for which assistance must be provided without regard to whether the offense would constitute an offense under the laws of the Requested Party.

Finally, the Central Authority is permitted to deny assistance if the request relates to an offense under military law that would not be an offense under ordinary criminal law; the request relates to the prosecution of a person for a criminal offense for which the person has been convicted or acquitted in the Requested Party; or the request is not made in conformity with the Agreement.

Before denying assistance under Article 3, the Central Authority of the Requested Party is required to consult with its counterpart in the Requesting Party to consider whether assistance can be given subject to such conditions as it deems necessary. If the Requesting Party accepts assistance subject to conditions, it shall comply with the conditions. If the Central Authority of the Requested Party denies assistance, it shall inform the Central Authority of the Requesting Party of the reasons for the denial.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested Party may accept an oral request in "urgent cases." A request in such a situation must be confirmed in writing promptly.

Paragraph 2 provides that the request and all supporting documents accompanying the request shall be submitted in an official language of the Requested Party.[11]

Paragraph 3 lists information deemed crucial to the efficient operation of the Agreement which must be included in each request. Paragraph 4 outlines the types of information that are important but not always crucial, and 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 Agreement that a request be legalized or certified in any particular manner.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires that the Central Authority of the Requested Party execute a request or arrange for its execution. The Agreement contemplates that upon receiving a request, the Central Authority will first review the request, then promptly notify the

[11] Hong Kong has two official languages, English and Chinese.

Central Authority of the Requesting Party if the request does not appear to comply with the Agreement's terms. If the request does satisfy the Agreement's requirements and the assistance sought can be provided by the Central Authority itself, the request will be fulfilled forthwith. If the request meets the Agreement's requirements but its execution requires action by some other entity in the Requested Party, the Central Authority will promptly transmit the request to the correct entity for execution. When the United States is the Requested Party, it is anticipated that the Central Authority will transmit most requests for execution to the federal investigators, prosecutors, or judicial officials it deems appropriate to fulfill the request.

Paragraph 2 requires the competent authorities responsible for executing the request to use their "best efforts." This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Hong Kong. Rather, it is anticipated that when a request from Hong Kong requires compulsory process for execution, the Department of Justice will ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Agreement. This paragraph specifically authorizes courts of the Requested Party to use their powers to issue subpoenas, search warrants, or other orders to satisfy requests under the Agreement.

Paragraph 3 provides that all requests shall be executed as empowered by the Agreement or by the laws of the Requested Party. Thus, the method of executing a request for assistance under the Agreement must be in accordance with the Requested Party's internal laws or specific procedures in the Agreement itself. For the United States, the Agreement is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

Paragraph 4 states that a request for assistance need not be executed immediately when execution will interfere with an ongoing criminal investigation, prosecution or proceeding in the Requested Party. Rather, the Central Authority of the Requested Party may postpone execution or make execution subject to certain conditions. The Requested Party must comply with the conditions if it accepts assistance subject to these conditions.

Paragraph 5 requires the Requested Party promptly to inform the Requesting Party of circumstances likely to result in a significant delay in responding to the request.

It is anticipated that some United States requests for assistance may contain information that under our law must be kept confidential, for example, information that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure. Therefore, paragraph 6 enables the Requesting Party to call upon the Requested Party to keep the information in the request confidential.[12] If the Requested Party cannot execute the request without disclosing the information in question (as may be the case if execution requires a

[12] This provision is similar to language in other United States mutual legal assistance treaties. *See, e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9. 1987, Art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, Art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, Art. 5(5).

public judicial proceeding in the Requested Party), or if for some other reason this confidentiality cannot be assured, the Agreement obliges the Requested Party to so indicate, thereby giving the Requesting Party an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by public disclosure of the information.

Paragraph 7 requires the Central Authority of the Requested Party to respond to reasonable inquiries by the Requesting Party concerning progress toward execution of its requests. This is intended to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 8 provides that the Central Authority of the Requested Party must promptly notify the Central Authority of the Requesting Party of the outcome of the execution of a request. If the request is denied in whole or in part, the Central Authority of the Requested Party must explain the reasons for the outcome to the Central Authority of the Requesting Party. For example, if the evidence sought cannot be located, or if a witness to be interviewed invokes a privilege under article 9(5), the Central Authority of the Requested Party must report this to the Central Authority of the Requesting Party.

ARTICLE 6—REPRESENTATION AND EXPENSES

This article reflects the increasingly accepted international rule that each Party shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This article is consistent with similar provisions in other United States mutual legal assistance treaties.[13]

In paragraph 1, it is understood that if execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested Party shall arrange for the presentation of the request to that court or agency at no cost to the Requesting Party. Since the cost of retaining counsel abroad to present and process letters rogatory is expensive at times, this provision for reciprocal legal representation is a significant improvement in international legal cooperation.

Paragraph 2 does oblige the Requesting Party to pay fees of retained counsel; expert witnesses; translation, interpretation, and transcription costs; and allowances and expenses related to travel of persons pursuant to Articles 11 and 12.

Paragraph 3 requires consultations between the Parties should it become evident during the course of executing the request that "expenses of an extraordinary nature" would be necessary to provide the assistance.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested Party may require that information or evidence provided under the Agreement not be used in any investigation, prosecution or proceeding other than that stated in the request without the prior consent of the Requested Party. In such cases, the Requesting Party

[13] *See, e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985, Art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, Art. 6.

must comply with the requirements. It will be recalled that Article 4(3)(d) states that the Requesting Party must specify the reason why information or evidence is sought.

It is not anticipated that the Central Authority of the Requested Party will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the use of the evidence. Indeed, it was agreed that neither Party would object to stating in the request that subsequent civil use is contemplated for information or evidence provided pursuant to the purposes stated in Article 1. In such a case, no prior consent of the Central Authority of the Requested Party would be required under Article 7 (1).

Paragraph 2 permits the Requested Party to request that information or evidence provided to the Requesting Party be kept confidential or be used only subject to terms and conditions it specifies. 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. For instance, the Requested Party may wish to cooperate with the investigation in the Requesting Party but choose to limit access to information that 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 Party. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting Party must comply with them.

Paragraph 3 provides that nothing in this article shall preclude the use or disclosure of information in a criminal prosecution to the extent that there is an obligation to do so under the U.S. Constitution or Hong Kong law. This provision was included because if the United States government receives evidence under the Agreement that appears to be exculpatory to a defendant in a criminal case, the government is obliged to share the evidence with the defendant.[14] Advance notice of any such proposed use or disclosure must be provided by the Requesting Party to the Requested Party. The Hong Kong delegation asked whether information it might supply in response to a request by the United States under the Agreement could be disclosed under the Freedom of Information Act. The delegations agreed that paragraph 3, as drafted, does not authorize disclosure under the Freedom of Information Act of information provided under the Agreement.

Paragraph 4 states that once evidence obtained under the Agreement is revealed to the public in accordance with paragraphs 1 or 2, the Requesting Party is authorized to use the evidence for any purpose. Once evidence obtained under the Agreement is 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 being cited or described in the press. Once that occurs, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Parties, and the invoca-

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

tion and enforcement of these provisions are left entirely to the Parties. If a private person believes that a Hong Kong authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Parties.

ARTICLE 8—STATEMENTS OF PERSONS

This article provides that, upon receipt of a request for a statement of a person for use in an investigation, prosecution or proceeding related to a criminal matter, the Requested Party must attempt to obtain the statement with the consent of the person.

This article further illustrates the Parties' intention to provide assistance to one another on a broad basis, as indicated in Article 1(2)(a).

ARTICLE 9—TAKING OF EVIDENCE OR TESTIMONY IN THE REQUESTED PARTY

Paragraph 1 provides that a person in the Requested Party from whom evidence is sought shall be compelled, if necessary, to appear and give evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested Party.

Paragraph 2 sets forth that the giving or taking of evidence includes testimony and the production of documents, records, or items. This paragraph illustrates one of the advantages of a mutual legal assistance agreement over letters rogatory. For the first time, there is clear legal authority for the Parties to assist each other in gathering physical evidence. In the past, Hong Kong law provided only for assistance in obtaining testimony or documentary evidence.

Paragraph 3 requires that, upon request, the Requested Party must furnish information in advance about the date and place of the taking of evidence.

Paragraph 4 provides that any persons specified in the request shall be permitted to be present during the execution of the request and, to the extent allowed by the Requested Party's laws, to pose questions to the person giving the testimony or evidence. These persons would include the defendant and defense counsel in a criminal case. The Hong Kong delegation indicated that the presence of these persons is provided for in Hong Kong law. It is understood that in the event that direct questioning of a witness is not possible, the defendant and defense counsel may submit questions for the judge to pose to the person whose testimony or evidence is being taken.

Paragraph 5, when read in conjunction with article 5(3), ensures that no person will be compelled to furnish information if the person has a right not to do so under the law of the Requested Party. Thus, a witness questioned in the United States pursuant to a request from Hong Kong is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney-client, interspousal) available in the United States, as well as the constitutional privilege against self-incrimination, to the extent that it applies in the context of evi-

dence being taken for foreign proceedings.[15] A witness testifying in Hong Kong may raise any of the similar privileges available under Hong Kong law.

If a witness attempts to assert a privilege that is unique to the Requesting Party, this paragraph does require that the Requested Party take the desired evidence and turn it over to the Requesting Party along with notice that it was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting Party, where the scope of the privilege and the legislative and policy reasons underlying the privilege are better understood. A similar provision appears in many of our recent mutual legal assistance treaties.[16]

Paragraph 6 states that documents, records, and any other items produced pursuant to this article or that are the subject of testimony taken under this article may be certified in accordance with procedures specified in the request. (*See* Form A attached to the exchange of letters dated April 15, 1997 and made part of this Agreement for use when the U.S. is the Requesting Party.) If certified in accordance with such procedures, they shall be admissible in courts of the Requested Party as proof of the truth of the matters set forth therein. However, it remains the responsibility of the judicial authority presiding at the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance or materiality) still must be satisfied in each case.

ARTICLE 10—PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records of government agencies. The term "government departments and agencies" includes all executive, judicial, and legislative units of the federal, state, and local levels in both Parties.

Paragraph 2 gives each Party the discretion to furnish to the other copies of materials in its possession, which 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 Party. This requirement is important because some United States statutes limit disclosure of government information to specific United States law enforcement authorities for specific purposes. The intent of the negotiators is to broaden statutorily limited access to include foreign authorities entitled to assistance under this Agreement. For example, the negotiators agreed that this Agreement is a "convention" under Title 26, United States Code, Section 6103 (k) (4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Hong Kong through this Agreement when, in a criminal investigation or prosecution, the Hong Kong authority on whose behalf the request is made can meet the same conditions

[15] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[16] *See, e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, Art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, Art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, Art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, Art. 8(4).

required of United States law enforcement authorities under Title 26, United States Code, Sections 6103 (h) and (i). Of course, if no law enforcement authorities are entitled under any condition to gain access to a particular non-public record, the treaty partner cannot expect to gain access to it under the Agreement.

The discretionary nature of this provision was deemed necessary because government files of a Party may contain information available to investigative authorities in that country that justifiably could be deemed inappropriate for release to a foreign government. For example, assistance might be deemed inappropriate if the information requested identifies or endangers an informant, prejudices sources of information needed in future investigations, or reveals information that was given to the Requested Party in return for a promise not to divulge it.

Paragraph 3 states that documents provided under this article may be certified in accordance with the procedures specified in the request, and if certified in this manner, the evidence shall be admissible in courts in the Requesting Party as proof of the truth of the matters set forth therein. (*See* Form B attached to the exchange of letters dated April 15, 1997 and made part of this Agreement for use when the U.S. is the Requesting Party.) Thus, the Agreement establishes a procedure for authenticating official foreign records that is consistent with Fed. R. Evid. 902(3) and Fed. R. Civ. P 44.

Paragraph 3, similar to Article 9(6), states that documents certified in accordance with this paragraph shall be "admissible," although the judicial authority presiding at the trial determines whether the evidence should in fact be admitted. Evidentiary tests other than authentication (such as relevance and materiality) must be established in each case.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, countries are willing and able to "lend" witnesses to the United States provided the witnesses will be carefully guarded while in the United States and will be returned to the country at the conclusion of their testimony. On occasion, the United States Justice Department also has arranged for consenting federal inmates in the United States to be transported to foreign countries for testifying in criminal proceedings.[17]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[18] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.

There also have been situations in which a person in custody in a United States criminal case has demanded permission to travel

[17] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[18] 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.

to another country to be present at a deposition being taken there in connection with the criminal case.[19] Paragraph 2 addresses this situation.

Paragraph 3 provides express authority for the receiving Party to maintain the person in custody throughout the person's stay there, unless the sending Party specifically authorizes release. This paragraph also requires the receiving Party to return the person in custody to the sending Party as soon as circumstances permit or as otherwise agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the prisoner consent to be returned to the sending Party.

Once the receiving Party agrees to assist the sending Party's investigation or proceeding pursuant to this article, it would be inappropriate for the receiving Party to hold the person transferred and require extradition proceedings before returning the person to the sending Party as agreed. Therefore, paragraph 3(c) specifies that extradition proceedings are not required before the status quo is restored by the return of the person transferred. Paragraph 3(d) states that the person is to receive credit for time served while in the custody of the receiving Party. This is consistent with United States practice in these matters.

ARTICLE 12—ATTENDANCE OF OTHER PERSONS

This article provides that upon request, the Requested Party shall invite witnesses who are located in its territory to travel to the Requesting Party to appear before an appropriate authority there. It shall notify the Requesting Party of the invitee's response. An appearance in the Requesting Party under this article is not mandatory; the invitation may be refused by the prospective witness. The Requesting Party is expected to pay the expenses of such an appearance pursuant to Article 6. Such expenses usually will include the costs of transportation and room and board.

ARTICLE 13—SAFE CONDUCT

This article, like Article 27 of the United States-Switzerland Treaty, provides that a person who is in the Requesting Party for testifying or for confrontation purposes pursuant to a request under Articles 11 or 12 shall be immune from criminal prosecution, punishment or any restriction on personal liberty, or service of process in a civil suit while present in the Requesting Party. This "safe conduct" is limited to events arising from acts or convictions that preceded the person's departure from the Requested Party. These assurances do not alter the Requesting Party's obligation, pursuant to Article 11 (3), to maintain a person in custody for those acts that resulted in the person's incarceration in the Requested Party.

Paragraph 2 requires that the person must be advised of any limitations placed upon safe conduct in this context.

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[19] *See, e.g., United States v. King,* 552 F.2d 833 (9th Cir. 1976) (defendants insisted on traveling to Japan with attorneys to be present at deposition of certain witnesses in prison).

Paragraph 3 states that for transferred persons not held in custody in the sending Party, any safe conduct provided under this article shall cease 15 days after the person has been notified that his presence is no longer required in the Requesting Party or whenever the person voluntarily reenters the Requesting Party after leaving it.

Paragraph 4 provides that a person who consents to provide evidence pursuant to Article 11 or 12 shall not be subject to prosecution based on the person's testimony, except for perjury.

Paragraph 5 states that the person cannot be required to provide assistance unrelated to the request.

Paragraph 6 protects the person who refuses to consent to provide assistance under Article 11 or 12 from any penalty or coercive measure by the courts of either Party.

ARTICLE 14—LOCATION OR IDENTITY OF PERSONS OR ITEMS

This article provides for determining the whereabouts in the Requested Party of persons (such as witnesses, potential defendants, or experts) or items at the request of the Requesting Party. This is a standard provision contained in all United States mutual legal assistance treaties. The Agreement requires only that the Requested Party "endeavor to ascertain" the location or identity of the persons or items sought by the Requesting Party. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting Party concerning the suspected location and last known location.

The Parties intended that the obligation to locate persons or items be limited to persons or items that are or may be in the territory of the Requested Party. Thus, the United States is not obligated to attempt to locate persons or items that may be in third countries. In all cases, the Requesting Party is expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 15—SERVICE OF DOCUMENTS

This article creates an obligation for the Requested Party to "use its best efforts" to effect the service of summonses, complaints, subpoenas, or other legal documents at the request of the Requesting Party.

Paragraph 2 provides that when the documents to be served call for the response or appearance of a person in the Requesting Party, the documents should be transmitted by the Requesting Party within a reasonable time before the response or appearance date. Thus, if the United States were to ask Hong Kong to serve a subpoena issued pursuant to Title 28, United States Code, Section 1783 on a United States citizen located in Hong Kong, the request would have to be submitted well in advance of the hearing or trial at which the citizen is expected to appear. This is to allow sufficient time for service to be effected and for the person to make arrangements for the appearance.

Paragraph 3 permits the Requested Party to effect service by mail or, upon request by the Requesting Party, by other methods not prohibited under the law of the Requested Party. It is expected

that when the United States is the Requested Party, service under the Agreement will be made by registered mail (in the absence of any request by Hong Kong to follow a specified procedure for service), or by the United States Marshals Service in instances when personal service is requested.

Paragraph 4 requires that proof of service be returned to the Requesting Party.

Paragraph 5 protects persons who fail to comply with process served under the Agreement from any penalty or coercive measure under the law of the Requesting Party. The Hong Kong delegation insisted on this rule, which does not appear in most United States mutual assistance agreements. The United States delegation was concerned that this provision might have an adverse impact on U.S. law enforcement, because under Title 28, United States Code, Section 1783, U.S. courts issue subpoenas for service abroad on U.S. nationals and permanent residents located in another country. If the United States asked Hong Kong to serve such a subpoena on a U.S. national in Hong Kong, the subpoena would be rendered valueless if the United States court could not punish the recipient if he or she ignored it. For this reason, the second sentence of Paragraph 5 states that it does not apply if the United States is the Requesting Party and the person served is a national or permanent resident of the United States.

ARTICLE 16—SEARCH AND SEIZURE

It is sometimes in the interests of justice for one country to ask another country to search for, secure, and deliver articles or objects needed as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[20] This article creates a formal framework for handling such requests.

Article 16 requires that a search and seizure request include "information justifying such action under the law of the Requested Party." This means that a request to the United States from Hong Kong must be supported by a showing of probable cause for the search. A United States request to Hong Kong has to satisfy the corresponding evidentiary standard there. It is contemplated that such requests are to be carried out in strict accordance with the laws of the Requested Party.

Paragraph 2 states that the Requested Party must provide information required by the Requesting Party concerning the circumstances of the search and seizure and the subsequent chain of custody of any item seized.

Paragraph 3 is designed to ensure that records are kept of articles seized and/or delivered under the Agreement. This provision effectively requires that the Requested Party record detailed and reliable information regarding the condition of an article at the time of seizure and the chain of custody between seizure and delivery to the Requesting Party.

This paragraph also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting Party, thus relieving the Requesting

[20] *See, e.g., Lancaster Factoring Company Limited v. Magnone,* 90 F.3d 38, 41 (2d Cir. 1996).

Party of the burden, expense, and inconvenience of having to transport the Requested Party's law enforcement officers to the Requesting Party to provide testimony regarding authentication and chain of custody each time the Requesting Party uses evidence produced pursuant to this article. (*See* Form C attached to the exchange of letters dated April 15, 1997 and made part of this Agreement for use when the U.S. is the Requesting Party.) As in Articles 9(6) and 10(3), the provision that the certificates are admissible without additional authentication at trial leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if some other reason exists to do so aside from authenticity or chain of custody.

Paragraph 4 requires the Requesting Party to observe any terms and conditions imposed by the Requested Party on the delivery of the seized property. Conditions may be imposed to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many United States extradition treaties.[21]

ARTICLE 17—RETURN OF ITEMS

This article provides that any documents, records, or items of evidence furnished under the Agreement must be returned to the Requested Party as soon as possible upon request by the Central Authority of the Requested Party. It is anticipated that unless original documents or articles of significant intrinsic value are involved, the Requested Party usually will not request return of the items, but this is a matter better left to development of practice.

ARTICLE 18—CONFISCATION AND FORFEITURE

A major goal of the Agreement is to enhance the efforts of both Parties in combatting narcotics trafficking. One significant strategy in this effort under U.S. practice is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article replaces the U.S.-Hong Kong Agreement Concerning the Confiscation and Forfeiture of the Proceeds and Instrumentalities of Drug Trafficking, signed at Hong Kong November 23, 1990, which expired when Hong Kong reverted to the sovereignty of the People's Republic of China.[22] It also expands the scope of assistance available in forfeiture-related matters. It is similar to Article 16 of the United States-Philippines Mutual Legal Assistance Treaty and Article 15 of the United States-Thailand Mutual Legal Assistance Treaty. Paragraph 1 requires the Requested Party, upon request, to endeavor to ascertain and to notify the Requesting Party of the existence in the former's territory of any proceeds or instrumentalities of offenses against the laws of the Requesting Party that may be forfeitable or otherwise subject to seizure. The

[21] *See, e.g.,* U.S.-United Kingdom Extradition Treaty, June 8, 1972, Art. 13, 28 U.S.T. 227, T.I.A.S. No. 8468, 1049 U.N.T.S. 167; U.S.-Canada Extradition Treaty, Dec. 3, 1971, Art. 15, 27 U.S.T. 983, T.I.A.S. No. 8237; U.S.-Japan Extradition Treaty, Mar. 3, 1978, Art. 13, 31 U.S.T. 892, T.I.A.S. No. 9625, 1203 U.N.T.S. 225; U.S.-Mexico Extradition Treaty, May 4, 1978, Art. 19, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[22] At present, the HKSAR provides assistance to the U.S. in matters related to freezing and forfeiting drug proceeds pursuant to a domestic law known as the Drug Trafficking (Recovery of Proceeds) Ordinance.

terms "proceeds or instrumentalities" are intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the Party in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Hong Kong, they may be seized in aid of a prosecution under Title 18, United States Code, Section 2314, or may be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner.

If the assets are the proceeds of drug trafficking, Title 18, United States Code, Section 981(a)(1)(B) would allow for forfeiture to the United States of property which represents the proceeds of serious foreign drug offenses in Hong Kong. The HKSAR, like Switzerland and Canada, has similar laws that reflect a growing trend among countries toward enacting legislation of this kind in the battle against narcotics trafficking.[23] The United States delegation expects that Article 18 will permit more effective use of U.S. forfeiture statutes.

Paragraph 2 provides that the Requested Party shall take measures to the extent permitted by its laws to immobilize the assets temporarily, pending a final court determination in the Requesting Party. Thus, if the law of the Requested Party enables it to seize assets in aid of a proceeding in the Requesting Party or to enforce a judgment of forfeiture levied in the Requesting Party, the Agreement provides that the Requested Party shall do so. The language of the article is carefully selected, however, so as not to require either Party to take any action that exceeds its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either Party against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

Paragraph 3 states that "appropriate" means are to be employed in providing assistance in the confiscation or forfeiture of assets. Such means may include the enforcement of an order issued by a court in the Requesting Party or the initiation of proceedings in the Requested Party. Paragraph 4 obligates the Requested Party to notify the Requesting Party of any action taken pursuant to this article.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in the law enforcement activity that led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the

[23] For example, Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances calls for the signatory nations to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act. Done at Vienna December 20, 1988; entered into force November 11, 1990.

United States and the foreign country and be approved by the Secretary of State. Paragraph 5 is consistent with this framework and will enable a Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Party, at the former's discretion and to the extent permitted by its laws.

ARTICLE 19—CERTIFICATION AND AUTHENTICATION

This article provides for the certification or authentication by consular or diplomatic officers, upon request by the Requesting Party, of documents, records or other evidence transmitted to the Requesting Party pursuant to this Agreement.

