
MUTUAL LEGAL ASSISTANCE TREATIES WITH CYPRUS,
EGYPT, FRANCE, GREECE, NIGERIA, ROMANIA, SOUTH
AFRICA, UKRAINE AND THE INTER-AMERICAN CONVEN-
TION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS
WITH RELATED PROTOCOL

OCTOBER 4 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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

REPORT

[To accompany Treaty Docs. 106-35; 106-19; 106-17; 106-18; 102-26; 106-20; 106-36; 106-16; and 105-25]

The Committee on Foreign Relations, to which were referred the Treaty Between the Government of the United States of America and the Government of the Republic of Cyprus on Mutual Legal Assistance in Criminal Matters, signed at Nicosia on December 20, 1999 (Treaty Doc. 106-35); the Treaty Between the Government of the United States of America and the Government of the Arab Republic of Egypt on Mutual Legal Assistance in Criminal Matters, signed at Cairo on May 3, 1998, and a related Exchange of Diplomatic Notes (Treaty Doc. 106-19); the Treaty Between the Government of the United States of America and the Government of France on Mutual Legal Assistance in Criminal Matters, signed at Paris on December 10, 1998 (Treaty Doc. 106-17); the Treaty Between the Government of the United States of America and the Government of the Hellenic Republic on Mutual Legal Assistance in Criminal Matters, signed at Washington on May 25, 1999 (Treaty Doc. 106-18); the Treaty Between the Government of the United States of America and the Federal Republic of Nigeria on Mutual Legal Assistance in Criminal Matters, signed at Washington on September 13, 1989 (Treaty Doc. 102-26); the Treaty Between the Government of the United States of America and the Government of Romania on Mutual Legal Assistance in Criminal Matters, signed at Washington on May 26, 1999 (Treaty Doc. 106-20); the Treaty Between the Government of the United States of America and the Government of the Republic of South Africa on Mutual Legal Assistance in Criminal Matters, signed at Washington on

September 16, 1999 (Treaty Doc. 106–36); the Treaty Between the Government of the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters, signed at Kiev on July 22, 1998, and with an Exchange of Notes signed on September 30, 1999, which provides for its provisional application (Treaty Doc. 106–16); and the Inter-American Convention on Mutual Assistance in Criminal Matters, adopted at the Twenty-Second Regular Session of the Organization of American States (“OAS”) General Assembly meeting in Nassau, The Bahamas, on May 23, 1992, and the Optional Protocol Related to the Inter-American Convention on Mutual Assistance in Criminal Matters, adopted at the Twenty-Third Regular Session of the OAS General Assembly meeting in Managua, Nicaragua, on June 11, 1993, both instruments signed on behalf of the United States at OAS Headquarters in Washington on January 10, 1995 (Treaty Doc. 105–25), having considered the same, reports favorably thereon, each with the understandings, declarations and provisos indicated in the corresponding resolutions of ratification, *infra*, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and said resolutions of ratification.

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I. PURPOSE

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

II. BACKGROUND

Eight mutual legal assistance treaties (“MLATs”) were submitted to the Senate during the 106th Congress. They include agreements with Cyprus, Egypt, France, Greece, Romania, South Africa, and Ukraine. The Inter-American Convention on Mutual Assistance in Criminal Matters and its Optional Protocol were submitted to the Senate during the 105th Congress. The MLAT with Nigeria was submitted to the Senate during the 102d Congress. If the agreements described in this report enter into force, they will join thirty-six existing MLATs already in force for the United States.

III. SUMMARY

A. GENERAL

Each of the treaties discussed in this report has distinctive features. All of them, however, including the multilateral Inter-American Convention (“OAS MLAT”), follow a common format and as a

group exhibit more similarities than differences. In general, they consist of twenty articles, more or less. They cover essentially the same matter, in the same general order, often with only minor variations of style and language. Typically their texts are arranged as follows:

- the *scope of assistance* of the Treaty, in the form of 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 petition for help 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 to 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*.

Parties to the Optional Protocol to the OAS MLAT would agree not to reject certain requests for assistance relating to tax crimes. The Optional Protocol was negotiated at the request of the United States out of concern that the OAS MLAT itself allowed assistance to be denied in certain cases in which the underlying offense was

considered a “fiscal” offense. The Executive Branch also desires ratification of the Optional Protocol to improve cooperation in a wide range of tax offenses.

B. KEY PROVISIONS

1. *Scope of Assistance*

In general, the MLATs begin with an article that addresses 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 the types of assistance available under the agreement, a statement on dual criminality and a disclaimer of any intent to give defendants additional rights.

2. *Central Authorities*

The Treaties all require the designation of a Central Authority that is vested with exclusive authority to send and receive treaty requests, and that often has broad administrative authority to make the treaties work. In most cases, the Central Authority is the country’s attorney general. For the United States, actual treaty administration is delegated to the Department of Justice’s Office of International Affairs which provides sufficiency review and traffic control over requests under the treaty. Central Authorities enjoy considerable authority and flexibility over dispatch and receipt of Treaty requests in order to ensure efficient implementation of the treaty.

The MLAT with Egypt is typical and permits the Central Authorities to set or agree to any conditions necessary for approval of requests that might otherwise be denied; to waive the requirement, in emergency situations, that requests be submitted in writing; to postpone or condition execution of a request for assistance that might interfere with a criminal investigation, prosecution or proceeding of its own; and to determine whether requests should be kept confidential and whether the information secured may be used for other purposes.

3. *Limitations on Assistance*

All of the Treaties have an article that describes the circumstances under which assistance may or must be refused. They help define the MLATs’ outer limits, but seldom surface in practice. The four most recurrent limitations permit the parties to decline a request for assistance (1) which involves a purely military offense not ordinarily treated as a criminal offense, (2) which is related to a political offense, (3) whose execution would prejudice a national security or similar essential interest, or (4) which does not comply with the MLATs’ procedural prerequisites.

The provision on purely military offenses and political offenses is drawn from extradition practice. The purely military offense exception covers things like mutiny and desertion, is fairly self-evident, and rarely claimed. In an extradition context, the political offense exception, on the other hand, is neither so evident nor so rare. It clearly includes purely political crimes like treason, espionage, and sedition. Under U.S. law it also extends to crimes that are relatively political, that is, offenses “committed in the course of and

incidental to a violent political disturbance such as a war, revolution or rebellion.” Under the laws of various other nations it has sometimes been thought to encompass either politically motivated offenses or offenses whose prosecution is politically motivated or both.

Although the essential interests clause is almost always couched with national security, it is generally understood to be more inclusive than the language alone might suggest. The most commonly cited examples are (1) requests “involving prosecution by the Requesting State of conduct that occurred in the Requested State that is constitutionally protected in the Requested State” and (2) requests for sensitive law enforcement information where the “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.”

MLATs not infrequently join other restriction clauses with one or more of the usual four limitation clauses. Requests involving a prosecution based on race, religion, nationality, or political opinion may be singled out for possible rejection. Search and seizure and forfeiture assistance may be limited if dual criminality requirements are not met. Double jeopardy or the prospect of a constitutional violation may also be explicitly mentioned as a ground for denying a MLAT request.

Among the pacts under consideration, the denial clause of the French MLAT is the most abbreviated, and the denial clause of the OAS MLAT is the most expansive. The Optional Protocol to the OAS MLAT was negotiated at the request of the United States out of concern that the OAS MLAT itself allowed assistance to be denied in certain cases in which the underlying offense was considered a “fiscal” offense. The Executive Branch believes ratification of the Optional Protocol will improve cooperation with OAS MLAT parties over a wide range of tax offenses.

4. Form and Content of Requests

The form and content demands of most MLATs have been formulated to streamline the request process, to prevent denials based on misunderstandings, and to keep requests within the confines of the Treaty. Under normal circumstances, requests must be written in the language of the requested country. Certain basic information must be provided for all requests and other information requirements are tailored to requests for particular kinds of assistance. Search and seizure requests, for instances, are expected to include a particularized description of the place to be searched and the items to be seized. The provision in the Treaty with Cyprus is representative in both type and content.

5. Execution of Requests

Contemporary MLATs generally merge several provisions concerning treaty administration using similar if not identical language for matters such as:

- 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 requesters to be informed of the status of performance on their requests; and
- the rights of requesters to be informed of the outcome of the execution of their requests.

6. *Costs*

The Treaties handle associated costs primarily as incidents of 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. The 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*

Most MLATs 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 provision is sometimes worded as a prohibition (“the Requesting State shall not * * *”) and sometimes as a prerogative (“the Requested State may require * * *”). In either case, it is designed to ensure that information will not be used for purposes for which it could not have been obtained directly under the MLAT. Consequently, its invocation can be anticipated, is apparently relatively uncommon, and can be tailored to minimal adverse effect. In this country, the limitation places the MLAT information and evidence initially beyond the reach of a Freedom of Information Act request.

The same article normally includes confidentiality limitations in addition to use limitations. They permit responding countries to insist that the evidence or information they provide be kept confidential and to condition their responses accordingly. News of the results of a MLAT request may be just as damaging as word of the fact a request has been made. Premature disclosure could result in flight; destruction of evidence; concealment of assets; harm, intimidation, corruption, or obstruction of witnesses or officials; and embarrassment of the innocent. The cloak tends to be fairly tightly drawn.

8. *Testimony and Evidence in the Requested State*

An original purpose of the MLAT program was to permit the United States to obtain evidence from foreign jurisdictions in a form admissible in American courts. That remains unchanged. There are alternative procedures for any type of assistance that a

MLAT enables, but the Treaties make it possible to overcome real and practical problems.

American courts usually have no authority to subpoena foreign nationals living abroad. Although Americans living overseas can be subpoenaed, to do so in many countries is considered both diplomatically and legally offensive. Even when foreign resistance can be overcome, U.S. law imposes formidable requirements that must be met before depositions can be taken overseas and the testimony subsequently introduced in criminal proceedings in this country.

MLATs are crafted to overcome these obstacles, in addition to meeting the practical and diplomatic challenges of taking depositions in a foreign country. They obligate the parties to call witnesses, using compulsory process if necessary.

9. Records of Government Agencies

The majority of MLATs divide governmental information available under their provisions into two categories, namely, 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 Treaties contemplate access to material held by any of the three branches of government. The United States is unwilling to compromise drug trafficking intelligence produced and held by our various law enforcement agencies. Thus, as in some past MLATs, the Senate has insisted upon a resolution of ratification proviso instructing the Administration to deny any MLAT request that would give corrupt foreign officials information that might be used to frustrate our efforts to combat drug trafficking.

The Technical Analyses accompanying in many of these Treaties have noted that the provision permits access by both the law enforcement and tax enforcement authorities of our MLAT Treaty partners to tax information held by the Internal Revenue Service to the same extent that access is available to federal officials.

10. Appearances Outside the Requested State

Foreign witnesses can not be compelled to travel to the United States to testify nor can a witness in this country be compelled to travel overseas to testify, 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 whether witnesses may request reimbursement in advance, whether witnesses may be invited to appear in third countries, and the extent to which safe conduct will be offered. The advance reimbursement stipulations, where they appear, are cast in discretionary terms and likely reflect general practice. Guarantees of safe conduct assure invited witnesses that, during their visit, the host country will not arrest, charge, or sue them for any past conduct.

11. Transfer of Persons in Custody

The Treaties anticipate situations where prisoners are sought as participants in proceedings in another country. The Treaties over-

come 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 its laws to accept custody on its 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.

12. Location and Identification of Persons or Items

The MLAT parties generally pledge their best efforts to ascertain the location or identity of “persons or items” within their territory 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.

13. Service of Documents

In American criminal cases, service of documents consists most often of the service of subpoenas. Foreign nationals living abroad are ordinarily beyond the reach of American courts, but Congress has long authorized federal courts to subpoena Americans residing overseas. The existing statute, 28 U.S.C. 1783, permits subpoenas ordering an American to return to this country to testify as well as subpoenas ordering an appearance in the country where the American witness resides. For purposes of American law, section 1783 requires no Treaty reenforcement to be effective. In some countries, however, its use may be offensive to notions of sovereignty and illegal in few instances. Letters rogatory may be an available alternative, but they come with their own shortcomings. 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 generally 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. Although 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. Assistance in Forfeiture, Restitution and Fine Collection Proceedings

The forfeiture articles in most contemporary MLATs address forfeiture, restitution, and the collection of criminal fines. Forfeiture is the confiscation of the fruits and instrumentalities of criminal activity.

In the United States, there are over one hundred federal forfeiture laws, but the most heavily used are those enacted to fight drug trafficking, money laundering and organized crime. The proceeds resulting from cooperative federal-state investigations are shared with participating state law enforcement agencies. Both the money laundering and drug forfeiture provisions make the same benefit available to foreign countries. The United States will enforce foreign forfeiture judgments and may confiscate any property located in the United States but derived from, or traceable to, a serious violation of a foreign controlled substances law.

Forfeiture varies from one jurisdiction to another and as a consequence the impact of MLAT forfeiture provisions vary a great deal from one treaty to the next. Experience under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances has made forfeiture easier in drug-related cases. Article 5 of the Convention requires the parties: to adopt forfeiture laws with respect to proceeds generated by drug trafficking; to establish the procedures to identify, trace and freeze or seize proceeds, property, instrumentalities and other forfeitable items; to permit judicial access to bank, financial and other commercial records; and to establish confiscation procedures for property located within their territory but subject to confiscation as a consequence of drug trafficking elsewhere.

MLAT forfeiture assistance articles are generally similar to the U.N. Convention. They encourage the parties to give aid where their laws permit, but they do not contemplate conforming amendments within the parties' domestic law.

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 instrumentalities of offenses, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions." With exception of forfeiture judgments, courts in the United States will not ordinarily enforce foreign restitution orders or collect foreign criminal fines.

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 to a year 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 these treaties on September 12, 2000, (a transcript of the hearing and questions for the record can be found in Senate hearing 106-660 entitled, "Consideration of Pending Treaties"). The Committee considered the treaties on September 27, 2000, and ordered them favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the proposed Treaties subject to the understandings, declarations and provisos indicated in section VIII, below.

VI. COMMITTEE RECOMMENDATION AND COMMENTS

The Committee 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. The Committee believes that the following comments may be useful to the Senate in its consideration of the proposed treaties and to the Departments of State and Justice.

A. RESTRICTION ON COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

As discussed in Exec. Rpt. 105-23, on July 17, 1998, a majority of nations at the United Nations Diplomatic Conference on the Establishment of an International Criminal Court (Rome, Italy) approved a treaty that would, upon entry into force, establish an International Criminal Court. The Court would be empowered to investigate and prosecute war crimes, crimes against humanity, genocide and aggression. The United States voted against this treaty.

Because of the implications for Americans involved in formulation and execution of our foreign policy, several members of the Committee remain deeply concerned by the prospect of an International Criminal Court empowered to investigate the matters referred to above that is permanent, could become politicized, and over which there would be limited international political control. This concern is magnified by events since adoption of Exec. Rpt. 105-23, namely, International Criminal Tribunal for the Former Yugoslavia Prosecutor Carla del Ponte's claim of jurisdiction over United States and other NATO forces for their conduct during 1999 Kosovo combat operations.

In light of the Secretary of State's expressed desire that the United States become a "good neighbor" to the Court if it enters into being, and if certain safeguards designed to protect U.S. officials and soldiers from prosecution are approved, as well as other

factors, several members of this Committee are concerned that United States bilateral MLATs could become conduits for transferring information or for assistance from the United States to the Court even though the United States voted against its establishment.

Accordingly, the Committee has decided once again to insert a related understanding into each of the Resolutions of Ratification accompanying the MLATs discussed in this report. Specifically, this provision is designed to make clear that information shared with a party by the United States pursuant to the MLAT shall not be forwarded to the International Criminal Court. The Committee recognizes that the terms of the treaties will not give the United States, as the Requested State, total control over the Requesting State's use of assistance provided under the MLAT.

For instance, under the article on use limitations, information provided under the MLAT 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 each MLAT to prevent any assistance or information provided by the United States from being transferred to the International Criminal Court.

The Committee intends that this restriction is binding on the President, and would be removed only in the event that the United States ratifies the treaty establishing the Court pursuant to the procedures stated in Article II, section 2, of the United States Constitution.

Lastly, Members of the Committee were troubled to learn at the September 12, 2000, hearing on the MLATs covered in this report that the Department of Justice does not at present routinely include in all MLAT transmittal letters language which forbids MLAT treaty partners from passing U.S.-provided information to the International Criminal Court. While the Committee recognizes that the Court does not yet exist, there is nonetheless significant concern that information which is made available today to treaty partners whose MLATs do not contain the Senate's use limitation restriction (e.g., Spain) may conclude that they are free, in the future, to share U.S.-provided information with the International Criminal Court if it comes into existence. Consequently, the Committee strongly recommends—even if a given MLAT was ratified without the Senate understanding—that the Department of Justice routinely include an International Criminal Court use prohibition clause when it transmits information or provides assistance to any MLAT treaty partner.

B. USE OF MLATS TO AGGRESSIVELY PURSUE INTERNATIONAL PARENTAL CHILD ABDUCTORS

The Committee remains concerned about the serious problem of international parental child abduction. Notably, a September 2000 General Accounting Office report (GAOP/GAO/NSIAD-00-226BR) reveals that an estimated 1,000 children are abducted by one of their parents from the United States annually. Between January 1995 and May 15, 2000, "left behind" American parents initiated nearly 300 cases under the 1980 Hague Convention on the Civil Aspects of International Child Abduction involving just three coun-

tries: Germany, Sweden and Austria. Well over half of those cases are unresolved.

The Committee reiterates its grave concern over this troubling issue. Under current practice, MLATs provide for cooperation between law enforcement officials. Although the Hague Treaty addresses civil aspects of this issue, the act of international parental abduction is a Federal crime. The Committee believes that care should be taken to ensure that MLATs will be useful tools for attaining information and other cooperation to assist in the return of abducted or wrongfully retained children. The Committee anticipates that the Executive Branch will consider terminating MLATs or taking other measures in the event that the Central Authority of a given party consistently fails to adequately provide assistance under the respective MLAT. The Committee is especially concerned that the proposed MLATs discussed in this report be monitored to ensure cooperation in the exchange of information related to international parental child abduction.

The Departments of State and Justice testified on September 12, 2000, that these treaties are essential to ensuring that criminals do not evade prosecution. This same principle should be true for the crime of parental child abduction in violation of the 1993 International Parental Kidnaping Act. The Committee expects, therefore, that officials of the Departments of State and Justice will seek law enforcement cooperation in all cases unless it will hinder U.S. law enforcement efforts. The Committee also expects these officials to raise this issue in the course of negotiation of all bilateral law enforcement treaties and in other bilateral diplomatic exchanges.

C. MLAT WITH NIGERIA

The Executive Branch testified on September 12, 2000, before the Committee that the MLAT with Nigeria will be "an effective tool in the investigation and prosecution of a wide variety of modern crimes of concern to the U.S. and Nigeria." The Committee notes that the MLAT with Nigeria was concluded in 1989, and received in the Senate in 1992. The treaty has languished owing in part to United States concerns about the lack of a democratic government in Nigeria. The return of democratic government in Nigeria now makes it possible to proceed with consideration of this agreement. Sophisticated international criminality originating in Nigeria in narcotics trafficking, wire fraud and other areas are imperatives which also led the Committee to move forward with this MLAT.

VII. EXPLANATION OF PROPOSED TREATIES

The following are the article-by-article technical analyses provided by the Departments of State and Justice for each of the mutual legal assistance treaties covered by this Report.

Technical Analysis of the Treaty Between The Government of the United States of America And The Government of the Republic of Cyprus on Mutual Legal Assistance in Criminal Matters

On December 21, 1999, the United States signed a Treaty Between the Government of the United States of America and the

Government of the Republic of Cyprus 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, international drug trafficking and other offenses.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. Cyprus currently does not have any specific law on mutual legal assistance, but it assured the United States that it will enact new legislation to implement 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 history. 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 Cyprus, 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 but such proceedings are covered by the Treaty.

¹The 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 Cyprus under the Treaty in connection with investigations prior to charges being filed in Cyprus.

²One U.S. 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*, Title 21, United States Code, Section 881; Title 18, United States Code, Section 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 of this article makes it clear that there is no requirement of dual criminality under this Treaty for cooperation. Thus, assistance is to 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 Cyprus criminal law differ significantly, and a general dual criminality rule would make assistance unavailable in many significant areas. During the negotiations, the Cyprus delegation gave assurances that assistance would be available under the Treaty to the United States in investigations of major crimes such as conspiracy; drug trafficking, including operating a 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; Export Control Act violations; criminal tax; securities fraud and insider trading, environmental protection, and antitrust offenses.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties⁴ 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 Cyprus 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 Party⁵ establish a “Central Authority” to make and receive Treaty requests. The Central Authority of the United States would make all requests to Cyprus on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of Cyprus would make all requests emanating from officials in Cyprus.

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 proper 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

⁴See, *United States v. Johnpoll*, 739 F.2d 702 (2d Cir. 1984), cert. denied, 469 U.S. 1075 (1984).

⁵The terms “Party” and “State” are used interchangeably in the Treaty and have the same meaning.

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

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.

Paragraph 4 states explicitly that in urgent cases the Central Authorities may transmit requests through the International Criminal Police Organisation (INTERPOL). Although no mutual legal assistance treaty now in force explicitly provides for requests to be made through INTERPOL, it is usually anticipated that the Central Authorities may select any means of communication that they find convenient, including INTERPOL. Many recent U.S. extradition treaties explicitly permit provisional arrest requests to be submitted through the INTERPOL channel,⁷ and the use by the Central Authorities of INTERPOL's communication facilities for urgent mutual assistance requests should prove equally valuable. The negotiators agreed that this paragraph does not authorize INTERPOL to participate substantively in its implementation.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty. These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(a) permits the denial of a request if it relates to a political offense or an offense under military law that 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."

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, as Central Authority for the United States, would work closely with the Department of

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).

⁷ See, e.g., U.S.-Cyprus Extradition Treaty, signed at Washington June 17, 1996, entered into force September 14, 1999, art. 11(1).

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 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 U.S. Central Authority may invoke paragraph 1(b) to decline to provide information pursuant to a request under this Treaty if 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 a felony, including the facilitation of the production or distribution of illegal drugs.⁸

Paragraph 1(c) permits the denial of a request if execution of the request would violate the Constitution of the Requested State or the obligations of the Requested State under any international multilateral treaty relating to human rights. The clause permitting denial if the request would violate the Constitution of the requested state is self-explanatory, and is similar to provisions that appear in several other treaties.⁹ The clause permitting denial if the request would violate a human rights convention was requested by Cyprus’ delegation.

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 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 prosecution of a political offense (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,

⁸This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with, *e.g.*, Luxembourg, Hong Kong, Poland and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark Mr. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

⁹U.S.-Jamaica Mutual Legal Assistance Treaty, signed at Kingston July 7, 1989, entered into force July 25, 1995, art. 2(1)(e).

¹⁰U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61.

thereby giving the Requesting State a chance 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 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.” If the request is not in writing, it must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. Each request shall be in the language of the Requesting State accompanied by a translation in the language of the Requested State (*i.e.*, English for the United States and Greek for Cyprus) 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 lists nine kinds of information that are important but not always crucial, and must 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority to promptly 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 competent judicial or other authorities 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 Cyprus. Rather, it

is anticipated that when a request from Cyprus 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. Similarly, Cyprus' delegation informed the U.S. delegation that this general language should not be understood to authorize the use of the Treaty to conduct criminal proceedings in Cyprus for the U.S. (*e.g.*, the accepting of guilty pleas from defendants).

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 specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty. It also 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.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for representation of the Requesting State in the execution of a 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.

Paragraph 3 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. 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 U.S. and Cyprus authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documents obtained abroad to be admitted in evidence if they are duly certified and the defendant has been given fair opportunity to test its authenticity.¹¹ Since Cyprus' law contains no similar provision, documents acquired in Cyprus in strict conformity with Cyprus procedures might not be admissible in United States courts. Furthermore, United States courts use procedural techniques such as videotape depositions that simply are not used in Cyprus even though they are not forbidden there.

¹¹Title 18, United States Code, Section 3505.

Second, the evidence in question could be needed for subsection 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.

Finally, Paragraph 3 provides that where neither the Treaty or the request specifies a particular procedure to be followed, the request shall be executed in accordance with the appropriate procedure under the laws applicable to criminal investigations and proceedings 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 legal proceeding in the Requested State. The paragraph also allows the Requested State to provide the information to the Requesting State subject to conditions needed to prevent 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 use its best efforts 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.

¹²This provision is similar to language in other mutual legal assistance treaties. *See, e.g.*, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, 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 cannot be provided immediately, 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 Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision 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. Article 6 does provide 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.

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 the Requesting State not use any information or evidence provided under the Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of Central Authority of the Requested State. If such a use limitation is required, the Requesting State must comply with the requirement. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence 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.

¹³ See, e.g., U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, art. 6.

Paragraph 2 states that the Requested State may request that the information or evidence it furnishes 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 the Requesting State accepts the evidence subject to conditions of confidentiality, the Requesting State must 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 Cyprus 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 such a condition.

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.¹⁴ 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 a manner consistent with Paragraph 1 or 2, the Requesting State is free to use the evidence for any purpose. When 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 Cyprus authority has used 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.

¹⁴ See, *Brady v. Maryland*, 373 U.S. 83 (1963).

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 give statements¹⁵ or produce items, including documents and 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 any persons specified in the request (*e.g.*, the defendant and his counsel in criminal cases) shall be permitted by the Requested State to be present and question the person giving the testimony or evidence.