ARTICLE 20—OTHER ASSISTANCE

This article establishes that assistance provided for under this Agreement shall not preclude the provision of assistance between the Parties that is available pursuant to any other applicable agreements. Article 20 also states that the Agreement shall not be deemed to prevent recourse to any assistance available under the internal laws of either Party, or pursuant to other arrangements or practices between them. Thus, the Agreement leaves undisturbed provisions of United States and Hong Kong law that deal with letters rogatory and does not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 21—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of practical ways to make the treaty more effective and their own efforts more productive. This article calls upon the Parties to share those ideas with one another and encourages them to agree on implementation measures. Practical measures of this kind might include methods of keeping each other informed of the progress of matters in which assistance is provided pursuant to the Agreement. Another example might include use of the Agreement to obtain evidence that otherwise might be sought via methods less acceptable to the Requested Party. Very similar provisions are contained in recent United States mutual legal assistance treaties.[24]

It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 22—RESOLUTION OF DISPUTES

This article provides that any dispute as to the interpretation, application, or implementation of the Agreement shall be handled through diplomatic channels if the Central Authorities fail to resolve the matter themselves.

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[24] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, Art. 18; U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985, Art. 18; U.S.-Cayman Islands Mutual Legal Assistance Treaty, July 3, 1986, Art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990, Art. 18.

ARTICLE 23—ENTRY INTO FORCE AND TERMINATION

This article contains standard provisions on the procedures for the Agreement's application and ratification, and the exchange of instruments of ratification.

Paragraph 1 provides that the Agreement shall enter into force thirty days after written notification that the respective requirements of the Parties for its entry into force have been satisfied.

Paragraph 2 states that the Agreement shall apply to any request presented after it enters into force, even if the relevant acts or omissions occurred before the date on which the Agreement enters into force. Provisions of this kind are common in law enforcement agreements; similar provisions are found in most United States mutual legal assistance treaties.

Paragraph 3 contains standard treaty language setting forth the procedure for terminating the Agreement. Termination shall take effect three months after the date of the receipt of written notification. Requests received prior to receipt of the termination notice will nevertheless be processed as if the Agreement were still in force.

Technical Analysis of the Treaty Between the United States of America and Israel on Mutual Legal Assistance in Criminal Matters

On January 26, 1998, the United States signed a treaty with Israel 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking.

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. Israel has its own mutual legal assistance laws in place for implementing the Treaty.[1]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 provides for assistance in all matters involving the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

[1] Israel currently provides mutual legal assistance pursuant to the Legal Assistance to Foreign States (Consolidated Version) Law, 5737-1977 (hereinafter "Israel Mutual Assistance Law"). That law is in the process of revision, and we have been assured that the revised law will not adversely affect Israel's ability to implement the treaty.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Israel, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the Government the proceeds of illegal drug trafficking may be civil in nature;[4] such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this Article, however, makes it clear that there is no general requirement of dual criminality under this treaty. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "...except where otherwise provided by this treaty," a phrase which refers to Article 3(1), under which the Requested State may, in its discretion, require dual criminality for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Israel criminal law differ significantly, and a general dual criminality rule would make assistance unavailable in many significant areas.

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[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Israel under the Treaty in connection with investigations prior to charges being filed in Israel. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted Section 1782, to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment effectively overruled these decisions, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This interpretation poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] *See* 21 U.S.C. Section 881; 18 U.S.C. 1964.

This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances from the Israel delegation that assistance would be available under the Treaty to the United States investigations of essentially all criminal matters, including drug trafficking, terrorism, organized crime and racketeering, money laundering, fraud, Export Control Act violations, child exploitation or obscenity, antitrust offenses, and crimes against the environment or endangered species.

The U.S. and Israeli delegations that negotiated the Treaty developed an exchange of Notes addressing the relationship between this Treaty and the Convention between the United States and Israel with Respect to Taxes on Income, signed on November 20, 1975, with Protocols signed May 30, 1980 and January 26, 1993, which entered into force December 30, 1994 (the "Tax Convention"). The delegations agreed that the Treaty will cover criminal tax cases, but, at the insistence of Israeli authorities, it was also agreed that the assistance would not be requested under the Treaty for any matter that ordinarily would fall under the Tax Convention unless (1) the request is for a form of assistance not included within the framework of the Tax Convention or (2) the case concerned also includes "serious non-fiscal offenses" as well as tax offenses. In any event, a request for assistance under the Treaty with regard to a fiscal offense should specify whether assistance under the Tax Conven-tion has been previously requested or granted. The Parties also expressed their understanding that requests for assistance in the form of bank records with respect to a fiscal offense will be made only in connection with serious offenses involving willful, fraudulent conduct. Serious offenses would include, for example, cases involving substantial sums of money or involving a pattern of criminal conduct. An exchange of notes detailing this understanding was signed on January 26, 1998, and accompanies the Treaty.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] that states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Israel by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to obtain, suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" to make and receive treaty requests. The Central Authority of the United States would make all requests to Israel on behalf of federal agencies, state agencies, and local law enforcement authori-

[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[6] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), *cert. denied* 469 U.S. 1075 (1984).

ties in the United States. The Israeli Central Authority will make all requests emanating from officials in Israel.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and also to the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] Paragraph 2 also states that the Minister of Justice of Israel or the person designated by the Minister of Justice will serve as the Central Authority for Israel.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice its sovereignty, security, important public policy, ordre public, or other essential interests. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with any public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with an important public policy, which the delega-

[7] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

tions agreed could include foreign policy considerations.[8] Another example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority would invoke paragraph 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 U.S. investigation or prosecution.[9]

Paragraph 1(b) permits the Requested State to deny the request if it relates to political offense or an offense under military law which would not be an offense under ordinary criminal law. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph 1(c) permits the denial of a request if it was not made in conformity with the Treaty.

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzer-land Mutual Legal Assistance Treaty,[10] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to

[8] The Justice and State Departments will work together in reviewing requests to Israel and considering Israeli requests that affect important public policy interests relating to foreign policy considerations.

[9] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[10] U.S.-Switzerland Mutual Legal Assistance Treaty, July 7, 1989, art. 26, 27 U.S.T. No. 8302, 1052 U.N.T.S. 61.

the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may, in its discretion, accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within such time period as the Requested State determines. This paragraph also requires that requests be accompanied by a translation in the language of the Requested State unless otherwise agreed.

Paragraph 2 lists the kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

Paragraph 4 states that any exhibits or other attachments to a request shall be translated into the language of the Requested State unless the Central Authorities agree other-wise.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests or, when appropriate, transmit it to the authority having jurisdiction to do so. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United

States for the collection of evidence pursuant to a request from Israel. Rather, it is anticipated that when a request from Israel requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[11]

The third sentence in Article 5(1) reads "[t]he Courts of the Requested State shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request; in the case of Israel, this authority shall be derived from its domestic law." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in aid of the execution of mutual assistance requests. It also reflects the fact that Israel, where its domestic legislation does not so provide, will enact legislation to ensure that its domestic legal framework for executing requests for legal assistance is consistent with the terms of this provision.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for representation of the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[12], and provides, that "[r]equests shall be executed as empowered by this Treaty or by applicable law." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to utilize a procedure for executing a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Israeli authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documen-

[11] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[12] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 5(5).

tary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[13] Israeli law currently contains no similar provision. Thus, documents assembled in Israel in strict conformity with Israeli procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are generally not used in Israel.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing criminal investigation, prosecution, or proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the criminal investigation, prosecution, or proceeding in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to

[13] Title 18, United States Code, Section 3505.

keep the information in the request confidential.[14] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[15] Article 6 does, however, oblige the Requesting State to pay fees of expert witnesses, translation, interpretation, and transcription, and the allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

Paragraph 2 states that if expenses of an extraordinary nature are or will be required to execute the request, the Central authorities of the Parties shall consult to determine the manner in which the expenses shall be borne. A major case in the Requesting State could involve substantial (and costly) investigative efforts in the Requested State, and the law enforcement authorities of the two Parties have finite resources.

Paragraph 3 states that in cases of seizure, immobilization or forfeiture of assets or restraining orders in which a court of the Requested State, pursuant to its law, issues an order to compensate an injured party or requires furnishing of a bond or other security, the Central Authorities of the Parties shall consult to determine the manner in which such costs shall be borne.

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[14] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 5(5).

[15] *See, e.g.* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Requested State shall not use evidence or information provided under the Treaty for purposes other than those stated in the request without prior consent of the Central Authority of the Requested State. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Central Authority of the Requested State may request that the information or evidence it provides to the Requesting State be kept confidential or be used only subject to terms and conditions it may specify. 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. 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. Paragraph 2 requires that if the Requesting State accepts the information or evidence subject to such conditions, it shall comply with the conditions to the fullest extent possible. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in this Article shall preclude the use or disclosure of information in a criminal prosecution to the extent that (in the case of a request from the United States) it is obliged to do so under its Constitution or (in the case of a request from Israel) it is obligated to do so under the fundamental rights provided under the law of Israel. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once information or evidence obtained under the Treaty has been revealed to the public in a public judicial or administrative proceeding related to a request, the Requesting State is free to use the evidence or information for any purpose "unless otherwise indicated by the Requested Party when executing the request." Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impos-

sible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Israeli authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—STATEMENTS, TESTIMONY OR EVIDENCE BEFORE AUTHORITIES OF THE REQUESTED STATE

Paragraph 1 states that the Requested State shall, upon request, endeavor to obtain a statement of a person for the purpose of an investigation, prosecution or proceeding of the Requesting State.

Paragraph 2 requires that the Requested State shall, if necessary, compel the appearance of a person for taking testimony and producing documents, records, and articles to the same extent as would be permitted in investigations, prosecutions and proceedings of that State. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 3 requires that upon request the Requested State shall furnish information in advance about the date and place of the taking of statement, testimony or evidence.

Paragraph 4 provides that any interested parties, including the defendant and his counsel in criminal cases, may be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 5, when read together with Article 5(3), ensures that no person will 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 request from Israel is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[16] A witness testifying in Israel may raise any of the similar privileges available under Israeli law.

Paragraph 5 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[17]

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[16] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[17] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 14, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 8(4).

Paragraph 6 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(6) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authori-

ties. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Israel under this article in appropriate cases.[18]

Paragraph 3 states that documents provided under this article may be authenticated under the provisions of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, or may be authenticated in the manner specified by the Requesting State, which may include use of Form B appended to the Treaty, and if certified or authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Like Article 8(6), Article 9(3) states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—APPEARANCE OF PERSONS BEFORE AUTHORITIES OF THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness.

The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought. It is assumed that such expenses would normally include the costs of transportation, room, and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

The article also provides that the Central Authority of the Requesting State shall promptly inform the Central Authority of the Requested State of the person's response.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting fed-

[18] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Parties to provide tax return information in appropriate circumstances.

eral inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[19]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[20] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[21]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence is sought by the Requested State for purposes of assistance under this Treaty shall be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[22]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Paragraph 4 provides that if the sending State notifies the receiving State that the transferred person is no longer required to be held in custody, that person shall either be expeditiously returned to the sending State or be set at liberty. A person so set at liberty shall be entitled to the cost of his return travel to the sending State, if he returns to that state.

Paragraph 5 states that the Requesting State shall be responsible for making all necessary arrangements for the transit of transferred persons through third countries.

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[19] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[20] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 10, art. 26.

[21] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

[22] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 12—SAFE CONDUCT

Paragraph 1 of Article 12 states that a person appearing before authorities in the Receiving State pursuant to a request under Article 10 or 11 shall not be subject to service of process, or be detained or subjected to any other restrictions of liberty with respect to criminal proceedings related to acts or convictions which preceded that person's departure from the Sending State, except as provided in Article 11.

Paragraph 2 states that the Central Authority of the Receiving State may, in its discretion, determine whether a person appearing before the authorities of the Receiving State under Article 10 or 11 may be detained or subjected to any restriction of personal liberty with respect to civil proceedings related to any acts or omissions which preceded the person's departure from the Sending State.

Paragraph 3 states that, when not inconsistent with its domestic laws, the Central Authority of the Receiving State may, in its discretion, determine that a person appearing before the authorities of the Receiving State under Article 10 or 11 shall not be subject to service of process with respect to a civil proceedings related to any acts or omissions which preceded the person's departure from the sending state. Safe conduct may only be offered under this paragraph, however, when it is not inconsistent with the domestic law of the receiving state.

None of these provisions prevent the prosecution of a person for perjury or any other crime committed while in the receiving State.

Paragraph 4 states that the safe conduct guaranteed in this article shall cease fifteen days after the person has been notified that his presence is no longer required, and, being physically able to depart, he has not left the territory of the Receiving State or he has left the Receiving State and thereafter returns to it.

ARTICLE 13—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 14—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to execute a request to effect the service of docu-

ments such as summons, complaints, subpoenas, or other legal papers pursuant to a Treaty request. Identical provisions appear in several U.S. mutual legal assistance treaties.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be transmitted by the Requesting State to the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request. If service cannot be effectuated, or cannot be effected in the manner specified, the Requesting State shall be so informed and shall be advised of the reasons.

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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782,[23] and Israeli' courts have the power to execute such requests, under Section 3(a) of the Israeli mutual assistance law. This article creates a formal framework for handling such requests.

Paragraph 1 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Israel will have to be supported by a showing of probable cause for the search. A United States request to Israel would have to satisfy the corresponding evidentiary standard there, which is "reason to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.[24]

Paragraph 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, upon request, and to the extent possible, every official who has custody of a seized item shall certify the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requested State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requesting State to provide authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. The requirement that the certificates be admissible without additional authentication

[23] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, Netherlands v. Van Aalst, Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

[24] *See* Section 23 of Israeli Criminal Procedure (Arrest and Search) Ordinance (New Version) 5729-1969.

leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[25]

ARTICLE 16—RETURN OF DOCUMENTS, RECORDS AND ARTICLES OF EVIDENCE

This article provides that any documents, records, or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. This would normally be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 17—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Israel in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 states that the Parties shall assist one another to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily seize or immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty encourages the Requested State to do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[26]

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[25] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 17; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-U.K. Mutual Legal Assistance Treaty, Jan. 6, 1994.

[26] In Israel, unlike the U.S. law, the law does not currently allow for civil forfeiture. However, Israeli law does permit forfeiture for certain criminal offenses (at present including in particular

Paragraph 2 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure or immobilization under the laws of the other Party. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables which are either being used in the crime or which were purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Israel, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, U.S.C. Section 2314,[27] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[28] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[29] The United States delegation expects that Article 17 of the Treaty will enable this legislation to be even more effective.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the

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narcotics violations), and ordinarily a defendant must be convicted in order for Israel to confiscate the defendant's property.

[27] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[28] Title 18, United States Code, Section 1956(c)(7)(B).

[29] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs an Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[30] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by its respective laws.

Paragraph 4 states that the parties shall assist each other to the extent permitted by their respective laws in connection with restitution to victims of crime, and the imposition or collection of fines in criminal proceedings. However, there is no obligation under this paragraph to enforce restitution orders or to collect fines or to enforce judgments imposing fines.

ARTICLE 18—REFERRAL FOR INVESTIGATION OR PROSECUTION

This article is similar to provisions in other United States mutual legal assistance treaties[31] that deal with the situation in which the officials of one State determine from their investigation of a crime that prosecution of the offense by the authorities of the other State is more appropriate. For example, Israeli investigators probing the illegal possession of narcotics in Israel may learn that the narcotics were smuggled out of the country to the United States, and decide to ask the United States to continue the investigation, turning over to the Drug Enforcement Administration such evidence as they have assembled.

This article was included in this Treaty because of the growing number of cases in which Israel prosecutes Israeli citizens for crimes committed in the United States in lieu of extradition,[32] and United States prosecutors cooperate with Israeli authorities to achieve successful prosecutions. It is anticipated that this process will be facilitated by the Treaty.

ARTICLE 19—OTHER ASSISTANCE

This article states that assistance and other procedures set forth in this Treaty shall not prevent assistance under any other applicable international agreement between the two countries. It also provides that the Treaty shall not be deemed to prevent recourse to any assistance available under the domestic laws of either country. Thus, the Treaty leaves the provisions of United States and Israeli law on letters rogatory completely undisturbed, and does not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 20—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts

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[30] *See* Title 18, United States Code, Section 981 (i)(1).

[31] U.S.-Thailand Mutual Legal Assistance Treaty, Mar. 19, 1986, art. 14; U.S.-Spain Mutual Legal Assistance Treaty, *supra* note 24, 1990, art. 19.

[32] *See* Cohen, New York v. Kirman/Israel v. Kirman: A Prosecution In Tel Aviv Under Israeli Law for a Narcotics Offense Committed in New York, 4 Crim. L. F. 597 (1993); Abramovsky, Partners Against Crime: Joint Prosecutions of Israeli Organized Crime Figures by U.S. and Israeli Authorities, 5 Fordham Int'l L.J. 1903 (1996).

more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[33] It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 21—RATIFICATION, ENTRY INTO FORCE, APPLICATION, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification.

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

Paragraph 3 provides that the Treaty shall apply to any request presented after it enters into force, even if the request relates to offenses that occurred before the Treaty enters into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and Saint Kitts and Nevis on Mutual Legal Assistance in Criminal Matters

On September 18, 1997, the United States signed a treaty with Saint Kitts and Nevis 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking in the eastern Caribbean.

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. Saint Kitts and Nevis has its own mutual legal assistance laws in place for implementing the Treaty, and does not anticipate enacting new legislation.[1]

[33] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 24, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

[1] "An Act to make provision with respect to the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in St. Kitts and

Continued

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Saint Kitts and Nevis, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[4] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list

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Nevis and to make provision concerning mutual assistance in Criminal Matters between Kitts and Nevis and countries other than Commonwealth countries," hereinafter "the Mutual Assistance in Criminal Matters Act, 1993." Since there are some differences between the Treaty and St. Kitts and Nevis law, it is anticipated that St. Kitts and Nevis will issue regulations under Section 29 of the Act that will "direct that [the] Act shall apply in relation to [the United States] as if it were a Commonwealth country, subject to such limitations, conditions, exceptions or qualifications (if any) as may be prescribed . . ." in order for the terms of the Treaty to prevail.

[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Saint Kitts and Nevis under the Treaty in connection with investigations prior to charges being filed in Saint Kitts and Nevis. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 makes it clear that there is no general requirement of dual criminality for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime inxcept as otherwise provided in this Treaty," a phrase which refers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality before executing a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Saint Kitts and Nevis criminal law differ, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Section 1961-1968); money laundering; crimes against environmental protection laws; and antitrust violations.

While the Treaty does not require dual criminality in general, Saint Kitts and Nevis' delegation did raise questions about assistance in one area in which the criminal laws of the Parties differ. Since Saint Kitts and Nevis currently has no income tax legislation, it suggested that the Treaty restrict mutual assistance in tax cases, noting that such restrictions are contained in the United States' mutual legal assistance treaty with the United Kingdom regarding the Cayman Islands. The United States delegation was unwilling to agree that this Treaty be so limited, because criminal tax prosecutions are often used to pursue and prosecute major criminals such as drug traffickers and organized crime figures. Inhis treaty is intended solely for mutual legal assistance in criminal matters between the Parties as set forth in paragraph (1) above," thereby emphasizing that the Treaty applies only to criminal tax matters. At Saint Kitts and Nevis' request, diplomatic notes subsequently were exchanged indicating the Parties' agreement that Saint Kitts and Nevis may interpret Article 1 to exclude assistance under the treaty for civil and administrative income tax matters that are unrelated to any criminal matter.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] which states that the Treaty is in-

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[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[6] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

tended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Saint Kitts and Nevis by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Saint Kitts and Nevis on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. Saint Kitts and Nevis' Central Authority will make all requests emanating from officials in Saint Kitts and Nevis.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] Paragraph 2 also states that the Attorney General of Saint Kitts and Nevis or a person designated by the Attorney General will serve as the Central Authority for Saint Kitts and Nevis.[8]

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

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[7] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

[8] Section 4, Mutual Assistance in Criminal Matters Act, 1993.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph 1(b) 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 U.S. investigation or prosecution.[9]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. In the course of the negotiations, the Saint Kitts and Nevis' delegation expressed its view that in very exceptional and narrow circumstances the disclosure of business or banking secrets could be of such significant

[9] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884 (1989) (treaty citations omitted). See also Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

importance to its Government (e.g., if disclosure would effectively destroy an entire domestic industry rather than just a specific business entity) that it could prejudice that State's "essential public interests" and entitle it to deny assistance.[10] The U.S. delegation did not disagree that there might be such extraordinary circumstances, but emphasized its view that denials of assistance on this basis by either party should be extremely rare.

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense.[11] It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Finally, Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State. This provision was deemed necessary under Saint Kitts and Nevis law,[12] and is similar to clauses in other United States mutual legal assistance treaties.[13]

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[14] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance.

This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunder-

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[10] The Saint Kitts and Nevis view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty. See Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

[11] *See* Section 19(2)(a) and 19(2)(b), Mutual Assistance in Criminal Matters Act, 1993.

[12] Section 19(2)(e), Mutual Assistance in Criminal Matters Act, 1993.

[13] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).

[14] 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.

standings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Saint Kitts and Nevis. Rather, it is anticipated that when a request from Saint Kitts and Nevis requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[15]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in

[15] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Saint Kitts and Nevis, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty [16], and provides, that "[r]equests shall be executed according to the internal laws and procedures of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Saint Kitts and Nevis authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity. [17] Saint Kitts and Nevis law currently contains no similar provision. Thus, documents assembled in Saint Kitts and Nevis in strict conformity with its procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Saint Kitts and Nevis.

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[16] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 13.
[17] Title 18, United States Code, Section 3505.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[18] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

[18] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, supra, note 5, art. 5(5).

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[19] Article 6 states that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to

[19] *See, e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 18, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

The Saint Kitts and Nevis delegation expressed particular concern that information supplied by Saint Kitts and Nevis in response to United States requests must receive real and effective confidentiality, and not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. Brady v. Maryland, 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Saint Kitts and Nevis authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Saint Kitts and Nevis is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[20] A witness testifying in Saint Kitts and Nevis may raise any of the similar privileges available under Saint Kitts and Nevis law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[21]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance, and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the

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

[21] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 18, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 8(4).

Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Saint Kitts and Nevis under this article in appropriate cases.[22]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

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[22] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph l provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while a person is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the Treaty with Saint Kitts and Nevis, the Central Authority merely reports whether safe conduct has been extended. This is because in Saint Kitts and Nevis only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Saint Kitts and Nevis under Article 3 of the Treaty) cannot do so. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so. For the United States, the "competent authorities" for these purposes would be the Central Authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting fed-

eral inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[23]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[24] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[25]

Paragraph 2 provides that a person in the custody of the Requested State whose presence in the Requesting State is sought for purposes of assistance under this Treaty shall be transferred from the Requested State to the Requesting State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[26]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a person under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

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[23] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[24] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 14, art. 26.

[25] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial. It is also consistent with Section 24, Mutual Assistance in Criminal Matters Act, 1993.

[26] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State.[27] The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. This is consistent with Saint Kitts and Nevis law,[28] and identical provisions appear in several U.S. mutual legal assistance treaties.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Saint Kitts and Nevis to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[29] This article creates a formal framework for handling such requests.

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[27] This is consistent with Section 2, Mutual Assistance in Criminal Matters Act, 1993.

[28] Section 25, Mutual Assistance in Criminal Matters Act, 1993.

[29] *See e.g.,* United States ex Rel. Public Prosecutor of *Rotterdam, Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.)(search warrant issued February 24, 1984). The courts of Saint Kitts and Nevis also have the power to execute such requests under Section 22, Mutual Assistance in Criminal Matters Act, 1993.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Saint Kitts and Nevis will have to be supported by a showing of probable cause for the search. A United States request to Saint Kitts and Nevis would have to satisfy the corresponding evidentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[30]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegation understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development of practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Saint Kitts and Nevis in combating narcotics trafficking. One significant strategy in this effort is action by

[30] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 21; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 18; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Saint Kitts and Nevis, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[31] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[32] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be willing and able to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[33] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as

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[31] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[32] Title 18, United States Code, Section 1956(c)(7)(B).

[33] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[34]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[35] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Saint Kitts and Nevis law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that

[34] In Saint Kitts and Nevis, unlike the U.S., the law does not currently allow for civil forfeiture. However, Saint Kitts and Nevis law currently does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for the Government of Saint Kitts and Nevis to confiscate the defendant's property.