Paragraph 4 states that when a person asserts a claim of immunity, incapacity, or privilege under the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article 5(3), and 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 Cyprus is guaranteed the right to invoke any of the testimonial privileges (*e.g.*, attorney-client, inter-spousal) 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 Cyprus may raise any of the similar privileges available under the law of Cyprus.

Paragraph 4 also states 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 take the 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 shall, upon request, be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in Form A appended to the Treaty. In Cyprus, the attestation will be given under oath, before a judge magistrate, or judicial officer, and any false statements made in the attestation will be subject to prosecution in Cyprus as a “false oath or declaration” in violation of Article 117 of Cyprus’ Criminal Code. Thus, the provision establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. The absence or nonexistence of such records shall, upon re-

¹⁵The Treaty draws a distinction between taking “testimony” and taking “statements” because under Cyprus’ law “testimony” can only be given after formal charges have been filed.

¹⁶This is consistent with the approach taken in Title 28, United States Code, Section 1782.

¹⁷*See, e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

quest, be certified through the use of Form B, also appended to the treaty. Records authenticated by Form A, or Form B certifying the absence or nonexistence of such records, shall be admissible in evidence in the Requesting State. 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 State 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 undertaking 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, like most other U.S. bilateral mutual legal assistance treaties, 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 Cyprus under this article in appropriate cases.

Paragraph 3 states that records provided under this article may be authenticated by the officials responsible for maintaining them through the use of Form C appended to the Treaty. No further authentication is required. If authenticated in this manner, the records shall be admissible in evidence in the Requesting State. The paragraph also provides for the appropriate officials to certify the absence or nonexistence of records, through Form D appended to the Treaty. 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” in the Requesting State 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 OUTSIDE OF THE REQUESTED STATE

This article provides that upon request, the Requested State shall invite persons in the Requested State to travel outside of the Requested State (*i.e.*, to the Requesting State or to a third state) to appear. The Central Authority of the Requested State shall inform the Central Authority of 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. Therefore, paragraph 2 provides that the Requesting State must indicate to the Requested State the extent to which the person’s expenses will be paid. 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 paragraph provides that the person may ask that the Requesting State advance the money to pay these expenses, and that this advance may be handled through the Embassy or 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 under this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty by reason of acts or convictions which preceded the person’s departure for the Requesting State 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 states that any safe conduct provided under 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 Central Authority of the Requesting State may extend the safe conduct for up to fifteen days if it determines 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.¹⁸

Article 11 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,¹⁹ which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.²⁰ Paragraph 1 provides that persons in custody in the Requested State whose presence outside of that State (*i.e.*, to the Requesting State or to a third state) is sought for purposes of assistance under this Treaty, such as providing testimony in a criminal prosecution, shall be transferred in custody for that purpose if the person consents and the Central Authorities of both states agree.

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.²¹

Paragraph 3 provides express authority, and the obligation, for the receiving State to keep such a person in custody throughout the person’s stay there, unless the sending State specifically authorizes release. This paragraph also authorizes and obligates the receiving State to return the person in custody to the sending State as soon as circumstances permit or as otherwise agreed, and provides that this return will occur in accordance with terms and conditions agreed upon by the Central Authorities. The initial transfer of a

¹⁸For 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, Eells, Davies, Murphy, and Millard*, a major narcotics prosecution in “the Old Bailey” (Central Criminal Court) in London.

¹⁹U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26.

²⁰It is also consistent with 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.

²¹*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.

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.

In keeping with the obligation to return a person transferred under this article, paragraph (3)(c) explicitly prohibits the Party to whom a person is transferred from requiring the transferring Party to initiate extradition or other proceedings 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. Finally, Paragraph 3(e) states that if the transfer of the person outside the Requested State is to a third state rather than to the Requesting State, it is the Requesting State that nevertheless must be responsible for making all arrangements to meet the requirements of this paragraph, including the requirements that the person be kept in custody and returned 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 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—TRANSIT OF PERSONS IN CUSTODY

Article 11 contemplates that persons in custody will be moved from State to State for purposes of mutual assistance, and it is reasonable to anticipate situations in which one State may need to bring persons in custody through the other on the way to or from third States. Article 12 provides the legal framework for such transit. Similar articles appear in other recent U.S. mutual legal assistance treaties.²²

Paragraph 1 states that a Requested State may authorize the transit through its territory of a person whose personal appearance has been requested in investigations, prosecutions, or proceedings in the Requesting State. Despite the discretionary nature of such transit, an explicit reference to constitutional limitations was included because at the request of the Cyprus delegation because of its concerns about potential litigation attempting to apply its constitutional ban on extradition of nationals to such transit.

Paragraph 2 provides the Requested State with express authority to keep a person in custody during transit and imposes an obligation to do so.

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

²² See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force, September 17, 1990, art. 11.

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 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 most U.S. mutual legal assistance treaties.²³

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 Cyprus 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 must be transmitted by the Central Authority of the Requesting 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. U.S. 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 and is similar to provisions in many other U.S. mutual legal assistance treaties.²⁵

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 Cyprus will have to be supported by a showing of probable cause for the search. A U.S. request to Cyprus would have to satisfy the corresponding evidentiary standard there, which is “a rea-

²³ See, e.g., U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 13.

²⁴ For example, in *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.), a search warrant was issued February 24, 1984, based on a request under Title 28, United States Code, Section 1782.

²⁵ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15.

sonable 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 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 continuity of custody, the identity of the item, 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 provide 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.

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. 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 17—PROCEEDS AND INSTRUMENTALITIES OF OFFENSES

A major goal of the Treaty is to enhance the efforts of both the United States and Cyprus 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 16 of the U.S.-Barbados Mutual Legal Assistance Treaty and Article 17 of the U.S.-Latvia. Paragraph 1 authorizes the Central Authority of one Party 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 Party in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law. For in-

stance, if the assets in question are located in the United States and were obtained as a result of a fraud in Cyprus, they could be seized under Title 18, United States Code, Section 981 in aid of a prosecution under Title 18, United States Code, Section 2314,²⁶ 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 kidnaping, 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.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 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 Party 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 Party to take any action that would exceed its internal legal authority. It does not, for instance, mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country

²⁶This 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. Proceeds of such activity become subject to forfeiture pursuant to Title 18, United States Code, Section 981 by way of Title 18, United States Code, Section 1956 and Title 18, United States Code, Section 1961. The forfeiture statute applies to property involved in transactions in violation of section 1956, which covers any activity constituting an offense defined by section 1961(1), which includes, among others, Title 18, United States Code, Section 2314.

²⁷Title 18, United States Code, Section 1956(c)(7)(B).

²⁸Article 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, December 20, 1988.

against property identified by the other if the relevant prosecution officials do not deem it proper to do so.²⁹

U.S. 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.³⁰ 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 ARRANGEMENTS

This article states that assistance and procedures set forth in this Treaty shall not prevent either Party from granting assistance to the other Party through the provisions of other applicable international agreements. Article 18 also states that the Parties may provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable.³¹ The Treaty would leave the provisions of United States and Cyprus law on letters rogatory completely undisturbed, and would 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 Central Authorities 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. Similar provisions are contained in all recent United States mutual legal assistance treaties. 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 states that the Treaty is subject to ratification and that the instruments of ratification are to be exchanged as soon as possible.

²⁹In Cyprus, unlike the United States, the law does not allow for civil forfeiture. However, Cyprus law permits forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Cyprus to confiscate the defendant's property.

³⁰See, Title 18, United States Code, Section 981(i)(1).

³¹See, e.g., the Agreement for Mutual Assistance Between Customs Services, signed at Washington June 2, 1987, entered into force August 21, 1987. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, with related notes, signed at Nicosia March 19, 1984; entered into force December 31, 1985.

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 the date of the Treaty's entry into force, without regard to whether the relevant acts or omissions under investigation occurred before, on or after 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 receipt of written notification. Similar termination provisions are included in other United States mutual legal assistance treaties.

**Technical Analysis of the Mutual Legal Assistance Treaty
Between the Government of the United States of America
and the Government of Egypt**

On May 3, 1998, the United States signed a Treaty Between the Government of the United States of America and the Government of the Arab Republic of Egypt on Mutual Legal Assistance in Criminal Matters (the "Treaty"). In recent years, the United States has signed 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.

The Treaty with Egypt is expected to be a major advance for the United States in its attempts to win the cooperation in Africa and the Middle East in combating organized crime, transnational terrorism, international drug trafficking, and other crimes.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. The Egyptian delegation informed the U.S. delegation that Egypt has no specific mutual legal assistance law, and that it will render assistance pursuant to the Treaty itself, referring to its domestic procedural law where applicable.

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 history. 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 of Article 1 requires the Parties to provide assistance in all matters involving the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters.

The delegations understood that the term "investigations" includes grand jury proceedings in the United States and similar pre-

charge proceedings in Egypt, and other legal measures taken prior to the filing of formal charges in either Party.¹ The term “proceedings” is intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings.² 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, disbarment proceedings and proceedings to forfeit to the Government the proceeds of illegal drug trafficking may be civil in nature;³ such proceedings were discussed with the Egyptian delegation and are covered by the Treaty. The U.S. delegation also informed the Egyptian delegation that requests for assistance might emanate from any of various U.S. agencies, including the following: the Federal Bureau of Investigation; the Securities and Exchange Commission; the Internal Revenue Service; the U.S. Customs Service; the Bureau of Alcohol, Tobacco, and Firearms; and the Drug Enforcement Administration. Finally, the U.S. delegation indicated that requests might arise before a case became criminal in nature; for example, the SEC often investigates matters before it is known whether criminal proceedings will be instituted.

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.

Paragraph 3 states that assistance is to be provided in connection with any conduct that is the subject of investigation or proceedings in the Requesting State. This language is intended to make it clear that there is no requirement of dual criminality for cooperation under this treaty. Thus, assistance is to be provided even when the criminal matter under investigation in the Requesting Party would not be a crime in the Requested Party. Article 1(3) is important because a dual criminality rule would make assistance unavailable where United States and Egypt criminal laws differ.

In discussing the types of cases for which assistance might be requested, the U.S. delegation delineated a number of offenses on which it might seek assistance. Some of the offenses discussed related to the following: drug trafficking and money laundering;

¹The requirement that assistance be provided under the Treaty 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 or not to file criminal charges. This obligation is a reciprocal one, and the United States must assist Egypt under the Treaty in connection with investigations prior to charges being filed in Egypt.

²One 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, *Fonseca v. Blumenthal*, 620 F.2d 322 (2nd Cir. 1980); *In Re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2nd Cir. 1976). 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 Title 28, United States Code, Section 1782, as interpreted in the *India* and *Fonseca* cases.

³Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

money laundering in the non-drug context; racketeering, including RICO; continuing criminal enterprises; cases involving criminal and civil forfeiture; kidnaping, including parental kidnaping; terrorism; fraud, including fraud against the government, securities fraud, and insider trading; customs, export control, and smuggling cases; taxes; the environment; foreign corrupt practices and bribery; antitrust violations; currency reporting; computer crime; and alien smuggling. Egypt indicated that offenses on which it would seek evidence are similar to those discussed by the U.S. delegation.

Paragraph 4 contains a standard provision in U.S. 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, nor is it intended to extend to civil matters. Private litigants in the United States may obtain evidence from Egypt 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, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

Article 2 of the Treaty requires that each Party establish a “Central Authority” for transmission, reception, and handling of treaty requests. The Central Authority of the United States would make all requests to Egypt on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Egyptian Central Authority will make all requests emanating from officials in Egypt.

The Central Authority for the Requesting Party will exercise discretion as to the form and content of requests, and also as to the number and priority of requests. The Central Authority of the Requested Party is also 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 duties of Central Authority under mutual legal assistance treaties to the Assistant Attorney General in charge of the Criminal Division.⁵ Paragraph 2 also states that the Minister of Justice of Egypt or the person designated by the Minister of Justice will serve as the Central Authority for Egypt.

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

⁴ See, *United States v. Johnpoll*, 739 F.2d 702 (2nd Cir.), cert. denied, 469 U.S. 1075 (1984).

⁵ 28 C.F.R. Section 0.64-1. The Assistant Attorney General for the Criminal Division has in turn delegated the authority to the Deputy Assistant Attorneys General and to the Director of the Criminal Division’s Office of International Affairs, in accordance with the regulation. Directive No. 81, 45 Fed.Reg. 79,758(1980), as corrected at 48 Fed. Reg. 54,595(1983). This authority is further delegated to Deputy Directors of the Office of International Affairs. 59 Fed. Reg. 42,160 (1994).

telephone, telefax, 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. These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph 1(a) permits the denial of a request if it relates to an offense under military law which would not be an offense under ordinary criminal law.

Paragraph 1(b) permits the Central Authority of the Requested State⁶ 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 term “security” includes cases where assistance might involve disclosure of information which 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 which 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 which 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 also 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; attaining that purpose would be hampered if sensitive law enforcement information available under the Treaty were to fall into the wrong hands. Therefore, the U.S. Central Authority may invoke Article 3(1)(b) to decline to provide information pursuant to a request under this Treaty if 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 a felony, including facilitation of the production or distribution of illegal drugs.⁷

⁶The terms “Party” and “State” are used interchangeably in the Treaty and have the same meaning.

⁷This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with, *e.g.* Luxembourg, Hong Kong, Poland, and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 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 interests” provision. Indeed, a major objective of the Treaty is to provide a formal, pre-existing channel for making such information available for law enforcement purposes.

The Treaty, unlike most other mutual legal assistance treaties, does not expressly permit the denial of a request if it involves a “political offense.” The U.S. delegation proposed that this exception be included in the Treaty, but, as the term was unfamiliar to the Egyptian delegation, it was removed. The delegations agreed that the Central Authorities could deny assistance in cases involving political offenses pursuant to the “essential interests” provision of Article 3(1)(b). An exchange of diplomatic notes to this effect was submitted for the Senate’s information.

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

Paragraph 2 obligates 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 State might request information which could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a case involving a political offense (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. It is anticipated that 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 CONTENT OF REQUESTS

Paragraph 1 of this Article 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. The request shall be in the language of the Requested State unless agreed otherwise. The Egyptian delegation requested that all requests to Egypt be in Arabic and the United States expects that all requests from Egypt will be in English.

Paragraph 2 lists the four kinds of information deemed crucial to the efficient operation of the Treaty and which must be included in each request. Article 4(3) outlines kinds of information which are

important, but not always crucial, and must 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 to promptly execute a request. The Treaty contemplates 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 requirement but its execution requires action by some other agency in the Requested State, the Central Authority will promptly transmit the request to the correct agency for execution. For example, the Egyptian delegation explained that given the strict banking laws in Egypt, records cannot be released without an order issued by the Court of Appeal in Cairo. When a request for Egyptian bank records is made, the Minister of Justice will transmit the request to a general prosecutor who, in turn, will obtain the necessary order on behalf of the United States.

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 to execute the request. This provision is neither intended nor understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Egypt. Rather, it is anticipated that when a request from Egypt 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 this Treaty.

The third sentence in Paragraph 1 reads “[t]he Courts of the Requested State shall have authority to issue orders necessary to execute the request.” This language specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty. Other recent mutual legal assistance treaties specify that the courts have authority to issue subpoenas and search warrants, as well as “other orders necessary” to execute the request. The Egyptian delegation explained that the specific terms would have no meaning when translated to Arabic; therefore, they asked that the broader terminology be used. The agreed upon 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 legal 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 other 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 cost.

Paragraph 3 provides that requests shall be executed according to the internal laws and procedures of the Requested State except to the extent that the 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. For the United States, the Treaty is intended to be self-executing, and no new or additional legislation is 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 are prohibited in the Requested State. This provision is necessary for two reasons:

First, there are significant differences between the procedures that must be followed by U.S. and Egyptian authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documents obtained abroad to be admitted in evidence if they are duly certified and the defendant has been given fair opportunity to test its authenticity.⁸ Since Egypt's law contains no similar provision, documents acquired in Egypt in strict conformity with Egyptian procedures might not be admissible in U.S. courts. Furthermore, U.S. courts use procedural techniques such as videotape depositions that simply are not used in Egypt even though they are not forbidden there.

Second, the evidence in question could be subject 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

⁸Title 18, United States Code, Section 3505.

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 where 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 which 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 on 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 which is ordinarily protected by Rule 6(e) of the 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) of the Treaty. Therefore, 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 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 obligates 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. The Egyptian delegation indicated that requests for legal assistance can be kept confidential, even when bank records are sought; bank account holders will not be informed that an order for records has been issued and that records have been obtained.

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 two 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 the request. If the assistance sought is not provided, or if execution is delayed or postponed, 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.

⁹This provision is similar to language in other United States mutual legal assistance treaties. See, e.g., U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 5(5).

ARTICLE 6—COSTS

Article 6 of the Treaty 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.¹⁰ Article 6 does oblige the Requesting State to pay fees of expert witnesses, translation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11. The delegations also agreed that the States could negotiate extraordinary costs which might be incurred in a particular case.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may request 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 the Requested State provides such consent, the Requesting State must comply with any conditions specified with the consent. It will be recalled that Article 4(2)(d) requires the Requesting State to specify the purpose for which the information or evidence is sought.

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, and 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 it provides to the Requesting State be kept confidential or be used only subject to specified terms and conditions. The delegations agreed that conditions of confidentiality would be imposed only when necessary, and would be 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 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.

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.¹¹ Any such proposed disclosure shall be noticed by the Requesting State to the Requested State in advance.

¹⁰ See, e.g., U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, art. 6.

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

Paragraph 4 states that once evidence obtained under the Treaty has been revealed to the public in accordance with Paragraph 1 or 2 of this Article, the Requesting State is free to use the evidence for any purpose. When 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 described in the press. 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) of the Treaty, the restrictions outlined in Article 7 are for the benefit of the two nations that are parties to the Treaty (the United States and Egypt) and the invocation and enforcement of these provisions are left entirely to the parties. Where any individual alleges that an authority in the Requesting State is seeking to use information or evidence obtained from the Requested State in a manner inconsistent with this article, the recourse would be for the person to inform the Central Authority of the Requested State 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 shall be compelled, if necessary, to appear and testify or produce 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. The Egyptian delegation indicated that compulsory process is available in Egypt, as in the United States. There, a court issues a notice, or subpoena, to the appropriate person or entity. Where the receiving entity is not responsive to the notice, the responsible person faces fines and imprisonment.

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, except to the extent prohibited under the law of the Requested State, any interested parties, including the defendant and his or her counsel, shall be permitted to be present during the taking of testimony under this article. This provision was the subject of much discussion during the treaty negotiations, resulting in an Agreed Minute, signed by both delegations, setting forth their common understanding on its implementation. The Agreed Minute confirms that Egyptian laws authorize the presence of the defendant or his representative during the taking of related testimony and records the critical need for U.S. law enforcement personnel connected with the investigation or prosecution of an offense for which evidence or testimony is sought in Egypt to be present during the taking of such evidence or testimony. The Minute sets forth the Egyptian delegation's explanation that under Egyptian law the victim of the offense that is the subject of the assistance request has the right to designate a representative to be present during the taking of testimony or evidence by a state prosecutor. In this situation, the victim could designate any person (for example, a U.S. official) to be its representa-

tive.¹² In the case of crimes such as narcotics offenses, where the victim was the United States as a whole rather than a specific individual, the Egyptian Delegation confirmed that the U.S. Central Authority could propose and the Egyptian authorities would permit a U.S. official to be present during the taking of such evidence or testimony in Egypt when such official could provide information relevant to the execution of the request by having him designated as an expert or witness with respect to the investigation. For its part, the United States delegation confirmed that Egyptian officials connected with the investigation or prosecution of an offense for which evidence or testimony is sought in the United States would be permitted to be present during the taking of such evidence or testimony.

Paragraph 3 also provides that persons specified in a request for assistance may “pose questions directly or indirectly to the person giving the testimony.” The Egyptian delegation indicated that only a prosecutor, acting as a *juge d’instruction*, may pose questions to a witness. The U.S. delegation explained that there is a need for prosecutors and the defendant sometimes to pose questions during the course of an examination. The Egyptian delegation agreed that such questions could be posed through the judge, by means of a written list of questions or otherwise, but that the questions could not be asked directly.

Paragraph 4 states that if a witness asserts a claim of immunity, incapacity, or privilege under the laws of 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 most of our recent mutual legal assistance treaties.¹³ The negotiating delegations agreed that the Requesting State would inform the Requested State of any potential privileges which might be raised, to the extent that they are known, when a request is made. It is understood that when a person asserts a claim of immunity, incapacity, or privilege under the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article 5(3) and 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 Egypt is guaranteed the right to invoke any of the testimonial privileges (attorney-client, inter-spousal) 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 for-

¹²The Egyptian delegation indicated that its rules with regard to who may be present during the taking of testimony are strict and exclusive, and that these rules provide the “legal qualification” necessary for one to be present. Under Egyptian law, the following persons may be present during the taking of testimony outside of trial, such as at a deposition: the public prosecutor; the witness and his or her counsel; the victim and a representative of the victim; the person suspected or accused of the crime and his or her counsel; and an expert able to provide information relevant to the topic on which testimony is given.

¹³See, e.g., U.S.-Barbados Mutual legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

eign proceedings.¹⁴ A witness testifying in Egypt may raise any of the similar privileges available under Egyptian law, including the privilege against self-incrimination.

Paragraph 5 states that evidence produced pursuant to this article may be authenticated by an attestation, including, in the case of business records, authentication using 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 paragraph also provides for certification of the absence or nonexistence of records, using Form B, also appended to the Treaty. The final sentence of the paragraph provides for the admissibility of authenticated documents, and the certificate of nonexistence, as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing and does not need implementing legislation. However, admissibility ultimately will be determined by the judicial authority presiding over the trial. Evidentiary tests other than authentication (such as relevance, materiality, etc.) would still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Paragraph 1 obliges each State to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a governmental 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 either country.¹⁵

Paragraph 2 provides that the Requested State may share with its treaty partner copies of nonpublic information contained in government files. The undertaking 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 such 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.

¹⁴This is consistent with the approach taken in Title 28, United States Code, Section 1782.

¹⁵The Egyptian delegation indicated that even publicly available records should be obtained through the use of a formal treaty request, in order to qualify U.S. law enforcement officials to receive the records. The Egyptian delegation also indicated that records such as criminal records and records of conviction can be obtained administratively from the Ministry of Interior.

The U.S. delegation discussed whether this treaty could serve as a basis for exchange of information in tax matters. It was the intention of the U.S. 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 Egyptian delegation indicated that information could be exchanged in tax matters; accordingly, the U.S. delegation is satisfied that this Treaty, like most other U.S. mutual legal assistance treaties, 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 Egypt under this article in appropriate cases. In addition, cooperation in tax matters is reflected by the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income entered into force between Egypt and the United States on December 31, 1981.

The third paragraph states that documents provided under this article may be authenticated using Form C attached to the Treaty, and, if certified or authenticated in this manner, the evidence shall be admissible in evidence in the Requesting State. Moreover, the paragraph provides that the absence or nonexistence of records may, when requested, be certified using Form D, also appended to the Treaty. Thus, the Treaty establishes a procedure for authenticating official foreign records by certification 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, like Article 8(5), states that documents authenticated under this paragraph, as well as certificates of absence or nonexistence, shall be "admissible;" it will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. Evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

Article 10 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. Therefore, paragraph 1 provides that the witness shall be informed of the extent of the 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 may, if it so chooses, determine that it will not subject the witness to service of process or detention or any restriction of personal liberty for acts committed before the witness left the Requested State to serve as a witness. It should be noted that this safe conduct is limited to acts or convictions which preceded the

witness' departure from the Requested State. This provision does not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State under this article or at a later time.

Paragraph 3 states that any safe conduct provided under 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 State and thereafter returns to it. However, the Central Authority of the Requesting State may extend the safe conduct up to fifteen days if it determines 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 the custody of another country. In some instances, the country involved is willing and able to "lend" the witness to the United States Government, provided that the witness would be carefully guarded while in the United States and returned to the foreign country at the conclusion of the testimony. On occasion, the Department of Justice has been able to arrange 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. This article is based on Article 26 of the U.S.-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 It provides that, upon request, a person in custody in either State whose presence is requested in the other State for purposes of assistance under this Treaty may be transferred to that State if the person consents and if the Central Authorities of both States agree. There have also been situations in which a person in custody on a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with the case.¹⁹ Article 11(1) also covers this situation.

Paragraph 2 provides express authority and the obligation for the receiving State to maintain such a transferred person in custody throughout his or her stay there, unless the sending State specifically authorizes release. The paragraph also requires the receiving State to return the person in custody to the sending State, as soon as circumstances permit or as otherwise agreed by both Central Authorities. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Au-

¹⁶For example, in September 1986, the U.S. Justice Department and the U.S. 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.

¹⁷U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern, May 25, 1973, entered into force January 23, 1977, art. 26.

¹⁸It is also consistent with Title 18, United States Code, Section 3508, which provides for the transfer to the United States of witnesses in the custody of other States whose testimony is needed at a federal criminal trial.

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.

thorities, but the provision does not require that the prisoner consent to be returned to the sending State.

In keeping with the obligation to return a person transferred under this article, paragraph (2)(c) expressly prohibits the State to whom a person is transferred from requiring the transferring State to initiate extradition or any other proceedings before the *status quo* is restored by the return of the person transferred. Finally, paragraph (2)(d) states that the prisoner will receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

The article does not provide for any specific “safe conduct” for prisoners 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 transfer without safe conduct, and the requesting State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to travel.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This Article provides that the Requesting State may seek to ascertain the identity or whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or items. This is a standard provision contained in all U.S. 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 a person or item is limited to persons or items which are or may be in the territory of the Requested State. Thus, neither the United States nor Egypt would 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 part of the Requested State to use its best efforts to effect the service of documents such as summonses, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request. Identical provisions appear in most U.S. mutual legal assistance treaties.²⁰

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 Egypt to follow a specified procedure for service), or by the United States Marshal’s Service in instances where personal service is requested.