[35] *See* Title 18, United States Code, Section 981 (i)(1).

otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[36] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of The Treaty Between The United States of America and The Republic of Latvia on Mutual Legal Assistance in Criminal Matters

On June 13, 1997, the United States signed a treaty with Latvia on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar mutual legal assistance 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 with Latvia is the first mutual legal assistance treaty we have signed with a former Soviet republic, and it is expected to be a valuable weapon for the United States in its efforts to combat transnational terrorism, international drug trafficking, and Russian organized crime.

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. Latvia has no mutual legal assistance legislation at the present time, but Latvia's delegation gave assurances that the Treaty would be implemented in Latvia without such legislation. The U.S. delegation was told that under Latvian jurisprudence, the terms of the Treaty would take precedence over silence in Latvian domestic law, and, in case of a conflict between the Treaty and future Latvian domestic law, the Treaty would control.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of

[36] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 18, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 30, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Latvia, and other legal measures taken prior to the filing of formal charges in either State.[1] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[2] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[3] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 makes it clear that there is

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[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Latvia under the Treaty in connection with investigations prior to charges being filed in Latvia. Prior to the 1996 amendments of Title 28, United States Code, Section 1782, some U.S. courts had interpreted that Section to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[3] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

no general requirement of dual criminality for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State. Article 1(3) is important because United States and Latvian criminal law differ, and a general dual criminality rule would make assistance unavailable in significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[4] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Section 1961-1968); money laundering; terrorism; tax crimes, including tax evasion and tax fraud; crimes against environmental protection laws; antitrust violations; and alien smuggling.

Paragraph 4 contains a standard provision in United States Mutual legal assistance treaties[5] that states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Latvia by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Latvia on behalf of federal, state, and local prosecutors, agencies, and other law enforcement authorities in the United States. The Latvia Central Authority would make all requests emanating from officials in Latvia.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under Mutual legal assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[6] Article 2(2) of the Treaty also states that

[4] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[5] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

[6] 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

the Prosecutor General of Latvia or a person designated by the Prosecutor General shall serve as the Central Authority for Latvia.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph 1(a) permits the Requested State to deny a request if a request involves an offense under military law that would not be an offense under ordinary criminal law.

Paragraph (1)(b) permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other Mutual legal assistance treaties.

Paragraph (1)(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases where assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other Government agencies to determine whether to execute a request that falls into this category.

The delegations agreed that the phrase "essential interests" is intended to limit narrowly the class of cases in which assistance may be denied. It is not enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example is a request involving prosecution by the Requesting State of conduct that occurred in the Requested State that is constitutionally protected in the Requested State.

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

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Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

United States Central Authority may invoke paragraph 1(c) to decline to provide sensitive or confidential drug-related information pursuant to a Treaty request whenever it determines, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who likely 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.[7]

Paragraph (1)(d) permits the denial of a request if it was not made in conformity with the Treaty.

Paragraph 2 is similar to paragraph 2 of the United States-Switzerland Mutual Legal Assistance Treaty,[8] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to paragraph 1. For example, a Party might request information that could be used either in a routine criminal case (which is within the scope of the Treaty) or in a political prosecution (which is subject to refusal). This paragraph permits the Requested State to provide the information on condition that it be used only in the routine criminal case. Naturally, the Requested State should notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of any reasons for denying assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings and enable the Requesting State to prepare future requests better.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

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[7] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884 (1989) (treaty citations omitted). See also Staff of Senate Comm. on Foreign Relations, 100th Cong., 2d Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[8] 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Latvia. Rather, it is anticipated that when a request from Latvia requires compulsory process for execution, the Department of Justice would utilize Title 28, United States Code, Section 1782, to ask a federal court to issue the necessary process. This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

The third sentence in Article 5(1) reads "[t]he courts or other competent authorities of the Requested State shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "courts or other competent authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Latvia, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

Paragraph 2 states that the Central Authority of the Requested State shall represent or make arrangements for representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that if execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested State will arrange for the presentation of the request to that court or agency for the benefit of the Requesting State.

Paragraph 3 provides that requests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise. Thus, for example, the provision in Article 8(4) that claims of privilege under the law of the Requesting

State are to be referred back to the Requesting State for resolution would take precedence over a contrary provision in domestic law. To illustrate, 28 U.S.C. 1782 permits, as a basis for not compelling testimony or production of evidence, deference to privileges legally applicable in a Requesting State. To the extent that this provision were considered to be in conflict with the Treaty, the Treaty provision would prevail.

The paragraph also provides that the method of executing a request for assistance under the Treaty shall be followed "except insofar as prohibited by the laws of the Requested State." Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner that renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, the Requested State must follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings (e.g., use of videotape depositions). However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing criminal investigation or proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or proceeding in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's investigation or proceeding.

It is anticipated that some United States requests for assistance may contain information that is kept confidential under our law or practice. For example, it may be necessary to disclose information that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of describing "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Paragraph 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[9] If the Requested State cannot execute the request without disclosing the information in question (as might be the situation if execution requires a public judicial proceeding in the Requested State), or if for some other reason this confidentiality cannot be assured, the Treaty obliges the Requested State to so notify the Requesting State to provide an opportunity for it to withdraw the request rather than risk jeopardizing an investigation or proceeding by public disclosure of the information.

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[9] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, supra, note 4, art. 5(5).

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires the Central Authority of the Requested State to promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must explain the reason. For example, if evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article obligates the Requested State to pay all costs relating to the execution of a request, with the exception of those costs enumerated in the article: (1) the fees of experts, including expert witnesses, unless both Central Authorities otherwise agree; (2) interpretation, translation and transcription costs; and (3) allowances and expenses related to travel of persons who either are traveling in the Requested State for the convenience of the Requesting State, or are traveling pursuant to Articles 10 and 11.

Costs "relating to" execution means the costs normally incurred in transmitting a request to the executing authority, notifying witnesses and arranging for their appearances, producing copies of the evidence, conducting a proceeding to compel execution of the request, etc. The negotiators agreed that the costs "relating to" execution that must be borne by the Requested State do not include expenses associated with the travel of investigators, prosecutors, counsel for the defense, or judicial authorities to, for example, question a witness or take a deposition in the Requested State pursuant to Article 8(3), or travel in connection with Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed. Paragraph 1 of this article states that the Central Authority of the Requested State may require that the information or evidence provided not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such a use limitation is requested, the Requesting State must comply with the requirement.

Both delegations agreed that the Central Authority of the Requested State will not routinely require subsequent use limitations under paragraph 1. Rather, it is expected that such limitations will be imposed sparingly, only when there is good reason to restrict use of the evidence for a purpose not specified in the request.

Paragraph 2 authorizes the Requested State to request that the information or evidence it provides to the Requesting State be kept confidential. This paragraph operates in situations outside Article 3 where the Requested State has no basis to deny or limit assistance. For instance, the Requested State may wish to cooperate with

the investigation in the Requesting State but to limit disclosure of information that would unduly prejudice the interests of persons not connected with the matter being investigated. Paragraph 2 permits the request for confidentiality. If the Requesting State accepts the assistance with this condition, it is required to make "best efforts" to comply with it. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions that prevent the Requesting State from using it. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act.

If the United States Government received evidence under the Treaty for one prosecution that appeared to be exculpatory to a defendant in another prosecution, the United States might be obliged to share the evidence with that defendant in the second case. Brady v. Maryland, 373 U.S. 83 (1963). Therefore, paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of evidence or information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. The Requesting State is required to notify the Requested State before any such disclosure.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed publicly in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed in a public trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block its use.

It should be noted that under Article 1(4) the restrictions outlined in Article 7 are for the benefit of the Parties, and the invocation and enforcement of these provisions are left entirely to the Parties. If a private person alleges that a Latvian authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents and records. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

The second sentence of Article 8(1) makes applicable the criminal laws in the Requested State in situations in which a person in that State provides false evidence in execution of a request. This language is essential for Latvia; it provides a basis, which Latvia would otherwise lack, to prosecute a person for giving false testimony in the execution of Treaty requests. The Latvian negotiators

gave assurances that, given such language, Latvia not only could but would prosecute false statements in connection with testimony under this article. The negotiators expect that where a falsehood is made in execution of a request, the Requesting State could ask the Requested State to prosecute for perjury, and provide the Requested State with the information or evidence needed to prove the falsehood. The U.S.-Spain Mutual Legal Assistance Treaty contains a similar provision. [10]

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that persons specified in the request, including the defendant and his counsel, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4 deals with claims of immunity, incapacity, and privilege based on the law of the Requesting State but raised in the Requested State. The immunities and privileges available to witnesses under the law of the Requested State are not affected by paragraph 4. No person will be compelled in the Requested State to furnish information or evidence 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 request from Latvia, in addition to any applicable constitutional privilege (e.g., self-incrimination, to the extent applicable in the context of evidence being taken for foreign proceedings), may claim a testimonial privilege (e.g., attorney-client) legally recognized under United States law. A witness testifying in Latvia may raise any of the similar privileges available under Latvian law. However, paragraph 4 does require that if a witness attempts to assert in the Requested State a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our mutual legal assistance treaties. [11]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. The second sentence of this paragraph provides for the admissibility of a certification of the absence or nonexistence of a record. The third sentence provides that evidence produced pursuant to the Form A, of Form B certifying the absence or nonexistence of a record, shall, without additional authentication, be admissible as evidence to

[10] U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990, art. 8(1).

[11] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, supra, note 9, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 8(4).

prove the content of the record or the fact of its absence or nonexistence. This provision is primarily for the benefit of the United States inasmuch as it makes such evidence "admissible" without the appearance of a witness located in a foreign country. Of course, it will be up to the judicial authority presiding over the U.S. trial to determine whether the evidence will in fact be admitted. Evidentiary tests other than authentication (such as relevance, and materiality) still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government agency or judicial authority in the Requested State. The phrase "government agencies and judicial authorities" includes all executive, judicial, and legislative units at the federal, state, and local level in each country.

Paragraph 2 provides that the Requested Party may provide copies of any records, including documents or information in any form, that are in the possession of a government department or agency in that State, but that are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities. The Requested State may in its discretion deny a request pursuant to this paragraph entirely or in part.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters, and such assistance could include tax return information when appropriate. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Latvia under this article in appropriate cases. [12]

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[12] Under 26 U.S.C. 6103(i) information in the files of the Internal Revenue Service (generally protected from disclosure under 26 U.S.C. 6103) may be disclosed to federal law enforcement personnel in the United States for use in a non-tax criminal investigations or proceedings, under certain conditions and pursuant to certain procedures. The negotiators agreed that this Treaty (which provides assistance both for tax offenses and in the form of information in the custody of tax authorities of the Requested State) is a "convention . . . relating to the exchange of tax information" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Latvia through this Treaty when, in a criminal investigation or prosecution, the Latvian authority on whose behalf the request is made can meet the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103(h) and (i). As an illustration, a Latvian request for tax returns to be used in a non-tax criminal investigation, in accordance with 26 U.S.C. 6103(i)(1)(A), would have to specify that the Latvian 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 Latvian criminal statute (not involving tax administration) to which Latvia is or may be a party.

(ii) any investigation which may result in such a proceeding, or

(iii) any Latvian proceeding pertaining to enforcement of such a criminal statute to which Latvia is or may be a party. (See 26 U.S.C. 6103(i)(1)(A))

The request would have to be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns as specified at 26 U.S.C. 6103(i)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with 26 U.S.C. 6103(i)(1)(B), that:

Paragraph 3 states that records provided under this article may be authenticated in accordance with the procedures specified in the Convention Abolishing the Requirement of Legalization for Foreign Public Documents.[13] The absence or nonexistence of such records shall, upon request, be certified by an official responsible for maintaining them through the use of Form C appended to the Treaty. Records authenticated under this paragraph, or the form certifying the absence or nonexistence of the records, shall be admissible in evidence in the Requesting State to prove the content of the records, or the absence or nonexistence thereof. Thus, the Treaty establishes a procedure for the admission of foreign official records by certification without the need for a foreign witness to appear and testify.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but whether the evidence will in fact be admitted remains the decision of the judicial authority presiding over the trial. Other evidentiary requirement such as relevance or materiality must still be established.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State or a third State to appear before an appropriate authority in the other State. The Central Authority of the Requested State is to notify the Requesting State of the invitee's response. An appearance in the Requesting State or third State under this article is not mandatory, and the prospective witness may refuse the invitation.

The Requesting State, pursuant to Article 6, is expected to pay the expenses of such an appearance, and paragraph 2 of Article 10 provides that the witness shall be informed of the amount and kind of expenses that the Requesting State will provide in a given situation. It is assumed that such expenses would normally include the costs of transportation, room, and board. The second sentence of paragraph 2 states that a person who agrees to appear pursuant to this article may ask that the Requesting State advance money to cover the expenses, and an advance may be provided through the Embassy or a consulate of the Requesting State.

(i) there is reasonable cause to believe, based upon information believed to be reliable, 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 Latvian criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

In other words, the Latvian law enforcement authorities seeking tax returns would be treated as if they were United States law enforcement authorities—undergo the same access procedure where they would be held to the same standards.

[13] Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague, Oct. 5, 1961. Both the United States and Latvia are parties to this Convention, under which an apostille applied to a document by one Party must be accepted by other Parties as proof of authenticity. The Hague Legalization Convention permits the Requested State to charge a modest fee for the apostille, but Latvia's delegation insisted that the Requested State should not require payment of the apostille fee when the request is made pursuant to Article 9 of this Treaty, in keeping with Article 6 of this Treaty. That is why Article 9(3) states that authentication shall be done "without cost to the Requesting State."

Article 10(3) provides that the Central Authority of the Requesting State may determine that a person appearing in that State pursuant to this article shall not be subject to service of process, or be detained or "subjected to any restriction of personal liberty" for acts or convictions that occurred before the person departed from the Requested State. This determination does not protect against prosecution, punishment, or restriction of personal liberty with respect to acts committed after departure from the Requested State, or against the filing of a civil suit (as opposed to service of the process). This article is intended to apply to persons who are transferred while in custody pursuant to Article 12 and to those who appear as civilians and are not incarcerated.

Paragraph 4 states that the safe conduct guaranteed in the preceding paragraph expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if he leaves the territory of the Requesting State and thereafter returns to it.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the presence (generally for testimony) in one State of a person in custody in another State. In some instances, foreign States are willing and able to "lend" incarcerated persons to the Requesting State, provided the person is carefully guarded while in the other State and returned to the Requested State when no longer needed. For example, on occasion the United States has arranged for consenting federal inmates to be transported to foreign countries to assist in criminal proceedings.[14]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[15] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[16]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[17]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay

[14] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[15] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 8, art. 26.

[16] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

[17] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a person under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, paragraph (3)(c) specifies that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Paragraph 3(e) makes it clear that when the Requesting State proposes that a person in custody in the Requested State be transferred to a third State, the Requesting State shall be obliged to make all arrangements necessary to comply with this paragraph's requirements, including the incarceration of the person while in that third State and the return of the person to the Requested State.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article because it is anticipated that the authorities of the two states will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—TRANSIT OF PERSONS IN CUSTODY

Most modern extradition treaties provide for cooperation in the transit of persons being extradited,[18] although the extradition treaty currently in force between the United States and Latvia[19] is silent on this topic. Article 12 is not focused on the transit of extradited persons. Rather, this article provides a basis for mutual cooperation with respect to prisoners who are involved in a criminal investigation or prosecution other than as extradited fugitives (e.g., as witnesses appearing to testify or as defendants appearing to be present at a proceeding).

Paragraph 1 gives each Party the power to authorize transit through its territory of a person being transferred to the other State by a third State. Paragraph 2 obligates each Party to keep in custody a person in transit during the transit period. Requests for transit are to contain a description of the person being trans-

[18] *See, e.g.,* U.S.-Hungary Extradition Treaty, Dec. 1, 1994, art. 19; U.S.-Japan Extradition Treaty, Mar. 3, 1978, art. 15, 31 U.S.T. 892, T.I.A.S. 9625; U.S.-Mexico Extradition Treaty, *supra* note 9, art., 20, 31 U.S.T. 5059, T.I.A.S. 9656.

[19] U.S.-Latvia Extradition Treaty, Oct. 16, 1923, 43 Stat. 1738, T.S. 677, 9 Bevans 515, 27 L.N.T.S. 371, as amended Oct. 10, 1934, 49 Stat. 3131, T.S. 884, 9 Bevans 554, 158 L.N.T.S. 263.

ported and a brief statement of the facts of the case for which the person is sought. Paragraph 3 allows each Party to refuse transit of its nationals.

Under this article, no advance authorization is needed if the person in custody is in transit to one of the Parties and is traveling by aircraft and no landing is scheduled in the territory of the other. Should an unscheduled landing occur, a request for transit may be required at that time, and the Requested State may grant the request if, in its discretion, it is deemed appropriate to do so. Where transit is granted, the person in transit shall be kept in custody until such time as the person may continue in transit out of the Requested State.

ARTICLE 13—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article requires each 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, regarding the location of the person or item. 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.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items in third countries. In all instances, the Requesting State is expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 14—SERVICE OF DOCUMENTS

Paragraph 1 requires the Requested State to use its "best efforts" to effect service of any document related to any request for assistance made under the Treaty. "Best efforts" varies depending on the information provided in the request, in accordance with Article 4. It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Latvia to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 15—SEARCH AND SEIZURE

Where appropriate, the Requested State may search for, secure, and deliver items needed as evidence, or for other purposes, for the

Requesting State. Article 5(1) empowers United States courts to issue search warrants to obtain evidence request by Latvia.

For the United States to be able to execute a search and seizure under this Article, the Latvian request must provide information demonstrating "probable cause," as is required by the Fourth Amendment to the U.S. Constitution. The Latvian request must contain facts, or be augmented by facts from a reliable source, that persuade a U.S. judicial authority that probable cause exists to believe that a crime has been or is being committed in Latvia and that particularly described evidence of the crime is located at a particularly described place to be searched in the United States. A U.S. request to Latvia would have to satisfy the corresponding evidentiary standard in Latvia.[20]

Paragraph 2 is designed to establish a chain of custody for evidence seized pursuant to a request and to provide a method for proving that chain by certificates admissible in a judicial proceeding in the Requesting State. The Requested State is required to maintain a reliable record, from the time of a seizure, of the "identity of the item, the integrity of its condition, and the continuity 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 tracing the route of the item seized (and any change in 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 a reason other than authenticity exists to do so. 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 not in serious question. For Latvia, 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 the extent "deemed necessary." This paragraph is not intended to serve as an impediment to the transfer of items seized. This article is similar to provisions in many other United States mutual legal assistance treaties.[21]

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[20] The Latvian delegation said that there is no general standard of proof for a search warrant in Latvia, where one judge may order a search based on evidence solely that another judge would deem insufficient. The Latvian delegation also said that as a matter of practice, a Latvian judge asked to issue a search warrant in Latvia for evidence needed in the U.S. might ask to see a search warrant for that evidence issued in the U.S. The U.S. delegation explained that our courts do not issue warrants to search places outside U.S. jurisdiction.

[21] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 11; U.S.-Canada Mutual Legal Assistance Treaty, supra, note 9; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Spain Mutual Legal Assistance Treaty, *supra* note 10; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

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 item, including a document or record, provided by the Requested State pursuant to the Treaty. Both Parties anticipate that, unless original records or items of significant intrinsic value are involved, the Requested State will not usually request return of the item; however, both Parties recognize that this is a matter best left to development in practice.

ARTICLE 17—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Latvia in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.- Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Latvia, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[22] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion, or a fraud by or against a foreign bank are civilly and criminally forfeitable in the United States since these offenses are predicate offenses under U.S. money laundering laws.[23] Thus, it is a violation of U.S. criminal law to launder the proceeds of these foreign fraud or theft offenses when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one

[22] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[23] Title 18, United States Code, Section 1956(c)(7)(B).

year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[24] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization 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 permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[25] Paragraph 3 is consistent with this framework, and will enable a Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 18—COMPATIBILITY WITH OTHER TREATIES

This article clarifies that assistance and procedures provided by this Treaty shall not prevent either Party from providing assistance under other applicable international agreements. Article 18 also leave intact recourse to any assistance available under the internal laws of either State. Thus, the provisions of United States and Latvia law on letters rogatory remain undisturbed, and the

[24] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[25] *See* Title 18, United States Code, Section 981 (i)(1).

Treaty does not alter any pre-existing agreements concerning investigative assistance.[26]

ARTICLE 19—CONSULTATION

Experience has shown that as the Parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Similar provisions are contained in recent United States Mutual legal assistance treaties.[27] It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 20—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

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

Paragraph 3 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and the Republic of Lithuania on Mutual Legal Assistance in Criminal Matters

On January 16, 1998, the Attorney General of the United States and the Minister of Foreign Affairs of the Republic of Lithuania signed a Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed 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 with Lithuania is the second mutual legal assistance treaty that we have concluded with a republic of the former Soviet Union.

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 Lithuanian delegation advised that under Lithuanian jurisprudence, the terms of the Treaty would take precedence over silence in Lithuanian domestic

[26] *See e.g.,* U.S.-Latvia Memorandum of Understanding concerning Cooperation in the Pursuit of Nazi War Criminals, Sept. 11, 1992.

[27] *See e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 9, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 21, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4, art. 18.

law and, in case of a conflict between the Treaty and future Lithuanian domestic law, the Treaty would control.

The Treaty with Lithuania is a major advance in the formal law enforcement relationship between the two countries and is expected to be a valuable weapon for the United States in its efforts to combat transnational terrorism, international drug trafficking, and Russian organized crime.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Lithuania, and other legal measures taken prior to the filing of formal charges in either State.[1] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[2] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[3] yet such proceedings are covered by the Treaty.

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[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Lithuania under the Treaty in connection with investigations prior to charges being filed in Lithuania. Prior to the 1996 amendments to Section 1782, some U.S. courts had interpreted that Section to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[3] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Paragraph 3 specifies that the principle of double or dual criminality—that the obligation of the Requested State to provide assistance only attaches where the criminal conduct committed in the Requesting 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. During the negotiations, the Lithuanian delegation provided assurances that assistance would be available under the Treaty to the United States in criminal matters involving such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Sections 1961-1968); money laundering; terrorism; tax crimes, including tax evasion and tax fraud; crimes against environmental protection laws; antitrust violations; and alien smuggling.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[4] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Lithuania by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

Article 2(1) requires that each Party shall "seek and obtain assistance" under the Treaty through their respective Central Authorities. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[5] The Central Authority for the Republic of Lithuania will be the Office of the Prosecutor General and the Ministry of Justice.[6] This dual Central Authority arrangement for Lithuania re-

[4] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

[5] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

[6] Similarly, Article 2(2) of the U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994, provides that the Hungarian Minister of Justice and Office of the Chief Public Prosecutor will serve as a dual Central Authority.

flects the importance and independence of the Office of the Prosecutor General in the Lithuanian criminal justice system. Both the Lithuanian Constitution and the Lithuanian Criminal Code designate distinct and separate responsibilities and duties to the Office of the Prosecutor General and the Ministry of Justice. The Prosecutor's Office is responsible for handling requests to and from foreign authorities for assistance in criminal matters at the investigation stage, while the Ministry of Justice is responsible for handling requests to and from foreign authorities for assistance in criminal matters at the prosecution stage. The Lithuanian delegation informed that, in practice, the U.S. Central Authority could send all requests to the Office of the Prosecutor General, since most foreign requests fall within the investigative stage.[7] If the request falls under the jurisdiction of the Lithuanian Ministry of Justice, however, the Office of the Prosecutor General will promptly forward the request to the Ministry of Justice for execution.

Article 2(2) provides that the U.S. Central Authority will "make" requests on behalf of federal, state, and local "prosecutors, investigators with criminal law enforcement jurisdiction, and agencies and entities with specific statutory or regulatory authority to refer matters for criminal prosecution" in the United States. The Lithuanian Central Authority will make requests on behalf of Lithuanian prosecutors and courts. Although the Central Authorities will exercise differing degrees of control and responsibility over the preparation of such requests (as to both form and content), only the Central Authorities will make the requests.