Paragraph 2 provides that where the documents to be served call for the appearance of a person in the Requesting State, the document must be received by the Central Authority of the Requested

²⁰U.S.-Lithuania Mutual Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 13.

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.

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 State 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 a request and is similar to provisions in many other United States mutual legal assistance treaties.²²

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 Egypt will have to be supported by probable cause for the search. A United States request to Egypt would have to satisfy the corresponding evidentiary standard there. The Egyptian delegation indicated that, under Egyptian law, an order issued by either the Egyptian court or the general prosecutor, depending on the case, is needed before a search can be performed; a court order is needed where the rights of private, third parties (who are not targets of the investigation) are involved.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered under the Treaty. This provision requires that, upon request, every official in the Requested State who has had custody of a seized item shall certify the identity, continuity of custody, and changes in condition, using Form E appended to the Treaty.

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 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.

ARTICLE 15—RETURN OF ITEMS

This procedural article provides that, if requested, any documents or items of evidence furnished under the Treaty must be re-

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 Feb. 24).

²² See, e.g., U.S.-Latvia Mutual Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15.

turned to the Requested State as soon as possible. This requirement applies 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 require return, but this is a matter best left to development of practice.

ARTICLE 16—ASSISTANCE IN SEIZURE AND FORFEITURE
PROCEEDINGS

Article 16 is similar to Article 16 of the U.S.-Barbados Mutual Legal Assistance Treaty and Article 17 of the U.S.-Latvia Mutual Legal Assistance Treaty. The first paragraph authorizes the Central Authority of one Party 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 which either were used in the crime or 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 Egypt, they could be seized 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 kidnaping, robbery, extortion, or 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.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 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 would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States." This is consistent with the laws in other countries, such as Switzerland and

²³This 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. Proceeds of such activity become subject to forfeiture pursuant to Title 18, United States Code, Section 981 by way of Title 18, United States Code, Section 1956 and Title 18, United States Code, Section 1961. The forfeiture statute applies.

²⁴Title 18 United States Code, Section 1956(c)(7)(B).

Canada, and there is a growing trend among nations toward legislation of this kind in the battle against narcotics trafficking.²⁵ The U.S. delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

The second paragraph of Article 16 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. However, the language of the article is carefully selected so as not to require either State to take any action that would exceed its internal legal authority. It does not, for instance, mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecuting authorities do not deem it proper to do so.

The Egyptian delegation stated that its courts have the authority to enforce restitution orders and fines of foreign courts, as well as to freeze or restrain assets pursuant to a future foreign order of forfeiture. However, the delegation stated that assets may be forfeited only upon a criminal conviction, and Egyptian courts do not have the authority to order the final forfeiture of assets pursuant to a foreign order in the absence of an international agreement to that effect. The Egyptian delegation indicated that the Government of Egypt may freeze, or seize or restrain, assets on our behalf. However, it can forfeit assets only upon a criminal conviction, and Egyptian courts do not have the authority to enforce forfeiture orders of foreign courts.²⁶ It should be noted that, although frozen assets cannot be forfeited to the U.S. government, such assets can be transferred to victims as part of restitution or paid to the U.S. government pursuant to fines imposed on the defendant.

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 will generally reflect 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 Article 16(3) is consistent with this framework, and will enable the transfer of forfeited assets, or the proceeds of

²⁵ Article 5 of the United Nations Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which calls for the state parties to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters. United Nations Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, December 20, 1988.

²⁶ The Egyptian delegation indicated that a separate treaty providing for the recognition of foreign judgments would be needed.

²⁷ Title 18, United States Code, Section 981(i)(1).

the sale of such assets, to the other Party to the extent permitted by the respective laws of the Parties.

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 agreement between the two countries. It also provides that the Treaty shall not be deemed to prevent recourse to any assistance available under the internal laws of either country. Finally, Article 17 preserves the ability of each to provide assistance pursuant to any bilateral arrangement, agreement or practice that may be applicable. Thus, the Treaty leaves the provisions of United States and Egyptian law on letters rogatory completely undisturbed, and does 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 calls upon the Parties to share those ideas with one another, and encourages them to agree on the implementation of such measures. Practical measures of this kind might include methods of keeping each other informed of the progress of investigations and cases in which treaty assistance was utilized. It is anticipated that consultations will be held on a regular basis.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 provides that the Treaty and its Appendices are subject to ratification and that the instruments of ratification shall be exchanged as soon as possible.

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

Paragraph 3 states 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 many recent United States' mutual legal assistance treaties.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination will take effect six months after receipt of written notification. Similar requirements are contained in mutual legal assistance treaties with other countries.

²⁸ See, e.g., the U.S.-Egypt Agreement on Procedures for Mutual Assistance in connection with Matters Relating to the Westinghouse Electric Corporation, signed at Washington November 19, 1978, entered into force November 29, 1978 (30 UST 3996; TIAS 9441; 1169 UNTS 328), and related agreements; U.S.-Egypt Agreement on Procedures for Mutual Assistance in Connection with Matters Relating to the General Electric Company, signed at Washington September 17, 1993, entered into force September 17, 1993, as amended November 18, 1994; U.S.-Egypt Arrangement for the Direct Exchange of Certain Information Regarding the Traffic in Narcotic Drugs, entered into force August 26, 1930 (11 Bevans 1331); and the Agreement Regarding the Transfer of Forfeited Assets, signed at Cairo May 20, 1993, entered into force May 20, 1993.

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

On December 10, 1998, the United States signed a Treaty on Mutual Legal Assistance in Criminal Matters Between the United States of America and France (“the Treaty”). In recent years, the United States has signed similar treaties with a number of countries as part of a program 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, international drug trafficking, and other offenses.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. France has a new law, effective June 23, 1999, specifically governing foreign assistance.

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 history. 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

Throughout the Treaty, the negotiators relied heavily on wording in provisions of France’s mutual legal assistance treaties with Australia and Canada to bridge differences in the U.S. and French systems. That reliance is evident in the first paragraph of the first article, which provides for assistance in investigations or proceedings in respect of criminal offenses the punishment of which, at the time of the request for assistance, is a matter for the judicial authorities of the Requesting State.

By this language the negotiators did not intend that an offense with respect to which assistance is sought be pending before a court; they did intend that the offense entail the possibility of punishment (*i.e.*, penal sanctions) that would be a matter for a court and not for an administrative body. The Treaty is not intended to provide assistance for administrative or regulatory matters, except as provided otherwise in the Treaty, *e.g.*, Article 11.

For France, jurisdiction to conduct investigations lies with its judicial authorities. Because the United States does not rely on judicial authorities to conduct criminal investigations, the negotiators specifically agreed that the phrase includes, for the United States, grand jury proceedings and investigations undertaken by “competent authorities.”¹ Then, to clarify this point, the negotiators, at Article 3, defined “competent authorities.”

¹The requirement that assistance be provided under the Treaty 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 or not to file criminal charges.

The negotiators intended that the phrase “proceedings in respect of criminal offenses” cover proceedings not strictly criminal in nature. For example, Article 11 specifically provides for assistance with respect to proceedings to forfeit the proceeds of illegal drug trafficking, which may be civil in nature.²

Paragraph 2 excludes from coverage of this Treaty military offenses that are not otherwise offenses under ordinary criminal law and specified types of procedures regarding offenses (*i.e.*, execution of requests for provisional arrest and extradition; enforcement of judgments except as provided at Article 11).

Paragraph 3 is based on a notion that is standard in U.S. mutual legal assistance treaties, but differently worded in this Treaty. Generally, such treaties are intended solely for government-to-government mutual legal assistance cooperation.³ This Treaty does not change that proposition. The Treaty is not intended to provide to private persons in either State a means of evidence gathering. Private litigants in the United States or France may continue to obtain evidence from the other State by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Additionally, for the United States, 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. Because the situation in France was clearly different on this point (*i.e.*, France considered that the Treaty might create a private right of action to contest, for example, the procedure used to execute a request as improper implementation of the Treaty), the negotiators agreed on the formulation set forth in this paragraph and, to ensure that the U.S. position that the Treaty creates no private rights of action was unaltered, further agreed to an explanatory note. Both delegations intended and understood that the explanatory note would be an integral part of the Treaty. See Explanatory Note on the Treaty, Article 1(3).

Assistance under the Treaty requires no 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) with one exception, set forth in Article 11(3), relating to immobilization of proceeds of offenses. Most U.S. mutual legal assistance treaties have no requirement for dual criminality. For France, the critical question is whether the request is made on behalf of a competent authority as defined in Article 3.

ARTICLE 2—CENTRAL AUTHORITIES

Paragraph 1 requires that each State designate a Central Authority to make and receive requests under the Treaty. 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 Attor-

²See, Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

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

ney General in charge of the Criminal Division.⁴ The Ministry of Justice is the Central Authority for France. The Central Authority of the United States would make all requests to France on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of France would make all requests emanating from officials in France. 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 proper agency, court or other authority (which, in the United States, may be federal or state) for execution, and ensuring that a timely response is made.

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, facsimile, or any other means, at the option of the Central Authorities themselves.

Paragraph 2 provides for consultations between the Central Authorities for the purpose of implementing the Treaty. The delegations anticipated that the Central Authorities would agree upon such practical measures as they deemed to be necessary to facilitate the implementation of the Treaty. The French delegation particularly noted that the procedures to be made available to the United States pursuant to Article 9 were substantially different from normal French procedures and the provision for consultations should help ensure that the provision was properly implemented in France.

Paragraph 3 requires the Central Authorities to keep each other informed of the status of execution of requests. The negotiators expected that the Central Authorities would maintain open lines of communication that would encompass all aspects of the execution of requests.

ARTICLE 3—COMPETENT AUTHORITIES

This article describes the authorities upon whose behalf the Central Authorities of each State will make requests. For France, the competent authorities are judicial authorities, including public prosecutors. For the United States, the competent authorities are prosecutors and authorities with statutory or regulatory responsibility for investigations of criminal offenses, including the referral of matters to prosecutors for criminal prosecution.

The delegations agreed to include a sample listing of U.S. competent authorities in the Explanatory Note on the Treaty because the U.S. system vests jurisdiction to investigate criminal offenses in numerous federal and state agencies and authorities. See Explanatory Note on the Treaty, Article 3. However, because the list was illustrative only, and not intended to be exhaustive, the delegations agreed that a request made by the Central Authority of the

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).

United States on behalf of a “competent” authority would be sufficient to establish the credentials of the authority as a “competent authority.”

ARTICLE 4—CONTENTS OF REQUESTS

Paragraph 1 specifies that requests must be in writing. The paragraph then identifies seven categories of information that must be included in each request.

Paragraph 2 allows the Requesting Party to indicate a time by which the assistance should be provided.

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.

ARTICLE 5—TRANSMISSION OF REQUESTS

This article specifies that the channel for transmitting requests and the results from execution of requests shall be directly between Central Authorities. The provision allows two variants for both sending requests and receiving results: (1) in urgent situations, the transmitting Central Authority may transmit an advance copy of the request by any means, including via the Interpol channel and (2) the Central Authorities may agree to the transmittal of results from execution through a different channel than the Central Authority to Central Authority channel.

ARTICLE 6—DENIAL OF ASSISTANCE

This article specifies the limited classes of situations in which assistance may be denied under the Treaty, in addition to those excluded under Article 1(2). The negotiators understood that, for the United States, decisions concerning denial of assistance would be made by the executive (*i.e.*, the Central Authority for the United States). Although for France the executive likewise makes such decisions, its judiciary will also be able to render an independent decision regarding the propriety of providing assistance which, if the Central Authority for France disagrees, it may appeal to a higher court.

Paragraph (1)(a) permits the Requested State to decline to execute a request if the request relates to an offense that the Requested State considers to be a political offense (*e.g.*, espionage, treason and other actions recognized as political offenses under the jurisprudence developed in extradition cases) or related to a political offense (*i.e.*, ordinary criminal acts committed for political reasons). In practice, France seldom denies requests on the basis that the offense (*e.g.*, bank robbery) has political underpinnings. Moreover, to the extent that political underpinnings exist, France relies on proportionality to determine whether to consider the matter to be related to a political offense, with the notion that violence negates ideology.

Paragraph (1)(b) permits the Requested State to decline to execute a request if to do so would prejudice the “sovereignty, security, public order, or other essential interests” of that State. All U.S. mutual legal assistance treaties contain provisions allowing the Re-

requested State to deny execution of a request if execution would prejudice its essential interests.

The negotiators agreed that “sovereignty” or “security” as a basis for denying assistance includes the notion that providing assistance would disclose information otherwise classified for national security reasons. It is anticipated that the U.S. Department of Justice, as Central Authority for the United States, would work closely with the Department of State and other U.S. government agencies to determine whether to execute a request that might fall in this category.

The negotiators further agreed that the term “public order,” while similar in consequence to sovereignty or security, means a “judicial” public order (*i.e.*, principles of the state that cannot be violated). In the same vein, the phrase “other essential interests” was intended to cover similar equally serious interests of the Requested State. Such interests are not implicated where providing assistance, for example, causes political or public embarrassment, and the discretion to deny assistance would be improperly exercised for that reason. 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 that occurred in the Requested State and is constitutionally protected in that State.

However, “essential interests” could also 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 U.S. Central Authority may invoke paragraph 1(b) to decline to provide information pursuant to a request under this Treaty if 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 a felony, including facilitation of the production or distribution of illegal drugs.⁵

The negotiators understood that, inasmuch as the controlling principle under the Treaty is the obligation of the Parties to provide assistance to each other, the exceptions are to be narrowly interpreted and used only if necessary. Moreover, to the extent that execution of a portion of a request warrants denial based upon its impact on sovereignty, security, public order, or other essential interests, the unaffected portion of the request is to be executed.

Because the purpose of the Treaty is to provide assistance whenever possible, paragraph 2 obliges the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying execution of a request outright pursuant to paragraph 1. For example, a State might request information that could be used either in a routine criminal case (which would be within the scope of the

⁵This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with, *e.g.*, Luxembourg, Hong Kong, Poland and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

Treaty) or in a prosecution involving a political offense (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. The Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby giving the Requesting State a chance to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State accepts the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the reasons for a denial of assistance. This ensures, first, that the Requesting State is always aware that a particular request has been denied and, second, is in a better position to make requests thereafter. To the extent that a request is only partly denied, the Requested State's explanation for not providing complete execution should also avoid misunderstandings.

ARTICLE 7—POSTPONING EXECUTION

Article 7 recognizes that prompt execution of a request could be difficult or impossible where such execution would “interfere with an ongoing criminal investigation or proceeding” in the Requested State. In that situation, it may, after consultation between the Central Authorities, postpone execution, including transmission, or make execution subject to conditions needed to prevent interference with the Requested State's investigation or proceeding. If the Requesting State accepts the assistance subject to conditions, it must comply with them. The reference to postponing transmission reflects the negotiators' understanding that the Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence, for later transmission, that might otherwise be lost before the conclusion of the investigation or legal proceedings in that State.

ARTICLE 8—EXECUTION OF REQUESTS

Paragraph 1 provides that “[r]equests shall be executed in accordance with the provisions of this Treaty and the laws of the Requested State.” Thus, neither State is expected to take any action in execution of a request that would be expressly prohibited under its domestic 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.

Paragraph 2 outlines the obligations of the Requested State's authorities in executing requests from the Requesting State. The negotiators intended that the Central Authority of the Requested State would initiate the execution of requests. Upon receiving a request, that Central Authority will first review it and 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 satisfies the Treaty's requirements, paragraph 2 holds the Central Authority responsible for making “all necessary arrangements” to place the request before the proper agency, court, or other author-

ity for execution (and ensuring that a timely response is made). When the United States is the Requested State, the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution.

Sentence 2 of paragraph 2 both authorizes and requires administrative and judicial authorities to “use all necessary measures available under the laws of the Requested State” to execute a request. For the United States, this empowers its courts to do everything within their power to execute the request, including issuing subpoenas, search warrants or other orders necessary to execute the request. It also 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. This provision is not intended or understood to authorize United States authorities to use the grand jury for the collection of evidence pursuant to a request from France. Rather, when execution of a request from France requires the use of compulsory process, the U.S. Department of Justice will use the mechanism of Title 28, United States Code, Section 1782 and the provisions of the Treaty, to present the request to a federal court in order to secure the necessary process. The court shall then order “any form of assistance, not prohibited” by U.S. law. This includes the issuance of subpoenas, search warrants, and such other orders as are “necessary or useful” for execution of the request. For example, when France seeks the testimony or evidence of a witness located in the United States, a U.S. court will normally fulfill its Treaty responsibility by appointing a commissioner pursuant to Title 28, United States Code, Section 1782 and authorizing that commissioner to issue a commissioner’s subpoena to compel the witness to appear and testify and produce such documents, records, and items as France has requested. The language of this sentence reflects the understanding of the Parties that each intends to provide the other with every form of assistance available to the judicial and executive branches of government in the execution of requests.

Paragraph 3 authorizes a person “giving testimony or evidence” to assert any claim of immunity, incapacity, or privilege available under the laws of the Requested State. Such claim will be resolved in the Requested State and the person will be required (or not) to give testimony or evidence accordingly. On the other hand, if the person seeks to assert a claim available under the laws of the Requesting State, the person will be required to give the testimony or evidence and the claim will be recorded for the record, where it will be preserved for resolution by the authorities of the Requesting State in accordance with the law of that State. The applicability of the privilege can then be determined in the Requesting State where the scope of the privilege and the legislative and policy reasons underlying it are best understood.

The paragraph does provide for consultation between the Central Authorities where a witness gives advance notice of intention to assert a claim under the laws of the Requesting State. This may provide an alternative to the Central Authority of the Requested State by providing an opportunity in advance to ascertain the viability of the claim and then act accordingly in lieu of simply compelling a

witness to give testimony or evidence where the witness raises a claim under the laws of the Requesting State.

Paragraph 3 is similar to provisions found in numerous other U.S. mutual legal assistance treaties.⁶ It ensures that no person will be compelled to furnish testimony 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 France may invoke any testimonial privilege (*e.g.*, attorney client, husband-wife) available in the United States, including the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for the French proceeding. Conversely, a witness testifying in France pursuant to a U.S. request may raise any of the privileges available under the laws of France.

Paragraph 4 specifies that a person who gives false testimony or evidence in the execution of a request in the Requested State shall be subject to prosecution or punishment in that State in accordance with its laws. The provision does not require that the person giving false testimony or evidence be prosecuted in the Requested State; it merely clarifies that the person may be subject to such prosecution. The provision also does not affect the ability of the Requesting State to prosecute in accordance with its laws. Both the United States and France have laws that subject a person providing false testimony or evidence in the execution of a treaty request to criminal sanction.

ARTICLE 9—SPECIFIC PROCEDURES

This article—particularly paragraphs 1 and 2—represents the solution to the most intractable problem facing the negotiators: providing a reliable Treaty mechanism that would enable the United States routinely to secure testimony in France, which testimony would thereafter be usable in a criminal proceeding in the United States. Because the two countries' systems are so procedurally different in regard to taking and preserving testimony, finding a meeting point was difficult, and the negotiators recognized that a perfect solution was impossible. However, the negotiators intended, and were confident that the text of this article permits, the taking of testimony in France in a manner that, in all but the rarest of situations, will produce testimony usable in a U.S. criminal proceeding.

Paragraph 1, sentence 1, provides that, if requested, the Requested State shall inform the Requesting State of the dates and places of execution of a request.

Paragraph 1, sentence 2, provides that "authorities and persons designated by the Requesting State may be permitted to be present, and may assist in," executing the request "if the Requested State consents." The Central Authority for France, together with the French judicial authority (*i.e.*, an examining magistrate) taking the testimony, will normally make the critical determination regarding consent. Although the element of consent creates some uncertainty for the United States with respect to the

⁶See, *e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

presence of relevant parties at the taking of testimony, the subsequent sentence requires consent with respect to depositions, with limited exceptions: France “shall permit such designated authorities and persons to be present at and assist in the taking of depositions . . . subject to, in particular, the application of Articles 6 [Denial of Assistance] and 7 [Postponing Execution].” Referencing these articles demonstrates the narrow grounds on which the parties anticipated consent for participation in depositions might be denied since such denial or postponement is otherwise available independent of Article 9 and, thus, the provision institutes no new standard for consent. Moreover, that the negotiators intended for consent to be given for most depositions is explicitly stated in the explanatory note:

The scope of this commitment [to accommodate requests for depositions in compliance with U.S. internal procedure], however, may be limited, notably by the application of Articles 6 and 7 relating respectively to the denial of requests for legal assistance and to postponement of execution of such requests. This commitment does not preclude that, in certain cases, which in practice shall be most exceptional, the authority entrusted with the execution of the request may determine that the presence and assistance of the designated persons are not possible within a specific case. [Emphasis added.]

See Explanatory Note on the Treaty, Article 9.

Paragraph 2, sentence 1, specifies that the procedures subsequently listed shall be “carried out insofar as they are not contrary to the fundamental principles of a judicial proceeding in the Requested State.” The reference to “fundamental principles” was considered imperative by the French delegation because the procedures subsequently outlined are novel from the French perspective. Nonetheless, the French delegation believed that none were in fact incompatible with French fundamental principles of a judicial proceeding. To reach a different conclusion would render France unable to provide any mutual legal assistance to the United States.

Paragraph 2 continues in sentence 2 to list procedures that the Requested State “shall” provide to the Requesting State. Several of these procedures, especially as the negotiators contemplated and intended that they be implemented, are foreign to French practice and procedure. Subparagraph (a) provides for the taking of testimony from witnesses “under oath” and contemplates questioning, not under oath, of targets and defendants. Subparagraph (b) provides for “confrontation” between witnesses and defendants during depositions (or videoconferencing). Confrontation includes the possibility of defendants presenting questions to be asked of witnesses. Subparagraph (c) provides the same possibility for the Requesting States’ authorities present during, for example, the confrontation. Subparagraph (d) provides for the creation of a record or recording of, for example, the confrontation. Subparagraph (e) allows for a verbatim transcript. For the purposes of creating a record or verbatim transcript, the Requesting State may request the presence of persons who are technicians (*e.g.*, court reporters or stenographers, video technicians). The costs for the services of technicians is covered in Article 23.

Because extant French procedures in the area of taking testimony are different from U.S. procedures and the legal implications of procedures currently being utilized in other jurisdictions are untested in France, the negotiators anticipated the need for substantial consultation to implement this article. See discussion under Article 2, paragraph 2, *supra*.

Paragraph 3 provides, that upon request, the Requested State shall provide original documents or records, if possible. The negotiators intended that the Requested State would make every reasonable effort to comply with such a request. However, the Requested State normally will provide true copies of the documents or records.

Paragraph 4 deals with evidentiary foundation requirements for business records. The negotiators discussed the fact that business records produced pursuant to this Treaty in the Requested State must be admissible in proceedings in the courts of the Requesting State for the Treaty to serve its intended purpose. To address this evidentiary need, the negotiators agreed that, upon request, the Requested State will secure either a certificate (such as Form A appended to the Treaty) or a proces-verbal (containing the same essential information as is contained in Form A) to accompany the business records. The contents of Form A are consistent with and meet the requirements of Title 18, United States Code, Section 3505. Consequently, foreign business records produced and accompanied by a certificate or proces-verbal produced in compliance with the Treaty are admissible in a criminal proceeding in the United States as evidence. While such evidence is admissible, the judicial authority presiding over the U.S. trial must determine whether the evidence, in fact, should be admitted. The negotiators intended that evidentiary tests such as relevance and materiality would still have to be satisfied in each case.

ARTICLE 10—SEARCH AND SEIZURE

Because the purpose of a mutual legal assistance treaty is to enable each treaty partner to use mechanisms available under its domestic laws to provide assistance to the treaty partner, most U.S. mutual legal assistance treaties contain a provision authorizing the use of search warrants to execute requests.⁷ This Treaty is no exception. Thus, this article provides a framework pursuant to which U.S. courts may issue search warrants in execution of French requests.

Paragraph 1 provides that the Requested State “shall execute a request for search, seizure, and delivery of items” to the Requesting State if the request includes “information justifying such search under the laws of the Requested State.” This means that a French request to the United States must be supported by a showing of probable cause for the search. Likewise, a U.S. request to France would have to satisfy the corresponding evidentiary standard there.

Paragraph 2 is designed to produce a record of the chain of custody of items seized and delivered up under the Treaty. This provision requires that, upon request, a competent authority certify the

⁷ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15(3).

(1) identity of the item seized, (2) identity of every official who had custody of the item, and (3) the circumstances (*i.e.*, continuity) of its custody. The competent authority is further required to certify any additional change in custody or in condition of the item seized. If properly prepared, the certificate or certificates from the competent authority in the Requested State “shall be admissible in evidence in the Requesting State as proof” of chain of custody and integrity of condition of an item seized pursuant to a request. While the certificates will be “admissible” without additional authentication, the trier of fact is free to bar use of the evidence itself, in spite of the certificates, if some reason to do so exists other than authenticity or chain of custody.