Article 2(3) specifies that the Central Authority for the Requesting State shall use its "best efforts" not to make a request if, in its view, the request is either: (a) based on offenses that do not have serious consequences; or (b) the extent of the assistance to be requested is unreasonable in view of the sentence expected upon conviction. This provision is intended to give the Central Authorities a firm basis on which to refuse to submit a request on behalf of a competent authority because of the insignificance or inappropriateness of the request.

Article 2(4) provides that the Central Authorities shall communicate directly with one another for purposes of making and executing requests.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

During negotiations, the Lithuanian delegation informed that they do not have a separate military code; rather, military law is covered in a section of the single Lithuanian criminal code dealing with "ordinary criminal law." Since the Lithuanians have no separate military law, per se, the Lithuanian delegation noted its con-

[7] *See* pages 240–241, *infra,* for additional discussion of the respective roles of the Prosecutor General's office and the Ministry of Justice.

cern that Lithuania would never have a basis on which to deny a request for a "military offense." The negotiating delegations, thus, agreed to distinguish between "military law," which is encompassed within "ordinary criminal law," and "military criminal law." By using the term "military criminal law," the Lithuanians will have the same discretion to deny a request on this very narrow basis that the United States will have. That is, the delegations understand this provision to provide that a Requested State will have discretion to deny a request under this provision only when there exists a certain criminal conduct that would be an offense under military criminal law, but would not be an offense under ordinary law. For example, showing disrespect to a senior military officer would be a purely military criminal offense and, thus, a basis on which the Requested State would have discretion to deny assistance. On the other hand, if a military officer murders another military officer, this would be a military offense as well as an offense under ordinary law and, thus, the Requested State would not have discretion to deny assistance under this provision. As a practical matter, the negotiating delegations noted that they anticipate that this provision will rarely, if ever, be used as a basis for denial of a request.

Paragraph 1(b) permits denial of a request if it involves a political offense.[8] It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the sovereignty, security or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases where assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other Government agencies to determine whether to execute a request that falls into this category.

The delegations agreed that the phrase "essential interests" is intended to limit narrowly the class of cases in which assistance may be denied. It is not enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example is a request involving prosecution by the Requesting State of conduct that occurred in the Requested State that is constitutionally protected in the Requested State.

It was agreed that "essential interests" may include interests unrelated to national military or political security, and may be invoked if the execution of a request would violate essential United

[8] *See* Section 18(2)(a) and 18(2)(b), Lithuania Mutual Assistance Act, 1992.

States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose of the Treaty is to enhance law enforcement cooperation. The attainment of that goal would be hampered if sensitive law enforcement information available under the Treaty were to fall into the wrong hands. Accordingly, the United States Central Authority may invoke paragraph 1(c) to decline to provide sensitive or confidential drug-related information pursuant to a Treaty request whenever it determines, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who likely 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.[9]

Paragraph 1(d) permits the denial of a request if it is not made in substantial compliance with Article 4 of the Treaty.

Paragraph 2 is similar to Article 3(2) of the U.S.- Switzerland Mutual Legal Assistance Treaty,[10] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the grounds for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise, and the request

[9] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884 (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2d Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

[10] 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.

shall be in the language or translated into the language of the Requested State unless otherwise agreed.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. If the Central Authority is not competent to execute the request, it must promptly transmit the request to a competent authority for execution. For the Republic of Lithuania, the Central Authority will determine whether (1) the request complies with the terms of the Treaty, and (2) its execution would prejudice the sovereignty, security, or other essential interests of Lithuania. If the request merits execution, the Central Authority will transmit the request to an appropriate department within the Office of the Prosecutor General or the Ministry of Justice for that purpose.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the competent authorities of the Requested State to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Lithuania. Rather, it is anticipated that when a request from Lithuania requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[11]

The third sentence in Article 5(1) reads "[t]he Courts of the Requested State shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request." In Lithuania, courts, as well as public prosecutors, are empowered under Lithuanian law to "issue subpoenas, search warrants, or other orders necessary to execute the request."

In Lithuania, execution of requests will be almost exclusively within the province of the Office of the Prosecutor General, Ministry of Justice, and the courts, whereas in the United States, execution can be entrusted to any competent authority in any branch of government, federal or state. Nevertheless, when a request from Lithuania requires compulsory process for execution, it is antici-

[11] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

pated that the competent authority in the United States will issue the necessary compulsory process itself,[12] or ask a Court to do so.

Paragraph 2 reconfirms that the Central Authority of the Requested State shall arrange for requests from the Requesting State to be presented to the appropriate authority in the Requested State for execution. In practice, the Central Authority for the United States will transmit the request with instructions for 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 will select an appropriate representative, generally a federal prosecutor, to present the matter to a court. Thereafter, the prosecutor will represent the United States, acting to fulfill its obligations to Lithuania under the Treaty by executing the request. Upon receiving the court's appointment as a commissioner, the prosecutor/commissioner will act as the court's agent in fulfilling the court's responsibility to do "everything its] power" to execute the request. In short, the prosecutor may only seek permission from a court to exercise the court's authority in using compulsory measures if he receives permission from the court to do so.

The situation with respect to Lithuania is different. The U.S. Central Authority will transmit all requests to the Lithuanian Office of the Public Prosecutor. If the case is in the investigative stage, the Office of the Public Prosecutor will assign the request to an appropriate department within that office. Public prosecutors in Lithuania have authority to order compulsory process, including, but not limited to, requiring a witness to appear to provide testimony, issuing subpoenas to compel the production of documents or other evidence, and ordering a search and seizure. The exercise of this authority by Lithuanian prosecutors does not require the consent of a court. In other words, unlike in the United States, a Lithuanian prosecutor may execute a foreign request seeking compulsory process without the assistance of the Lithuanian courts.

If the request to Lithuania relates to an indicted case, the Office of the Prosecutor General of Lithuania will transmit the request to the Ministry of Justice for forwarding to an appropriate court with general advice regarding Lithuania's treaty obligation and the general evidentiary and procedural requirements of the United States.

Paragraph 3 provides that requests shall be executed in accordance with the laws of the Requested State except to the extent that the Treaty provides otherwise. Thus, for example, the provision in Article 8(4) that claims of privilege under the law of the Requesting State are to be referred back to the courts of the Requesting State would take precedence over a contrary provision in domestic law. To illustrate, 28 U.S.C. 1782 permits, as a basis for not compelling testimony or production of evidence, deference to privileges legally applicable in a Requesting State. To the extent that this provision were considered to be in conflict with the treaty, the treaty provision would prevail.

The negotiators discussed the procedures applicable in their respective States in executing requests for legal assistance from the

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

other and agreed to accommodate any specific procedure requested by the other to the extent permitted under the laws of the Requested State or as discussed with respect to specific treaty provisions. (*See, e.g.,* Article 8.)

The second sentence of Paragraph 3 makes clear that the Treaty does not authorize the use in the Requested State of methods of execution that would be otherwise prohibited in the Requested State.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the facts of the offenses and the procedural history of the case" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[13] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is delayed or postponed, the Central Authority of the Requested State must also explain the reasons to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

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[13] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.- Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US-Philippines Mutual Legal Assistance Treaty, art. 5(5).

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[14] Article 6 does not, however, oblige the Requested State to pay fees of experts, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons traveling either in the Requested State for the convenience of the Requesting State or pursuant to Articles 10 and 11.

Costs "relating to" execution means the costs normally incurred in transmitting a request to the executing authority, notifying witnesses and arranging for their appearances, producing copies of the evidence, conducting a proceeding to compel execution of the request, etc. The negotiators agreed that costs "relating to" execution to be borne by the Requested State do not include expenses associated with the travel of investigators, prosecutors, counsel for the defense, or judicial authorities to, for example, question a witness or take a deposition in the Requested State pursuant to Article 8(3), or travel in connection with Articles 10 and 11.

Paragraph 2 of this article provides that if it becomes apparent during the execution of a request that complete execution of a request would require extraordinary expenses, then the Central Authorities shall consult to determine the terms and conditions under which execution may continue.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(e) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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

[14] *See, e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 13, art. 6.

State. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act.

Situations could arise in which the United States received information or evidence under the Treaty with respect to one case that was exculpatory of a defendant in another case and might be obliged to share the evidence or information with the defense. Brady v. Maryland, in 373 U.S. 83 (1963). Therefore, Paragraph 3 provides that nothing in Article 7 would preclude the use or disclosure of information or evidence to the extent that such information or evidence is exculpatory to a defendant in a criminal prosecution.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Lithuanian authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Lithuanian public prosecutors and courts and U.S. courts have the power to compel testimony or documents from individuals or companies in connection with both domestic and foreign proceedings. In the United States, a prosecutor asks a U.S. court to appoint him as a commissioner empowering him to execute subpoenas on behalf of the foreign authority. The procedure in the United States as described is used regardless of whether the request concerns a case still at the investigative stage or one that has already been indicted. In Lithuania, the authority of the public prosecutor

to issue subpoenas and to use other compulsory measures exists independently of the courts. Therefore, in Lithuania, where the request concerns a case at the investigative stage and is handled by the Office of the Prosecutor General, the public prosecutor may use his power to issue subpoenas to compel the production of documents or other evidence on behalf of the foreign authority. Where the request concerns an indicted case and is handled by a court, the court uses its power to issue subpoenas to compel the production of documents or other evidence on behalf of the foreign authority.

The criminal laws in both States contain provisions that sanction the production of false evidence. The second sentence of Paragraph 1 explicitly states that the criminal laws in the Requested State shall apply in situations where a person in that State provides false evidence in execution of a request. The negotiators expect that were any falsehood made in execution of a request, the Requesting State could ask the Requested State to prosecute for perjury, and provide the Requested State with the information or evidence needed to prove the falsehood.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

The Lithuanian delegation advised that a deposition on behalf of the United States would usually take place before a prosecutor, but sometimes before a court. A foreign deposition that takes place in Lithuania will differ depending on whether the questioning is conducted before a court versus a public prosecutor. The U.S. delegation was told that 99% of requested depositions in Lithuania will take place before a public prosecutor. When a deposition is scheduled to take place before a public prosecutor, the procedure is much more liberal and flexible and, thus, a public prosecutor might allow a U.S. prosecutor and defense counsel to pose questions directly to the witnesses. When a deposition is scheduled to take place before a Lithuanian court, however, the rules are stricter and questioning of the witnesses could only be done by a Lithuanian prosecutor, defense counsel, or judge on behalf of the U.S. parties. The Lithuanian delegation assured that there is no Lithuanian provision of law that would prohibit a U.S. prosecutor, defense counsel, or defendant from being present, regardless of whether the proceeding is before a Lithuanian court or public prosecutor. Moreover, a public prosecutor essentially has the same authority as a Lithuanian court for purposes of conducting a foreign deposition, i.e., the public prosecutor could compel testimony or evidence, place someone under oath subject to penalty of perjury, etc. In summary, neither delegation foresaw a problem in accommodating the needs of confrontation under either system.

The Lithuanian negotiators also assured the U.S. delegation that a stenographer could be present at depositions in Lithuania.

The presence of a stenographer is generally critical to preserve testimony of witnesses inasmuch as the 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. The United States practice is intended, among other things, to allow the trier of fact to receive testimony, to the extent possible, as if the witnesses were present at the United States court proceeding.

Paragraph 4 permits a witness whose testimony or evidence is sought to assert a claim of immunity, incapacity, or privilege under the laws of the Requesting State. The executing authority will note the asserted claim made under the law of the Requesting State, but defer to the appropriate authority in the Requesting State to rule on the merits. The taking of testimony or evidence, thus, can continue in the Requested State without delaying or postponing the proceeding whenever issues involving the law of the Requesting State arise. Both States recognize the privilege of witnesses against self-incrimination. The Lithuanian delegation also informed some of the privileges available under Lithuanian law include a doctor-patient privilege and an attorney-client privilege. There is no banker-client privilege in Lithuania.

Paragraph 5 is primarily for the benefit of the United States. The United States evidentiary system requires that evidence that is to be used as proof 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 "[e]vidence produced . . . pursuant to this Article," the negotiators focused on and were primarily concerned with business records. In order to ensure the United States that business records provided by Lithuania pursuant to the Treaty could be authenticated in a manner consistent with existing U.S. law, the negotiators crafted Form A to track the language of Title 18, United States Code, Section 3505, the foreign business records authentication statute. If the Lithuanian authorities properly complete, sign, and attach Form A to executed documents, or submit Form B certifying the absence or non- existence of business records, a U.S. judge may admit the records into evidence without the appearance at trial of a witness. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence; whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 9—OFFICIAL RECORDS

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by an executive, legislative or judicial authority in the Requested State.

Paragraph 2 provides that the Requested State may provide copies of any records, including documents or information in any form, that are in the possession of an executive, legislative, or judicial authority in that State, but that are not publicly available, to the same extent and under the same conditions as such copies would

be available to its own law enforcement or judicial authorities. The Requested State may in its discretion deny a request pursuant to this paragraph entirely or in part.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters, and such assistance could include tax return information when appropriate. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Lithuania under this article in appropriate cases.[15]

Paragraph 3 is primarily for the benefit of the United States. It provides for the authentication of records produced pursuant to this Article by an executive, legislative or judicial authority responsible for their maintenance. Such authentication is to be effected through the use of Form C appended to the Treaty. If the Lithuanian authorities properly complete, sign, and attach Form C to executed documents, or submit Form D certifying the absence or nonexistence of such records, a U.S. judge may admit the records into evidence as self-authenticating under Rule 902(3) of the Federal Rules of Evidence. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence. Whether the evidence is, in fact, admitted is

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[15] Under 26 U.S.C. 6103(i) information in the files of the Internal Revenue Service (generally protected from disclosure under 26 U.S.C. 6103) may be disclosed to federal law enforcement personnel in the United States for use in a non-tax criminal investigations or proceedings, under certain conditions and pursuant to certain procedures. The negotiators agreed that this Treaty (which provides assistance both for tax offenses and in the form of information in the custody of tax authorities of the Requested State) is a "convention . . . relating to the exchange of tax information" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Lithuania through this Treaty when, in a criminal investigation or prosecution, the Lithuanian authority on whose behalf the request is made can meet the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103(h) and (i). As an illustration, a Lithuanian request for tax returns to be used in a non-tax criminal investigation, in accordance with 26 U.S.C. 6103(i)(1)(A), would have to specify that the Lithuanian 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 Lithuanian criminal statute (not involving tax administration) to which Lithuania is or may be a party.

(ii) any investigation which may result in such a proceeding, or

(iii) any Lithuanian proceeding pertaining to enforcement of such a criminal statute to which Lithuania is or may be a party. (*See* 26 U.S.C. 6103(i)(1)(A))

The request would have to be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns as specified at 26 U.S.C. 6103(i)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with 26 U.S.C. 6103(i)(1)(B), that:

(i) there is reasonable cause to believe, based upon information believed to be reliable, 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 Lithuanian criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

In other words, the Lithuanian law enforcement authorities seeking tax returns would be treated as if they were United States law enforcement authorities—undergo the same access procedure where they would be held to the same standards.

a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 10—APPEARANCE OUTSIDE THE REQUESTED STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State or to a third State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State or in a third State under this article is not mandatory, and the invitation may be refused by the prospective witness.

Paragraph 2 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided. Paragraph 2 also provides that the person who agrees to travel to the Requesting State may request and receive an advance for expenses. The advance may be provided through the embassy or a consulate of the Requesting State.

Paragraph 2 provides that the Central Authority of the Requesting State may, in its discretion, determine that a person appearing in the Requesting State pursuant to this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any acts or convictions that preceded the person's departure from the Requested State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 4 imposes on the safe conduct provided in the article a time limitation of seven days, which begins to run after a competent authority of the Requesting State has notified the person appearing pursuant to the Treaty that the person's presence is no longer required and that person, being free to leave, has not left or, having left, has voluntarily returned.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[16]

[16] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Mur-*

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[17] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[18]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[19]

Paragraph 3(a) 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, unless otherwise agreed by both Central Authorities.

Paragraph 3(b) states that the transferred person shall not be required to testify in proceedings not specified in the request, unless he consents to do so.

Paragraph 3(c) provides that the receiving State must return the transferred person to the custody of the sending State as soon as circumstances permit or as otherwise agreed by the Central Authorities. The transferred person need not consent to the return to the sending State, only to the original transfer.

Paragraph 3(d) 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 Lithuania to the United States and files a habeas corpus in an attempt to prevent a return to Poland in the absence of an extradition request.

Paragraph 3(e) states that the person transferred will receive credit in the sending State for the time in custody in the receiving State.

Paragraph 3(f) provides that, where the receiving State is a third state, the Requesting State shall make all arrangements necessary to meet the requirements of this paragraph.

Paragraph 4 states that safe conduct for the transferred person may be provided for by the Central Authority of the receiving State under the same terms set forth in Article 10, subject to the conditions set forth in paragraph 3 of this article.

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phy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[17] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 10, art. 26.

[18] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial. This provision is also consistent with Sections 10 and 23, Lithuania Mutual Assistance Act, 1992.

[19] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State.[20] The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request.

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[21] This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Lithuania will have to be supported by a showing of probable cause for the search. A United States request to Lithuania would have to satisfy the corresponding evidentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form E

[20] This is consistent with Lithuania law. *See* Section 20, Lithuania Mutual Assistance Act, 1992.

[21] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

appended to this Treaty, the identity of the item, the continuity of custody, and any changes in its condition.

The article also provides that the certificates describing continuity of custody will be admissible in evidence in the Requesting State as proof of the truth of the matters set forth therein.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[22]

Paragraph 4 obligates the Central Authority of the Requested State to use its best efforts to obtain any necessary approval for the transfer of items where such approval is required under the laws of that State concerning import, export, or other transfer of items. This provision was intended primarily to assist the U.S. authorities in obtaining the transfer of items without unnecessary delays that might otherwise be encountered under Lithuanian import and export laws.

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

The Treaty will enhance the efforts of both the United States and Lithuania in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.- Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For in-

[22] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990; U.S.-Bahamas Mutual Legal Assistance Treaty; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13; U.S.-Hungary Mutual Legal Assistance Treaty, supra, note 6; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.- Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.- Philippines Mutual Legal Assistance Treaty, *supra* note 13; U.S.- Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

stance, if the assets in question are located in the United States and were obtained as a result of a fraud in Lithuania, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[23] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[24] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[25] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[26]

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[23] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[24] Title 18, United States Code, Section 1956(c)(7)(B).

[25] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[26] In Lithuania, unlike the U.S., the law does not currently allow for civil forfeiture. However, Lithuania law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Lithuania to confiscate the defendant's property.

Under Lithuanian law, forfeiture can occur in two ways. In one instance, a Lithuanian prosecutor can issue a forfeiture order, which is finalized by a court, thereby allowing him to seize and forfeit criminal proceeds and instrumentalities of an offense committed by a person who has been charged with that offense. If the person, ultimately, is acquitted, then the Lithuanian authorities must return the property to that person. In the second instance, the Lithuanian criminal code provides that forfeiture may occur as punishment for a crime. The Lithuanian Constitutional Court has found that for forfeiture to be used as part of a punishment for a criminal offense, the offense must be a serious one.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[27] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

Lithuania does not prohibit sharing and, thus, the Lithuanian delegation stated that it thought that Lithuanians could share a percentage of forfeited proceeds with the United States on a case-by-case basis.

ARTICLE 17—COMPATIBILITY WITH OTHER TREATIES

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Lithuania law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[28]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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 assist-

[27] *See* Title 18, United States Code, Section 981 (i)(1).

[28] *See e. g.,* the U.S.-Lithuania Agreement for the Exchange of Information With Respect to Taxes, Nov. 3, 1984, T.I.A.S. 11203.

ance was utilized, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[29] It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 19—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 provides that this Treaty shall enter into force upon the exchange of instruments of ratification.

Paragraph 3 provides that the Treaty will be terminated six months from the date that a Party receives written notification from the other. Similar requirements are contained in our treaties with other countries.

Technical Analysis of the Treaty Between the United States of America and Saint Lucia on Mutual Legal Assistance in Criminal Matters

On April 18, 1996, the United States signed a treaty with Saint Lucia 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking in the strategically important eastern Caribbean.

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. Saint Lucia plans to enact implementing legislation for the Treaty, as it currently has no specific mutual legal assistance law in force.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

[29] See, e.g., U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 13, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 22, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, supra, note 22.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Saint Lucia, and other legal measures taken prior to the filing of formal charges in either State.[1] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[2] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature,[3] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article, however, makes it clear that there is no general requirement of dual criminality under this Treaty. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "[e]xcept as otherwise provided in this Treaty," a phrase which refers to Article 3(1)(e), under

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[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Saint Lucia under the Treaty in connection with investigations prior to charges being filed in Saint Lucia. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[3] See 21 U.S.C. § 881; 18 U.S.C. § 1964.

which the Requested State may, in its discretion, require dual criminality for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Saint Lucia criminal law differ, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[4] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Section 1961-1968); money laundering; tax crimes, including tax evasion and tax fraud; crimes against environmental protection laws; and antitrust violations.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[5] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Saint Lucia by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Saint Lucia on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Saint Lucian Central Authority would make all requests emanating from officials in Saint Lucia.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the

[4] See e.g., U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[5] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

Criminal Division.[6] Paragraph 2 also states that the Attorney General of Saint Lucia or a person designated by the Attorney General will serve as the Central Authority for Saint Lucia.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny the request if it relates to an offense under military law which would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that "security" would include cases in which assistance might involve disclosure of information which is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph (1)(b)

[6] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

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 U.S. investigation or prosecution.[7]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. In the course of the negotiations, the Saint Lucia delegation expressed its view that in very exceptional and narrow circumstances the disclosure of business or banking secrets could be of such significant importance to its Government (e.g., if disclosure would effectively destroy an entire domestic industry rather than just a specific business entity) that it could prejudice that State's "essential public interests" and entitle it to deny assistance.[8] The U.S. delegation did not disagree that there might be such extraordinary circumstances, but emphasized its view that denials of assistance on this basis by either party should be extremely rare.

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Finally, Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State. This provision is similar to clauses in other United States mutual legal assistance treaties.[9]

Paragraph 2 is similar to Article 3(2) of the U.S.- Switzerland Mutual Legal Assistance Treaty[10], and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu

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[7] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[8] The Saint Lucia view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty. *See* Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

[9] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).

[10] 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.

of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

Where the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. However, this provision is neither intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Saint Lucia. Rather, it is anticipated that when a request from Saint Lucia requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of this Treaty. [11]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Saint Lucia, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Article 5(2) is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty, [12] and provides thatr]equests shall be executed according to the internal laws and procedures of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a Treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the

[11] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[12] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 9.

extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Saint Lucia authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[13] Saint Lucia law currently contains no similar provision. Thus, documents assembled in Saint Lucia in strict conformity with Saint Lucian procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Saint Lucia.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Article 5(3) requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal

[13] Title 18, United States Code, Section 3505.

Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Article 5(5) of the Treaty enables the Requesting Party to call upon the Requested State to keep the information in the request confidential.[14] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[15] Article 6 states that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

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[14] This provision is similar to language in other United States mutual legal assistance treaties. See e.g., U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 5(5).

[15] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 6.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under Article 7(1). Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Article 7(2) requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

The Saint Lucia delegation expressed concern that information it might supply in response to a request by the United States under the Treaty not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Article 7(3) states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure and the provision of the Constitution under which such disclosure is required shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. The negotiators noted that once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The Parties agreed that once this has occurred, it is practically impossible for the Central Authority of the Requesting State to block the use of that information by third parties.