ARTICLE 11—PROCEEDS OF OFFENSES

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

Paragraph 1 obligates the Parties to assist one another in “proceedings related to the forfeiture of proceeds or instrumentalities of criminal offenses.” Such assistance may include locating assets (see paragraph 2), immobilizing assets (see paragraph 3), or executing forfeiture judgments (see paragraph 4).⁸

Paragraph 2 requires the Parties to assist each other, in accordance with their respective laws, in locating and identifying proceeds and instrumentalities of offenses that are believed to be located in the Requested State. The Requesting State must articulate a basis for believing that the assets being sought are located in the Requested State.

Paragraph 3 allows each State, in an exercise of its discretion, to assist the other, to the extent permitted by its laws, by immobilizing proceeds and instrumentalities where the request for immobilization contains “facts that would constitute an offense under the laws of both States.” This provision is the exception to the general principle in the Treaty that each State shall provide assistance to the other without regard to whether the matter for which assistance is requested is a criminal matter in the Requested State. As suggested by the text, the purpose of immobilization is to protect the asset against dissipation and ensure its availability for forfeiture (or restitution). For instance, if the assets obtained by fraud in France are located in the United States, U.S. authorities could act to seize them under Title 18, United States Code, Section 981

⁸The paragraph does not obligate the States to initiate forfeiture proceedings. Nonetheless, if the assets are the proceeds of drug trafficking, 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. 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, December 20, 1988.

in aid of a prosecution under Title 18, United States Code, Section 2314.⁹ U.S. authorities could also seek to secure a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnaping, 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.¹⁰ 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.

Paragraph 4 authorizes each State, in an exercise of its discretion, to execute final forfeiture judgments of the other State in accordance with the laws of the Requested State.

Paragraph 5 further authorizes a State that executes a final forfeiture decision to dispose of the forfeited asset “in accordance with its laws.” One possible disposition specifically envisioned by the negotiators is to share forfeited assets with the treaty partner.¹¹

ARTICLE 12—RETURN OF EVIDENCE

Paragraph 1 provides that any evidence furnished pursuant to the Treaty “shall be retained by the Requesting State unless the Requested State asks at the time of transmission for its return.” The negotiators believed that this practice was the most effective way to deal with the evidence provided, most of which would consist of true copies of documents that the Requested State would not require to be returned.

Paragraph 2 provides a Treaty basis for the Requested State to protect the interests of third parties in an item transmitted to the Requesting State. The Requesting States, in order to receive such item, would be required to agree to terms and conditions necessary to either care for the item or secure third party interests in the item to be transferred. This article is similar to provisions in other U.S. mutual legal assistance treaties.¹²

ARTICLE 13—RESTITUTION

This article commits the Parties to assist each other to the extent permitted by their respective laws to “facilitate restitution.” The negotiators agreed, first, that the assets to which the restitution ar-

⁹This 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. Proceeds of such activity become subject to forfeiture pursuant to Title 18, United States Code, Section 981 by way of Title 18, United States Code, Section 1956 and Title 18, United States Code, Section 1961. The forfeiture statute applies to property involved in transactions in violation of section 1956, which covers any activity constituting an offense defined by section 1961(1), which includes, among others, Title 18, United States Code, Section 2314.

¹⁰Title 18, United States Code, Section 1956(c)(7)(B).

¹¹U.S. 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. See, Title 18, United States Code, Section 981(i)(1). Paragraph 5 is consistent with this framework and will enable a State having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other State, at the former's discretion and to the extent permitted by their respective laws.

¹²See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15(3).

title will apply are assets wrongfully taken from a victim (*e.g.*, stolen property) and not the damages that a court could award for injury or the like caused by an offense. Second, the obligation to facilitate contemplated by this article does not include an obligation to pursue litigation on behalf of the other State to recover the assets. The Requested State may be able, in accordance with its laws, to immobilize assets. However, the Requesting State or the victims then have the obligation to pursue recovery.

ARTICLE 14—CONFIDENTIALITY

Paragraph 1 anticipates the situation in which the Requesting State provides information in its request that is either sensitive to the investigation or proceeding in the Requesting State, or protected against disclosure by domestic laws in the Requesting State, or both. For example, in order for the United States to provide “a description of the nature of the investigation or proceeding, including the facts on which the request is based,” as required by Article 4(1)(b) of the Treaty, the request may disclose information protected by Rule 6(e), Federal Rules of Criminal Procedure. This paragraph enables the United States to formally ask France to use “best efforts” to keep the information in the request confidential. 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 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.

Whereas paragraph 1 concerns information provided by the Requesting State in its request, paragraph 2 concerns information provided by the Requested State in response to a request.

This paragraph envisions a situation where the Requested State has information to provide in execution of a request, but considers that information to be sensitive and would prefer to limit its disclosure. Because no basis for denial under Article 6 exists, the Requested State cannot justifiably impose confidentiality restrictions as a precondition to production. However, this paragraph allows the Requested State to formally request that the Requesting State honor certain confidentiality restrictions. 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.

Article 4(1)(b) requires that the Requesting State specify “the purpose for which the assistance is sought” in its request. Paragraph 3 of this article provides the Central Authority of the Requested State with the discretion to require that the Requesting State use the executed results provided under the Treaty only for the purpose specified in the request without the prior consent of the Requested State. Where the Central Authority of the Requested State imposes a subsequent use limitation, the Requesting State must comply with such a condition.

To the extent that France does impose a subsequent use limitation on assistance provided, that assistance would become unavailable for disclosure pursuant to the Freedom of Information Act. A FOIA disclosure would constitute a disclosure for a purpose other than that for which the assistance was requested.

It should be noted that under Article 1(3), the restrictions outlined in Article 14 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 French authority has used 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.

Paragraph 4 anticipates a situation where confidentiality restrictions or use limitations conflict with constitutional obligations. To the extent such a conflict arises, the constitutional obligation controls. Paragraph 4 provides that nothing in Article 14 “shall preclude the use or disclosure of information or evidence” in a criminal proceeding to the extent that there is an obligation to do so, with respect to the United States, under its Constitution.¹³ For France, this extends to its Constitution and general principles of its law having Constitutional value. The State confronted with the need to make such a disclosure has an obligation “to the extent possible” to notify the other State in advance.

Paragraph 5 states that once assistance provided subject to conditions imposed pursuant to paragraphs 2 or 3 has been used for the purpose for which it was provided and, in the course of such use, has been made public, the Requesting State is thereafter free to use the assistance for any purpose.

ARTICLE 15—SERVICE OF PROCEDURAL DOCUMENTS AND JUDICIAL DECISIONS

Paragraph 1 imposes an obligation on the Requested State to effect service of “procedural documents and judicial decisions” on parties located in that State. Similar provisions appear in most other U.S. mutual legal assistance treaties. Items to be served include summons, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request.

Paragraph 2 describes the method of service. When the United States is the Requested State, service will be made by registered mail (in the absence of any request by France to follow a specified procedure for service) or by the United States Marshal’s Service in instances in which personal service is requested.

Paragraph 3 provides for the form of proof of service. It also specifies that, if service cannot be effected, the Requested State will so notify the Requesting State and specify the reason.

Paragraph 4 deals with the service of documents that call for the appearance of a person in the Requesting State. The documents to be served are to be transmitted to the Central Authority of the Requesting State 50 days before the date of the scheduled appearance. Upon request, this requirement may be waived for persons other than defendants.

¹³ See, *Brady v. Maryland*, 373 U.S. 83 (1963).

ARTICLE 16—APPEARANCE IN THE REQUESTING STATE

Paragraph 1 provides a formal mechanism for inviting a person located in the Requested State to appear elsewhere and transmitting the person's responses to the Requesting State. The invitation to appear outside the Requested State may be for any appropriate purpose under the Treaty. An appearance pursuant to such an invitation is voluntary and may be refused by the prospective witness.

Paragraph 2 deals with financial arrangements for the person's appearance. The request must indicate the approximate amount of the invited person's travel and subsistence costs that will be reimbursed. It is assumed that such expenses would normally include the costs of transportation, as well as room and board. When the person is to appear in the United States, a nominal witness fee would also be provided. If the person so requests, the Requesting State may arrange for monetary advances to the traveler through the diplomatic or consular missions in the Requested State.

Paragraph 3 covers the situation where a person fails to appear in the Requesting State after his appearance in the Requesting State has been ordered by means of a document served by authorities of the Requested State pursuant to a request. As the provision makes clear, the person failing to appear as a result of service perfected pursuant to a request cannot be penalized for that failure. The provision does not affect any applicable penalty imposed for failure to appear where service was perfected by other than the Treaty route.

ARTICLE 17—SAFE CONDUCT

Paragraph 1 provides a guarantee of "safe conduct" for a witness or expert whose appearance is sought in the Requesting State. Safe conduct means that a person appearing in the Requesting State pursuant to a request "shall not be subject to service of process, prosecuted, detained or subjected to any other restriction of personal liberty" in the Requesting State by reason of any acts or convictions that preceded the person's departure to travel to that State. It is understood that safe conduct would not protect a person from prosecution for perjury or for any other crime committed while in the Requesting State. Furthermore, the Central Authority of the Requesting State has discretion to limit the safe conduct, but must notify the Central Authority of the Requested State and any such limitation of safe conduct must be communicated to the witness or expert at the time that person is invited to appear. After receiving the invitation and notice regarding safe conduct, the person invited must decide whether to appear in view of the limited safe conduct.

Paragraph 2 establishes a mechanism whereby a person in the Requested State who is charged with a criminal offense in the Requesting State, and is served with notice of that charge, may voluntarily travel to the Requesting State (1) for the sole purpose of resolving the matter charged (2) with immunity from prosecution for acts or convictions that preceded the person's departure from the Requested State other than those specified in the document served. The delegations agreed that if the person is convicted of the matter charged, then he may be incarcerated for the length of the sentence

imposed as a result of that conviction. However, he may not be incarcerated for service of any other sentence.

Paragraph 3 states that safe conduct expires if the person with the guarantee, being “free to leave,” has not left within a period of fifteen consecutive days after receiving notice that his presence is no longer required, or if the person leaves the territory of the Requesting State and thereafter returns to it.

ARTICLE 18—TEMPORARY TRANSFER

Sometimes in the course of a criminal investigation or proceeding the need arises for assistance from a person in custody in another country. In some instances, a foreign country has been willing and able to “lend” witnesses to the U.S. 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 other occasions, the U.S. Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.¹⁴ On a few occasions, a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at the deposition of a witness whose testimony may subsequently be introduced into evidence at the defendant’s criminal trial in the United States.¹⁵ This article provides a formal mechanism to accomplish these objectives.

Paragraph 1 authorizes either State, in an exercise of its discretion, to temporarily transfer a prisoner to the other State to “give testimony or evidence or otherwise provide assistance” in a criminal matter.

Paragraph 2 provides that such transfer may be denied for the following reasons:

- (a) the person in custody does not consent;
- (b) the person’s period of detention might be extended as a result of the temporary transfer;
- (c) the person’s presence is required in the sending State for an ongoing criminal proceeding;
- (d) safety or security is a concern, or other “imperative” concerns exist.

The negotiators intended that this form of assistance be readily available if the person in custody consents, but also understood that the sending State may have an overriding interest in not permitting the temporary transfer.

Paragraph 3 establishes the obligation and authority of the receiving State to maintain custody. For the United States, this is consistent with Title 18, United States Code, Section 3508, which provides for the transfer of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

¹⁴For example, in September, 1986, the U.S. Justice Department and the U.S. 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.

¹⁵See, 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.

In keeping with the fact that a transfer under this article is intended to be temporary, Paragraph 4 provides that the receiving State shall require no proceeding to effect the return of the person transferred to the sending State. The return must occur by the date specified by the sending State, although that period may be extended by agreement between the States.

Paragraph 5 obligates the sending State to credit the person temporarily transferred for time served while in the custody of the receiving State.

Paragraph 6 authorizes safe conduct pursuant to Article 17.

ARTICLE 19—TRANSIT

Article 18 of this Treaty and similar articles in other mutual legal assistance treaties provide for persons in custody to be moved from State to State for purposes of mutual assistance. In anticipation of situations in which one State may need to bring persons in custody through the other on the way to or from third States, this article provides the legal framework for such transit.

Paragraph 1 authorizes the Requested State, in an exercise of discretion, to permit the transit through its territory of a person in custody whose personal appearance has been requested to provide assistance in a criminal matter.

Paragraph 2 imposes the obligation on and provides the authority to the State permitting transit to maintain custody of the person in custody during transit. The negotiators anticipated that the normal transit situation would involve a temporary stop at an international airport to change airplanes.

ARTICLE 20—OFFICIAL RECORDS

Paragraph 1 obliges each State to furnish to the other copies of publicly available records, including documents or information in any form, possessed by its executive or judicial authorities. For the United States, this includes federal, state and local levels of government.

Paragraph 2 provides that the Requested State may share with its Treaty partner copies of nonpublic information in government files. The undertaking under this provision is discretionary, and such requests may be denied in whole or in part. Moreover, to the extent that competent authorities in the Requested State may gain access to such information, the Requested State will exercise its best efforts to provide the information only “to the same extent and under the same conditions” to the Requesting State. The Central Authority of the Requested State, in close consultation with the interested law enforcement authorities of that State, will determine that extent and those conditions.

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 negotiators discussed whether this article should serve as a basis for exchange of information in tax matters. It was the intention of the U.S. 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 U.S. delegation was satisfied after discussion that this Treaty, like most U.S. bilateral mutual legal assistance treaties 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 France under this article in appropriate cases.

Paragraph 3 provides that official records produced pursuant to this article shall be certified by a competent authority of the Requested State and that such certification shall render the records admissible in evidence in the Requesting State. The negotiators intended that the certification of official records by French competent authorities would be consistent with Rule 902(3) and (4) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure with respect to authentication. As the provision states, "no further authentication shall be necessary." The certification that self-authenticates the records is also intended to meet the requirements of Rule 803(8), Federal Rules of Evidence, with the result that the records shall be admissible as "proof of the truth of the matters set forth therein." Although records properly certified in this manner shall be "admissible," whether the records are actually admitted into evidence will remain within the province of the judicial authority presiding over the proceedings. Evidentiary requirements, including relevance and materiality, must be established in each case.

ARTICLE 21—TRANSLATION

This article requires the Requesting State to provide a translation of the request and any supporting documents into the language of the Requested State.

ARTICLE 22—LEGALIZATION

This article specifies that evidence transmitted pursuant to this Treaty, in whatever form, shall be "exempt" from all legalization formalities, except as otherwise provided in the Treaty. The only exceptions are provided at Articles 9(4), 10(2), and 20(3), which the French delegation agreed to include to meet a major objective of the United States, that is, to secure evidence in a form admissible in a U.S. proceeding.

ARTICLE 23—COSTS

Paragraph 1 reflects the general proposition that each State shall bear expenses incurred within its territory in executing legal as-

sistance treaty requests for the other State, with certain exceptions.

Subparagraph (a) requires the Requesting State to pay for travel and travel-related expenses incurred for witnesses and experts pursuant to Articles 16 and for persons in custody pursuant to Articles 18 and 19.

Subparagraph (b) requires the Requesting State to pay for costs of interpreters and translators. In France, such services are often furnished by government employees, whereas in the United States such services are generally retained from private service providers.

Subparagraph (c) requires the Requesting State to pay for the costs of services provided by private parties at the request of the Requesting State. This includes many of the costs involved in taking depositions (*e.g.*, court reporter, sound or video technician). As a result of the discussion with respect to this subparagraph, the negotiators included in the explanatory note a clarification that, for depositions requested by France in the United States, (1) the United States would arrange and pay for audio recordings of testimony, and (2) the United States would use the procedure set out in the note for transmitting the audio recording to France in a manner that would allow the testimony to be used in a French judicial proceeding. However, to the extent that private service providers became involved in the execution of a request, France would pay the costs. See Explanatory Note on the Treaty, Article 23(1).

Subparagraph (d) requires the Requesting State to pay for the fees of experts needed to fulfill a request.

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

ARTICLE 24—INITIATION OF CRIMINAL PROCEEDINGS IN THE REQUESTED STATE

This article establishes a formal mechanism whereby either State may refer “information and evidence relating to criminal acts” to the other for prosecutorial consideration by its competent authorities. The matter must appear to fall within the jurisdiction of both Parties.

The obligation of the Requested State is only to consider initiating an investigation or prosecution “as appropriate under its laws.”

The Requested State is to inform the Requesting State of “any action taken” and, where a proceeding ensues, transmit a copy of the decision rendered.

ARTICLE 25—ENTRY INTO FORCE

This article specifies that the Treaty shall enter into force on the first day of the second month after both Parties have notified each other that the procedures for entry of the Treaty into force have been completed in each State.

The negotiators agreed that any request presented after this Treaty enters into force shall be executed pursuant to the Treaty even if the underlying acts or omissions occurred before that date.

ARTICLE 26—TERMINATION

This article provides that either State may terminate this Treaty via written notice to the other State through the diplomatic channel. Termination shall take effect six months after the date of receipt of written notification. Similar termination provisions are included in other U.S. mutual legal assistance treaties.

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

On May 26, 1999, the United States signed a Treaty Between the Government of the United States of America and the Government of the Hellenic Republic 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 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 efforts to combat organized crime, transnational terrorism, international drug trafficking and other crimes.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. No implementing legislation will be necessary to bring the Treaty into force in Greece. Greece will implement the treaty pursuant to the provisions of its international assistance law found at articles 458-461 of the Greek Code of Criminal Procedure. For Greece, the Treaty creates new law and supersedes inconsistent provisions in domestic legislation.

The following technical analysis 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 history. The technical analysis includes a discussion of United States 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 related to criminal matters.” The negotiators specifically agreed to provide Treaty assistance at any stage of a criminal matter. For the United States, this includes coopera-

¹ The “Hellenic Republic” is hereafter referred to as “Greece.”

tion before a crime is committed, a grand jury investigation, a criminal trial and related proceedings.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 The Treaty also covers any proceeding, whether labeled civil or administrative, which may not be criminal in nature but is “related to criminal matters.” Thus, the Treaty may be invoked to provide assistance for 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, a civil forfeiture proceeding against instrumentalities or proceeds of crime (*e.g.*, drug trafficking),⁴ or for disgorgement proceedings brought by an administrative agency (*e.g.*, the Securities and Exchange Commission) to recover the profits from illegal practices.

Paragraph 2 lists the types of assistance that were specifically considered by the negotiators. Most of the items are described in greater detail in subsequent articles. The list is not exhaustive, as is indicated by the language “assistance will include” in the paragraph’s opening clause and is reinforced by the final subparagraph indicating that the Treaty covers “any other form of assistance not prohibited by the laws of the Requested State.”

Paragraph 3 makes it clear that there is no requirement of dual criminality for cooperation under this Treaty. Thus, assistance is to be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State. Nevertheless, the negotiators discussed the offenses for which dual criminality exists and concluded that it exists for all major U.S. crimes.⁵

Paragraph 4 contains a standard provision in U.S. mutual legal assistance treaties⁶ stating that the Treaty is intended solely for government-to-government mutual legal assistance and not intended to provide private persons a means of evidence gathering or to extend generally to civil matters. Private litigants in the United States may continue to seek evidence from Greece by letters rogatory, an avenue of international assistance that the Treaty leaves undisturbed. Further, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or

²The requirement that assistance be provided under the Treaty 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 or not to file criminal charges. This obligation is a reciprocal one; the United States must assist Greece under the Treaty in connection with investigations prior to charges being filed in Greece.

³One U.S. 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 at the investigatory stage, or 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*, Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

⁵For example, both the United States and Greece criminalize terrorism, narcotics offenses, money laundering, fraud, organized crime, tax violations, securities violations, antitrust violations, and environmental crimes.

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

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

ARTICLE 2—CENTRAL AUTHORITY

Paragraph 1 requires that each Party⁷ designate a “Central Authority” to implement the provisions of the Treaty, including making and receiving requests. The Central Authority of the United States would make all requests to Greece on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of Greece would make all requests emanating from prosecutors and investigating magistrates in Greece.

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 proper agency, court, or other authority (which, in the United States may be federal or state) for execution, and ensuring that a timely response is made.

Paragraph 2 states that the Central Authority for the United States is the Attorney General or a person designated by the Attorney General. 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.⁸ For Greece, the Ministry of Justice or a person designated by the Minister of Justice will be the Central Authority.⁹

Paragraph 3 provides that the Central Authorities will communicate directly with each other for the purposes of the treaty. It is anticipated that such communication will be accomplished by telephone, facsimile or any other means agreed to by the Central Authorities.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty. These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(a) permits the denial of a request if execution of the request relates to an offense that is considered by the Requested State to be a political offense or 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 that State. All United States mutual legal assistance treaties contain provisions allowing

⁷The terms “Party” and “State” are used interchangeably in the Treaty and have the same meaning.

⁸28 C.F.R. § 0.64-1. The Assistant Attorney General for the Criminal Division has in turn delegated this authority to the Deputy Assistant Attorney 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).

⁹Under Greek law, the Minister of Justice is responsible for international legal assistance. Greek Code of Criminal Procedure, art. 458.

the Requested State to decline to execute a request if execution would prejudice its essential interests.

The delegations agreed that the phrase “security” would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the U.S. Department of Justice, as Central Authority for the United States, will 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 phrase “similar 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 that occurred in the Requested State and is constitutionally protected in that State.

“Similar essential interests” could also 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 U.S. Central Authority may invoke paragraph 1(b) to decline to provide information pursuant to a request under this Treaty if 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 a felony, including facilitation of the production or distribution of illegal drugs.¹⁰

Paragraph 1(d) permits a request to be denied 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,¹¹ and obligates 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 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 prosecution of a political offense (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. It is contemplated that the Requested State will notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby giving the Requesting State a chance to indicate whether it is willing to accept the evidence subject to

¹⁰This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with *e.g.*, Luxembourg, Hong Kong, Poland and Barbados. See Cong. Rec. S12985-S12987 (November 1, 1998). See, also, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

¹¹U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61.

the conditions. If the Requesting State accepts the evidence subject to the conditions, it must honor the conditions.

Paragraph 3 requires the Central Authority of the Requested State to 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 the assistance sought. This should avoid misunderstandings and enable the Requesting State to better prepare future requests.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Paragraph 1 requires that Treaty requests be in writing. This provision is consistent with Greek law, which requires assistance requests to leave a written trace or imprint. In cases of urgency, requests may be transmitted by the most rapid means available, including facsimile or cable, but verbal requests will not be accepted. Cases of “urgency” may include, for example, an effort to impede the imminent transfer of illegal proceeds from the Requested State to a third state. If necessary, the emergency request is to be confirmed within 20 days. A request will be in the language of the Requested State unless otherwise agreed. This language contemplates the acceptance of a request in the language of the Requesting State under some circumstances, for example, in a case of urgency.

Paragraphs 2 and 3 are similar to provisions in other United States mutual legal assistance treaties specifying the contents of a request. Paragraph 2 identifies four categories of information that must be included in each request deemed crucial to the efficient operation of the Treaty. Paragraph 3 describes eight other categories of information that are important but not always crucial and therefore must be provided “[t]o the extent necessary and possible.”

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

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires the Parties to promptly 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 competent authorities to do everything within their 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 Greece. Rather, it is anticipated that when a request from Greece requires compulsory process for execution, the U.S. 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 Treaty.

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 specifically authorizes U.S. courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty. It also 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.

Paragraph 2 states that the Central Authority of the Requested State will make all necessary arrangements for the execution of a request for assistance on behalf of the Requesting State. Thus, it is understood that if execution of the request entails action by a judicial authority 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.

Paragraph 3 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.” For both the United States and Greece, the Treaty is intended to be self-executing; no new or additional legislation will be needed to carry out the obligations undertaken. In both countries, the Treaty supersedes prior, inconsistent domestic legislation.

The same paragraph requires that “[p]rocedures specified in the request shall be followed except to the extent that those procedures cannot lawfully be followed by the Requested State.” This provision is necessary for two reasons. First, there are significant differences between the procedures that must be followed by U.S. and Greek authorities in collecting evidence in order to assure the admissibility of that evidence at trial. Second, the evidence in question could be needed for 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 unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts. Nevertheless, in instances in which neither the Treaty nor the request specify a particular procedure, the Treaty provides that the request shall be executed pursuant to the procedures and laws applicable to criminal investigations or proceedings in the Requested State.

Paragraph 4 provides 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. This language does not contemplate delay as a result of an administrative or civil proceeding or a closed criminal matter 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 or destroyed before the conclusion of the investigation or legal proceedings in that state. The paragraph also permits the Requested State to provide the assistance to the Requesting State subject to conditions needed to prevent interference with the Requested State’s investigation or proceedings.

It is anticipated that some U.S. 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, paragraph 5 enables the Requesting State to call upon the Requested State to use its best efforts 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 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Central Authority of the Requesting State concerning progress in execution of its request. This is to encourage open communication between the Central Authorities in monitoring the status of specific requests.

Paragraph 7 obligates the Central Authority of the Requested State to notify the Central Authority of the Requesting State of the outcome of the execution of a request. 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 U.S. mutual legal assistance trea-

¹²This provision is similar to language in other mutual legal assistance treaties. *See, e.g.*, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 5(5).

ties.¹³ 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. During the negotiations, it was discussed and agreed that this provision also obligates the Requested State to assume the costs of representation. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation is a significant advance in international legal cooperation between the United States and Greece. 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.

ARTICLE 7—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that the Requesting State not use any information or evidence provided under the Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested State. If such a use limitation is required, the Requesting State must comply with the requirement. It is noted that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence is sought.

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 permits the Central Authority of the Requested State to request that specific information or evidence furnished to the Requesting State be kept confidential or be used subject to specified conditions. Conditions of confidentiality would be imposed only when necessary and would be 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 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 State. This paragraph requires that if the Requesting State accepts conditions of confidentiality, it shall 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 that prevent the Requesting State from using it.