It should be kept in mind that under Article 1(4) of the Treaty, the restrictions outlined in Article 7 are for the benefit of the Parties (the United States and Saint Lucia) and the invocation and enforcement of these provisions are left entirely to the Parties. Where any individual alleges that an authority in Saint Lucia is seeking to use information or evidence obtained from the United States in a manner inconsistent with this article, the recourse would be for the person to inform the Central Authority of the United States of the allegations, for consideration as a matter between the governments.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4, read together with Article 5(3), ensures that no person will be compelled to furnish information if the person 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 request from Saint Lucia is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[16] A witness testifying in Saint Lucia may raise any of the similar privileges available under Saint Lucian law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[17]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a

[16] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[17] See e.g., U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 14, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 8(4).

procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to pro-

vide tax return information to Saint Lucia under this article in appropriate cases.[18]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902 (3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, like Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite witnesses who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify that Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph 1 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the witness is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while the person is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the Treaty with Saint Lucia, the Central Authority merely reports whether safe conduct has been extended. This is because in Saint Lucia only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Saint Lucia under Article 3 of the Treaty) cannot do so. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

[18] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so. For the United States, the "competent authorities" for these purposes would be the Central Authority; for Saint Lucia, the Director of Public Prosecutions would be the appropriate competent authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[19]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the U.S.-Switzerland Mutual Legal Assistance Treaty,[20] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[21]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[22]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Cen-

[19] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[20] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 10, art. 26.

[21] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

[22] *See also United States v. King,* 5522d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

tral Authorities, but the provision does not require the person's consent to return to the sending State.

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, Article 11(3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. Identical provisions appear in several U.S. mutual legal assistance treaties.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Saint Lucia to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Re-

quested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[23] This article creates a formal framework for handling such requests.

The article requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Saint Lucia will have to be supported by a showing of probable cause for the search. A United States request to Saint Lucia would have to satisfy the corresponding evidentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced pursuant to this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication at trial leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some other reason to do so aside from authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be

transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[24]

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[23] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984). The courts of other states in the eastern Caribbean have the power to execute requests for such searches, too. See, e.g., Section 21, Barbados Mutual Assistance Act 1992; Section 22, Dominica Mutual Assistance Act 1990.

[24] See e.g., U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 17; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Saint Lucia in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Saint Lucia, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[25] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[26] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act) within whose jurisdiction such offense or

[25] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[26] Title 18, United States Code, Section 1956(c)(7)(B).

activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada, and there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[27] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization 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 permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[28] Article 16(3) is consistent with this framework, and will enable a Contracting Party having custody over the proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Saint Lucia law on let-

[27] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[28] See Title 18, United States Code, Section 981 (i)(1).

ters rogatory completely undisturbed, and would not alter any preexisting agreements concerning investigative assistance.[29]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[30] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification.

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and the Grand Duchy of Luxembourg on Mutual Legal Assistance in Criminal Matters

On March 13, 1997, the United States and the Grand Duchy of Luxembourg signed a Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with others 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 matters.

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[29] E.g., the U.S.-St. Lucia Agreement for the Exchange of Information With Respect to Taxes, with Annex, signed at Washington January 30, 1987, entered into force April 22, 1991, T.I.A.S. 12057.

[30] See e.g., U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 14, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 24, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4, art. 18.

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 Treaty with Luxembourg is a major advance in the formal law enforcement relationship between the two countries, as the following technical analysis of the Treaty illustrates.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 provides for assistance "in connection with the investigation and prosecution of offenses, the punishment of which, at the time of the request for assistance, would fall within the jurisdiction of judicial authorities in the Requesting State, and in forfeiture and restitution proceedings related to criminal offenses." For the United States, this includes a grand jury investigation, a criminal trial, a sentencing proceeding, and an administrative inquiry by an agency with investigative authority for the purpose of determining whether to refer the matter to the Department of Justice for criminal prosecution.[1] Furthermore, the Treaty may be invoked to provide assistance for forfeiture proceedings against instrumentalities or proceeds of crime (e.g., drug trafficking) or for restitution proceedings related to a criminal offense.

Unlike some United States mutual legal assistance treaties, the Treaty with Luxembourg is intentionally silent regarding assistance in the "prevention" of crime (i.e., in anticipation of criminal activity). This is because the Treaty is not intended to cover police-to-police cooperation before a crime is committed. The delegations agreed that "investigation" is to be given a broad interpretation. The preamble to the Treaty makes clear that the parties desire to extend to each other the widest measure of cooperation and assistance in criminal matters. The phrase "would fall" was chosen to ensure coverage for matters that might not yet be within the jurisdiction of a court.

Paragraph 2 lists the types of assistance specifically considered by the negotiators. Most of the items are described in greater detail

[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Luxembourg under the Treaty in connection with investigations prior to charges being filed in Luxembourg. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted Section 1782, to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

in subsequent articles. The list is not exhaustive, as indicated by the phrase "assistance shall include" in the paragraph's chapeau and reinforced by the phrase in item (i) that provides for "any other form of assistance not prohibited by the laws of the Requested State."

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article, however, makes it clear that there is no general requirement of dual criminality under this Treaty for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State.

However, paragraph 3 also states that a party may decline to provide assistance if execution of the request requires a court order for search and seizure or other coercive measures, and the facts stated in the request fail to establish a reasonable suspicion that the conduct would constitute an offense under its laws for which the maximum penalty would be deprivation of liberty for at least six months. This means that the Requested State is obligated to grant such assistance if, using the standard of "reasonable suspicion," it is determined that the conduct described would be a crime under the laws of the Requested State. However, where dual criminality is lacking and execution requires coercive measures, such as a search and seizure, the provision of assistance will be discretionary with the Requested State. The delegations agreed that it was sufficient for purposes of dual criminality that the offenses be similar, and anticipated that the dual criminality requirement would prevent the granting of assistance only in rare instances. The last sentence of Paragraph 3 obligates the Requested State to "make every effort to approve a request for assistance requiring court orders or other coercive measures."

Paragraph 4 requires that assistance be granted for specified tax and customs duty offenses and for offenses involving any other taxes that the parties specify at a later date through an exchange of diplomatic notes.

Paragraph 5 makes assistance mandatory for tax offenses other than those specified in Paragraph 4 where the facts in a request establish a reasonable suspicion of "fiscal fraud" ("escroquerie fiscale"). This provision applies to offenses involving a serious tax fraud such as felony tax offenses in the United States and matters falling under the law relating to "escroquerie fiscale" in Luxembourg.

Fiscal fraud is defined in Paragraph 5(a) and (b) as criminal offenses where "the tax involved, either as an absolute amount or in relation to an annual amount due, is significant" and the conduct involved "constitutes a systematic effort or a pattern of activity designed or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities." The delegations agreed that "annual" encompasses any year, not only calendar years. Diplomatic notes exchanged by the parties provide additional guidance regarding the kinds of matters in which assistance will be provided.

The parties agreed that matters relating to misleading conduct in the collection of taxes may constitute other crimes, such as fraudulent insolvency or breach of trust, for which assistance will be provided under Paragraph 3.

The final sentence of Paragraph 5 provides that assistance shall not be refused because the Requested State does not have the same kind of tax or tax regulations as the Requesting State. This provision is to protect against a technical application of Paragraph 5.

Paragraph 6 expresses the intention of the negotiators that the Treaty is for government-to-government mutual legal assistance. Paragraph 6 specifies the authorities on whose behalf a request may be made. It permits the Central Authority for the United States to make requests to Luxembourg on behalf of federal, state, and local prosecutors and criminal investigators, as well as on behalf of authorities such as the Securities and Exchange Commission and Internal Revenue Service, which have responsibility to investigate criminal activity for purposes of referral for criminal prosecution. Private litigants in each of the parties may continue to obtain evidence from the other party by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed.

Paragraph 7 provides that the Treaty is not intended to create any new right in a private person to impede the execution of a request or to suppress or exclude evidence provided under the Treaty, nor is it meant to affect any pre-existing rights of a private party.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Luxembourg on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of Luxembourg would make all requests emanating from officials in Luxembourg.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[2] For Luxembourg, the Parquet General will be the Central Authority.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It

[2] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph 1(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph 1(b) permits the Requested State to deny assistance relating to an offense for which the maximum penalty in the Requesting State is a year or less. Under this provision, the offense must be a serious one in the Requesting State.

Paragraph 1(c) permits the Requested State to deny assistance if it has prosecuted the person whose conduct is the subject of the request for the identical conduct, and the person has been convicted and sentenced, or acquitted, in the Requested State. The negotiators anticipate this provision will apply only in rare circumstances where the conduct addressed is identical, the criminal proceedings occurred in the Requested State, and the proceedings resulted in conviction and sentencing or acquittal.

Under Paragraph 1(d) the Requested State may deny a request if execution of the request "would prejudice the sovereignty, security, ordre public, or similar essential interests of the Requested State." The delegations agreed that, for Luxembourg, an essential interest may be a concern regarding the death penalty. Should Luxembourg impose a condition on use of evidence in a death penalty matter, the condition would be operative only if U.S. prosecutors introduce the materials received in execution of a Treaty request, or parts thereof, into evidence in the proceeding. The Luxembourg delegation agreed that no limitation would apply on use of the evidence in the course of the investigation, nor would there be a bar to imposition of a death penalty if a defendant obtained the evidence and used it at trial.

"Essential interests" may include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph 1(d) 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 U.S. investigation or prosecution.[3]

The negotiators anticipate that the provision, including its use in death penalty cases, will be invoked in the rarest and most extreme circumstances; the phrase "similar essential interests," juxtaposed with the word "security," is intended to convey a concept of substantial national importance. It is also anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

Paragraph 1(e) provides that the request may be denied if it is not made in conformity with Article 4. (Article 4, discussed later herein, relates to the form and contents of Treaty requests.) This restriction, similar to those typically found in United States mutual legal assistance treaties, gives the Central Authority discretion to accept a request even though it lacks some element that is otherwise required.

Paragraph 2 provides that the request may be denied if it involves a political offense. A similar restriction is typically found in United States mutual legal assistance treaties. The negotiators agreed that offenses not considered "political offenses" under the U.S.-Luxembourg extradition treaty are similarly not considered political offenses for purposes of this Treaty. For Luxembourg, the Central Authority will examine whether the request involves a political offense. Should a court address a political offense claim once the Central Authority forwards a request for execution, the public prosecutor will present the arguments of the United States in favor of assistance to the court at both the trial and appellate levels. In the United States, the decision to deny assistance on political offense grounds lies with the Central Authority. The negotiators anticipate this provision will be applicable only is extremely rare circumstances. The final sentence of Paragraph 2 provides that the political offense exception shall not apply to any offense that the Parties consider not to be a political offense under any international agreement to which they are parties.

Paragraph 3 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[4] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal under the Treaty's terms). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would no-

[3] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[4] 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.

tify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 4 effectively requires that the Central Authority of the Requested State notify the Central Authority of the Requesting State of the reason for denying a request for assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Requests that the United States sends to Luxembourg, and supporting documents, must be translated into French. Luxembourg's requests to the United States, and supporting documents, must be accompanied by a translation into English.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be

necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Luxembourg. Rather, it is anticipated that when a request from Luxembourg requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.

Paragraph 2 provides thatr]equests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The second sentence of Paragraph 2 authorizes the courts in each State to issue such orders to execute requests made under the Treaty as would be authorized for domestic investigations and prosecutions. In the United States, the mechanism used to call upon the courts to exercise their authority to execute Luxembourg requests will be an application filed pursuant to Title 28, United States Code, Section 1782. Typically, upon application pursuant to that statute, the court appoints a commissioner and authorizes the commissioner to issue subpoenas (which should be as far-reaching and comprehensive as in domestic investigations and prosecutions) to take testimony and produce evidence. The commissioner may also call upon the court to enforce the subpoenas, if necessary, or for other orders, such as for searches and seizures to the extent that "probable cause" exists, or to freeze the proceeds of crime, to the extent necessary or appropriate to execute the Luxembourg request.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there may be significant differences between the procedures which must be followed by United States and Luxembourg authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[5] Luxembourg law currently contains no similar provision. Thus, documents assembled in Luxembourg in strict conformity with procedures in Luxembourg on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Luxembourg. Second, the evidence in question

[5] Title 18, United States Code, Section 3505.

could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 2 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 3 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing criminal investigation or proceeding in the Requested State, jeopardize the security of a person, or impose an extraordinary burden on the resources of that State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the execution of the request. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to appropriate conditions.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of "a description of the facts and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 4 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[6] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

[6] This provision is similar to language in other United States mutual legal assistance treaties. See e.g., U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, Nov. 13, 1994, art. 5(5).

Paragraph 5 provides that the Requested State may permit the presence of individuals specified in the request during its execution. This provision makes clear that the Requested State may grant requests by the Requesting State for the presence of prosecutors, agents, defendants, defense counsel, court reporters, translators, interpreters, or other individuals who may facilitate the execution of the request.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[7] Paragraph 1 states that the Requesting State will pay fees of experts, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons within the Requested State for the convenience of the Requesting State and to travel of persons pursuant to Articles 10 and 12.

Paragraph 2 provides that if it becomes apparent, as execution is occurring, that complete execution will involve extraordinary expense, the Central Authorities are to consult to determine the terms and conditions for execution to continue. The negotiators agreed consultation should occur where costs are extraordinarily large, as where the Requested State might be obliged to pay for a search for records for several weeks at an hourly rate.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act.

Paragraph 2 provides that information or evidence obtained by the Requesting State for the investigation or prosecution of a tax offense may also be used by authorities involved in the assessment, collection, or administration of the taxes that underlie the offense, or in enforcing or determining the appeals relating to such taxes. This ensures that the evidence may be used in all civil and administrative proceedings that relate to the determination of the taxes owed. The parties agreed that the evidence may be used in civil

[7] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 6, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6, art. 6.

and administrative proceedings even if the tax fraud prosecution results in an acquittal or even if, after the evidence is received, a decision is made not to institute criminal proceedings. The parties agreed that the evidence would not be used in criminal prosecutions for tax offenses not covered by Article 1(5) except as otherwise provided pursuant to Paragraph 1.

Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that it is mandatory for the United States under its Constitution and for Luxembourg under the European Convention for the Protection of Human Rights and Fundamental Freedoms. For the United States, this provision addresses, for instance, issues arising where evidence provided for one investigation or prosecution is of exculpatory value to a defendant in another prosecution. The Requesting State is required to notify the Requested State before any such use or disclosure takes place.

Paragraph 4 provides that once information or evidence becomes public in the Requesting State in the normal course of the proceeding for which it was provided, it thereafter may be used for any purpose with four exceptions. Even after evidence becomes public, its use is prohibited in prosecutions of offenses under military law that would not be offenses under ordinary criminal law; political offenses; capital offenses; and tax offenses not covered by the Treaty. The Requesting State must obtain the consent of the Requested State to use the information or evidence in the prosecution of one of these listed offenses.

ARTICLE 8—TESTIMONY, STATEMENTS, OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 obligates the Requested State to compel persons to appear and testify or produce evidence requested by the Requesting State to the same extent as in criminal investigations or proceedings in the Requested State. Judicial authorities in both States have the power to compel testimony and production of documents in connection with both domestic or foreign proceedings. Whereas in the United States, competent authorities will rely on compliance with a subpoena for production of most documents, in Luxembourg, authorities will gather the documents through a search and seizure procedure.

The criminal laws in both States contain provisions that sanction giving or producing false evidence. The second sentence of Paragraph 1 explicitly states that the criminal laws in the Requested State shall apply in situations where a person in that State provides false evidence in execution of a request. The negotiators expect that, were false testimony or certification of documents provided in execution of a request, the Requesting State could ask the Requested State to prosecute for perjury and provide the Requested State with the information or evidence needed to prove the falsehood.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony, statements or evidence. Although the time period "in advance" is undefined, the negotiators understood that each State would attempt to accommodate the needs of the other

in this regard. The negotiators agreed that a court in the Requesting State with jurisdiction over a person who has filed an opposition in the Requested State (e.g., to the taking of testimony) may order the person not to object or to withdraw the opposition.

Advance notice is of particular importance to the United States because the United States sometimes relies heavily on deposition testimony where a witness is unwilling or unable to come to the United States to testify at trial. With assurance of advance notice, the United States trial court can order that a deposition take place in Luxembourg on a date to be specified by the Luxembourg authorities. The Central Authorities then can work together to arrange a date for the testimony and notify the parties sufficiently in advance of the date to permit the parties to be present.

Paragraph 3 guarantees that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present during the taking of testimony under oath for use in a proceeding, and be allowed either to directly question the person giving testimony or to have questions posed in accordance with the applicable procedures of the Requested State. For the United States, the persons specified to be present in Luxembourg could include prosecutors, investigators, court reporters, translators, interpreters, defendants, and defense counsel.

The presence of a stenographer is generally critical to preserve testimony of witnesses inasmuch 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. Among other things, the United States practice is intended to allow the trier of fact to receive testimony, to the extent possible, as if the witnesses were present at the United States court proceeding.

The ability to secure the presence of the defendant and defense counsel is important under United States law, which normally seeks to afford the defendant an opportunity to confront a witness who testifies against the defendant and to ask the witness questions. Neither delegation foresaw a problem in accommodating the need for confrontation under either system.

Paragraph 4, when read together with Article 5(2), ensures that no person will 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 request from Luxembourg is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[8] A witness testifying in Luxembourg may raise any of the similar privileges available under Luxembourg law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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

[8] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[9]

Paragraph 5 is primarily for the benefit of the United States. The United States evidentiary system requires that evidence to be used as proof in a legal proceeding be authenticated as a precondition to admissibility. This paragraph provides for authentication and, further, ensures that records produced will not be excluded in U.S. proceedings by the hearsay rule. Items produced in the Requested State pursuant to Article 8 may be certified by an "attestation." Although the provision is sufficiently broad to include the certification of any items produced, the negotiators focused on and were primarily concerned with business records. In order to ensure the United States that business records provided by Luxembourg pursuant to the Treaty could be authenticated and hearsay objections addressed in a manner consistent with existing United States law, the negotiators crafted Form A to track the language of Title 18, United States Code, Section 3505, the foreign business records authentication statute. Article 8(5)(a) provides that Luxembourg authorities properly complete, sign, and attach Form A to executed documents so that a U.S. judge may admit the records into evidence without the appearance at trial of a witness.

Paragraph 5 also provides for a situation where a witness declines to complete Form A. The article permits the use of a "protocol containing the essential information" that would otherwise be included in Form A. Accordingly, a judicial official can interview the witness and provide a protocol with the required information. Finally, Article 8(5)(c) provides for use of a "document" containing the essential information required by the Requesting State. With this provision, the negotiators sought to accommodate changes in United States and Luxembourg evidentiary law without changing the Treaty. Pursuant to Article 8(5)(c), the Requesting State would need to make its requirements for certification known in the request, and such procedures would be followed to the extent possible under the law of the Requested State.

It is understood that the last sentence of this paragraph provides for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing and does not need implementing legislation.

Article 8(5) provides that evidence authenticated in accordance with this provision is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance and materiality) would still have to be satisfied in each case.

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[9] See e.g., U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, Supra note 6, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6, art. 8(4).

ARTICLE 9—OFFICIAL RECORDS

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by its judicial authorities or a government department or agency in the Requested State. This includes "government departments and agencies" including all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may provide copies of records of any nature and in any form that are in the possession of its judicial authorities or government departments or agencies, but that are not accessible to the public, to the same extent and under the same conditions that would apply to its own law enforcement or judicial authorities. The Requested State may, in its discretion, deny entirely or in part a request covered by this paragraph.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters, and such assistance could include tax return information when appropriate. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Luxembourg under this article in appropriate cases. [10]

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[10] Under 26 U.S.C. 6103(i) information in the files of the Internal Revenue Service (generally protected from disclosure under 26 U.S.C. 6103) may be disclosed to federal law enforcement personnel in the United States for use in a non-tax criminal investigations or proceedings, under certain conditions and pursuant to certain procedures. The negotiators agreed that this Treaty (which provides assistance both for tax offenses and in the form of information in the custody of tax authorities of the Requested State) is a "convention ... relating to the exchange of tax information" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Luxembourg through this Treaty when, in a criminal investigation or prosecution, the authority of Luxembourg on whose behalf the request is made can meet the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103(h) and (i). As an illustration, a request from Luxembourg for tax returns to be used in a non-tax criminal investigation, in accordance with 26 U.S.C. 6103(i)(1)(A), would have to specify that the law enforcement authority of Luxembourg is:

personally and directly engaged in--

(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated criminal statute of Luxembourg (not involving tax administration) to which Luxembourg is or may be a party.

(ii) any investigation which may result in such a proceeding, or

(iii) any proceeding in Luxembourg pertaining to enforcement of such a criminal statute to which Luxembourg is or may be a party. (See 26 U.S.C. 6103(i)(1)(A))

The request would have to be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns as specified at 26 U.S.C. 6103(I)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with 26 U.S.C. 6103(I)(1)(B), that:

(i) there is reasonable cause to believe, based upon information believed to be reliable, 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 criminal investigation in Luxembourg or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

In other words, the law enforcement authorities of Luxembourg seeking tax returns would be treated as if they were United States law enforcement authorities—undergo the same access procedure where they would be held to the same standards.

Paragraph 3 provides for the authentication, by certification of a competent authority of the Requested State, of records produced pursuant to this article. With the certification no further authentication is necessary. Nevertheless, Luxembourg agreed that its Central Authority, upon request, would further provide a "Certification of Foreign Public Documents" that states: "I, [Luxembourg Central Authority], attest on penalty of criminal punishment for false statement or attestation that the position of the authority with the government of Luxembourg certifying the official record is [official title] and that in that position, the authority is authorized by the laws of Luxembourg to attest that the documents attached [and described below] are true and accurate copies of original official records that are recorded or filed in [name of office or agency], which is a government office or agency of LuxembourDescription of Documents] Signature/Title/Date."

With the simple certification, or if the United States so requests, with the certification of both the certifying official and the Luxembourg Central Authority, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44 of the Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible," but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—APPEARANCE IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness.

When the United States seeks to have Luxembourg invite a person to appear in the United States, the United States Central Authority will send a letter of invitation through the Luxembourg Central Authority. The person invited is free to decline and shall not be subject to any penalty for doing so or for failing to appear after agreeing to do so. This does not preclude the United States from seeking under Article 14 service of a document such as a subpoena issued under Title 28, United States Code, Sections 1783-1784 and directed to a United States citizen or resident located in Luxembourg, which subpoena may entail sanctions for failure to appear in the United States as directed by the subpoena.

Paragraph 2 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided. Paragraph 2 also provides that the

person who agrees to travel to the Requesting State may request and receive an advance for expenses. The advance may be provided through the embassy or a consulate of the Requesting State.

ARTICLE 11—SAFE CONDUCT

Article 11(1) provides assurances that any witness or expert who appears in the Requesting State pursuant to a request for assistance shall not be "subject to any civil suit to which the person could not be subjected but for the person's presence in the Requesting State." It further provides that such person shall not be "prosecuted, punished, or subjected to any restriction of personal liberty" for acts committed prior to his leaving the Requested State. As specifically stated, these assurances do not protect against civil suits, prosecution, punishment, or restriction of personal liberty with respect to acts committed after departure from the Requested State. Any person appearing in the United States pursuant to a request under Article 10 or Article 12 will have such assurances unless the United States Central Authority specifies otherwise in the request inviting the person to appear.

Article 11(2) terminates the safe conduct provided in paragraph 1 if, after the person with safe conduct is notified that his or her presence is no longer required, that person, although free to leave, remains in the Requesting State for seven days, or, having left, voluntarily returns.

ARTICLE 12—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[11]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[12] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[13]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is needed for purposes of assistance under this Treaty shall be transferred from the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a

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[11] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[12] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 4, art. 26.

[13] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[14]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 12 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 13—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

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[14] *See also* United States v. King, 552 F.2d 833 (9th Cir. 1976), *cert. denied,* 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 14—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating to a Treaty request. Identical provisions appear in several U.S. mutual legal assistance treaties.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Luxembourg to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested. In Luxembourg, police officials serve documents and either make a return with a receipt or provide a statement regarding service.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires the Requested State to effect service and return proof of service in the manner provided by its laws, or if the request sets forth a specific manner, in "a special manner consistent with such laws." This allows each State to make a specific request regarding the manner of service, and the Requested State will honor that request as long as it is consistent with its laws.