Paragraph 3 provides that Article 7 will not hamper the use or disclosure in a criminal prosecution of information or evidence obtained pursuant to the Treaty, to the extent that there is an obligation to make such disclosure under the Constitution of the Request-

¹³ See, e.g., U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, art. 6.

ing State.¹⁴ Nothing in this Treaty would preclude such disclosure. The paragraph requires the Requesting State to notify the Requested State prior to making such use or disclosure.

Paragraph 4 provides that information or evidence made public in the Requesting State in accordance with paragraph 1 or 2 may, thereafter, be used 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 control the use of that information by third 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 give statements or produce items, including documents and 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 states that the Requested State shall permit the presence of such persons as specified in the request during the execution of the request and shall allow such persons to question the person giving testimony or producing evidence. This provision is the result of extensive discussion and careful negotiation because it is inconsistent with Greece's usual practice regarding the taking of witness testimony. The provision is intended to accommodate the confrontation clause of the U.S. Constitution's Sixth Amendment and is a standard provision in other mutual legal assistance treaties. For Greece, however, this provision is inconsistent with domestic law and with its other international obligations since Greece has taken reservations in all other international treaties and conventions that contain provisions similar to Article 8(3). This Treaty will supersede inconsistent domestic Greek law and create new law with regard to Greece's assistance to the United States. For this reason, and in order to provide guidance to Greek authorities executing U.S. requests for deposition testimony in Greece, Article 8(3) provides a list of persons specifically authorized by law to be present and to question witnesses.¹⁵

Subparagraph 3(a) authorizes the participation of "two representatives of the Requesting State." This clause would allow the participation of officials who will represent the Requesting State, including law enforcement and/or diplomatic agents.

Subparagraph 3(b) authorizes the participation of "all parties to the criminal proceeding that is the basis for the request." The term

¹⁴ See, *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁵ While the list of persons authorized to be present and/or participate in the taking of testimony describes general categories of people, the delegations agreed that the Parties would use their best efforts to limit the number of participants to those persons who are absolutely indispensable to the proceeding, in an effort to maintain the decorum of that proceeding.

“parties” refers to the defense and the prosecution and in particular the presence of the defendant in the taking of deposition testimony.

Subparagraph 3(c) authorizes the participation of the attorneys for the parties. This includes the attorney(s) for the defendant and those for the prosecution. Since the prosecution is also a “party” under subparagraph 3(b), this provision would allow the participation of another prosecution attorney.

Subparagraph 3(d) authorizes the participation of support personnel necessary to the proceeding. These include, but are not limited to, court reporters or other transcribers of the testimony, interpreters (as many as may be necessary), and guards (if the defendant is in custody).

Paragraph 4 states that if a witness asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the Requested State may take the 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.¹⁵ It is understood that when a person asserts a claim of immunity, incapacity, or privilege under the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article 5(3) and 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 Greece is guaranteed the right to invoke any of the testimonial privileges (*e.g.*, attorney-client, inter-spousal) 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 Greece may raise any of the similar privileges available under the law of Greece.

Paragraph 5 contains authentication and certification requirements for evidence furnished to the United States by Greece. This paragraph specifies that information or evidence provided pursuant to Article 8 (business records) shall be authenticated or certified using Form A. Thus, the provision establishes a procedure for authenticating business records in a manner essentially similar to Title 18, United States Code, Section 3505. The absence or nonexistence of a business record may be certified on Form B. Paragraph 1(c) states that evidence authenticated or certified by Forms A or B shall be admissible in evidence in the Requesting State.¹⁸

¹⁶ See, *e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996 and entered into force March 3, 2000, art. 8(4).

¹⁷ This is consistent with the approach taken in Title 28, United States Code, Section 1782.

¹⁸ Article 8(5) provides that the evidence authenticated by Form A or Form B certifying the absence or nonexistence of such records shall be “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 State to furnish to the other copies of publicly available records, including documents or information in any form, 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 disclose such information 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 tax offenses would be covered by this treaty and concluded that assistance would be available for such matters. It was the intention of the U.S. 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 where such information would be available to U.S. law enforcement authorities. The U.S. delegation was satisfied after discussion that this Treaty, like most other U.S. mutual legal assistance treaties, is a “convention for 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 Greece under this article in appropriate cases.

Paragraph 3 states that, upon request, the records which are produced pursuant to this article shall be authenticated under the provisions of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, of October 5, 1961, (the Hague Convention) or by an official responsible for maintaining them through the use of Form C appended to the Treaty. Thus, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) and (4) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure. The absence or nonexistence of such records shall, upon re-

quest, be certified by an official responsible for maintaining similar records through the use of Form D appended to the Treaty. The paragraph states that no additional authentication will be necessary and the records authenticated under this paragraph or Form C, or Form D certifying the absence or nonexistence of such records, shall be admissible in evidence in the Requesting State.¹⁹

ARTICLE 10—APPEARANCES OUTSIDE OF THE REQUESTED STATE

Paragraph 1 of this article provides that, upon request, the Requested State shall invite a person located in its territory to travel and appear outside the Requested State and that the Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the invitee's response. The intention is to establish a formal mechanism for inviting, but not compelling, an appearance outside the Requested State; the invitation may be refused by the prospective witness. Typically, when the United States is the Requesting State, it seeks the appearance of a person in Greece before a grand jury or trial in the United States, and it is anticipated that the United States will make such traditional use of this language. However, this text is written to permit an invitation to appear at any location, including a location in a third State, to provide assistance under the treaty.

The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6. Therefore, paragraph 2 requires that the Requesting State indicate the extent to which the person's expenses will be paid. It also permits the person who agrees to appear to request advance payment of the expenses and allows the Requesting State to pay such expenses through its embassy or consulate. It is anticipated 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.

Paragraph 3 protects the individual who appears in the Requesting State from service of process, detention, or any restrictions of personal liberty, by reason of any acts or convictions that preceded the person's departure from the Requested State. The mandatory safe conduct provision in this article is consistent with Greek practice and similar language appears in other U.S. treaties of this kind.²⁰ 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 pursuant to this article or at a later time.

Paragraph 4 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

¹⁹ Like Article 8(5), the records authenticated and certified under Article 9(3) are "admissible" but the judicial authority presiding over the trial still must consider other evidentiary tests (such as relevance and materiality) to determine whether the evidence should be admitted.

²⁰ See, e.g., U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 27, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61; U.S.-Netherlands Mutual Legal Assistance Treaty, signed at the Hague June 12, 1981, entered into force September 15, 1983, art. 9, TIAS No. 10734, 1359 UNTS 209; U.S.-Italy Mutual Legal Assistance Treaty, signed at Rome November 9, 1982, entered into force November 13, 1985, art. 17.

leaves the territory of the Requesting State and, thereafter, returns to it voluntarily. However, the Central Authority of the Requesting State may extend the safe conduct up to 15 days if it determines that there is good cause to do so.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In criminal cases, a need sometimes arises for the testimony in one country of a witness in custody in another country. In some instances, a foreign country has been willing and able to “lend” witnesses to the U.S. 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 other occasions, the U.S. Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.²¹

Article 11 provides an express legal basis for cooperation in these matters. Paragraph 1 provides that persons in custody in the Requested State whose presence outside of that State (*i.e.*, to the Requesting State or to a third state) is sought for purposes of assistance under this Treaty, such as testifying in a criminal prosecution, shall be transferred in custody for that purpose if the person consents and the Central Authorities of both states agree.

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, and the obligation, for the receiving State to keep such a person in custody throughout the person’s stay there, unless the sending State specifically authorizes release. This paragraph also authorizes and obligates the receiving State to return the person in custody to the sending State as soon as circumstances permit or as otherwise agreed. 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.

In keeping with the obligation to return a person transferred under this article, paragraph (3)(c) explicitly prohibits the State to whom a person is transferred from requiring the transferring State to initiate extradition or any other proceedings 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

²¹For example, in September, 1986, the U.S. Justice Department and the U.S. 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.

²²See, 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.

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. The language makes clear that such transfers are discretionary.

Greece currently has the ability to transfer persons in custody to another country or to hold such persons if transferred to it. The United States has similar authority to maintain the custody of persons transferred to the United States whose testimony is needed at a federal criminal trial.²³ Article 11(3)(a) creates further, explicit authority for transfer and for maintaining such custody.

ARTICLE 12—TRANSIT OF PERSONS IN CUSTODY

Article 11 contemplates that persons in custody may be moved from State to State for purposes of mutual assistance, and it is reasonable to anticipate situations in which one State may need to bring persons in custody through the other on the way to or from third States. Article 12 provides the legal framework for such transit. A similar article appears in other recent U.S. mutual legal assistance treaties.²⁴

Paragraph 1 states that a Requested State may authorize the transit through its territory of a person whose personal appearance has been requested by the Requesting State in an investigation, prosecution, or proceeding. Paragraph 2 provides that where such transit is authorized, the Requested State shall have the authority and obligation to keep the person in custody during transit.

ARTICLE 13—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

This article provides for ascertaining the identity and whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) or the location of items if the Requesting State seeks such information. This is a standard provision contained in all U.S. mutual legal assistance treaties. The Treaty requires only that the Requested State use its “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 identity, suspected whereabouts and last known location of persons and items.

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 that may be in third countries. In all cases, the Requesting State would be expected to supply sufficiently specific

²³ See, Title 18 United States Code, Section 3508.

²⁴ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 11.

requests including all available information about the last known location of the persons or items sought.

ARTICLE 14—SERVICE OF DOCUMENTS

This article requires the Requested State to use its “best efforts” to effect the service of documents such as summonses, complaints, subpoenas, or other legal papers relating to an investigation, prosecution or other proceeding covered by the Treaty. Identical provisions appear in other U.S. mutual legal assistance treaties.²⁵

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 Greece to follow a specified procedure for service) or by the United States Marshal’s Service in instances in which personal service is requested. As of the date of the negotiations, legislation that would allow service by mail was pending in Greece.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents are to be transmitted by the Central Authority of the Requesting 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 items needed in the former as evidence or for other purposes. U.S. courts can and do execute such requests under Title 28, United States Code, Section 1782.²⁶ This article creates a formal framework for handling such requests and is similar to provisions in other U.S. mutual legal assistance treaties.²⁷

Article 15 requires that the request for a search, seizure and transfer of items justify such action under the laws of the Requested State. This means that a request to the United States from Greece will have to be supported by a showing of probable cause for the search. A U.S. request to Greece would have to satisfy the corresponding evidentiary standard there, similar to probable cause. Further, the matter for which the search and seizure is requested must involve a “serious offense” for which a search would be authorized under Greek law.

Paragraph 2 is intended to ensure that a record is kept of items seized and delivered up under the Treaty. This provision requires that, upon request, every official who has custody of a seized item shall certify, through use of Form E appended to the Treaty, the identity of the item, the continuity of custody, and any changes in

²⁵ See, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 13.

²⁶ For example, in *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.), a search warrant was issued on February 24, 1984, based on a request under Title 28, United States Code, Section 1782.

²⁷ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15.

its condition. The paragraph further states that no additional certification is required and Form E shall be admissible in evidence in the Requesting State.

Paragraph 3 establishes that the Central Authority of 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.

ARTICLE 16—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. 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 17—PROCEEDS AND INSTRUMENTALITIES OF OFFENSES

This article is similar to a number of U.S. mutual legal assistance treaties, including Article 16 of the U.S.-Barbados Mutual Legal Assistance Treaty and Article 17 of the U.S.-Latvia Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one Party to inform the Central Authority of the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be subject to forfeiture or seizure. The term "proceeds or instrumentalities of offenses" was intended to include things such as money, vessels, vehicles, or other valuables either used in the commission of 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 present this information to its authorities for a determination whether any action is appropriate. For instance, if the assets obtained by fraud in Greece are located in the United States, U.S. authorities could act to seize them under 18 U.S.C. 981 in aid of a prosecution under Title 18, United States Code, Section 2314.²⁸ U.S. authorities could also seek to secure a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnaping, robbery, extortion or a fraud by or against a foreign bank are subject to civil and criminal forfeiture in the United States since these offenses are predicate offenses under U.S. money laundering laws.²⁹ 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

²⁸This 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. Proceeds of such activity become subject to forfeiture pursuant to Title 18, United States Code, Section 981 by way of Title 18, United States Code, Section 1956 and Title 18, United States Code, Section 1961. The forfeiture statute applies to property involved in transactions in violation of section 1956, which covers any activity constituting an offense defined by section 1961(1), which includes, among others, Title 18, United States Code, Section 2314.

²⁹Title 18, United States Code, Section 1956(c)(7)(B).

brought into the United States. The Greek delegation explained that while, currently, Greece has forfeiture legislation that covers drug offenses, legislation has been proposed to extend the coverage of offenses for which forfeiture may be possible. In the future, this same legislation may make it possible for Greece to enforce foreign criminal forfeiture judgments.

If the assets are the proceeds of drug trafficking, it is especially likely that the States will be able and willing to help one another. Similar to the Greek statute, 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.³⁰ The U.S. delegation expects that Article 17 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 and instrumentalities of offenses; restitution to the victims of crime; and the collection of fines imposed as sentences in criminal prosecutions. This assistance may include the temporary immobilization of the proceeds or instrumentalities pending further proceedings. Thus, if the law of a 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 Treaty 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 would exceed its internal legal authority. It does not, for instance, mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution officials do not deem it proper to do so.

U.S. 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 that 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.³¹ Paragraph 3 is consistent with this framework and will enable a Party having custody over proceeds or instrumentalities of offenses to transfer

³⁰ 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, December 20, 1988. Both the United States and Greece are parties to this Convention.

³¹ See, Title 18, United States Code, Section 981(i)(1).

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. The Greek delegation explained that Greece's legislation does not prohibit international sharing and, therefore, in future, Greece will rely on Article 17(3) as the legal basis to share with the United States property forfeited in Greece with U.S. assistance.

ARTICLE 18—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures set forth in this Treaty shall not prevent either Party from granting assistance to the other Party through the provisions of other applicable international agreements or through the provisions of its national laws. Article 18 also states that the Parties may provide assistance pursuant to any bilateral arrangement or practice that may be applicable. The Treaty would leave the provisions of U.S. and Greek law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.³²

ARTICLE 19—CONSULTATION

Experience has shown that as the Central Authorities work together, they become aware of various practical ways to make implementation of the Treaty more effective and their own efforts more efficient. Periodic or regular consultations provide a forum for initiating improvements in the Treaty's implementation. This article states that the Central Authorities will share those ideas with one another, and will agree on the implementation of such measures. Practical measures of this kind might include methods for keeping each other informed of the progress of investigations and cases in which treaty assistance was utilized. Similar provisions are contained in recent U.S. mutual legal assistance treaties.

ARTICLE 20—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 states that the Treaty is subject to ratification and that the instruments of ratification shall be exchanged as soon as possible.

Paragraph 2 states that the Treaty shall enter into force 60 days after the exchange of instruments of ratification. The Greek delegation requested this 60 day period between the exchange of instruments of ratification and entry into force in order to publish the text and provide guidance concerning the new law (*e.g.*, authorized presence of specific persons during the taking of witness testimony) and procedure (*e.g.*, authentication by use of forms) adopted by the Treaty. The exchange of instruments will take place through the diplomatic channels.

Like many other U.S. mutual legal assistance treaties negotiated in the past two decades, Article 20(3) expressly makes this Treaty retroactive, and covers requests presented after entry into force whether the relevant acts or omissions occurred before, on, or after the date upon which the Treaty entered into force.

³² See, *e.g.*, Agreement on the Procedures for Mutual Legal Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, May 20, 1976, 27 U.S.T. 2006, T.I.A.S. 8300, 1052 U.N.T.S. 349.

Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect one year after receipt of written notification.

Technical Analysis of the Mutual Legal Assistance Treaty Between the United States of America and the Federal Republic of Nigeria

On September 13, 1989, the United States and Nigeria signed a Treaty Between the Government of the United States of America and the Federal Republic of Nigeria on Mutual Legal Assistance in Criminal Matters ("the Treaty"). This Treaty grew out of a successful executive agreement between the United States Department of Justice and the Nigerian Ministry of Justice, signed at Washington November 2, 1987. The Treaty is quite similar to the mutual legal assistance treaties which the United States has signed with other countries. The Treaty is expected to be a valuable weapon for the United States in its efforts to combat organized crime, transnational terrorism, international drug trafficking and other offenses. The Treaty is also a major step forward in the improvement of general relations between the United States and Nigeria.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. During the negotiations, Nigeria told the United States that it does not have any specific law on mutual legal assistance, but that Nigeria anticipates enacting implementing legislation for the Treaty before that country in a position to exchange instruments of ratification and bring the Treaty into 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 history. 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 I—SCOPE OF ASSISTANCE

The first article of the Treaty provides for assistance in all matters involving the investigation, prosecution and suppression of offenses and in proceedings related to criminal matters.

The negotiators specifically agreed that the term "proceedings" includes grand jury proceedings in the United States. Similarly, the Treaty covers other legal measures taken prior to the filing of formal charges in either State and the full range of proceedings in a criminal case, include such matters as bail and sentencing hearings.¹ It was also agreed that since the phrase "proceedings con-

¹One U.S. 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

nected therewith” is rather broader than the investigation, prosecution or sentencing process itself, proceedings covered by the treaty need not be strictly criminal in nature. For instance, proceedings to forfeit to the Government the proceeds of illegal drug trafficking are sometimes civil in nature.² The Treaty could be invoked in matters where no criminal prosecution or investigation is pending, such as a civil forfeiture proceeding involving assets acquired through a criminal offense covered by the Treaty.

The second paragraph of the article sets forth a list of the major types of assistance specifically considered by the Treaty negotiators. Most of the items listed in the second paragraph are described in further detail in subsequent articles. The second paragraph’s list of kinds of assistance is not intended to be exclusive, a fact which is indicated by the word “include” in the opening clause of the paragraph and reinforced by the final subparagraph.

The third paragraph is self-explanatory and permits assistance to be granted even if the conduct which is the subject of a request does not constitute a crime under the laws of the Requested State.

The fourth paragraph provides that the Treaty is intended solely for government to government mutual legal assistance.³ The Treaty is not intended to be utilized by individuals or non-governmental entities in either State. Thus, private parties may not invoke the Treaty in order to obtain evidence from the other country. The Nigerian delegation stressed that the obligations in the Treaty run from government to government, and that in several parts of the Treaty the balance struck regarding the obligations of the Parties was influenced by the United States delegation’s assurance that the rather substantial degree of government assistance called for by the Treaty would be available only to the U.S. Government, not to any person in the United States who happens to be a defendant in a criminal case or have some other non-prosecutorial interest. Private litigants in the United States may continue to obtain evidence from Nigeria by letters rogatory, an avenue of international assistance which this Treaty leaves undisturbed. Similarly, the Treaty is not intended to create any right in a private person to suppress or exclude evidence thereunder.

ARTICLE II—CENTRAL AUTHORITIES

Article II of the Treaty requires that each party shall establish a “Central Authority.” The Central Authority of the United States would make all requests to Nigeria on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Nigerian Central Authority will make all requests emanating from the authorities there. The Central Authority for the Requesting State of course will exercise some discretion as to the

execution of requests concerning matters at the investigatory stage, or 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.

²Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964.

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

form and contents 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 from the other, transmitting it to the appropriate federal or state agency, court or other authority for execution, with a view to insuring that a timely response is made.

The second paragraph of the article provides that the Attorney General will be the Central Authority for the United States, as is the case under all other U.S. mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. Section 0.64-1.⁴ This paragraph also states that the Attorney General of the Federation of Nigeria or a person designated by him will serve as the Central Authority for Nigeria.

ARTICLE III—LIMITATIONS ON ASSISTANCE

Article III specifies the classes of cases in which assistance may be denied under the Treaty. Article III(1)(a) is self-explanatory, and permits denial of assistance where the request fails to conform to the Treaty's requirements. Articles III(1)(b) and III(1)(c) permit the Central Authority of the Requested State to deny a request if the request relates to a political offense or to a strictly military offense. These restrictions are similar to those found in our other mutual legal assistance treaties.

Article III(1)(d) permits assistance to be refused if execution of the request would be contrary to the Constitution of the Requested State or would adversely affect the security or other essential national interests of the Requested 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 United States intends to interpret this provision sparingly.

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

"Essential national interests" could also 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 U.S. Central Authority may invoke paragraph 1(d) to decline to provide information pursuant to a re-

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).

quest under this Treaty if 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 a felony, including facilitation of the production or distribution of illegal drugs.⁵

The negotiators had discussed placing a provision in this article which would have barred assistance under the Treaty if the Central Authority of the Requested State had a reasonable basis to believe that compliance with the request would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for these reasons to any person affected by the request. The Nigerian delegation felt that the Nigerian Constitution may require some cognizance of this concept in the case of a United States request to Nigeria. This concern was addressed through the inclusion of the portion of Article III(1)(d) which permits the Central Authority of the Requested State to deny assistance if the execution of the request would be contrary to the Constitution of that State. This enables the Central Authority to deal with cases in which it must consider the possibility of political persecution (or consider any other constitutionally mandated principle). The clause permitting denial if the request would violate the Constitution of the Requested State is similar to language that appears in several other mutual legal assistance treaties.⁶

The second paragraph of this article permits the Requested State to impose appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of this article. For example, a State might request information which could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a prosecution of a political offense (which could be refused 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. It is anticipated that the Requested State would notify the Requesting State of proposed conditions before actually delivering the evidence in question, thereby accord the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If it does accept the evidence, it must respect the conditions specified by the Requested State with respect to the evidence.

The third paragraph of Article III states that a request for assistance need not be executed immediately where execution would interfere with an investigation or legal proceeding in progress in the Requested State, or it may be executed subject to conditions determined to be necessary after consultations with the Central Authority of the Requesting State. It is understood that the Central Authority of the Requested State will determine when to apply this provision and may, in his discretion, take such preliminary action

⁵This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with, *e.g.*, Luxembourg, Hong Kong, Poland and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

⁶*E.g.*, U.S.-Jamaica Mutual Legal Assistance Treaty, signed at Kingston July 7, 1989, entered into force July 25, 1995, art. 2(1)(e).

as deemed advisable to obtain or preserve evidence which might otherwise be lost before the conclusion of the investigation or legal proceeding taking place in that State.

The fourth paragraph of the article requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the reason for denying or postponing execution of the request. This assures that when a request is denied or only partly executed the Requested State will provide some explanation for not providing all of the information or evidence sought. This will eliminate misunderstandings which can arise in the operation of the agreement, and enable the Requesting State to better prepare its requests in the future.

ARTICLE IV—FORM AND CONTENTS OF REQUESTS

The first paragraph 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. An oral request must be confirmed in writing “as soon as practicable.”

The second paragraph lists information which is deemed crucial to efficient operation of the agreement, and so must be included in each request. The third paragraph outlines kinds of information which should be provided “when appropriate.”

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.

ARTICLE V—EXECUTION OF REQUESTS

The first paragraph of Article V requires each Central Authority “as expeditiously as practicable” to execute a request or, when appropriate, to transmit it to the authority having jurisdiction to do so. The Treaty contemplates that the Central Authority which receives a request will first review the request and immediately notify the Central Authority of the Requesting State if it is of the opinion that the request does not comply with the Treaty’s terms. If the request does satisfy the Treaty’s requirements and the assistance sought can be provided by the Central Authority itself, the request will be fulfilled immediately. If the request meets the Treaty’s requirements but its execution requires action by some other agency in the Requested State, the Central Authority will see to it that the request is promptly transmitted to the correct agency for execution.

Where the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests to federal investigators, prosecutors, or judicial officials for execution. However, a request may be transmitted to state officials for execution if the Central Authority deems it more appropriate to do so.

The second sentence of the first paragraph authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to take whatever action would be necessary and 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 Nigeria. Rather, it is anticipated that when a request

from Nigeria requires compulsory process for execution, the U.S. 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 provides that the “the courts of the Requested State shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request.” This language specifically authorizes U.S. courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

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 other State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation should be a significant advance in international legal cooperation. It is also understood that should the Requesting State choose to hire private counsel in connection with a particular request, it is free to do so, at its own expense.

The third paragraph of the article provides that all requests shall be executed in accordance with the laws of the Requested State except to the extent that the Treaty specifically provides otherwise. For the United States, the Treaty is intended to be self-executing, and no new or additional legislation apart from Title 28, United States Code, Section 1782, is needed to carry out the obligations undertaken.

The same paragraph requires that procedures specified in the request be followed in the execution of the request except insofar as those procedures are prohibited by the law of the Requested State. This provision is necessary both because (1) there may be significant differences between procedures that must be followed by U.S. and Nigerian authorities in collecting evidence in order to assure the admissibility of that evidence at trial and (2) the evidence in question could be needed for 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 unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

The fourth and fifth paragraphs of the article require that the Central Authority of the Requested State respond to inquiries and promptly notify the Central Authority of the Requesting State of the outcome of the execution of the request. This assures 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.

Paragraph six requires, unless otherwise agreed, that the Requested State return the original request with information and evidence obtained, indicating the place and time of execution. The final paragraph of the article provides that requests shall be furnished in complete and unedited form and that the Requested

State will make every effort to furnish original documents and records if requested by the Requesting State.

ARTICLE VI—CONFIDENTIALITY

The first paragraph of Article VI requires that neither a request nor the information provided under the Treaty be disclosed by one Contracting Party to a third State except as authorized by the Central Authority of the other Contracting Party.

Article VI(2) establishes an obligation to use best efforts to keep a request and its contents confidential, but only when requested to do so by the Central Authority of the Requesting State.⁷ If the Requested State cannot execute the request without disclosing the information in question (as may be the case if execution requires a public judicial proceeding in the Requested State), the Treaty obliges the Requested State to so indicate, thereby giving the Requesting State an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by disclosure of the information. The third paragraph of the article requires the State which has obtained evidence to use its best efforts to keep the evidence confidential or use it only subject to terms and conditions it may specify, if requested by the Central Authority of the Requested State. It is anticipated that in this Treaty, as under most United States mutual legal assistance treaties, conditions of confidentiality will be imposed only when necessary, and will be 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. The term “best efforts” is 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 can let the Requesting State see valuable evidence but impose confidentiality restrictions which effectively prevent the Requesting State from ever using the evidence. In the event that disclosure of evidence obtained under the Treaty might be required in a proceeding involving a matter other than that described in the request,⁸ the United States would consult with the Government of Nigeria in order to fashion a method of disclosure consistent with the requirements of both States.

It should be kept in mind that under Article I(4) of the Treaty, the restrictions outlined in Article VI are for the benefit of the parties to the Treaty—the United States and Nigerian governments—and the enforcement of these provisions is left entirely to the parties. Whenever there is an allegation that an authority or individual in the United States is seeking to use information or evidence obtained from Nigeria in a manner inconsistent with this article, the complainant’s recourse would be to inform the Central Authority of Nigeria of the allegations, for consideration only as a matter between the governments.

⁷This provision is similar to language in other U.S. mutual legal assistance treaties. *See, e.g.*, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 5(5).

⁸*See, Brady v. Maryland*, 373 U.S. 83 (1963).

ARTICLE VII—EXPENSES

Article VII of the Treaty is largely self-explanatory and proceeds from the basic principle that the Requested State should bear all expenses incurred in the execution of the request, but obliges the Requesting State to pay fees of private experts, costs of translations, transcriptions and allowances and expenses related to travel, unless otherwise mutually decided in a particular case. This is consistent with similar provisions in other U.S. mutual legal assistance treaties.⁹

ARTICLE VIII—LIMITATIONS ON USE

Article IV of the Treaty states that the Requesting State must specify the reason why information or evidence sought under the Treaty is needed. The first paragraph of Article VIII requires that information provided under the Treaty will not be used for any purpose other than that stated in the request without the consent of the Central Authority of the Requested State.

The second paragraph of the article provides that once information or evidence becomes public, the Requesting State is free to use it for any purpose. When evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even cited or described in the press. When that occurs, it is practically impossible for the Central Authority of the Requesting State to block the use of that information by third parties.

ARTICLE IX—OBTAINING EVIDENCE IN THE REQUESTED STATE

The first paragraph of Article IX states that a person in the Requested State shall be compelled, if necessary,¹⁰ to appear and testify or produce 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 that party. The second and third paragraphs provide that any interested parties, including the defendant and his counsel in criminal cases, may be permitted to be present and pose questions during the taking of testimony under this article and require the Requested State to provide information about the date and place of the taking of the testimony or evidence in advance, if requested.

Paragraph 4 states that if a witness asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the Requested State will take the 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 deter-

⁹See, e.g., U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, art. 6.

¹⁰The use of the words "if necessary" appears at first glance to make the obligation to execute a request for testimony discretionary. However, the words "if necessary" were used in the Treaty in order to make it clear that compulsory process is not required in every case. For instance, a witness may be perfectly willing to provide the needed testimony voluntarily. Use of the words "shall be compelled" without the words "if necessary" might appear to oblige the Requested State to issue a subpoena or other compulsory process even if it were not necessary. The United States and Nigerian delegations fully intended that the Treaty establish a mandatory obligation to arrange the production of the requested testimony, leaving it to the Requested State's discretion whether or not to use compulsory judicial process to fulfill that obligation.

mined 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.¹¹ It is understood that when a person asserts a claim of immunity, incapacity, or privilege under the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article V(3) and 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 Nigeria is guaranteed the right to invoke any of the testimonial privileges (*e.g.*, attorney-client, inter-spousal) 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.¹² A witness testifying in Nigeria may raise any of the similar privileges available under the law of Nigeria.

Article IX(5) states that documents, records and articles of evidence produced pursuant to the Treaty may be authenticated by having a custodian of the records or other qualified person complete, under oath, a certification in a specified form. A model of the form to be used by the United States and the form to be used by Nigeria is appended to this Treaty as Forms A-1 and A-2. Thus, the provision establishes a procedure for authenticating Nigerian records for use in the United States in a manner essentially similar to that followed in Title 18, United States Code, Section 3505.

Although the article states that the evidence is “admissible” when accompanied by the appropriate form, 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 negotiators anticipate that the evidentiary tests other than authentication—such as relevance, materiality, and the like—would still have to be satisfied in each case.

ARTICLE X—OBTAINING EVIDENCE IN THE REQUESTING STATE

This article provides that upon request the Requested State shall invite witnesses who are located in its territory and needed in the Requesting State to travel to the Requesting State to testify there. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness. The Treaty requires that the Requesting State indicate the extent to which the expenses will be paid.

Paragraph two of this article, like Article 27 of the U.S.-Switzerland Mutual Legal Assistance Treaty, provides that a person who is in the Requesting State to testify or for confrontation purposes pursuant to the Treaty shall be immune from criminal prosecution, detention, or any restriction of personal liberty, or from the service of process in civil suit while he is in the Requesting State. This “safe conduct” is limited to acts or convictions which preceded the witness’ departure from the Requested State. It is understood that

¹¹ See, *e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

¹² This is consistent with the approach taken in Title 28, United States Code, Section 1782.

this provision does not, of course, prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State under this article or later.

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

ARTICLE XI—RECORDS OF GOVERNMENT AGENCIES

Article XI serves to insure speedy access to government records, including records of the executive, judicial, and legislative units at the federal, state, and local levels in either country.

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

The second paragraph provides that the Requested State “may” share with its Treaty partner copies of nonpublic information in government files. The article states that the Requested State may only utilize 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 the intention of the negotiators that the Central Authority of the Requested State determine what the 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 which would be available to investigative authorities in that State, but which would justifiably be deemed inappropriate to release to a foreign government. Examples of instances in which assistance might be denied under this provision would be where disclosure of the information is barred by law in the Requested State or where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information which was made available to the Requested State in return for a promise that it not be divulged to anyone.

The third paragraph states that documents provided under this Article will be authenticated pursuant to a certificate in a form appended to the Treaty. Thus, the authentication will be conducted in a manner similar to that required by Rule 902(3), Federal Rules of Evidence, and the records will be admissible into evidence without additional foundation or authentication. There are two forms, B-1 for use with evidence obtained in Nigeria and intended for use in the United States, and B-2 for evidence obtained in the United States and destined for use in Nigeria.

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

ARTICLE XII—TEMPORARY TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a arises for the testimony at a trial in one country of a witness serving a sentence in another country. In some instances, the country involved was willing and able to “lend” the witness to the U.S. Government, provided the witness would be carefully guarded while here and returned at the conclusion of his testimony.¹³ On other occasions, the U.S. Government was able to arrange for federal inmates here to be transported to foreign countries to assist in criminal proceedings there.¹⁴ Article XII calls for mutual assistance in situations of this kind, and thereby provides an express legal basis for cooperation in these matters. The provision is based on Article 26 of the U.S.-Switzerland Mutual Legal Assistance Treaty, which is in turn based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.

Paragraphs 1 and 2 provide that persons in custody in the Requested State whose presence in the Requesting State is sought for purposes of assistance under this Treaty, such as testifying in a criminal prosecution, shall be transferred in custody for that purpose if the person consents and the Central Authorities of both states agree. Paragraph 3 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.¹⁵

The article’s fourth paragraph provides express authority and the obligation for the receiving State to maintain the person in custody throughout his stay there, unless the other State specifically authorizes release. The paragraph also authorizes the receiving State to return the person in custody to the other State, and provides that this return will occur as soon as circumstances permit, or as otherwise agreed. The transfer of a prisoner under this article requires the consent of the person involved and of the Parties, but the provision does not require that the prisoner consent again to his return to the State where the transfer began.

In keeping with the obligation to return a person transferred under this article, paragraph (3)(c) explicitly prohibits the State to whom a person is transferred from requiring the transferring State to initiate extradition or any other proceedings before the status quo is restored by the return of the person transferred. It also prohibits the receiving State from declining to return a person transferred on the basis of nationality. Finally, the prisoner will receive

¹³Title 18, United States Code, Section 3508, provides for the transfer to the United States of witnesses in custody in other States whose testimony is needed at a federal criminal trial.

¹⁴For example, on September 13, 1986, the Justice Department and the Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in the case of *Regina v Dye, et al.*, a major narcotics case in Central Criminal Court—“the Old Bailey”—in London.

¹⁵*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.

credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

ARTICLE XIII—IDENTIFYING AND LOCATING PERSONS

Article XIII provides that the Requested State is to ascertain the whereabouts in the Requested State of persons (such as witnesses, potential defendants, or experts) where such information is of importance in connection with an investigation or proceeding covered by the treaty. The Treaty requires only that the Requested State make “best efforts” to locate the person and would not be obliged to attempt to locate persons that may be in third countries.

ARTICLE XIV—SERVICE OF DOCUMENTS

Article XIV creates an obligation on the part of the Central Authority of the Requested State to arrange for or effect the service of summons, complaints, subpoenas, or other legal documents at the request of the Central Authority of the other State. Similar provisions appear in other U.S. mutual legal assistance treaties.¹⁶

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 Nigeria to follow any specified procedure for service) and by the United States Marshal’s Service in instances where personal service is requested.

The second paragraph of the article states that where the document to be served calls for the appearance of a person in the Requesting State the document must be transmitted by the Requesting State to the Requested State a reasonable time before the scheduled appearance. Thus, if the United States were to ask Nigeria to serve a subpoena issued pursuant to Title 28, United States Code, Section 1783 on a United States citizen in Nigeria, the request would have to be submitted well in advance of the hearing or trial at which the respondent is expected to appear. This is to allow sufficient time for service to be effected and for the respondent to make arrangements for his appearance.

The third paragraph is self-explanatory and requires proof of service returned to the Requesting State.

ARTICLE XV—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 now under Title 28, United States Code, Section 1782,¹⁷ Article XV of the Treaty creates a reciprocal framework for handling such a request, similar to provisions in many other U.S. mutual legal assistance treaties.¹⁸

Pursuant to Article XV(1)’s requirement that the request include “information justifying such action under the laws of the Requested

¹⁶See, e.g., U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 13.

¹⁷See, e.g., *United States Ex Rel Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst*, Case No 84-52-Misc-01 (M.D. Fla, Orlando Div.) search warrant issued February 24, 1984.

¹⁸See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15.

State,” a request to the United States from Nigeria will have to be supported by probable cause for the search. A U.S. request to Nigeria would have to satisfy the corresponding evidentiary standard there. It is contemplated that the request would be carried out in strict accordance with the law of the country in which the search is being conducted.

Article XV(2) is designed to insure that a record is kept of articles seized and of articles delivered up under the Treaty through use of Form C appended to the Treaty. This provision effectively requires that detailed and reliable information be kept regarding the condition of the article at the time of the seizure, and the chain of custody between the time of seizure and time of delivery to the Requesting State.

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

The final paragraph of the article states that the Requested State need not surrender any articles it has seized unless it is satisfied that any interests third parties may have in the seized items are adequately protected. This article is similar to provisions in many United States extradition treaties.

ARTICLE XVI—RETURN OF DOCUMENTS, RECORDS, AND ARTICLES OF EVIDENCE

This procedural article provides that any documents, records or articles of evidence furnished under the Treaty must be returned to the Requested State upon request. It is anticipated that unless original records or articles of some intrinsic value are provided, the Requested State will not routinely request return, but this is a matter best left to development of practice.

ARTICLE XVII—TRACING, SEIZING, AND FORFEITURE OF PROCEEDS OF CRIMINAL ACTIVITIES

A primary goal of the Treaty is to enhance the efforts of both States in the war against narcotics trafficking and financial fraud. One major strategy in that war is to seize and confiscate the money, property, and other proceeds of such crimes. Article XVII is designed to further that strategy.

In the first paragraph of the article, the Parties to this Treaty assume an obligation to aid one another, on request, in proceedings for the forfeiture of illegally obtained assets, in restoring illegally obtained funds or articles to their rightful owners, and in collecting fines imposed as sentences in criminal prosecutions. The term “proceeds and instrumentalities” would include things such as money, vessels, or other valuables either being used in the crime or obtained as a result of the offense.

Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or enforce a judgment of forfeiture or fine levied in the Requesting State, the Treaty provides that the Requested State shall do so. The language of the article is carefully selected, however, to not require either State to take any action which would go beyond “the extent permitted by (its) laws.” It therefore does not mandate institution of forfeiture proceedings in either country against property identified by the other if the relevant prosecutorial authorities do not deem it proper to do so.

The second and third paragraphs contain procedural information regarding each party’s obligation to assist the other in seizing and forfeiting of proceeds of criminal activities.

Title 18, United States Code, Section 981(a)(1)(B) also allows the forfeiture to the United States of property “which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States.”¹⁹ The United States delegation expects that Article XVII of the Treaty will enable full use to be made of this legislation.

The fourth paragraph states that a party which has been requested to take action under this article shall apply its laws to the disposition of property it confiscates as a result of a request. United States law permits the Government to transfer a share of certain forfeited property to other countries pursuant to a bilateral agreement authorizing such transfers.²⁰ Under regulations promulgated by the Attorney General, the amount reflects the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. Article XVII(4) 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.

The fifth paragraph states that either party may notify the other of the location of assets which may be forfeitable or otherwise subject to seizure. Upon receipt of notice under this article, the Central Authority of the State in which the proceeds are located may take whatever action is appropriate under the law in that State. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Nigeria, they could be seized in aid of a prosecution under Title 18, United States Code, Section 2314,²¹ or be made subject to a temporary restraining order in anticipation of a civil action for the return of the assets to the

¹⁹The U.S. legislation is consistent with the laws in other countries, such as Switzerland, Canada, and the United Kingdom, and the movement among States is toward legislation of this kind for use in drug enforcement.

²⁰Title 18, United States Code, §981(i)(1)(B).

²¹This statute makes it an offense to transport money or valuables in interstate or foreign commerce knowing that they were obtained by fraud here or abroad.

lawful owner. If the assets are located in Nigeria, we expect similar action could be taken pursuant to Nigerian law. Proceeds of a foreign kidnaping, robbery, extortion or a fraud by or against a foreign bank are subject to civil and criminal forfeiture in the United States since these offenses are predicate offenses under U.S. money laundering laws.²² 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 in question are the fruit of drug trafficking, it is anticipated that the parties will move quickly and expeditiously to freeze them and ensure confiscation.

ARTICLE XVIII—INFORMATION ON CRIMES, ARRESTS, CONVICTIONS,
AND DEPORTATIONS

Paragraph 1 of this article of the Treaty provides that the Central Authority of one Party may inform his counterpart in the other Party if he becomes aware of criminal activities which are or may be committed within the jurisdiction of that other Party. The Central Authority receiving such information may, of course, deal with it as he deems most appropriate. This provision was included in the Treaty because the Nigerian delegation felt that Nigerian police occasionally acquire information in Nigeria about crimes taking place in the United States, and they wanted the Treaty to be available as a secure channel for transmitting information to appropriate United States authorities.

Paragraph 2 provides that the Central Authority of one Party may request information regarding the other Party's arrest, conviction or deportation of a national of the Requesting State. This article was proposed by the Nigerian delegation, which initially wanted the mutual legal assistance treaty to contain an alternative method for arranging the prompt provisional arrest of fugitives for extradition. The United States delegation insisted that provisional arrest can only be addressed in an extradition treaty, and the final text of this article focuses on a slightly different problem.

Nigerian law enforcement authorities sometimes seek information from the United States about a Nigerian national arrested in the United States. For instance, when United States authorities arrest a drug courier who is a Nigerian national, Nigerian police may well request full details on the arrest in order to investigate and apprehend those who supplied the drugs to the courier. The second paragraph enables the Central Authorities under the Treaty to assist in such situations. Finally, the Nigerian delegation indicated that sometimes convicted felons who are Nigerian nationals are deported from the United States to Nigeria without United States officials fully advising their Nigerian counterparts of the person's criminal history—information which Nigerian police could find very helpful in investigating crimes there. This article is intended to facilitate requests where the Requesting State's authorities have a law enforcement purpose for the request.

²²Title 18, United States Code, Section 1956(c)(7)(B).

ARTICLE XIX—OTHER TREATIES

This article states that assistance and procedures provided by this treaty shall not prevent assistance under any other international convention or agreement between the two countries. It also provides that the Treaty shall not be deemed to prevent recourse to any assistance available under the internal laws of either country. Thus, the Treaty leaves the provisions of United States and Nigerian law on letters rogatory completely undisturbed, and does not alter any pre-existing agreements concerning investigative assistance.²³

ARTICLE XX—CONSULTATION

The conclusion of this agreement is rather more than the simple signing of a Treaty. It is the beginning of a new, better, and more cooperative relationship between the United States and Nigerian law enforcement communities. It is the establishment of a framework within which the investigative and prosecutorial authorities of the two countries can work together more effectively. The first paragraph of the article encourages both parties to be aware of the opportunity presented by this agreement to ensure that other aspects of our bilateral relations benefit from the same kind of flexibility and mutual understanding that this Treaty reflects, particularly in the area of mutual legal assistance. For example, the Nigerian delegation specifically requested that the United States consider negotiation of an updated extradition treaty.

The U.S. 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. The second paragraph of the article calls upon the States to share those ideas with one another and encourages them to agree on the implementation of such measures. Practical measures of this kind might include methods of keeping each other informed of the progress of investigations and cases in which treaty assistance was used.

ARTICLE XXI—AMENDMENT

This article provides for amendments to the Treaty by agreement.

ARTICLE XXII—RATIFICATION AND ENTRY INTO FORCE

This article contains standard language concerning the procedure for exchange of the instruments of ratification, and the coming into force of the Treaty.

ARTICLE XXIII—TERMINATION

The final article contains the standard provision concerning the procedure for terminating the Treaty. The requirement that either State give six months notice to the other of an intent to terminate the Treaty is not unusual in a treaty of this kind, and is similar

²³ See, e.g., the Agreement on Procedures for Mutual Assistance in Law Enforcement Matters, signed at Washington November 2, 1987, entered into force Nov. 2, 1987 (TIAS 11540).

to the requirement contained in many of our mutual legal assistance treaties.

Technical Analysis of The Treaty Between The United States of America And Romania on Mutual Legal Assistance in Criminal Matters

On May 26, 1999, the United States signed a Treaty Between the United States of America and Romania 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, international drug trafficking, and other offenses.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. Romania currently does not have any specific law on mutual legal assistance, but it is considering proposing new legislation to assist in implementation of 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 history. 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 Romania, 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 “pro-

¹During the negotiations, the U.S. delegation asked the Romanian delegation to explain the relationship between treaties and legislation under Romanian law. The Romanian delegation told the U.S. delegation that in Romania treaties do not take precedence over legislation, and in the event of conflict the legislation prevails.

²The requirement that assistance be provided under the Treaty 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 or not to file criminal charges. This obligation is a reciprocal one; the United States must assist Romania under the Treaty in connection with investigations prior to charges being filed in Romania.

³One 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*

ceedings 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 but 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 of this article makes it clear that there is no requirement of dual criminality under this Treaty for cooperation. Thus, assistance is to 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 Romania criminal law differ significantly, and a general dual criminality rule would make assistance unavailable in many significant areas. During the negotiations, the Romania delegation gave assurances that assistance would be available under the Treaty to the United States in investigations of major crimes such as conspiracy; drug trafficking, including operating a 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; Export Control Act violations; criminal tax; securities fraud and insider trading; crimes against the environmental; or antitrust offenses.

Paragraph 4 contains a standard provision in United States mutual legal assistance treaties⁵ 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 Romania 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 Contracting Party designate a “Central Authority” to make and receive Treaty requests. The Central Authority of the United States would make all requests to Ro-

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.

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

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

mania on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of Romania would make all requests emanating from officials in Romania.

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 proper 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 2(2) of the Treaty also states that the Minister of Justice of Romania will serve as the Central Authority for Romania.

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, including use of the facilities of the International Criminal Police Organisation (INTERPOL), 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. These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(a) permits the denial of a request if it relates to an offense under military law that would not be an offense under ordinary criminal law. Romania has no separate code of military laws.

Paragraph (1)(b) permits the Central Authority of the Requested States 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, 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 assist-

⁶28 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).

ance 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 by that State.

However, it was agreed that "essential interests" could also 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 U.S. Central Authority may invoke paragraph 1(b) to decline to provide 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 a felony, including the facilitation of the production or distribution of illegal drugs.⁷

Paragraph 1(c) permits the denial of a request if execution of the request relates to an offense that is considered by the Requested State to be a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in extradition treaties for determining what is a "political offense." Paragraph 1(d) permits a request to be denied 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 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 prosecution of a political offense (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 giving the Requesting State a chance 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

⁷This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with, *e.g.*, Luxembourg, Hong Kong, Poland and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

⁸U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61.

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.

Paragraph 4 states that a request may not be denied on the ground of bank secrecy. This language, taken from the UN Model MLAT, was included in response to concerns by the U.S. delegation based on reports that Romanian bank secrecy was so stringent that prosecutors in Romania must obtain authorization from a committee composed of bank officials prior to issuing a subpoena for bank records, and that this requirement would also apply to issuance of a Romanian subpoena for bank records on behalf of the United States. The Romanian delegation explained that Article 37 of Romania's Banking Law does require that a bank's board of directors agree to the disclosure of bank records, but that this rule was intended to bar disclosures to civilians, not to law enforcement, and does not apply to disclosures in response to judicial process. They foresee no problem in getting bank records for the United States under the MLAT if the U.S. request shows that the account holder is implicated in the U.S. investigation in any way,⁹ either as a suspect or merely as someone "withholding evidence" from our investigators. They also said that Romanian prosecutors have the power to issue search warrants for bank records, and will do so on behalf of the United States if the requirements for a search warrant are present. Romania suggested that Article 3(4) be included in the MLAT to assure us that it would not allow bank secrecy laws to interfere with implementation of the Treaty.

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." If the request is not in writing, it must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. Paragraph 2 provides that each request shall be translated into the language of the Requested State unless otherwise agreed. Supporting documentation is also to be translated, if necessary, upon request by the Requested State.

Paragraph 3 lists the four kinds of information deemed crucial to the efficient operation of the Treaty which must be included in each request. Paragraph 3 lists ten kinds of information that are important but not always crucial, and must be provided "to the extent necessary and possible." In keeping with the intention of the States that requests be as simple and straightforward as possible, there is no requirement under the Treaty that a request be legalized or certified.

⁹In discussing Article 37, the Romanians concluded that a bank's concurrence is not needed if criminal charges have been filed against the account holder or if a criminal investigation has begun. When the United States delegation indicated that this was still too narrow because we often need records of persons who are neither charged nor suspected of criminal wrongdoing themselves, the Romanian delegation indicated that they still believed they could find a way to get bank records in response to a U.S. request.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority to promptly 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 competent authorities 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 Romania. Rather, it is anticipated that when a request from Romania 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 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 specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty. It also reflects an understanding that the States 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.

Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for representing the Requesting State in the execution of a request for assistance. Thus, it is understood that if execution of the request entails action by a judicial authority 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.

Paragraph 3 provides that "[r]equests shall be executed according to the 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. The delegations discussed the fact that neither State anticipates taking actions pursuant to a treaty request that 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 U.S. and Romanian authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documents obtained abroad to be admitted in evidence if they are duly certified and the defendant has been given fair opportunity to test its authenticity.¹⁰ Since Romania's law contains no similar provision, documents acquired in Romania in strict conformity with Romanian procedures might not be admissible in United States courts. Furthermore, United States courts use procedural techniques such as videotape depositions that simply are not used in Romania even though they are not forbidden there.

Second, the evidence in question could be needed for subsection 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 to the Requesting State subject to conditions needed to prevent 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 con-

¹⁰Title 18, United States Code, Section 3505.

fidential. 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 use its best efforts to keep the information in the request confidential.¹¹ 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 toward execution 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.¹² Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation 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. Article 6 does obligate the Requesting State to pay fees of expert witnesses, translation,¹³ interpretation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10, 11 and 12.

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 Au-

¹¹This provision is similar to language in other United States mutual legal assistance treaties. *See, e.g.*, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 5(5).

¹²*See, e.g.*, U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, art. 6.

¹³The Romanian delegation stated that in Romania translations are routinely paid for by the State, so the United States ordinarily would not be charged for translations conducted there.

thorities 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 the Requesting State not use any information or evidence provided under the Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of Central Authority of the Requested State. If such a use limitation is required, the Requesting State must comply with the requirement. It will be recalled that Article 4(3)(d) states that the Requesting State must specify the purpose for which the information or evidence 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 furnishes to the Requesting State be kept confidential. The delegations agreed that conditions of confidentiality would be imposed only when necessary, and would be 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 must 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 Romanian 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.

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.¹⁴ Any such proposed disclosure and the provision of the Constitution under which such disclosure is required

¹⁴ See, *Brady v. Maryland*, 373 U.S. 83 (1963).

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 a manner consistent with Paragraph 1 or 2, the Requesting State is free to use the evidence.¹⁵ When 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 Romania authority has used 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 give statements, or produce items, including documents and records and articles of evidence.