Paragraph 4 provides that persons, other than nationals or residents of the Requesting State, who do not answer a summons to appear will not be sanctioned for failure to respond or subject to coercive measures. Under this provision, sanctions and coercive measures for failure to respond after service under the Treaty are possible only with respect to nationals or residents of the Requesting State. Luxembourg agreed to effect service on U.S. citizens and residents and recognized that such individuals were subject to sanction under United States law for failure to respond and to potential coercive measures once service under the Treaty has occurred. The parties agreed that service of documents would occur only under the Treaty.

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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[15] This article creates a formal framework for handling such requests.

Article 15 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Luxembourg will have to be supported by a showing of probable cause for the search. A United States request to Luxembourg

[15] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (Search warrant issued February 24, 1984).

would have to satisfy the corresponding evidentiary standard applicable there at the time of the request.

For the United States, prosecutors will make requests for search and seizure in Luxembourg without the involvement of the United States courts. Because the Treaty defines a "judicial authority" for purposes of this article as "a prosecutor," Luxembourg expects that the United States prosecutor who issues, approves, or otherwise authorizes a U.S. request seeking search and seizure will be named in the request.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that the Requested State keep detailed and reliable information regarding the condition of an article at the time of seizure, and the chain of custody between seizure and delivery to the Requesting State. The Requested State is required to maintain a reliable record, from the time of a seizure, of the "identity of the item, the continuity of its custody, and the integrity of its condition." Each custodian then executes a certificate using Form B, which is appended to the Treaty, or a document that contains the essential information required by the Requesting State.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[16]

ARTICLE 16—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. This would normally be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

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[16] See e.g., U.S.-Argentina Mutual Legal Assistance Treaty, Dec. 4, 1990; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 9; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 6; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

ARTICLE 17—PROCEEDS, OBJECTS, AND INSTRUMENTALITIES OF AN OFFENSE

A major goal of the Treaty is to enhance the efforts of both the United States and Luxembourg in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 provides that, upon request, the Central Authority of one State may take protective measures that are appropriate under the laws in that State to ensure that proceeds, objects, and instrumentalities of a crime located in that State are available for forfeiture or restitution.

The phrase "proceeds, objects, or instrumentalities of an offense" 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. In many instances, Luxembourg is able to impose temporary protective measures with respect to criminal proceeds, and with such measures is often able to protect funds for restitution and forfeiture.

Paragraph 2 imposes an obligation upon each State to assist the other to the extent permitted by their respective laws in proceedings relating to the forfeiture of proceeds, objects, and instrumentalities of crime or restitution to victims of crime. This is consistent with Article 1(1) which provides that the Treaty covers assistance "in forfeiture and restitution proceedings related to criminal offenses." Luxembourg agreed that civil (as well as criminal) forfeiture proceedings in the United States would be covered as long as the civil proceedings relate to a criminal matter.

The limited obligation to assist is carefully crafted so as not to require either State to take any action that would exceed it internal legal authority. It 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. Luxembourg expects enactment of legislation regarding the proceeds of crime. Paragraph 2 makes available any forms of assistance that become available under newly enacted laws.

Paragraph 3 addresses the disposition of forfeited proceeds or property. The article permits the Parties to assist each other by giving effect to the other's forfeiture judgments to the extent possible under the domestic laws of the States or, alternatively, to initiate a legal action for the forfeiture of the assets. Luxembourg may, in effect, recognize a U.S. forfeiture judgment in a drug trafficking matter if its domestic standard for confiscation is met.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the

transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[17] Paragraph 3 is consistent with this framework, and will enable a Contracting Party that enforces a final decision relating to such proceeds, objects, and instrumentalities of an offense to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[18] It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification.

Paragraph 2 provides that the Treaty shall enter into force the first day of the second month after the exchange of instruments of ratification.

Paragraph 3 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of The Treaty Between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters

On July 10, 1996, the United States and Poland signed a Treaty on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with other countries as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases.

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

[17] See Title 18, United States Code, Section 981 (i)(1).

[18] See, e.g., U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 6, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 6, art. XVIII; U.S.-United Kingdom Mutual Legal Assistance Treaty, *supra* note 16, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 16, art. 18.

Title 28, United States Code, Section 1782. The Republic of Poland has its own internal legislation[1] that will apply to the United States' requests under the Treaty.

The Treaty with Poland is a major advance in the formal law enforcement relationship between the two countries, as the technical analysis of the Treaty illustrates.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Poland, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[4] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the

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[1] The 1969 Polish Code of Criminal Procedure, Part XII, Articles 523-538.

[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Poland under the Treaty in connection with investigations prior to charges being filed in Poland. Prior to the 1996 amendments of Title 28, United States Code, Section 1782, some U.S. courts interpreted that section to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[4] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article, however, makes it clear that there is no general requirement of dual criminality under this Treaty for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State. Article 1(3) is important because United States and Polish criminal law differ significantly, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances from the Polish delegation that assistance would be available under the Treaty to the United States investigations of key crimes such as drug trafficking, fraud, money laundering, tax offenses, antitrust offenses, and environmental protection matters.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Poland by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Poland on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Polish Central Authority would make all requests emanating from officials in Poland.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the

[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[6] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] For Poland, the Minister of Justice-Attorney General, or persons designated by him, will be the Central Authority. The Minister of Justice-Attorney General is one person, as required by the Polish Constitution. Generally, a U.S. request submitted to Poland for assistance during the investigative stage of a criminal matter will be handled by the Minister of Justice-Attorney General; where a request to Poland for assistance concerns an indicted case, the Minister of Justice-Attorney General will forward the request to a court for execution. The Polish negotiators noted their experience is that, under Polish law, most foreign requests for assistance fall within the investigative stage and are thus most often directed to a department within the Ministry of Justice for execution.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits denial of a request if it involves a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Au-

[7] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

thority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph 1(c) 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 U.S. investigation or prosecution.[8]

Paragraph (1)(d) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[9] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to

[8] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[9] 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.

the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the five kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 promptly. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

For Poland, the Central Authority will determine whether (1) the request complies with the terms of the Treaty, and (2) its execution would prejudice the security or other essential interests of Poland. If the request merits execution, the Central Authority will transmit the request to an appropriate department within the Ministry of Justice or to the appropriate judicial authorities for that purpose. The procedure is similar for the United States, except the United States Central Authority normally will transmit the request to federal investigators, prosecutors, or agencies for execution. The United States Central Authority also may transmit a request to state authorities in circumstances it deems appropriate.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Poland. Rather, it is anticipated that when a request from Poland requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[10]

The third sentence in Article 5(1) provides that "[t]he judicial or other competent authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For Poland, it was necessary to extend the authorization to "other competent authorities" in order to include public prosecutors empowered under Polish law to "issue subpoenas, search warrants, or other orders to execute the request."

In Poland, execution of requests will be almost exclusively within the province of the Ministry of Justice and the courts, whereas in the United States, execution can be entrusted to any competent authority in any branch of government, federal or state. Nevertheless, when a request from Poland requires compulsory process for execution, it is anticipated that the competent authority in the United States will issue the necessary compulsory process itself,[11] or ask the competent judicial authorities to do so.

For requests that relate to cases in the investigative stage, the Polish Central Authority will transmit the request to the appropriate department in the Ministry of Justice that will execute the request. The department within the Ministry of Justice to which the request is assigned will then either execute the request or forward it to the public prosecutor in the region in Poland where the evidence or information is located. Public prosecutors, whether in the Ministry of Justice or in other locations in Poland, have authority to order compulsory process, including, but not limited to, requiring a witness to appear to provide testimony, issuing subpoenas to compel the production of documents or other evidence, and ordering a search and seizure. The exercise of this authority by Polish prosecutors does not require the consent of the court. In other words, unlike in the United States, a Polish prosecutor may execute a foreign request seeking compulsory process without the assistance of the Polish courts.

For requests to Poland that are related to indicted cases, the Polish Central Authority will transmit the request to the appropriate

[10] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

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

court with general advice regarding Poland's treaty obligation and the general evidentiary and procedural requirements of the United States.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 provides that "[r]equests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Polish authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[12] Polish law currently contains no similar provision. Thus, documents assembled in Poland in strict conformity with Polish procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Poland.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist

[12] Title 18, United States Code, Section 3505.

unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[13] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests. "Reasonable" is not defined; the negotiators felt that the Central Authorities would develop a practical method of providing current information on a timely basis.

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[13] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 5(5).

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[14] Article 6 does not, however, oblige the Requested State to pay fees of experts, costs of translation and interpretation, costs of recording by private parties of testimony or statements, or the costs of preparation by private parties written records or videotapes of testimony or statements, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(e) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at

[14] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that such information is exculpatory to a defendant in a criminal prosecution. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Polish authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Article 8 requires that each State permit the taking of testimony and evidence on behalf of the other State.

Article 8(1) obligates the Requested State to compel persons to appear and testify or produce evidence requested by the Requesting State. Polish public prosecutors and courts and U.S. courts have the power to compel testimony or documents from individuals or companies in connection with both domestic and foreign proceedings. In the United States, a prosecutor asks a U.S. court to appoint him as a commissioner empowering him to execute subpoenas on behalf of the foreign authority. The procedure in the United States as described is used regardless of whether the request concerns a case still at the investigative stage or one that has already been indicted. In Poland, the authority of the public prosecutor to issue subpoenas and to use other compulsory measures exists independently of the courts. Therefore, in Poland, where the request concerns a case at the investigative stage and is handled by the Ministry of Justice, the public prosecutor uses his power to issue subpoenas to compel the production of documents or other evidence on behalf of the foreign authority. Where the request concerns an

indicted case and is handled by the court, the court uses its power to issue subpoenas to compel the production of documents or other evidence on behalf of the foreign authority.

With regard to compelling bank records sought by a foreign government, the process in the United States is the same as that required for compelling testimony or documents from an individual or company, as described above, without regard to the status of the proceedings in the Requesting State. In Poland, however, the process is different. Banking laws in Poland provide that the Polish public prosecutors and courts may compel the production of bank records of persons who have been charged and notified of the charge. The Polish delegation stated that a treaty request for bank records on behalf of a foreign authority would be held to the same standard as that applied to Polish prosecutors and courts. U.S. law enforcement authorities, therefore, would have the same access to bank records as Polish prosecutors and courts. Under Polish law as it presently exists, the United States can only expect to obtain bank records from Poland for use in cases that have already been charged, or where the target has been advised that he is the subject of a criminal investigation. A target letter sent to the last known address of the target of a U.S. investigation would satisfy the notification requirement. Furthermore, Polish authorities would provide bank records for a target whose whereabouts are unknown and to whom notice is therefore impossible. The negotiators engaged in extensive discussions about proposed legislation in Poland that will make bank records available at an earlier stage for use in both domestic and foreign criminal cases, and they agreed that there would be no changes required to the Treaty to expand the availability to the United States of bank records whenever new legislation is passed.

The delegations discussed the penalties for failure to comply with subpoenas in the United States and in Poland. In the United States, a person or company failing to comply with a subpoena may be fined and/or imprisoned. In Poland, authorities serving a subpoena for the production of documents, upon refusal by the person being served to produce the documents, will immediately execute a search of the premises where the evidence is believed to be located and a seizure of the evidence.

The delegations agreed that, as a general rule, both Contracting States will use Article 8(1), rather than Article 14, to compel document production. That is, both delegations recognized that searches and seizures are serious compulsory measures affecting the rights of private individuals and, thus, the delegations agreed that searches and seizures would be used as a last resort or where other means would be clearly ineffective. Instead, the Requested State first will attempt to compel production of documents, records, and articles of evidence sought by the Requesting State by using subpoenas in the United States and in Poland.

The criminal laws in both States contain provisions that sanction the production of false evidence. The second sentence of Article 8(1) explicitly states that the criminal laws in the Requested State shall apply in situations where a person in that State provides false evidence in execution of a request. The negotiators expect that were any falsehood made in execution of a request, the Requesting State

could ask the Requested State to prosecute for perjury, and provide the Requested State with the information or evidence needed to prove the falsehood.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Article 8(4) permits a witness whose testimony or evidence is sought to assert a right to decline to provide testimony or evidence under the laws of the Requesting State. The executing authority will note the asserted right made under the law of the Requesting State, but defer to the appropriate authority in the Requesting State to rule on the merits. The taking of testimony or evidence, thus, can continue in the Requested State without delaying or postponing the proceeding whenever issues involving the law of the Requesting State arise. Both States recognize the privilege of witnesses against self-incrimination.

Article 8(5) is primarily for the benefit of the United States. The United States evidentiary system requires that evidence that is to be used as proof 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 ofe]vidence produced . . . pursuant to this Article," the negotiators focused on and were primarily concerned with business records. In order to ensure the United States that business records provided by Poland pursuant to the Treaty could be authenticated in a manner consistent with existing United States law, the negotiators crafted Form A to track the language of Title 18, United States Code, Section 3505, the foreign business records authentication statute. If the Polish authorities properly complete, sign, and attach Form A to executed documents, or submit Form B certifying the absence or non-existence of business records, a United States judge may admit the records into evidence without the appearance at trial of a witness. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence; whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 9—OFFICIAL DOCUMENTS AND RECORDS OF GOVERNMENT AGENCIES

Article 9(1) obligates each State to furnish to the other copies of publicly available materials ("documents, records, or information in any form") in the possession of an "executive, legislative, or judicial authority in the Requested State." For the United States, this includes executive, legislative, and judicial units at the federal, state, and local levels. For Poland, this includes the executive, legislative, and judicial authorities at the central and regional government lev-

els. In Poland, the term "government" only refers to the executive branch, not the legislative and judicial branches. Thus, this article references each branch in both the English and Polish texts.

Paragraph 2 provides that the Requested State may provide copies of any documents, records, or information in any form that are in the possession of an executive, legislative, or judicial authority in that State, but that are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities. The Requested State may in its discretion deny a request pursuant to this paragraph entirely or in part.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty in tax matters, and such assistance could include tax return information when appropriate. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Poland under this article in appropriate cases.[15]

Article 9(3) is primarily for the benefit of the United States. It provides for the authentication of records produced pursuant to this Article by an executive, legislative or judicial authority responsible for their maintenance. Such authentication is to be effected through the use of Form C appended to the Treaty. If the Polish authorities properly complete, sign, and attach Form C to executed

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[15] Under 26 U.S.C. 6103(i) information in the files of the Internal Revenue Service (generally protected from disclosure under 26 U.S.C. 6103) may be disclosed to federal law enforcement personnel in the United States for use in a non-tax criminal investigations or proceedings, under certain conditions and pursuant to certain procedures. The negotiators agreed that this Treaty (which provides assistance both for tax offenses and in the form of information in the custody of tax authorities of the Requested State) is a "convention ... relating to the exchange of tax information" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners. Thus, the Internal Revenue Service may provide tax returns and return information to Poland through this Treaty when, in a criminal investigation or prosecution, the Polish authority on whose behalf the request is made can meet the same conditions required of United States law enforcement authorities under Title 26, United States Code, Sections 6103(h) and (i). As an illustration, a Polish request for tax returns to be used in a non-tax criminal investigation, in accordance with 26 U.S.C. 6103(i)(1)(A), would have to specify that the Polish 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 Polish criminal statute (not involving tax administration) to which Poland is or may be a party.

(ii) any investigation which may result in such a proceeding, or

(iii) any Polish proceeding pertaining to enforcement of such a criminal statute to which Poland is or may be a party. (See 26 U.S.C. 6103(i)(1)(A))

The request would have to be presented to a federal district court judge or magistrate for an order directing the Internal Revenue Service to disclose the tax returns as specified at 26 U.S.C. 6103(i)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with 26 U.S.C. 6103(i)(1)(B), that:

(i) there is reasonable cause to believe, based upon information believed to be reliable, 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 Polish criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

In other words, the Polish law enforcement authorities seeking tax returns would be treated as if they were United States law enforcement authorities—undergo the same access procedure where they would be held to the same standards.

documents, or submit Form D certifying the absence or non-existence of such records, a United States judge may admit the records into evidence as self-authenticating under Rule 902(3) of the Federal Rules of Evidence. The admissibility provided by this paragraph provides for an exception to the hearsay rule; however, admissibility extends only to authenticity and not to relevance, materiality, etc., of the evidence; whether the evidence is, in fact, admitted is a determination within the province of the judicial authority presiding over the proceeding for which the evidence is provided.

ARTICLE 10—APPEARANCE IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6.

Paragraph 1 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

The third and final sentence of Article 10(1) obliges the Requested State to "promptly inform" the Central Authority of the Requesting State of the witness' response to the invitation to appear in the Requesting State. This Treaty does not specify the means by which this communication must be made, and the negotiators understood that it could be made either orally or in writing, but in any event, promptly.

Article 10(2) provides that a person appearing in the Requesting State pursuant to this Article shall not be prosecuted, detained, or subjected to any restriction of personal liberty for acts or convictions that preceded his leaving the Requested State. These assurances do not protect against prosecution, punishment or restriction of personal liberty, with respect to acts committed after departure from the Requested State, or against civil suits. This article is intended to apply to persons who are transferred while in custody pursuant to Article 12 and to those who appear as civilians and are not incarcerated.

Article 10(3) imposes on the safe conduct provided in paragraph 1 a time limitation of 15 days which begins to run after notification that appearance is no longer required and the person, although free to leave, has remained in the Requesting State, or has voluntarily returned.

ARTICLE 11—TEMPORARY TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be

carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On

occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings. [16]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty, [17] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters. [18]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty shall be transferred temporarily from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case. [19]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

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[16] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[17] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 9, art. 26.

[18] It is also consistent with Title 18, United States Code, Section 3508.

[19] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The negotiators contemplated that "best efforts" would vary depending on the information provided in the request, in accordance with Article 4. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Poland to follow a specified procedure for service) or by the United States Marshal's Service in instances in which personal service is requested. Service in Poland typically will be made by mail, unless the United States specifies that some other form is necessary; Polish authorities typically will be able to accommodate such requests.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by an authority of the Requested State a reasonable time before the date set for any such appearance. The negotiators agreed that the Requested State will attempt to find in favor of the Requesting State in applying the standard.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[20] Under Polish law, there is no need for Polish courts to be involved in the issuance of search and seizure orders.

[20] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1998.)

In fact, the practice is that search and seizure orders, as well as subpoenas, generally are issued by public prosecutors. This article creates a formal framework for handling such requests.

The negotiators agreed 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.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that a request from the United States to Poland will have to satisfy the Polish evidentiary standard, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

For the United States to be able to execute a search and seizure on behalf of Poland, the Polish request must provide information demonstrating "probable cause," as is required by the Fourth Amendment to the United States Constitution. The Polish 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 Poland and that particularly described evidence of the crime is located at a particularly described place to be searched in the United States.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request by the Central Authority of the Requesting State, every official in the Requested State who has had custody of a seized item shall certify, through the use of Form E appended to this Treaty, the identity of the item, the continuity of custody, and any changes in its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody. For Poland, the chain of custody is not a significant factor in the admissibility of evidence.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[21]

[21] See e.g., U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, Jun. 12 and Aug. 18, 1987; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr.

Continued

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. This would normally be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Poland in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Poland, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[22] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[23] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 con-

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11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-U.K. Mutual Legal Assistance Treaty, Jan. 6, 1994.

[22] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[23] Title 18, United States Code, Section 1956(c)(7)(B).

trolled substance (as such term is defined for the purposes of the Controlled Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[24] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

With respect to restitution, the negotiators discussed whether the respective Contracting Parties can collect fines and make restitution to victims.[25] Specifically, the negotiators considered whether the Contracting Parties, in order to make a victim whole, would be able to move against assets of a person who defrauded the victim of money. In both the United States and Poland, the victim could file a civil suit and would 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.

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[26] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the

[24] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[25] *See* U.S.C. 3663 (b).

[26] *See* Title 18, United States Code, Section 981 (i)(1).

proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER TREATIES

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Poland law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[27]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[28] It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

Paragraph 2 provides that the Treaty shall enter into force 30 days after the exchange of instruments of ratification.

Paragraph 3 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and Trinidad and Tobago on Mutual Legal Assistance in Criminal Matters

On March 4, 1996, the United States signed a treaty with the Republic of Trinidad and Tobago ("Trinidad and Tobago") on Mu-

[27] *See e.g.,* the U.S.-Poland Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with Related Notes, Oct. 8, 1974, 28 U.S.T. 891, T.I.A.S. 8486.

[28] See, e.g., U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 13, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 21, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

tual 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 with Trinidad and Tobago is a major advance for the United States in its efforts to win the cooperation of Eastern Caribbean countries in combating organized crime, transnational terrorism, and international drug trafficking.

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. Trinidad and Tobago intends to enact implementing legislation for the Treaty, as it currently has no specific mutual legal assistance laws in force.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Trinidad and Tobago, and other legal measures taken prior to the filing of formal charges in either State.[1] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[2] It was also agreed that since the

[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Trinidad and Tobago under the Treaty in connection with investigations prior to charges being filed in Trinidad and Tobago. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[3] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article, however, makes it clear that "dual criminality" is not mandatory under this Treaty, and the Central Authority of The Requested State may, in its discretion, provide assistance under the Treaty even when the matter under investigation is not criminal under the Requested State's law. The discretion to grant assistance in the absence of dual criminality should enable the Treaty to function in the widest range of circumstances. The Central Authorities will apply this provision, and are expected to give a liberal interpretation to the dual criminality element, or to exercise discretion in granting assistance regardless of dual criminality, in order to aid one another as often as possible. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[4] During the negotiations, the United States delegation received assurances from the Trinidad and Tobago delegation that assistance is available under the Treaty to United States investigations of key crimes such as drug trafficking,[55] terrorism,[6] organized crime and racketeering,[7] money laundering, tax fraud or tax evasion, crimes against environmental laws, and antitrust law violations.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[8] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Trinidad and Tobago by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evi-

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[3] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

[4] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[5] This includes investigations of charges of conspiracy and engaging in a continuing criminal enterprise. *See* 18 U.S.C. § 2; 21 U.S.C. § 848.

[6] *See, e.g.,* 18 U.S.C. §§ 115, 1203, 2331-38; 49 U.S.C. § 1472.

[7] *See* 18 U.S.C. §§ 1961-68. Trinidad and Tobago does not have an identical offense, but does have statutes prohibiting graft and corruption.

[8] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

dence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Trinidad and Tobago on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Trinidad and Tobago Central Authority would make all requests emanating from officials in Trinidad and Tobago.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[9] Paragraph 2 also states that the Attorney General of Trinidad and Tobago or a person designated by the Attorney General will serve as the Central Authority for Trinidad and Tobago.

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph 1(a) permits the Requested State to deny a request if a request involves an offense under military law that would not be an offense under ordinary criminal law.

Paragraph 1(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of the Requested State. This would include cases when assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States, will work closely with the Department of State and other government agencies to determine whether to execute requests that might fall in this category. All United States mutual legal assistance treaties contain provisions permit-

[9] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

ting the Requested State to decline to execute requests if execution would prejudice its essential interests.

The delegations agreed that the phrase "essential interests" is intended to limit narrowly the class of cases in which assistance may be denied. It is not enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example is a request involving prosecution by the Requesting State of conduct that occurred in the Requested State that is constitutionally protected in the Requested State.

It was agreed that "essential interests" may include interests unrelated to national military or political security, and may be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose of the Treaty is to enhance law enforcement cooperation. The attainment of that goal would be hampered if sensitive law enforcement information available under the Treaty were to fall into the "wrong hands." Accordingly, the United States Central Authority may invoke paragraph 1(b) to decline to provide sensitive or confidential drug-related information pursuant to a Treaty request whenever it determines, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who likely 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]

Paragraph 1(c) permits the denial of a request not made in conformity with the Treaty.

Paragraph 2 is similar to paragraph 2 of the United States-Switzerland Mutual Legal Assistance Treaty,[11] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to paragraph 1. For example, a Contracting Party might request information that could be used either in a routine criminal case (which is within the scope of the Treaty) or in a political prosecution (which is subject to refusal). This paragraph permits the Requested State to provide the information on condition that it be used only in the routine criminal case. Naturally, the Requested State should notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does ac-

[10] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

[11] Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

cept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of any reasons for denying assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings and enable the Requesting State to prepare future requests better.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Trinidad and Tobago. Rather, it is anticipated that when a request from Trinidad and Tobago requires compulsory process for execution, the United States Department of Justice would ask a federal

court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[12]

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[13], and provides, that "[r]equests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's laws absent specific contrary procedures in the Treaty itself. Thus, neither State is expected to take any action pursuant to a Treaty request which would be prohibited under its laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

'The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Trinidad and Tobago authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[14] Trinidad and Tobago law currently contains no similar provision. Thus, documents assembled in Trinidad and Tobago in strict conformity with Trinidad and Tobago procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Trinidad and Tobago.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations

[12] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[13] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989.

[14] Title 18, United States Code, Section 3505.

could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[15] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the

[15] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.,* U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 5(5).

assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance Treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[16] Article 6 does assume that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

The Trinidad and Tobago delegation expressed particular concern that information supplied by Trinidad and Tobago in response to

[16] See, e.g., U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 15, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 6.

United States requests must receive real and effective confidentiality, and not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Trinidad and Tobago authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Trinidad and Tobago is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[17] A witness testifying in Trinidad and Tobago may raise any of the similar privileges available under Trinidad and Tobago law.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[18]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that the second and third sentences of this paragraph provide for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance, and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article

[17] This is consistent with the approach taken in Title 28, United States Code, Section 1782.

[18] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, *supra* note 15, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 8(4).

states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Trinidad and Tobago under this article in appropriate cases.[19]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not man-

[19] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

datory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph l provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while a person is in the Requesting State. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[20]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[21] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[22]

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[20] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[21] U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 26.

[22] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[23]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a person under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State. The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State.

[23] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Trinidad and Tobago to follow a specified procedure for service), or by the United States Marshals Service in instances when personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[24] This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Trinidad and Tobago will have to be supported by a showing of probable cause for the search. A United States request to Trinidad and Tobago would have to satisfy the corresponding evidentiary standard there. It is contemplated that such requests are to be carried out in strict accordance with the laws of the Requested State.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided au-

[24] See, e.g., United States ex rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No. 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

thentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This article is similar to provisions in many other United States mutual legal assistance treaties.[25]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Trinidad and Tobago in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Trinidad and Tobago, they could be seized under 18 U.S.C. 981 in aid of a prosecution

[25] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 15; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-U.K. Mutual Legal Assistance Treaty, Jan. 6, 1994.

under Title 18, United States Code, Section 2314,[26] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[27] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[28] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[29]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property.

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[26] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[27] Title 18, United States Code, Section 1956(c)(7)(B).

[28] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[29] In Trinidad and Tobago, unlike the U.S., the law does not currently allow for civil forfeiture. However, Trinidad and Tobago law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Trinidad and Tobago to confiscate the defendant's property.

Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[30] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party, at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER TREATIES

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Trinidad and Tobago law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.[31]

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[32] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedures for entry into force and the exchange of diplomatic notes on the completion of these procedures. Paragraph 1 also provides that the Treaty shall enter into force immediately upon the exchange of such diplomatic notes.

Paragraph 2 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six

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[30] *See* Title 18, United States Code, Section 981 (i)(1).

[31] *See e.g.*, the U.S.-Trinidad and Tobago Agreement for the Exchange of Information With Respect to Taxes, Jan. 11, 1989, T.I.A.S. 11607.

[32] *See,* e.g., U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 15, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 25, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4, art. 18.

months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

Technical Analysis of the Treaty Between the United States of America and the Republic of Venezuela on Mutual Legal Assistance in Criminal Matters

On October 12, 1997, the United States signed a treaty with Venezuela 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 officials in need of foreign evidence for use in criminal cases.

The Treaty is expected to be a valuable weapon for the United States in its efforts to combat organized crime, international drug and firearms trafficking, money laundering, large-scale international fraud, and other serious offenses.

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. Venezuela will enact new legislation for implementing the Treaty.

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Venezuela, and other legal measures taken prior to the filing of formal charges in either State.[1] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[2]

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[1] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Venezuela under the Treaty in connection with investigations prior to charges being filed in Venezuela. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment to Section 1782 effectively overruled these decisions, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[2] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence

It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds of illegal drug trafficking may be civil in nature;[3] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article makes it clear that there is no requirement of dual criminality under this Treaty for cooperation, except with respect to assistance or cooperation in connection with searches, seizures, and forfeitures. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State. However, if the request relates to a search, seizure, or forfeiture, the Central Authority of the Requested State must first determine whether the act to which the request relates is punishable as an offense under the laws of the Requested State. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[4] During the negotiations, the United States delegation received assurances from the Venezuela delegation that assistance would be available under the Treaty to the United States in investigations of all major criminal matters including: narcotics trafficking, terrorism, organized crime and racketeering, money laundering, fraud, Export Control Act violations, child exploitation or obscenity, tax offenses, antitrust offenses, and crimes against the environment or endangered species.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[5] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Venezuela by letters rogatory, an avenue of inter-

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sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This interpretation poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

[3] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

[4] *See e.g.*, U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

[5] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

national assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right on the part of any private person to obtain, suppress, or exclude evidence, or to impede the execution of a request for assistance.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Venezuela on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Venezuelan Central Authority would make all requests emanating from officials in Venezuela.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[6] Article II(2) of the Treaty also states that the Venezuelan Attorney General (i.e., the "Fiscal General") will serve as the Central Authority for Venezuela.

Paragraph 3 explains that the Central Authority of the Requested State will process requests directly, unless it is appropriate to transmit the request to other competent authorities for execution. This paragraph also states that the Central Authorities will promptly execute requests received pursuant to this Treaty.

Paragraph 4 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This Article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Central Authority of the Requested State to deny the request if it relates to a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the context of extradition treaties for determining what is a "political offense." This restriction is similar to that found in other U.S. mutual legal assistance treaties.

[6] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

Paragraph (1)(b) permits the Central Authority of the Requested State to deny the request if it relates to an offense under military law which would not be an offense under ordinary criminal law. Similar clauses appear in many other U.S. mutual assistance treaties.

Paragraph (1)(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security, public order, or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies in deciding whether to deny a request on this ground.

The delegations also agreed that the phrase "essential interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential interests related to the fundamental purposes of the Treaty. For example, 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. Therefore, the United States Central Authority may invoke Paragraph 1(c) 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 U.S. investigation or prosecution.[7]

Paragraph (1)(d) permits the Central Authority of the Requested State to deny a request if the request is not made in conformity with the provisions of this Treaty.

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[7] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). *See also* Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,[8] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 requires that the Central Authority of the Requested State notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "urgent situations," in accordance with its domestic laws. A request in another form must be presented in writing within ten days. The Venezuelan delegation explained that their domestic law required that requests be presented in writing, but that an oral request could initiate the process with respect to some matters pending receipt of the written documents. This paragraph also requires that requests be accompanied by a translation in the language of the Requested State.

Paragraph 2 lists the four kinds of information that are deemed crucial to the efficient operation of the Treaty, and must be included in each request. Paragraph 3 outlines kinds of information which are important but not always crucial, and 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 that a request be legalized or certified in any particular manner.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to comply with the Treaty's terms. If the request does satisfy the Treaty's requirements and the assist-

[8] 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.

ance sought can be provided by the Central Authority itself, the request will be fulfilled immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Venezuela. Rather, it is anticipated that when a request from Venezuela requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of the Treaty. The second sentence in Article V(1) reads, "[t]he Courts of the Requested State shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request."[9] This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from the judiciary in executing mutual assistance requests.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty[10], and provides, that "[r]equests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States,

[9] This paragraph of the Treaty, thus, specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[10] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989.

the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Venezuela authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given fair opportunity to test its authenticity.[11] Venezuelan law currently contains no similar provision. Thus, documents assembled in Venezuela in strict conformity with Venezuelan procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Venezuela.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner that would render the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation, prosecution, or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

[11] Title 18, United States Code, Section 3505.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article IV(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[12] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This Article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[13] Article 6 does, however, oblige the Requesting State to pay fees of expert witnesses, the costs of translation, interpretation, and transcription, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

Paragraph 2 of Article VI was included to satisfy Venezuelan concerns that a very large and complex request from the United States might drain the budget of their Central Authority. This paragraph provides for consultation between the Central Authorities when either Party considers the costs to be incurred in executing a request to be extraordinary. Such consultations would serve the purpose of establishing the terms and conditions under which the assistance could be provided.

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[12] This provision is similar to language in other United States mutual legal assistance treaties. *See e.g.*, U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 5(5).

[13] *See, e.g.*, U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 12, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 6.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article IV(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested sparingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State shall take "all possible legal measures" to comply with them. This language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it. If assistance is provided with a condition under this paragraph, the U.S. could deny public disclosure under the Freedom of Information Act. If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). It was the express understanding of the negotiators that the "all possible legal measures" clause of Paragraph 2 would allow the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution.

Paragraph 3 states that once information or evidence obtained under the Treaty has been revealed to the public in accordance with paragraphs 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article I(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely to the Contracting Parties. If a person alleges that a Venezuelan authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY AND EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State shall be summoned and, if necessary, compelled, to appear and testify or produce items, including documents, records, and articles of evidence. The compulsion contemplated by this Article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that, unless prohibited from doing so by its domestic law, any persons specified in the request may be permitted by the Requested State to be present and pose questions during the taking of testimony or production of evidence under this Article.

Paragraph 4 requires that if a witness attempts to assert a claim of immunity, incapacity or privilege under the laws of the Requesting State, the Requested State will nevertheless take the desired testimony or 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[14]

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each State, upon request, to furnish the other with copies of publicly available records, including documents or information in any form, possessed by government departments and agencies in the Requested State. The negotiators intended this provision to include all such records in the executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion to

[14] *See e.g.*, U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), T.I.A.S. No. 10734, 1359 U.N.T.S. 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, Supra note 12, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 8(4).

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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision is necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Venezuela under this article in appropriate cases.[15]

ARTICLE 10—TESTIMONY AND EVIDENCE IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article VI.

Paragraph 1 provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 allows that, upon request by the invited person, the Requesting Party may provide security guarantees for that person during his or her presence in that State.

Paragraph 3 provides that the Central Authority of the Requesting State may, in its discretion, determine that a person who is in

[15] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

the Requesting State pursuant to this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while he is in the Requesting State. Such safe conduct is limited to acts or convictions which preceded the witness' departure from the Requested State. Accordingly, this provision does not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State. Since the decision to offer such safe conduct may have to be made by the prosecutor or the judge responsible for the potential criminal charges, not by the Central Authority alone, the Central Authority may need to consult with other officials regarding any proposal to offer safe conduct under this paragraph.

Paragraph 4 provides that a person appearing in the Requesting State may not be required to provide testimony or give statements in proceedings other than those specified in the request, unless the person consents in writing and the Central Authorities of both Parties agree.

Paragraph 5 states that the safe conduct contemplated in this Article shall cease ten days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or when the person, having left the territory of the Requesting Party, voluntarily returns to it.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY OR SUBJECT TO CRIMINAL PROCEEDINGS

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[16]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[17] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[18] The phrase "or subject to criminal proceedings" was specifically added to ensure that the Article would encompass persons who are on parole or under probation or other form of supervision by authorities of the State.

Paragraph 2 provides that a person in the custody of or subject to criminal proceedings in the Requested State whose presence in the Requesting State is sought for purposes of assistance under

[16] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye,* Williamson, Ells, Davies, Murphy, and Millard, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[17] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 8, art. 26.

[18] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents in writing and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[19]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This Article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all of our mutual legal assistance treaties. The Treaty requires that the Requested State take "all necessary measures" to locate the persons or items sought by the Requesting State. The standard language in U.S. mutual legal assistance treaties requiring the use of "best efforts" was unacceptable to the Venezuelan delegation because they deemed such language too vague for purposes of this provision. After discussion, however, the negotiators agreed that the term "necessary measures" was intended to impose a level of commitment comparable to that imposed by the term "best efforts" as applied in the context of other U.S. treaties.

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[19] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

It was the understanding of the negotiators that the obligation to locate a person or item is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of any person or item sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This Article creates an obligation on the Requested State to "take all necessary measures" to effect the service of documents, such as summons, complaints, subpoenas, or other legal papers, relating in whole or in part to a Treaty request. Several U.S. mutual legal assistance treaties contain a similar provision that imposes a "best efforts" obligation on the parties. As with Article XII, the Venezuelan delegation considered the term "best efforts" too vague in this context. The Parties therefore agreed to use the language "necessary measures", which was intended to embody a standard analogous to that of "best efforts".

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

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782,[20] and Venezuela's courts have the power to execute such requests. This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Venezuela will have to be supported by a showing of probable cause for the search. A United States request to Venezuela would have to satisfy the corresponding evidentiary standard there, which is roughly the same.

Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred.

[20] *See e.g.,* United States ex Rel. Public Prosecutor of Rotterdam, *Netherlands v. Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984).

This article is similar to provisions in many other United States mutual legal assistance treaties.[21]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents, records, or articles of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. This would normally be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Venezuela in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds, fruits or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds, fruits or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds, fruits, or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Venezuela, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[22] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[23] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

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[21] See e.g., U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 14; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 12; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.-Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-U.K. Mutual Legal Assistance Treaty, Jan. 6, 1994.

[22] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[23] Title 18, United States Code, Section 1956(c)(7)(B).

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B) allows for 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 Substance Act, Title 21, United States Code, Section 853) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[24] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds, fruits or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization 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 permits the government to transfer a share of certain forfeited property to other countries that participated directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[25] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party,

[24] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[25] *See* Title 18, United States Code, Section 981 (i)(1).

at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—AUTHENTICATION AND CERTIFICATION

Paragraph 1 of this article provides that notwithstanding any authentication or certification necessary under its law, the Requested State shall authenticate any document, record, or copy thereof, or provide a certification regarding any article, in the manner requested by the Requesting State, if this is not incompatible with the laws of the Requested State.

Paragraph 2 states that for the purpose of facilitating the use of the special authentications or certifications mentioned above, the Requesting State shall enclose in the request the appropriate forms or describe the particular procedure to be followed.

Although in many U.S. mutual legal assistance treaties the forms for authentication and certification are appended to the treaty, the Venezuelan delegation insisted that such forms not be included in this treaty because under Venezuelan practice equivalent but different documents are often used. Nevertheless, this article enables the Requesting State to enclose with each request the forms it wishes the Requested States to use, and such forms shall be used if not incompatible with the Requested State's laws.

ARTICLE 18—COMPATIBILITY WITH OTHER TREATIES

This Article states that assistance and procedures provided by this Treaty shall not prevent either Party from granting assistance to the other through the provisions of other applicable international agreements to which they are parties. The Article further states that the Parties may also provide assistance to each other pursuant to any bilateral arrangement, agreement, or practice that may be applicable, consistent with their respective domestic laws. The Treaty thus leaves completely undisturbed the provisions of United States and Venezuelan law on letters rogatory, and does not alter any pre-existing executive agreements concerning investigative assistance.[26]

ARTICLE 19—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Re-

[26] *See, e.g.,* U.S.-Venezuela Agreement on Procedures for Mutual Assistance in connection with the Boeing Company Matter, May 31, 1977, 28 U.S.T. 5219, T.I.A.S. 8623, related agreement Dec. 6 and 8, 1978, 30 U.S.T. 2254, T.I.A.S. 9333, 1171 U.N.T.S. 105; U.S.-Venezuela Agreement Regarding Cooperation in the Prevention and Control of Money Laundering Arising from Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, with attachment, Nov. 5, 1990; U.S.-Venezuela Agreement for Mutual Assistance in the Administration of Justice in Connection with Certain Banking, Financial, and Other Institutions, Mar. 17, 1995.

quested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[27] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this Article.

ARTICLE 20—ENTRY INTO FORCE, DURATION, AND TERMINATION

Paragraph 1 provides that the Treaty shall enter into force upon written notification between the Parties, through diplomatic channels, of compliance with their respective legal requirements necessary for its approval. For the United States, such requirements would include obtaining the advice and consent of the Senate to ratification. The Venezuelan delegation indicated that the Treaty would likewise be subject to the approval of the Venezuelan legislature. Paragraph 1 also provides that the Treaty shall have indefinite duration.

Paragraph 2 provides that the Treaty shall apply to any request presented after the Treaty enters into force, even if the relevant acts or omissions occurred prior to that date. Provisions of this kind are common in law enforcement agreements.

Paragraph 3 contains standard provisions concerning the procedure for terminating the Treaty. The requirement that the termination take effect six months after the date of notification is not unusual in a mutual legal assistance treaty, and similar requirements are contained in our treaties with other countries.

This paragraph also provides that requests for assistance that may be pending at the time of termination of the Treaty may be executed if agreed by both Parties.

Technical Analysis of the Treaty Between the United States of America and Saint Vincent and the Grenadines on Mutual Legal Assistance in Criminal Matters

On January 8, 1998, the United States signed a treaty with Saint Vincent and the Grenadines 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 expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, and international drug trafficking in the eastern Caribbean.

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. Saint Vincent and the Grenadines has its own mutual legal assistance laws in place for

[27] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 4, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 12, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 21, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 4, art. 18.

implementing the Treaty, and does not anticipate enacting new legislation.[1]

The following technical analysis of the Treaty was prepared by the Office of International Affairs, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, based upon the negotiating notes. The technical analysis includes a discussion of U.S. law and relevant practice as of the date of its preparation, which are, of course, subject to change. Foreign law discussions reflect the current state of that law, to the best of the drafters' knowledge.

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 requires the Parties to provide mutual assistance in connection with the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The negotiators specifically agreed that the term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Saint Vincent and the Grenadines, and other legal measures taken prior to the filing of formal charges in either State.[2] The term "proceedings" was intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.[3] It was also agreed that since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, proceedings to forfeit to the government the proceeds

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[1] "An Act to make provision with respect to the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in Saint Vincent and the Grenadines and to make provision concerning mutual assistance in Criminal Matters between Saint Vincent and the Grenadines and countries other than Commonwealth countries," hereinafter "the Mutual Assistance in Criminal Matters Act, 1993." Since there are some differences between the Treaty and law of Saint Vincent and the Grenadines, it is anticipated that Saint Vincent and the Grenadines will issue regulations under Section 30 that will "direct that [the] Act shall apply in relation to [the United States] as if it were a Commonwealth country, subject to such limitations, conditions, exceptions or qualifications (if any) as may be prescribed..." in order for the terms of the Treaty to prevail.

[2] The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the U.S., as our investigators and prosecutors often need to obtain evidence from foreign countries in order to determine whether or not to file criminal charges. This obligation is a reciprocal one; the U.S. must assist Saint Vincent and the Grenadines under the Treaty in connection with investigations prior to charges being filed in Saint Vincent and the Grenadines. Prior to the 1996 amendments to Title 28, United States Code, Section 1782, some U.S. courts had interpreted that provision to require that assistance be provided in criminal matters only if formal charges have already been filed abroad, or are "imminent," or "very likely." McCarthy, "A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance," 15 Fordham Int'l Law J. 772 (1991). The 1996 amendment eliminates this problem, however, by amending subsec. (a) to state "including criminal investigation conducted before formal accusation." In any event, this Treaty was intentionally written to cover criminal investigations that have just begun as well as those that are nearly completed; it draws no distinction between cases in which charges are already pending, "imminent," "very likely," or "very likely very soon." Thus, U.S. courts should execute requests under the Treaty without examining such factors.

[3] One United States court has interpreted Title 28, United States Code, Section 1782, as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. Since this paragraph of the Treaty specifically permits requests to be made in connection with matters not within the jurisdiction of an adjudicatory "tribunal" in the Requesting State, this paragraph accords the courts broader authority to execute requests than does Title 28, United States Code, Section 1782, as interpreted in the India and Fonseca cases.

of illegal drug trafficking may be civil in nature;[4] yet such proceedings are covered by the Treaty.

Paragraph 2 lists the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the paragraph are described in detail in subsequent articles. The list is not intended to be exhaustive, a fact that is signaled by the word "include" in the opening clause of the paragraph and reinforced by the final subparagraph.

Many law enforcement treaties, especially in the area of extradition, condition cooperation upon a showing of "dual criminality", i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. Paragraph 3 of this article, however, makes it clear that there is no general requirement of dual criminality under this Treaty for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "[e]xcept as otherwise provided in this Treaty," a phrase which refers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). Article 1(3) is important because United States and Saint Vincent and the Grenadines criminal law differ significantly, and a general dual criminality rule would make assistance unavailable in many significant areas. This type of limited dual criminality provision is found in other U.S. mutual legal assistance treaties.[5] During the negotiations, the United States delegation received assurances that assistance would be available under the Treaty to the United States in investigations of such offenses as conspiracy; drug trafficking, including continuing criminal enterprise (Title 21, United States Code, Section 848); offenses under the racketeering statutes (Title 18, United States Code, Section 1961-1968); money laundering; crimes against environmental protection laws; and antitrust violations.

Saint Vincent did suggest that the Treaty not permit mutual assistance in tax cases, noting that a similar restriction is contained in the United States' mutual legal assistance treaty with the United Kingdom regarding the Cayman Islands. The United States delegation was unwilling to agree that this Treaty be so limited, because criminal tax charges are often used to pursue and prosecute major criminals such as drug traffickers and organized crime figures. It was agreed that Article 1(4) should specify that "[t]his treaty is intended solely for mutual legal assistance in criminal matters between the Parties as set forth in paragraph (1) above," thereby emphasizing that the Treaty applies to criminal tax matters. At the request of Saint Vincent and the Grenadines, a Protocol to the Treaty states that Article 1 may be interpreted to exclude assistance under the Treaty for civil and administrative income tax matters that are unrelated to any criminal matter. The Protocol is substantially identical to exchanges of diplomatic notes with Anti-

[4] *See* 21 U.S.C. § 881; 18 U.S.C. § 1964.

[5] *See e.g.,* U.S.-Argentina Treaty on Mutual Legal Assistance in Criminal Matters, Dec. 4, 1990, art. 1(3); U.S.-Philippines Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, art. 1(3).

gua and Barbuda and St. Kitts and Nevis in connection with the signature of those mutual legal assistance treaties.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties[6] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from Saint Vincent and the Grenadines by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence provided pursuant to the Treaty, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

This article requires that each Party establish a "Central Authority" for transmission, receipt, and handling of Treaty requests. The Central Authority of the United States would make all requests to Saint Vincent and the Grenadines on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of Saint Vincent and the Grenadines would make all requests emanating from officials in Saint Vincent and the Grenadines.

The Central Authority for the Requesting State will exercise discretion as to the form and content of requests, and the number and priority of requests. The Central Authority of the Requested State is also responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and ensuring that a timely response is made.

Paragraph 2 provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the authority to handle the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division.[7] Article 2(2) of the Treaty also states that the Attorney General of Saint Vincent and the Grenadines or the person designated by the Attorney General will serve as the Central Authority for Saint Vincent and the Grenadines.[8]

Paragraph 3 states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, or INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

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[6] *See United States v. Johnpoll,* 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

[7] 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. 81, 45 Fed. Reg. 79,758 (1980), as corrected at 48 Fed. Reg. 54,595 (1983). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

[8] Section 4, Mutual Assistance in Criminal Matters Act, 1993.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty.

Paragraph (1)(a) permits the Requested State to deny a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Similar provisions appear in many other U.S. mutual legal assistance treaties.