The compulsion contemplated by this article can be accomplished in the United States by subpoena under Title 28, United States Code, Section 1782 or any other means available under the law of the Requested State. The Romanian delegation predicted that when the Treaty is in force Romania will use a combination of subpoenas, search warrants, and other measures to compel witnesses to provide information in response to U.S. requests. The Romanian delegation explained that in Romania, prosecutors usually employ a search warrant to obtain information from a bank or other institution that is needed in criminal investigations. It is possible to issue a subpoena, but evidently that is not done often, primarily because the penalty for noncompliance with a subpoena is such a small fine that subpoenas have little coercive effect. A similar problem emerged in discussions regarding obtaining documents, records or physical evidence from private citizens. The Romanian delegation indicated that its Central Authority could issue a subpoena for such items, but this may not be effective because the fines for noncompliance are very small. Alternatively, Romanian prosecutors could issue search warrants and seize the items, but only if the person with the item is the target of the investigation. In both cases the Romanian delegation ultimately concluded that Romania

¹⁵ Many U.S. MLATs state that information that has been made public in the requesting state may be used "for any purpose" thereafter. Romania requested that the phrase "for any purpose" not appear in this Treaty because it might be read to authorize the use of the information or evidence for illegal purposes, but Romania fully agreed that the information or evidence can be used for any lawful purpose or in any investigation, prosecution, or proceeding, whether or not the matter is related to the matter identified in the request.

probably will need to consider new legislation to carry out its obligations under the Treaty.

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 question the person giving the testimony or evidence. Persons present at the execution of a request will also be permitted to make a verbatim record, using technical means.

Paragraph 4 states that if a witness asserts a claim of immunity, incapacity, or privilege that is unique to the Requesting State, the Requested State will take the 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 It is understood that when a person asserts a claim of immunity, incapacity, or privilege under the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article 5(3), and 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 Romania is guaranteed the right to invoke any of the testimonial privileges (*e.g.*, attorney client, inter-spousal) 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 Romania may raise any of the similar privileges available under the law of Romania.

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. The absence or nonexistence of such evidence will be authenticated on Form B. The attestation will be given under oath, before a judge magistrate, or judicial officer, and any false statements made in the attestation will be subject to prosecution in Romania as a false oath or declaration in violation of Article 292 of Romania's Criminal Code. 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 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, or Form B, is "admissible," but of course, it will be up to the judi-

¹⁶ See, *e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

¹⁷ This is consistent with the approach taken in Title 28, United States Code, Section 1782.

cial 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 State to furnish the other with copies of publicly available records, including documents or information in any form, possessed by a governmental or judicial authority in the Requested State. The term “governmental or judicial authority” 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 undertaking 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 such 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, like most other U.S. bilateral mutual legal assistance treaties, 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 Romania under this article in appropriate cases.

Paragraph 3 states that records provided under this article may be authenticated by the officials responsible for maintaining them through the use of Form C appended to the Treaty. No further authentication is required. If authenticated in this manner, the records shall be admissible in evidence in the Requesting State. The paragraph also provides for the appropriate officials to certify

the absence or nonexistence of records, through Form D appended to the Treaty. 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—APPEARANCE OUTSIDE OF THE REQUESTED STATE

This article provides that upon request, the Requested State shall invite persons in the Requested State to travel outside of the Requested State to appear in the Requesting State or in a third state for purposes of assistance under this Treaty. An appearance outside of the Requested State under this article is not mandatory, and the invitation may be refused by the prospective witness. The first paragraph states that the Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the person’s response. The paragraph also states that if the appearance is in a third state, the Requesting State shall be responsible for obtaining any necessary authorization from that third state.

Paragraph 2 provides that the Requesting State must indicate to the Requested State the extent to which the person’s expenses will be paid, pursuant to Article 6. 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 paragraph provides that the person may ask that the Requesting State advance the money to pay these expenses, and that this advance may be handled through the Embassy or consulate of the Requesting State in the Requested 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 under this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty by reason of acts or convictions which preceded the person’s departure for the Requesting State 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 states that any safe conduct provided under 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 Central Authority of the Requesting State may extend the safe conduct up to fifteen days if it determines 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.¹⁸

Article 11 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,¹⁹ which in turn is based on Article 11 of the European Convention on Mutual Assistance in Criminal Matters.²⁰ It provides that persons in custody in the Requested State, whose presence outside of that State (*i.e.*, to the Requesting State or to a third state) is sought for purposes of assistance under the Treaty, may be transferred in custody for that purpose if the person consents and the Central Authorities of both states agree. The paragraph also states that if the transfer of the person outside the Requested State is to a third state rather than to the Requesting State, it is the Requesting State that must be responsible for obtaining any necessary authorizations from that third state. Indeed, it is understood that the Requesting State must make all arrangements with the third state to meet the requirements of this paragraph, including the requirements that the person be kept in custody and returned to the Requested 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 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.²¹

Paragraph 3 provides express authority for the receiving State to keep such a person in custody throughout the person’s stay there, unless the sending State specifically authorizes release. This paragraph also requires and authorizes the receiving State to return the person in custody to the sending State as soon as circumstances permit or as otherwise agreed, and provides that this return will occur in accordance with terms and conditions agreed

¹⁸For 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.

¹⁹U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26.

²⁰It is also consistent with 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.

²¹*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.

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.

In keeping with the obligation to return a person transferred under this article, paragraph (3)(c) explicitly prohibits the Party to whom a person is transferred from requiring the transferring Party to initiate extradition or any other proceedings 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—TRANSIT OF PERSONS IN CUSTODY

Article 11 contemplates that persons in custody will be moved from State to State for purposes of mutual assistance, and it is reasonable to anticipate situations in which one State may need to bring persons in custody through the other on the way to or from third States. Article 12 provides the legal framework for such transit. Similar articles appear in other recent U.S. mutual legal assistance treaties.²²

Paragraph 1 states that a Requested State may authorize the transit through its territory of a person whose personal appearance has been requested in investigations, prosecutions, or proceedings in the Requesting State.²³

Paragraph 2 states that the Requested State shall have the authority and obligation to keep the person in custody in its territory.

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 use its “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

²² See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 11.

²³ The Romanian delegation indicated that there is some question whether Romania would exercise its discretion to authorize the transit in custody of a Romanian national because of the potential for litigation attempting to apply its constitutional ban on extradition of nationals to such transit.

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 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 most U.S. mutual legal assistance treaties.²⁴

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 Romania 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 are to be transmitted by the Central Authority of the Requesting 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 sometimes serves the interests of justice for one State to ask another to find, 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 1782.²⁵ Article 15 creates a formal framework for handling such requests and resembles provisions in other United States mutual legal assistance treaties.²⁶

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 Romania will have to be supported by a showing of probable cause for the search. A United States request to Romania would have to contain all the details concerning the action in the U.S. and satisfy the corresponding evidentiary standard there, contained in Article 100 of the Romanian Penal Procedure Code.

Paragraph 2 is designed to ensure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision 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 continuity of custody, the identity of the item, and any changes in its condition.

²⁴ See, e.g., U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington, January 16, 1998, entered into force August 26, 1999, art. 13.

²⁵ 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).

²⁶ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15(3).

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 provide 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.

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. 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 17—PROCEEDS AND INSTRUMENTALITIES OF OFFENSES

A major goal of the Treaty is to enhance the efforts of both the United States and Romania 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 16 in the U.S.-Barbados Mutual Legal Assistance Treaty and Article 17 of the U.S.-Latvia 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 Romania, they could be seized under Title 18, United States Code, Section 981 in aid of a prosecution under Title 18, United States Code, Section 2314.²⁷

²⁷This 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. Proceeds of such activity become subject to forfeiture pursuant to Title 18, United States Code, Section

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 kidnaping, 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.²⁸ 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 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 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.³⁰ It specifically recognizes that the authorities in the Requested State may take immediate action to temporarily immobilize the assets pending further proceedings.³¹ 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, for instance, mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution officials do not deem it proper to do so.³²

981 by way of Title 18, United States Code, Section 1956 and Title 18, United States Code, Section 1961. The forfeiture statute applies to property involved in transactions in violation of section 1956, which covers any activity constituting an offense defined by section 1961(1), which includes, among others, Title 18, United States Code, Section 2314.

²⁸Title 18, United States Code, Section 1956(c)(7)(B).

²⁹Article 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, December 20, 1988.

³⁰*See*, Article 519-522 of the Romanian Penal Procedure Code on enforcement of foreign judgments.

³¹The Romanian delegation said that this could be done pursuant to Article 163 *et seq.* of the Penal Procedure Code.

³²In Romania, unlike in the United States, the law does not allow for civil forfeiture. However, Romanian law permits forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for Romania to confiscate the defendant's property.

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.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 18—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures set forth in this Treaty shall not prevent either Party from granting assistance to the other Party through the provisions of other applicable international agreements. Article 18 also states that the Parties may provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable.³⁴

The Treaty would leave the provisions of United States and Romania law on letters rogatory completely undisturbed, and would 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 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. Similar provisions are contained in other recent United States mutual legal assistance treaties. 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 provides that the Treaty shall be subject to ratification, with the instruments of ratification to be exchanged as soon as possible. Paragraph 2 provides that the Treaty shall enter into force immediately upon the exchange of instruments of ratification. Paragraph 3, like many recent U.S. mutual legal assistance treaties, provides that the Treaty shall apply to any request presented

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

³⁴ See, *e.g.*, the Agreement for the Direct Exchange of Certain Information Regarding the Trafficking in Narcotic Drugs, Exchange of Notes at Bucharest February 4, 1928 and April 7, 1929, entered into force April 17, 1929 (11 Bevans 414).

after the date of the Treaty's entry into force, without regard to whether the relevant acts or omissions under investigation occurred prior to or after the date on which the Treaty entered into force. Paragraph 4 contains standard provisions concerning the procedure for terminating the Treaty. Termination shall take effect six months after the date of receipt 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 South Africa on Mutual Legal Assistance in Criminal Matters

On September 16, 1999, the United States signed a Treaty Between the Government of the United States of America and the Government of the Republic of South Africa 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, international drug trafficking, and other offenses.

It is anticipated that the Treaty will be implemented in the United States largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. South Africa currently has its own legislation on mutual legal assistance,¹ but it anticipates enacting additional legislation to implement the Treaty.²

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 history. 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.

¹The "International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996)." The key sections of this law that are germane to the interpretation and implementation of the Treaty are discussed in more detail in this technical analysis.

²The South African delegation said that under Article 231 of South Africa's Constitution, a mutual assistance treaty as normally brought into force has the force and effect of law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Thus, the terms of this Treaty would be overridden by any inconsistent internal law, apparently including pre-existing law, unless the treaty is enacted into law in national legislation. (Such enactment would be the functional equivalent of the enactment of implementing legislation identical to the Treaty's terms.) The U.S. delegation made it clear that the United States would consider it a breach of the Treaty if South Africa were to rely on internal statutes to deny assistance on grounds that are not contained in the Treaty. The South African delegation assured the U.S. delegation that South Africa takes its treaty obligations seriously, and agreed to consider the U.S. recommendation that this Treaty be brought into force by enactment into law to ensure that this Treaty would supersede any earlier, inconsistent legislation.

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 South Africa, and 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 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 but the treaty covers such proceedings.

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 makes it clear that there is no requirement of dual criminality under this Treaty for cooperation. Thus, assistance is to 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 South Africa criminal laws differ significantly, and a dual criminality rule would make assistance unavailable in many significant areas.

Paragraph 4 contains a standard provision in U.S. mutual legal assistance treaties⁶ 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

³The requirement that assistance be provided under the Treaty at the pre-indictment stage is critical to the United States inasmuch as U.S. 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 United States must assist South Africa under the Treaty in connection with investigations prior to charges being filed in South Africa.

⁴One U.S. 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 at the investigatory stage, or 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.

⁵*See*, Title 21, United States Code, Section 881; Title 18, United States Code, Section 1964. The U.S. and South African delegations also discussed the fact that some U.S. agencies such as the Securities and Exchange Commission have both criminal and civil responsibilities, and occasionally must investigate activity thoroughly before deciding whether to pursue the matter by civil or administrative sanctions or refer it for criminal prosecution. The delegations agreed that in such cases the matter could be considered “proceedings related to criminal matters” if the investigating agency and the Central Authority in the Requesting State believe, in good faith, that a criminal prosecution is a possibility.

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

gathering, or to extend generally to civil matters. Private litigants in the United States may continue to obtain evidence from South Africa 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 designate a “Central Authority” to make and receive Treaty requests. The Central Authority of the United States would make all requests to South Africa on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Central Authority of South Africa would make all requests emanating from officials in South Africa.

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 proper agency, court, or other authority (which in the United States may be federal or state) 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.⁷ Article 2(2) of the Treaty also states that “the Director-General: Department of Justice” of South Africa or a person designated by that official will serve as the Central Authority for South Africa.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, facsimile, or any other means, at the option of the Central Authorities themselves. The paragraph also states that in exceptional circumstances the Central Authorities may effect communication with each other through diplomatic channels or through the International Criminal Police Organisation (INTERPOL). Similar provisions appear in some other recent U.S. mutual legal assistance treaties.⁹ The delegations agreed that while use of diplomatic channels may be useful in rare cases involving requests of extraordinary diplomatic sensitivity, it is not anticipated that this option

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 The Director General is designated Central Authority under the International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), but the South African delegation anticipated that new legislation will be needed to implement this treaty, which might transfer the Central Authority function to another office.

⁹ See, e.g., U.S.-Korea Mutual Legal Assistance Treaty, signed at Washington November 23, 1993, entered into force May 23, 1997, art. 2(2).

would be utilized routinely, or often, since an important goal of this Treaty is to encourage direct communication between the law enforcement communities of the two Parties.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

This article specifies the limited classes of cases in which assistance may be denied under the Treaty. These restrictions are similar to those found in other mutual legal assistance treaties.

Paragraph (1)(a) permits the denial of a request if execution of the request relates to an offense that is considered by the Requested State to be a political offense.

Paragraph (1)(b) permits the Central Authority of 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.

Paragraph (1)(c) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the national security or any other 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 phrase “national security” would include cases in which assistance might involve disclosure of information that is classified for national security reasons. It is anticipated that the U.S. Department of Justice, as Central Authority for the United States, will 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 that occurred in the Requested State and is constitutionally protected in that State.

However, it was agreed that “essential interests” could also 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 U.S. Central Authority may invoke paragraph 1(b) to decline to provide information pursuant to a request under this Treaty if 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 a felony,

including facilitation of the production or distribution of illegal drugs.¹⁰

Paragraph (1)(d) permits a request to be denied if it is not made in conformity with the Treaty.

Paragraph 2 is similar to Article 4(2) of the U.S.-South Africa Extradition Treaty signed September 16, 1999, and identifies five categories of offenses that are not to be considered “political offenses” for which assistance can be denied under this Article.

First, the political offense exception does not apply where there is a murder or other violent crime against the person of a Head of State or Deputy Head of State of the Requesting or Requested States, or a member of such persons’ family. This clause covers a Deputy Head of State because in South Africa the Deputy Head of State acts as Head of State in the Head of State’s absence or incapacity.

Second, the political offense exception does not apply to offenses included in a multilateral treaty, convention, or international agreement that requires the parties to either extradite the person sought or submit the matter for prosecution, such as, for instance, the Convention for the Suppression of Unlawful Seizures of Aircraft, done at the Hague on 16 December 1970 (entered into force for South Africa 29 June 1972), 22 UST 1641, TIAS 7192.

Third, the political offense exception does not apply to any offense that constitutes murder.

Fourth, the political offense exception does not apply to an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage.

Finally, the political offense exception does not apply to conspiring or attempting to commit, or aiding, abetting, inducing, counseling, or procuring the commission of, or being an accessory before or after the fact to such an offense.

Paragraph 3 is similar to Article 3(2) of the U.S.-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 the first paragraph of the article. For example, a 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 prosecution of a political offense (which would be subject to refusal). This paragraph would permit the Requested State to provide information on the condition that it be used only in the routine criminal case. It is contemplated that the Requested State will notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby giving the Requesting State a chance to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State accepts the evidence subject to the conditions, it must honor the conditions.

¹⁰This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with, *e.g.*, Luxembourg, Hong Kong, Poland and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

¹¹U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26, 27 U.S.T. 2019, TIAS No. 8302, 1052 UNTS 61.

Paragraph 4 requires the Central Authority of the Requested State to 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 thereafter to better prepare its requests.

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.” If the request is not in writing, it must be confirmed in writing within 10 days unless the Central Authority of the Requested State agrees otherwise. Each request shall be in English.

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 lists 11 kinds of information that are important but not always crucial and that must 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.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires each Central Authority to promptly 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 competent authorities to do everything within their 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 South Africa. Rather, it is anticipated that when a request from South Africa requires compulsory process for execution, the U.S. 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 Treaty.

The third sentence in Article 5(1) reads “[t]he Courts of the Requested State have authority to issue subpoenas, search warrants, or other orders necessary to execute the request.” This language specifically authorizes U.S. courts to use all of their powers to issue

subpoenas and other process to satisfy a request under the Treaty. It also 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. Paragraph 2 states that the Central Authority of the Requested State shall make all necessary arrangements for representing the Requesting State in the execution of a request for assistance. Thus, it is understood that if execution of the request entails action by a judicial authority 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.

Paragraph 3, the subject of extensive discussion, provides that “[r]equests shall be executed in accordance with the laws of the Requested State, including the terms of this Treaty.” 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 be followed in the execution of the request except insofar as those procedures are prohibited by the law of the Requested State. This provision is necessary for two reasons.

First, there are significant differences between procedures that must be followed by U.S. and South African authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, under U.S. law documents obtained abroad may be admitted in evidence if they are duly certified and the defendant has been given fair opportunity to test their authenticity.¹² Since South African law contains no similar provision, documents acquired in South Africa in strict conformity with South African procedures might not be admissible in U.S. courts. Furthermore, U.S. courts use procedural techniques such as videotape depositions that simply are not used in South Africa even though they are not forbidden there.

Second, the evidence in question could be needed for 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 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 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 investigation or legal proceedings in that State. The paragraph also allows the Requested State to provide the in-

¹²Title 18, United States Code, Section 3505.

formation to the Requesting State subject to conditions needed to prevent interference with the Requested State's proceedings.

It is anticipated that some U.S. 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, Paragraph 5 enables the Requesting State to call upon the Requested State to use its best efforts 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 Central Authority of the Requesting State concerning progress in execution 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—AUTHENTICATION OR CERTIFICATION

Most mutual legal assistance treaties contain provisions on the proper procedure for authenticating evidence supplied by one State in response to requests by the other. Article 6 of the South Africa treaty consolidates the provisions on authentication and certification in a single article.

Paragraph 1 contains the authentication and certification requirements for evidence furnished to the United States by South Africa. Most U.S. treaties contain references to forms for authenticating and certifying business records in the article that discusses obtaining testimony or evidence, for authenticating official government records in the article on obtaining government records, and for certifying chain of custody in the article on conducting searches and seizures conducted pursuant to requests under the Treaty. Paragraph 1 of this Article specifies that information or evidence provided pursuant to Article 9 (business records) shall be authenti-

¹³This provision is similar to language in other U.S. mutual legal assistance treaties. *See, e.g.*, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 5(5).

cated or certified using Form A;¹⁴ information or evidence furnished pursuant to Article 10 (government records) shall be authenticated using Form B;¹⁵ and information or evidence provided pursuant to Article 16 (search and seizures) shall be authenticated pursuant to Form E.¹⁶ In each case, the information or evidence may also be authenticated in any other manner that the U.S. Central Authority requests. The absence or nonexistence of a business record or a government record may be certified on Form C or Form D, respectively. The authentication and certification requirements in Paragraph 1 are consistent with U.S. law and the provisions of other U.S. treaties of this kind. Paragraph 1(c) states that evidence authenticated or certified by Forms A or B or certified by Form E shall be admissible in evidence in the United States as proof of the truth of the matters set forth therein.¹⁷

Paragraph 2 outlines the authentication and certification requirements that will apply upon request by the Republic of South Africa to documents or articles of evidence furnished to South Africa by the United States. It provides that the substantive form of such authentication and certification is to be communicated by the Central Authority of the Republic of South Africa from time to time. It also requires that all documents provided by the United States to the Republic of South Africa be accompanied by an apostille, set forth as Form F.

ARTICLE 7—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 U.S. mutual legal assistance treaties.¹⁸ Article 7 does obligate 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 11, 12 and 13. During the negotiations, it was discussed and agreed that this provision obligates the Requested State to assume the costs of representation. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation is a significant advance in international legal cooperation between the United States and South Africa. It is also under-

¹⁴ Thus, the provision establishes a procedure for authenticating business records in a manner essentially similar to Title 18, United States Code, Section 3505.

¹⁵ Similarly, the Treaty establishes a procedure for authenticating official foreign documents that is consistent with Rule 902(3) and (4) of the Federal Rules of Evidence and Rule 44, Federal Rules of Civil Procedure.

¹⁶ By providing that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, the article relieves 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.

¹⁷ Article 6(1)(c) provides that the evidence authenticated by, *e.g.*, 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.

¹⁸ *See, e.g.*, U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, art. 6.

stood 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 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 8—LIMITATIONS ON USE

Paragraph 1 states that the Central Authority of the Requested State may require that the Requesting State not use any information or evidence provided under the Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested State. If such a use limitation is required, the Requesting State must comply with the requirement. It will be recalled that Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence 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 furnishes to the Requesting State be kept confidential. The delegations agreed that conditions of confidentiality would be imposed only when necessary and would be 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 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 State. Paragraph 2 requires that if the Requesting State accepts conditions of confidentiality, it shall 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 that prevent the Requesting State from using it.

The South Africa 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 such a condition.

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

criminal proceedings.¹⁹ During the negotiations, the South African delegation indicated that its courts might discern a similar obligation in South Africa's constitution. The Requesting State shall notify the Requested State of any such proposed disclosure in advance thereof.

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. When 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 8 are for the benefit of the two nations that are the parties to the Treaty, and the invocation and enforcement of these provisions are left entirely to the Parties. If a person alleges, for instance, that a South African authority has used 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 9—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 give statements or produce items, including documents and 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 any persons specified in the request (*e.g.*, the defendant and his counsel in criminal cases) shall be permitted by the Requested State to be present and allowed to question the person giving the testimony or evidence.

Paragraph 4 states that if a witness asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the Requested State will take the 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 It is understood that when a person asserts a claim of immunity, incapacity, or privilege under

¹⁹ See, *Brady v. Maryland*, 373 U.S. 83 (1963).

²⁰ See, *e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article 5(3) and 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 South Africa is guaranteed the right to invoke any of the testimonial privileges (*e.g.*, attorney-client, inter-spousal) 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.²¹ A witness testifying in South Africa may raise any of the similar privileges available under the law of South Africa.

ARTICLE 10—OFFICIAL RECORDS

Paragraph 1 obliges each State to furnish the other with copies of publicly available records, including documents or information in any form, in the possession of organs of State and government departments and agencies in the Requested State. The term “organs of State and 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 undertaking 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 such 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 South African delegation stated that, as a general proposition, the United States can expect to receive nonpublic information in government files if South African law enforcement authorities have access to it.

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 U.S. 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

²¹This is consistent with the approach taken in Title 28, United States Code, Section 1782.

tax offenses and non-tax offenses under circumstances where such information would be available to U.S. law enforcement authorities. The South African delegation stated that although the treaty provided for assistance with respect to tax offenses, South Africa would not provide the United States with records from South African tax officials for any offenses pursuant to the Treaty. They explained that their tax authorities take a very narrow view of their legal ability to share information with other agencies and steadfastly refuse to share tax records with South African prosecutors or investigators pursuing non-tax cases, much less with U.S. prosecutors or investigators under the MLAT. Therefore, the delegations did not view this Treaty as a “convention for the exchange of tax information” for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would not have the discretion to provide tax return information to South Africa under this article in appropriate cases.²²

ARTICLE 11—TESTIMONY IN THE REQUESTING STATE

This article provides that upon request, the Requested State shall invite persons in the Requested State to travel to the Requesting State to appear before an appropriate authority in that State. The Central Authority of the Requested State shall inform the Central Authority of 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 7. Therefore, paragraph 1 provides that the Requesting State must indicate to the Requested State the extent to which the person’s expenses will be paid. 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.

Paragraph 2 provides that the Central Authority of the Requesting State may, in its discretion, determine that a person appearing in the Requesting State under this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty by reason of acts or convictions that preceded the person’s departure for the Requesting State 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 under this article or at a later time.

Paragraph 3 states that any safe conduct provided under 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 Central Authority of the Requesting State may extend the safe conduct up to fifteen days if it determines that there is good cause to do so.

²²Thus, this Treaty is unlike any of the other U.S. bilateral mutual legal assistance treaties in that it does not authorize the Parties to provide tax return information in appropriate circumstances.

ARTICLE 12—TRANSFER OF PERSONS IN CUSTODY

In criminal cases, a need sometimes arises for the testimony in one country of a witness in custody in another country. In some instances, a foreign country has been willing and able to “lend” witnesses to the U.S. 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 other occasions, the U.S. Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.²³ On a few occasions, a person in custody in the United States on a criminal matter has sought permission to travel to another country to be present at the deposition of a witness whose testimony may subsequently be introduced into evidence at the defendant’s criminal trial in the United States.²⁴

Article 12 provides an express legal basis for cooperation in these matters. Upon request, a person in custody in either State whose presence is requested for purposes of assistance under this Treaty may be transferred from the custody of one State to the custody of the other State for that purpose provided that the person and the Central Authorities of both States agree, and that the receiving State agrees to adhere to any terms and conditions set by the transferring State. These terms and conditions may include: (1) that the receiving State have the authority and the obligation to keep the person transferred in custody unless authorized to release the person by the sending State; (2) that the receiving State return the person to the sending State’s custody as soon as circumstances permit or as otherwise agreed by both Central Authorities; (3) that the receiving State not require the sending State to initiate extradition proceedings to recover custody of the person; and (4) that any time the person transferred spends in the receiving State will be credited against the sentence remaining to be served in the sending State.