Paragraph (1)(b) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or other essential public interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the word "security" would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the United States Department of Justice, in its role as Central Authority for the United States, would work closely with the Department of State and other government agencies to determine whether to execute a request that might fall in this category.

The delegations also agreed that the phrase "essential public interests" was intended to narrowly limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one that would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy. An example might be a request involving prosecution by the Requesting State of conduct which occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that "essential public interests" could include interests unrelated to national military or political security, and be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose 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. Therefore, the United States Central Authority may invoke paragraph 1(b) 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 U.S. investigation or prosecution.[9]

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[9] This is consistent with the Senate resolution of advice and consent to ratification, e.g., of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong. Rec. 13884, (1989) (treaty citations omitted). See also Staff of Senate Comm. on Foreign Relations, 100th Cong., 2nd Sess., Mutual Legal Assistance Treaty Concerning the Cayman Islands 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential public interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes. In the course of the negotiations, the Saint Vincent and the Grenadines' delegation expressed its view that in very exceptional and narrow circumstances the disclosure of business or banking secrets could be of such significant importance to its Government (e.g., if disclosure would effectively destroy an entire domestic industry rather than just a specific business entity) that it could prejudice that State's "essential public interests" and entitle it to deny assistance.[10] The U.S. delegation did not disagree that there might be such extraordinary circumstances, but emphasized its view that denials of assistance on this basis by either party should be extremely rare.

Paragraph (1)(c) permits the denial of a request if it is not made in conformity with the Treaty.

Paragraph (1)(d) permits denial of a request if it involves a political offense.[11] It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense." These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(e) permits denial of a request if there is no "dual criminality" with respect to requests made pursuant to Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

Finally, Paragraph (1)(f) permits denial of the request if execution would be contrary to the Constitution of the Requested State. This provision was deemed necessary under the law of Saint Vincent and the Grenadines,[12] and is similar to clauses in other United States mutual legal assistance treaties.[13]

Paragraph 2 is similar to Article 3(2) of the U.S.- Switzerland Mutual Legal Assistance Treaty,[14] and obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a Contracting Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to

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[10] The Saint Vincent and the Grenadines view of this provision is thus similar to the Swiss view of Article 3(2) of the U.S.-Switzerland Treaty. See Technical Analysis to the Treaty between the U.S. and Switzerland on Mutual Assistance in Criminal Matters, signed May 25, 1973. U.S. Senate Exec. F, 94th Cong. 2d Sess. p. 39 (1976).

[11] Sections 19(2)(a) and 19(2)(b), Mutual Assistance in Criminal Matters Act, 1993.

[12] Section 19(2)(e), Mutual Assistance in Criminal Matters Act, 1993.

[13] U.S.-Jamaica Mutual Legal Assistance Treaty, July 7, 1989, art. 2(1)(e); U.S.-Nigeria Mutual Legal Assistance Treaty, Sept. 13, 1989, art. III(1)(d).

[14] U.S.-Switzerland Mutual Legal Assistance Treaty, May 25, 1973, art. 26, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61.

the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This ensures that, when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should avoid misunderstandings, and enable the Requesting State to better prepare its requests in the future.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 outlines kinds of information that are important but not always crucial, and 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority promptly to execute requests. The negotiators intended that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to 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 immediately. If the request meets the Treaty's requirements but its execution requires action by some other entity in the Requested State, the Central Authority will promptly transmit the request to the correct entity for execution.

When the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution if the Central Authority deems it appropriate to do so.

Paragraph 1 further authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to do everything within its power and take whatever action would be necessary to execute the request. This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Saint Vincent and the Grenadines. Rather, it is anticipated that when a request from Saint Vincent and the Grenadines requires compulsory process for execution, the United States Department of Justice would ask a federal court to issue the necessary process

under Title 28, United States Code, Section 1782, and the provisions of the Treaty.[15]

The third sentence in Article 5(1) reads "[t]he competent judicial or other authorities of the Requested State shall have power to issue subpoenas, search warrants, or other orders necessary to execute the request." This language reflects an understanding that the Parties intend to provide each other with every available form of assistance from judicial and executive branches of government in the execution of mutual assistance requests. The phrase refers to "judicial or other authorities" to include all those officials authorized to issue compulsory process that might be needed in executing a request. For example, in Saint Vincent and the Grenadines, justices of the peace and senior police officers are empowered to issue certain kinds of compulsory process under certain circumstances.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for and meet the costs of representing the Requesting State in any proceedings in the Requested State arising out of the request for assistance. Thus, it is understood that 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 Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation in Paragraph 2 is a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so at its own expense.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Mutual Legal Assistance Treaty,[16] and provides, that "[r]equests shall be executed according to the internal laws and procedures of the Requested State except to the extent that this Treaty provides otherwise." Thus, the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific contrary procedures in the Treaty itself. Neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Saint Vincent and the Grenadines authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defend-

[15] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

[16] U.S.-Jamaica Mutual Legal Assistance Treaty, *supra* note 13.

ant has been given fair opportunity to test its authenticity.[17] The law of Saint Vincent and the Grenadines currently contains no similar provision. Thus, documents assembled in Saint Vincent and the Grenadines in strict conformity with Saint Vincent and the Grenadines procedures on evidence might not be admissible in United States courts. Similarly, United States courts utilize procedural techniques such as videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are not used in Saint Vincent and the Grenadines.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened—and the Requesting State's investigation could be retarded—if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the Treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Paragraph 3 requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is unlawful in the Requested State (as opposed to simply unfamiliar there), the appropriate procedure under the law applicable for investigations or proceedings in the Requested State will be utilized.

Paragraph 4 states that a request for assistance need not be executed immediately when the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation or legal proceeding in the Requested State. The Central Authority of the Requested Party may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

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 that is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding" as required by Article 4(2)(b). Therefore, Paragraph 5 of Article 5 enables the Requesting State to call upon the Requested State to

[17] Title 18, United States Code, Section 3505.

keep the information in the request confidential.[18] If the Requested State cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested State), or if for some other 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 an investigation or proceeding by public disclosure of the information.

Paragraph 6 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Requesting State concerning progress of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is not provided, the Central Authority of the Requested State must also explain the basis for the outcome to the Central Authority of the Requesting State. For example, if the evidence sought could not be located, the Central Authority of the Requested State would report that fact to the Central Authority of the Requesting State.

ARTICLE 6—COSTS

This article reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties.[19] Article 6 does assume that the Requesting State will pay fees of expert witnesses, translation, interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that information provided under the Treaty not be used for any purpose other than that stated in the request without the prior consent of the Requested State. If such confidentiality is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed.

It is not anticipated that the Central Authority of the Requested State will routinely request use limitations under paragraph 1. Rather, it is expected that such limitations will be requested spar-

[18] This provision is similar to language in other United States mutual legal assistance treaties. See e.g., U.S.-Mexico Mutual Legal Assistance Treaty, Dec. 9, 1987, art. 4(5); U.S.-Canada Mutual Legal Assistance Treaty, Mar. 18, 1985; art. 6(5), U.S.-Italy Mutual Legal Assistance Treaty, Nov. 9, 1982, art. 8(2); US.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, 1994, art. 5(5).

[19] *See, e.g.,* U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 18, art. 8; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 6.

ingly, only when there is good reason to restrict the utilization of the evidence.

Paragraph 2 states that the Requested State may request that the information or evidence it provides to the Requesting State be kept 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. 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. Paragraph 2 requires that if conditions of confidentiality are imposed, the Requesting State need only make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence, but impose confidentiality restrictions which prevent the Requesting State from using it.

The Saint Vincent and the Grenadines delegation expressed concern that information it might supply in response to a request by the United States under the Treaty not be disclosed under the Freedom of Information Act. Both delegations agreed that since this article permits the Requested State to prohibit the Requesting State's disclosure of information for any purpose other than that stated in the request, a Freedom of Information Act request that seeks information that the United States obtained under the Treaty would have to be denied if the United States received the information on the condition that it be kept confidential.

If the United States Government were to receive evidence under the Treaty that seems to be exculpatory to the defendant in another case, the United States might be obliged to share the evidence with the defendant in the second case. *Brady v. Maryland,* 373 U.S. 83 (1963). Therefore, Paragraph 3 states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. Any such proposed disclosure and the provision of the Constitution under which such disclosure is required shall be notified by the Requesting State to the Requested State in advance.

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with Paragraph 1 or 2, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even be described in the press. The negotiators noted that once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4), the restrictions outlined in Article 7 are for the benefit of the Contracting Parties, and the invocation and enforcement of these provisions are left entirely

to the Contracting Parties. If a person alleges that a Saint Vincent and the Grenadines authority seeks to use information or evidence obtained from the United States in a manner inconsistent with this article, the person can inform the Central Authority of the United States of the allegations for consideration as a matter between the Contracting Parties.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 1 states that a person in the Requested State from whom testimony or evidence is sought shall be compelled, if necessary, to appear and testify or produce items, including documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State.

Paragraph 2 requires that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Paragraph 3 provides that any persons specified in the request, including the defendant and his counsel in criminal cases, shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article.

Paragraph 4, when read together with Article 5(3), ensures that no person will 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 request from Saint Vincent and the Grenadines is guaranteed the right to invoke any of the testimonial privileges (e.g., attorney client, interspousal) available in the United States as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[20] A witness testifying in Saint Vincent and the Grenadines may raise any of the similar privileges available under the law of Saint Vincent and the Grenadines.

Paragraph 4 does require that if a witness attempts to assert a privilege that is unique to the Requesting State, 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 the privilege are best understood. A similar provision appears in many of our recent mutual legal assistance treaties.[21]

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. It is understood that this paragraph provides for the admissibility of authenticated

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

[21] *See e.g.,* U.S.-Netherlands Mutual Legal Assistance Treaty, June 12, 1981, art. 5(1), TIAS No. 10734, 1359 UNTS 209; U.S.-Bahamas Mutual Legal Assistance Treaty, June 12 & Aug. 18, 1987, art. 9(2); U.S.-Mexico Mutual Legal Assistance Treaty, Supra note 18, art. 7(2); U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 8(4).

documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

Article 8(5) provides that the evidence authenticated by Form A is "admissible," but of course, it will be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The negotiators intended that evidentiary tests other than authentication (such as relevance, and materiality) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each Party to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a government department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the Federal, State, and local level in each country.

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, the article states that the Requested State may only exercise its discretion 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 intended that the Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The delegations discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the United States delegation that the United States be able to provide assistance under the Treaty for tax offenses, as well as to provide information in the custody of the Internal Revenue Service for both tax offenses and non-tax offenses under circumstances that such information is available to U.S. law enforcement authorities. The United States delegation was satisfied after discussion that this Treaty is a "convention relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to pro-

vide tax return information to Saint Vincent and the Grenadines under this article in appropriate cases.[22]

Paragraph 3 states that documents provided under this article may be authenticated in accordance with the procedures specified in the request, and if authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

Paragraph 3, similar to Article 8(5), states that documents authenticated under this paragraph shall be "admissible" but it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. The evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons who are located in its territory to travel to the Requesting State to appear before an appropriate authority there. It shall notify the Requesting State of the invitee's response. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 if requested by the person whose appearance is sought.

Paragraph l provides that the person shall be informed of the amount and kind of expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, and room and board. When the person is to appear in the United States, a nominal witness fee would also be provided.

Paragraph 2 provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made that a person who is in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty while he is in the Requesting State. Most U.S. mutual legal assistance treaties anticipate that the Central Authority will determine whether to extend such safe conduct, but under the Treaty with Saint Vincent and the Grenadines, the Central Authority merely reports whether safe conduct has been extended. This is because in Saint Vincent and the Grenadines only the Director of Public Prosecutions can extend such safe conduct, and the Attorney General (who is Central Authority for Saint Vincent and the Grenadines under Article 3 of the Treaty) cannot do so. This "safe conduct" is limited to acts or convictions that preceded the witness's departure from the Requested State. It is understood that this provision would not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

[22] Thus, this treaty, like all of the other U.S. bilateral mutual legal assistance treaties, authorizes the Contracting Parties to provide tax return information in appropriate circumstances.

Paragraph 3 states that the safe conduct guaranteed in this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if they determine that there is good cause to do so. For the United States, the "competent authorities" for these purposes would be the Central Authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in one country of a witness in custody in another country. In some instances, foreign countries are willing and able to "lend" witnesses to the United States Government, provided the witnesses would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the United States Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.[23]

Paragraph 1 provides an express legal basis for cooperation in these matters. It is based on Article 26 of the United States-Switzerland Mutual Legal Assistance Treaty,[24] which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.[25]

Paragraph 2 provides that a person in the custody of the Requesting State whose presence in the Requested State is sought for purposes of assistance under this Treaty may be transferred from the Requesting State to the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. This would also cover situations in which a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at a deposition being taken there in connection with the case.[26]

Paragraph 3 provides express authority for the receiving State to maintain such a person in custody throughout the person's stay there, unless the sending State specifically authorizes release. This paragraph also authorizes the receiving State to return the person in custody to the sending State, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Cen-

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[23] For example, in September, 1986, the United States Justice Department and the United States Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in *Regina v. Dye, Williamson, Ells, Davies, Murphy, and Millard,* a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

[24] U.S.-Switzerland Mutual Legal Assistance Treaty, *supra* note 14, art. 26.

[25] *See also* Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial. It is also consistent with Section 24, Mutual Assistance in Criminal Matters Act, 1993.

[26] *See also United States v. King,* 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977), where the defendants insisted on traveling to Japan to be present at the deposition of certain witnesses in prison there.

tral Authorities, but the provision does not require that the person consent to be returned to the sending State.

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, Paragraph (3)(c) contemplates that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Paragraph (3)(d) states that the person is to receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

Article 11 does not provide for any specific "safe conduct" for persons transferred under this article, because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to be transferred without safe conduct, and the Receiving State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to be transferred.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items if the Requesting State seeks such information. This is a standard provision contained in all United States mutual legal assistance treaties. The Treaty requires only that the Requested State make "best efforts" to locate the persons or items sought by the Requesting State.[27] The extent of such efforts will vary, of course, depending on the quality and extent of the information provided by the Requesting State concerning the suspected location and last known location.

The obligation to locate persons or items is limited to persons or items that are or may be in the territory of the Requested State. Thus, the United States would not be obliged to attempt to locate persons or items which may be in third countries. In all cases, the Requesting State would be expected to supply all available information about the last known location of the persons or items sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the Requested State to use its best efforts to effect the service of documents such as summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. This is consistent with the law of Saint Vincent and the Grenadines,[28] and identical provisions appear in several U.S. mutual legal assistance treaties.

It is expected that when the United States is the Requested State, service under the Treaty will be made by registered mail (in the absence of any request by Saint Vincent and the Grenadines to follow a specified procedure for service) or by the United States

[27] This is consistent with Section 21, Mutual Assistance in Criminal Matters Act, 1993.
[28] Section 25, Mutual Assistance in Criminal Matters Act, 1993.

Marshal's Service in instances in which personal service is requested.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents should be received by the Central Authority of the Requested State a reasonable time before the date set for any such appearance.

Paragraph 3 requires that proof of service be returned to the Requesting State in the manner specified in the request.

ARTICLE 14—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 the former as evidence or for other purposes. United States courts can and do execute such requests under Title 28, United States Code, Section 1782.[29] This article creates a formal framework for handling such requests.

Article 14 requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Saint Vincent and the Grenadines will have to be supported by a showing of probable cause for the search. A United States request to Saint Vincent and the Grenadines would have to satisfy the corresponding evidentiary standard there, which is "a reasonable basis to believe" that the specified premises contains articles likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that, upon request, every official who has custody of a seized item shall certify, through the use of Form C appended to this Treaty, the continuity of custody, the identity of the item, and the integrity of its condition.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provided authentication and chain of custody testimony each time the Requesting State uses evidence produced under this article. As in Articles 8(5) and 9(3), the injunction that the certificates be admissible without additional authentication leaves the trier of fact free to bar use of the evidence itself, in spite of the certificate, if there is some reason to do so other than authenticity or chain of custody. Paragraph 3 states that the Requested State may require that the Requesting State agree to terms and conditions necessary to protect the interests of third parties in the item to be transferred. This ar-

[29] *See e.g.,* United States Ex Rel Public Prosecutor of Rotterdam, *Netherlands v. Richard Jean Van Aalst,* Case No 84-52-M-01 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984). Saint Vincent and the Grenadines' courts, too, have the power to execute such requests under Section 22, Mutual Assistance in Criminal Matters Act, 1993.

ticle is similar to provisions in many other United States mutual legal assistance treaties.[30]

ARTICLE 15—RETURN OF ITEMS

This article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested State as soon as possible. The delegations understood that this requirement would be invoked only if the Central Authority of the Requested State specifically requests it at the time that the items are delivered to the Requesting State. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will not usually request return of the items, but this is a matter best left to development in practice.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and Saint Vincent and the Grenadines in combating narcotics trafficking. One significant strategy in this effort is action by United States authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of United States mutual legal assistance treaties, including Article 17 in the U.S.-Canada Mutual Legal Assistance Treaty and Article 15 of the U.S.-Thailand Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" was intended to include things such as money, vessels, or other valuables either used in the crime or purchased or obtained as a result of the crime.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Saint Vincent and the Grenadines, they could be seized under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314,[31] or be subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnapping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since these offenses are predicate offenses under U.S. money laundering laws.[32] Thus, it is a violation of United States criminal law to launder the proceeds of these foreign fraud or theft offenses, when such proceeds are brought into the United States.

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[30] *See e.g.,* U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Bahamas Mutual Legal Assistance Treaty, *supra* note 21; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 18; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, Jul. 3, 1986; U.S.- Hungary Mutual Legal Assistance Treaty, Dec. 1, 1994; U.S.-Korea Mutual Legal Assistance Treaty, Nov. 23, 1993; U.S.-Panama Mutual Legal Assistance Treaty, Apr. 11, 1991; U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5; U.S.-Spain Mutual Legal Assistance Treaty, Nov. 20, 1990; U.S.-United Kingdom Mutual Legal Assistance Treaty, Jan. 6, 1994.

[31] This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud in the United States or abroad.

[32] Title 18, United States Code, Section 1956(c)(7)(B).

If the assets are the proceeds of drug trafficking, it is especially likely that the Contracting Parties will be able and willing to help one another. Title 18, United States Code, Section 981(a)(1)(B), allows for 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 Substance Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and Canada; there is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.[33] The United States delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds or instrumentalities of offenses, to restitution to crime victims, or to the collection of fines imposed as sentences in criminal convictions. It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings. Thus, 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 of forfeiture levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.[34]

United States law permits the government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. Under regulations promulgated by the Attorney General, the amount transferred generally reflects the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[35] Paragraph 3 is consistent with this framework, and will enable a Contracting Party having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Contracting Party,

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[33] Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, calls for the States that are party to enact legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, Dec. 20, 1988.

[34] In Saint Vincent and the Grenadines, unlike the U.S., the law does not currently allow for civil forfeiture. However, Saint Vincent and the Grenadines law does permit forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Saint Vincent and the Grenadines to confiscate the defendant's property.

[35] *See* Title 18, United States Code, Section 981 (i)(1).

at the former's discretion and to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures provided by this Treaty shall not prevent assistance under any other applicable international agreements. Article 17 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 would leave the provisions of United States and Saint Vincent and the Grenadines law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the treaty more effective and their own efforts more efficient. This article anticipates that the Contracting Parties will 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, or the use of the Treaty to obtain evidence that otherwise might be sought via methods less acceptable to the Requested State. Very similar provisions are contained in recent United States mutual legal assistance treaties.[36] It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 contains standard provisions on the procedure for ratification and the exchange of the instruments of ratification

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

Paragraph 3 provides that the Treaty shall apply to any request presented pursuant to it after it enters into force, even if the relevant acts or omissions occurred before the date on which the Treaty entered into force. Provisions of this kind are common in law enforcement agreements.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

[36] *See, e.g.,* U.S.-Philippines Mutual Legal Assistance Treaty, *supra* note 5, art. 18; U.S.-Canada Mutual Legal Assistance Treaty, *supra* note 18, art. XVIII; U.S.-U.K. Mutual Legal Assistance Treaty Concerning the Cayman Islands, *supra* note 30, art. 18; U.S.-Argentina Mutual Legal Assistance Treaty, *supra* note 5, art. 18.

VIII. Texts of the Resolutions of Ratification

Agreement with Hong Kong:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Agreement between the Government of the United States of America and the Government of Hong Kong on Mutual Legal Assistance in Criminal Matters, with Annex, signed in Hong Kong on April 15, 1997 (Treaty Doc. 105–6), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Luxembourg:

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 Grand Duchy of Luxembourg on Mutual Legal Assistance in Criminal Matters, and related exchange of notes, signed at Washington on March 13, 1997 (Treaty Doc. 105–11), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Poland:

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 Government of the Republic of Poland on Mutual Legal Assistance in Criminal Matters, signed at Washington on July 10, 1996 (Treaty Doc. 105–12), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Trinidad and Tobago:

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 Trinidad and Tobago on Mutual Legal Assistance in Criminal Matters, signed at Port of Spain on March 4, 1996 (Treaty Doc. 105–22), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Barbados:

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 Barbados on Mutual Legal Assistance in Criminal Matters, signed at Bridgetown on February 28, 1996 (Treaty Doc.

105–23), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Antigua and Barbuda:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the United States of America and the Government of Antigua and Barbuda, signed at St. John's on October 31, 1996 (Treaty Doc. 105–24), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Dominica:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the United States of America and the Government of Dominica, signed at Roseau on October 10, 1996 (Treaty Doc. 105–24), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Grenada:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the United States of America and the Government of Grenada, signed at St. George's on May 30, 1996 (Treaty Doc. 105–24), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under

the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Saint Lucia:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the United States of America and the Government of Saint Lucia, signed at Castries on April 18, 1996 (Treaty Doc. 105–24), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in

Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Australia:

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 Australia on Mutual Assistance in Criminal Matters, and a related exchange of notes, signed at Washington on April 30, 1997 (Treaty Doc. 105–27), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and

with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Latvia:

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 Latvia on Mutual Legal Assistance in Criminal Matters, signed at Washington on June 13, 1997 and an exchange of notes signed the same date (Treaty Doc. 105–34), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Saint Kitts and Nevis:

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 Saint Kitts and Nevis on Mutual Legal Assistance in Criminal Matters, signed at Basseterre on September 18, 1997, and a related exchange of notes signed at Bridgetown on October 29, 1997, and February 4, 1998 (Treaty Doc. 105–37), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Venezuela:

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 Venezuela on Mutual Legal Assistance in Criminal Matters, signed at Caracas on October 12, 1997 (Treaty Doc. 105–38), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Israel:

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 State of Israel on Mutual Legal Assistance in Criminal Matters, signed at Tel Aviv on January 26, 1998, and a related exchange of notes signed the same date (Treaty Doc. 105–40), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Lithuania:

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 Lithuania on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 16, 1998 (Treaty Doc. 105–41), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Brazil:

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 Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, signed at Brasilia on October 14, 1997 (Treaty Doc. 105–42), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Saint Vincent and the Grenadines:

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 Saint Vincent and the Grenadines on Mutual Legal Assistance in Criminal Matters, and a Related Protocol, signed at Kingstown on January 8, 1998 (Treaty Doc. 105–44), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with the Czech Republic:

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 Czech Republic on Mutual Legal Assistance in Criminal Matters, signed at Washington on February 4, 1998 (Treaty Doc. 105–47), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution. (b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

Treaty with Estonia:

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 Estonia on Mutual Legal Assistance in Criminal Matters, signed at Washington on April 2, 1998 (Treaty Doc. 105–52), and an exchange of notes dated September 16 and 17, 1998 (EC–7063), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The Senate's advice and consent is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.

(b) DECLARATION.—The Senate's advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles

of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The resolution of ratification is subject to the following two provisos, which shall not be included in the instrument of ratification to be signed by the President:

(1) LIMITATION ON ASSISTANCE. 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.

(2) SUPREMACY OF THE CONSTITUTION.—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.

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