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.

South Africa does not currently have the ability to transfer persons in custody to another country or to hold such persons if transferred to it. The delegations agreed to include this provision in the event that South Africa develops such authority in the future. The language makes clear that such transfers are discretionary.

²³ For example, in September, 1986, the U.S. Justice Department and the U.S. 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 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—TRANSIT OF PERSONS IN CUSTODY

Article 12 contemplates that persons in custody may be moved from State to State for purposes of mutual assistance, and it is reasonable to anticipate situations in which one State may need to bring persons in custody through the other on the way to or from third States. Article 13 provides the legal framework for such transit. Similar articles appear in other recent U.S. mutual legal assistance treaties.²⁵

Paragraph 1 states that a Requested State may authorize the transit through its territory of a person whose personal appearance has been requested in investigations, prosecutions, or proceedings in the Requesting State. Paragraph 2 provides that where such transit is authorized, the Requested State shall have the authority and obligation to keep the person in custody during transit in accordance with the laws of the Requested State, including the terms of this Treaty. As with Article 12, this article is included in the event that South Africa develops authority to transfer and hold such persons.

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 use its “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 that 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 15—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 most U.S. mutual legal assistance treaties.²⁶

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 South Africa to follow a specified procedure for service) or by the United States Marshal’s Service in instances in which personal service is requested.

²⁵ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 11.

²⁶ See, e.g., U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 13.

Paragraph 2 provides that when the documents to be served call for the appearance of a person in the Requesting State, the documents must be transmitted by the Central Authority of the Requesting 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 items needed in the former as evidence or for other purposes. U.S. courts can and do execute such requests under Title 28, United States Code, Section 1782.²⁷ This article creates a formal framework for handling such requests similar to provisions in many other U.S. mutual legal assistance treaties.²⁸

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 South Africa will have to be supported by a showing of probable cause for the search. A U.S. request to South Africa would have to satisfy the corresponding evidentiary standard there, which is “a reasonable basis to believe” that the specified premises contains items likely to be evidence of the commission of an offense.

Paragraph 2 is designed to ensure that a record is kept of items seized and delivered up under the Treaty. This provision requires that, upon request, every official who has custody of a seized item shall certify the continuity of custody, the identity of the item, and any changes in its condition.

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.

ARTICLE 17—RETURN OF ITEMS

This article provides that any documents, records, or items furnished under the Treaty may be required to 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 require return of the items, but this is a matter best left to development in practice.

ARTICLE 18—ASSISTANCE IN FORFEITURE PROCEEDINGS

A major goal of the Treaty is to enhance the efforts of both the United States and South Africa in combating narcotics trafficking.

²⁷ For example, in *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.), a search warrant was issued on February 24, 1984, based on a request under Title 28, United States Code, Section 1782.

²⁸ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15.

One significant strategy in this effort in the United States is action by authorities to seize and confiscate money, property, and other proceeds of drug trafficking.

This article is similar to a number of U.S. mutual legal assistance treaties, including Article 16 of the U.S.-Barbados Mutual Legal Assistance Treaty and Article 17 of the U.S.-Latvia Mutual Legal Assistance Treaty. Paragraph 1 authorizes the Central Authority of one State to inform the other of the existence in the latter's territory of proceeds of crimes or instrumentalities that may be forfeitable or otherwise subject to seizure. The term "proceeds of crimes 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 present this information to its authorities for a determination whether an action is appropriate. For instance, if the assets obtained by fraud in South Africa are located in the United States, U.S. authorities could act to seize them under Title 18, United States Code, Section 981 in aid of a prosecution under Title 18, United States Code, Section 2314.²⁹ U.S. authorities could also seek to secure a temporary restraining order in anticipation of a civil action for the return of the assets to the lawful owner. Proceeds of a foreign kidnaping, 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.³⁰ 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. South Africa too has legislation on this issue that enables it to seize and confiscate assets in criminal cases.³¹

If the assets are the proceeds of drug trafficking, it is especially likely that the States 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 U.S. delegation expects that Ar-

²⁹This 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. Proceeds of such activity become subject to forfeiture pursuant to Title 18, United States Code, Section 981 by way of Title 18, United States Code, Section 1956 and Title 18, United States Code, Section 1961. The forfeiture statute applies to property involved in transactions in violation of section 1956, which covers any activity constituting an offense defined by section 1961(1), which includes, among others, Title 18, United States Code, Section 2314.

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

³¹South Africa Proceeds of Crime Act, 1996.

³²Article 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

title 18 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the States shall assist one another to the extent permitted by their laws in proceedings relating to (a) restraining or immobilizing proceeds of crimes or instrumentalities or objects used in the commission of crimes; (b) confiscation or forfeiture of such items; (c) recovery or collection of fines imposed as sentences in criminal proceedings; and (d) compensation or restitution to victims of crime. The language of the article is carefully selected so as not to require either State to take any action that would exceed its internal legal authority. It does not, for instance, mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecution officials do not deem it proper to do so.³³

U.S. 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 that 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 State having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such assets, to the other State, at the former's discretion and to the extent permitted by their respective laws. The South African delegation assured the United States that South Africa would also share with the United States a portion of assets confiscated there with U.S. assistance.

ARTICLE 19—COMPATIBILITY WITH OTHER ARRANGEMENTS

This article states that assistance and procedures set forth in this Treaty shall not prevent either State from granting assistance to the other State through the provisions of other applicable international agreements. Article 18 also states that the States may provide assistance pursuant to any bilateral arrangement, agreement, or practice that may be applicable. The Treaty would leave the provisions of U.S. and South African law on letters rogatory completely undisturbed, and would 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 more efficient. This article states that the Central Authorities will

Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, December 20, 1988.

³³ In South Africa, unlike the United States, the law does not allow for civil forfeiture. However, South Africa law permits forfeiture in criminal cases, and ordinarily a defendant must be convicted in order for South Africa to confiscate the defendant's property.

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

share those ideas with one another, and will 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. Similar provisions are contained in recent U.S. mutual legal assistance treaties. It is anticipated that the Central Authorities will conduct regular consultations pursuant to this article.

ARTICLE 21—APPLICATION

This Treaty, like many other U.S. mutual legal assistance treaties negotiated in the past two decades, is expressly made retroactive, and covers assistance contemplated in Article 1 whether the acts occurred before, on, or after the date upon which the Treaty entered into force. At South Africa's request, Article 21 also states that nothing in the treaty shall be deemed to require or authorize action by the Requested State contrary to the constitution of that State. Somewhat similar provisions appear in many U.S. treaties of this kind, and the provision is consistent with the Understanding routinely included in Senate resolutions of advice and consent to ratification of mutual legal assistance and extradition treaties.

ARTICLE 22—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Paragraph 1 states that the Treaty is subject to ratification and that the instruments of ratification are to be exchanged as soon as possible.

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 receipt of written notification. Similar termination provisions are included in other U.S. mutual legal assistance treaties.

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

On July 22, 1998, the United States signed a Treaty Between the United States of America and Ukraine on Mutual Legal Assistance in Criminal Matters ("the Treaty"). The Treaty with Ukraine 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. Due to the urgent need for immediate transnational law enforcement cooperation, on September 30, 1999, the U.S. and Ukraine exchanged diplomatic notes pledging that until such time as the Treaty enters into force the terms of the Treaty will be applied, provisionally, to the extent permitted under the laws of the respective States.

In recent years, the United States has signed treaties with a number of countries as part of a highly successful effort to mod-

ernize 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 largely pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. Ukraine currently has no specific mutual legal assistance law. Ukraine's delegation advised us that under Ukraine jurisprudence, the terms of the Treaty would take precedence over the silence in Ukrainian domestic law and, in case of a conflict between the Treaty and future Ukraine 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 history. 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 Contracting States 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 "investigation" includes a grand jury proceeding in the United States and any similar pre-charge proceedings in Ukraine, and other legal measures taken prior to the filing of formal charges in either State.¹ The term "proceeding" 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

¹The 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 United States must assist Ukraine under the Treaty in connection with investigations prior to charges being filed in Ukraine.

²One U.S. 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*, Title 21 United States Code, Section 881; Title 18 United States Code, Section 1964.

“include” in the opening clause of the paragraph and reinforced by the final subparagraph.

Paragraph 3 specifies that there is no requirement of dual criminality under this Treaty for cooperation. 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, Ukraine 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; and antitrust violations.

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 Ukraine 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 State shall have a Central Authority to make and receive requests pursuant to the Treaty. Article 2(4) states that the Central Authorities shall communicate directly with one another.

Article 2(2) designates the Attorney General of the U.S. 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.⁵ The Central Authority of the United States would make all requests to Ukraine on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. It would also be responsible for receiving each request, transmitting it to the proper agency, court or other authority (which, in the United States, may be federal or state) for execution, and ensuring that a timely response is made.

Article 2(2) also states that the Central Authority for Ukraine shall be the Ministry of Justice and the Office of the Prosecutor

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).

General.⁶ This dual Central Authority arrangement for Ukraine was requested by Ukraine because its constitution and law prescribe distinct and separate responsibilities to the Office of the Prosecutor General and the Ministry of Justice.⁷ The Ukraine delegation explained that the Office of the Prosecutor General is empowered to make requests from Ukraine to foreign authorities for assistance in criminal investigations, but a court in Ukraine could also seek foreign evidence in connection with a criminal trial, and in such cases requests would be made through the Ministry of Justice. The Ministry of Justice in Ukraine is also responsible for handling requests from foreign authorities for assistance that involve documents or evidence located exclusively in a Ukrainian court, *e.g.*, an authenticated copy of the sentence imposed on a convicted person. Other requests from outside Ukraine would be handled by the Office of the Prosecutor General, without distinction between whether the request involves a matter at the investigation or prosecution stage. The Ukrainian delegation told the U.S. delegation that, in practice, the U.S. Central Authority should send all requests to the Office of the Prosecutor General, and if the matter is one that Ministry of Justice should handle, the Office of the Prosecutor General will promptly forward the request to the Ministry and inform the United States that it has done so.

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. Specifically, Article 2(3) states that each Central Authority shall only make requests that it has considered and approved, and that the Central Authority of the Requesting State shall use its “best efforts” to ensure that no request is made where, in its view: (1) the offense on which the request is based does not have serious consequences, or (2) the assistance requested is disproportionate to 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, facsimile, 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. These restrictions are similar to those found in other mutual legal assistance treaties.

⁶This is similar to Article 2(2) of the U.S.-Hungary Mutual Legal Assistance Treaty, December 1, 1994, which provides that the Hungarian Minister of Justice and Office of the Chief Public Prosecutor will serve as a dual Central Authority, and Article 2(1) of the U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, which provides that the Lithuanian Central Authority will be the Office of the Prosecutor General and the Ministry of Justice.

⁷The International Affairs Department of Ukraine’s Ministry of Justice and the International Legal Relations Department of Ukraine’s Office of the Prosecutor General were both represented during the negotiations.

Paragraph 1(a) permits the Central Authority of the Requested State to deny a request that relates to 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.”⁸

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 U.S. 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 also was agreed that “essential interests” could 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 U.S. Central Authority may invoke Paragraph 1(c) to decline to provide information pursuant to a Treaty request if 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 a felony, including the facilitation of the production or distribution of illegal drugs.⁹

Paragraph 1(d) permits the denial of a request if it does not conform to the requirements of the Treaty. This was intended to refer to the requirements of Article 4 of the Treaty.

⁸Although there is no extradition treaty in force between the United States and Ukraine, this same principle has been incorporated in many U.S. Mutual legal assistance treaties, and it is anticipated that the jurisprudence on political offense developed under other treaties would be applicable.

⁹This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with e.g. Luxembourg, Hong Kong, Poland and Barbados. *See*, Cong. Rec. S12985-S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100-26, 100th Cong., 2d Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

Paragraph 2 is similar to Article 3(2) of the U.S.-Switzerland Mutual Legal Assistance Treaty,¹⁰ and obligates 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 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 prosecution of a political offense (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 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 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 States that requests be as simple and straightforward as possible, there is no requirement under the Treaty that a request be legalized or certified.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 1 requires that each Central Authority promptly execute requests, or, where appropriate, transmit them 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,

¹⁰U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26, 27 U.S.T. 2019, T.I.A.S. No. 8302, 1052 U.N.T.S. 61.

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 competent authorities within the Requested State to do everything within their 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 Ukraine. Rather, it is anticipated that when a request from Ukraine 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 competent authorities of the Requested State shall have authority to issue subpoenas, search and arrest warrants, or other orders necessary to execute the request.” This language 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 Ukraine delegation said that in Ukraine, public prosecutors as well as courts are empowered to “issue subpoenas, search warrants, or other orders necessary to execute the request,” and this provision was intended to insure that those prosecutors can and do use that power to execute requests from the United States. The 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.

Paragraph 2 provides 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. Thus, it is understood that if execution of the request entails action by a judicial authority 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. 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 Ukraine 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.

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, the method of executing a re-

quest for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific procedures in the Treaty itself. For the United States, the Treaty is intended to be self-executing; no new legislation is needed to carry out U.S. obligations under the Treaty.

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 U.S. and Ukraine authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documents obtained abroad to be admitted in evidence if they are duly certified and the defendant has been given fair opportunity to test its authenticity.¹¹ Since Ukraine's law contains no similar provision, documents acquired in Ukraine in strict conformity with Ukrainian procedures might not be admissible in United States courts. Furthermore, United States courts use procedural techniques such as videotape depositions that simply are not used in Ukraine even though they are not forbidden there.

Second, the evidence in question could be needed for subsection 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 negotiators discussed the procedures applicable in their respective States in executing requests for legal assistance from the other and agreed to accommodate any specific procedure requested by the other to the extent permitted under the laws of the Requested State or as discussed with respect to specific treaty provisions.

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 paragraph also allows the Requested State to provide information sought to the Requesting State subject to conditions needed to avoid interference with the Requested State's proceedings.

It is anticipated that some U.S. 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 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

¹¹Title 18, United States Code, Section 3505.

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 states that the Central Authority of the Requested State shall respond to reasonable inquiries by the Central Authority of 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 inform the Central Authority of the Requesting State of the outcome of the execution of a request. If the assistance sought is denied, 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

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 U.S. mutual legal assistance treaties.¹³ Article 6 does, however, oblige the Requesting 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 (i.e., in transit under Article 12) or pursuant to Articles 10 and 11.

During the negotiations it was discussed and agreed that this provision obligates the Requested State to assume the costs of representation. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes high, this provision for reciprocal legal representation is a significant advance in international legal cooperation between the United States and Ukraine. 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 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.

¹²This provision is similar to language in other U.S. mutual legal assistance treaties. *See, e.g.*, U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 5(5).

¹³*See, e.g.*, U.S.-Czech Republic Mutual Legal Assistance Treaty, signed at Washington February 4, 1998, entered into force May 7, 2000, 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 a use limitation is requested, the Requesting State must comply with the conditions. It will be recalled that Article 4(2)(d) requires the Requesting State to specify the purpose for which 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. Conditions of confidentiality would be imposed only when necessary, and would be 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 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 State. Paragraph 2 requires that if the Requesting State accepts conditions of confidentiality, it shall 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.

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.¹⁴ The paragraph also states that the Requesting State shall notify the Requested State in advance of any such use or disclosure.

Paragraph 4 states that once 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. When 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 recognized 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 in Article 7 are for the benefit of the Contracting States, and the invocation and enforcement of these provisions are left entirely to the Contracting States. Thus, if a person alleges that U.S. authority seeks to use information or evidence obtained from Ukraine in a

¹⁴ See, *Brady v. Maryland*, 373 U.S. 83 (1963).

manner inconsistent with this article, the allegations would be a matter for consideration as between the Contracting States.

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 Paragraph 1 explicitly states 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 in that State.¹⁵

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, shall be permitted by the Requested State to be present during the execution of the request, and such person shall be allowed to question the person during the giving of testimony under this article. The Ukraine delegation explained that when a deposition is taken in Ukraine pursuant to a request from the United States, the U.S. prosecutor, the defendant, the defense counsel, and any technical staff needed to conduct the questioning (*e.g.*, court reporter, videotape machine operator) would be permitted to be present at the proceedings. Neither the U.S. prosecutor or the defense can directly question witnesses during such proceedings in Ukraine, but they would be permitted to propose questions to be posed to the witness by Ukrainian law enforcement. The official record of the deposition would usually be prepared by Ukraine officials, and it would reflect the role played by U.S. officials during the deposition.

Paragraph 4 states that if a witness whose testimony or evidence is sought asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the Requested State will nonetheless take the testimony or evidence and notify the Central Authority of the Requesting State in writing of the claim for resolution by the competent authorities of that State. 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 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. It is understood that when a person asserts a claim of immunity, incapacity, or privilege under the laws of the Requested State, that claim shall be resolved in accordance with the law of the Requested State. This is consistent with Article 5(3) and ensures that no person will be compelled to furnish information if he has a right not

¹⁵ See, Title 18, United States Code, Section 1621.

¹⁶ See, *e.g.*, U.S.-Barbados Mutual Legal Assistance Treaty, signed at Bridgetown February 28, 1996, and entered into force March 3, 2000, art. 8(4).

to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a request from Ukraine is guaranteed the right to invoke any of the testimonial privileges (*e.g.*, attorney-client, inter-spousal) 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 Both States recognize the privilege of witnesses against self-incrimination. The Ukraine delegation also indicated that privileges available under Ukraine law include a doctor-patient privilege and an attorney-client privilege.

The United States would probably invoke Article 8 of the Treaty to obtain copies of bank or business records in Ukraine. One controversial issue encountered during the negotiations involved the ability of U.S. authorities to gain access to bank records in Ukraine under this Treaty. The Ukraine delegation assured the United States that Ukraine would honor U.S. requests under the Treaty for bank records to the extent possible under Ukraine law. While the talks were underway, however, Ukraine enacted regulations that authorized the establishment of anonymous bank accounts.¹⁸ Since the beneficial owners of such accounts could keep their true identity hidden from the officials at the bank where the account is maintained, it would be virtually impossible for Ukraine law enforcement to investigate suspicious transactions or effectively aid U.S. investigations involving Ukraine banks. These regulations on anonymous accounts undermined joint efforts to combat transnational crime because bank account information is frequently essential in the investigation of drug trafficking, money laundering, financial offenses, and other major crimes, and anonymous bank accounts deprive law enforcement officials of critically important information that is needed in order to trace the proceeds of illegal activity to reliably identify those who commit crime. For these reasons, the U.S. refused to sign the Mutual Legal Assistance Treaty until Ukraine repealed its anonymous bank secrecy regulations.¹⁹ On July 21, 1998, Ukraine President Kuchma issued a new decree forbidding anonymous bank accounts,²⁰ and the Mutual Legal Assistance Treaty was signed the following day, on July 22, 1998. The U.S. delegation anticipates no difficulty in obtaining access to bank and business records in Ukraine pursuant to this Treaty.

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 shall be certified by the appropriate form attached to the request. To authenticate business records, the delegations agreed to use Form A, included in the Annex to the Treaty. Thus, the provision establishes

¹⁷This is consistent with the approach taken in Title 28, United States Code, Section 1782.

¹⁸Decree of the President of Ukraine #679 on the Opening of Anonymous Hard Currency Accounts of Physical Persons (Resident and Non-resident), September 1, 1995.

¹⁹The United States also postponed exchanging instruments of ratification on the U.S.-Ukraine Convention for the Avoidance of Double Taxation on Income and Capital, with Protocol, March 4, 1994 (approved by the U.S. Senate August 1995).

²⁰Decree of the President of Ukraine #805 On Some Issues Pertaining to the Protection of Banking Secrets, July 21, 1998. This decree also repealed the prior decree that authorized the establishment of secret accounts, note 18, *supra*.

a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505, the foreign business records authentication statute. The absence or nonexistence of such records will be certified through the use of Form B, also included in the Annex. This paragraph also provides that records authenticated by Form A, or Form B certifying the absence or non-existence of business records shall be admissible in evidence in U.S. courts. With respect to the United States, this paragraph is self-executing, and does not need implementing legislation.

The admissibility provided by this paragraph extends only to authenticity and not to matters such as relevance and materiality; 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 State 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. Such authorities include units of the federal, state, and local level in each country.

Paragraph 2 provides that the Requested State may also 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. The undertaking to share such information is only “to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities.” Furthermore, the Requested State may in its discretion deny a request under this paragraph entirely or in part. 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 the extent to which such information will be shared and under what conditions.

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, like most other U.S. mutual legal assistance trea-

ties, 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 Ukraine under this article in appropriate cases.²¹

Paragraph 3 is primarily for the benefit of the United States. It provides for the authentication of records produced pursuant to this article, if specified in a request, through the use of the appropriate form attached to the request. The delegations agreed that, in response to a request by the United States, records provided would be certified using Form C, included in the Annex to the Treaty and the absence or nonexistence of such records through the use of Form D, also included in the Annex. Records authenticated under this paragraph or the form certifying the absence or non-existence of such records 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. The admissibility provided by this paragraph extends only to authenticity and not to matters such as relevance and, materiality. 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.

²¹Under Title 26, United States Code, Section 6103(i), information in the files of the Internal Revenue Service (generally protected from disclosure under Title 26, United States Code, Section 6103) may be disclosed to federal law enforcement personnel in the United States for use in 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 Ukraine through this Treaty when, in a criminal investigation or prosecution, the Ukrainian 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 Ukraine request for tax returns to be used in a non-tax criminal investigation, in accordance with Title 26, United States Code, Section 6103(i)(1)(A), would have to specify that the Ukraine 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 Ukraine criminal statute (not involving tax administration) to which Ukraine is or may be a party.

(ii) any investigation which may result in such a proceeding, or

(iii) any Ukraine proceeding pertaining to enforcement of such a criminal statute to which Ukraine is or may be a party. (See Title 26, United States Code, Section 6103(i)(1)(A))

Any request for such documents 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 Title 26, United States Code, Section 6103(i)(1)(B). Before issuing such an order, the judge or magistrate would have to determine, also in accordance with Title 26, United States Code, Section 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 Ukrainian 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, Ukraine law enforcement authorities seeking tax returns would be treated as if they were United States law enforcement authorities, including the same access procedure where they would be held to the same standards.

ARTICLE 10—TESTIMONY OR EVIDENCE 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.

The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6. Therefore, 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 paragraph also specifies that 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. 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 under this article or thereafter.

Paragraph 4 states that any safe conduct provided under this article shall cease 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 within seven days 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 U.S. Justice Department has arranged for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.²²

²²For example, in September, 1986, the United States Justice Department and the U.S. 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 Mil-lard*, a major narcotics prosecution in "the Old Bailey" (Central Criminal Court) in London.

Article 11 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 It is anticipated that, where the receiving State is a third state, the Requesting State will make all arrangements necessary to meet the requirements of this paragraph.

Paragraph 1 provides that persons in custody in the Requested State whose presence outside of that State is sought for purposes of assistance under this Treaty, such as providing testimony in a criminal prosecution, may be transferred in custody for that purpose if the person consents and the Central Authorities of both states agree.

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.²⁵

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) 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 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 being returned to the sending State.

In keeping with the obligation to return a person transferred under this article, paragraph 3(c) explicitly prohibits the State to whom a person is transferred from requiring the transferring State to initiate extradition or any other proceedings before the status quo is restored by the return of the person transferred.

Paragraph 3(d) states that the person transferred will receive credit in the sending State for the time in custody in 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

²³ U.S.-Switzerland Mutual Legal Assistance Treaty, signed at Bern May 25, 1973, entered into force January 23, 1977, art. 26.

²⁴ It is also consistent with 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.

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.

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

Article 11 contemplates that persons in custody will be moved from State to State for purposes of mutual assistance, and it is reasonable to anticipate situations in which one State may need to bring persons in custody through the other on the way to or from third States. Article 12 provides the legal framework for such transit. Similar provisions appear in other recent U.S. mutual legal assistance treaties.²⁶

Paragraph 1 gives each State the power to authorize transit through its territory of a person being transferred to the other State by a third state. Paragraph 2 obligates and authorizes each State to keep in custody a person during the transit period. It is expected that requests for transit would contain a description of the person being transported and a brief statement of the facts of the case for which the person is sought. While transit authorization under this article is always discretionary, Paragraph 3 specifically states that each State may refuse transit of its nationals.

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. 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 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 most U.S. mutual legal assistance treaties.²⁷

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 Ukraine to follow a specified proce-

²⁶ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 11.

²⁷ U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 13.

dures 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 Central Authority of the Requesting 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 1782.²⁸ This article creates a formal framework for handling such requests and is similar to provisions in many other United States mutual legal assistance treaties.²⁹

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 Ukraine will have to be supported by a showing of probable cause for the search. A U.S. request to Ukraine 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 delivered up under the Treaty. This provision requires that, upon request, every official who has custody of a seized item shall certify, through the use of a form attached to the request, the identity of the item, the continuity of custody, and any changes in its condition. The delegations agreed that, at least for requests by the United States, the form will be as set forth in Form E in the Annex to the Treaty.

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, thus relieving the Requesting State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requested State to provide 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.

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 based on a request under Title 28, United States Code, Section 1782).

²⁹ See, e.g., U.S.-Latvia Mutual Legal Assistance Treaty, signed at Washington June 13, 1997, entered into force September 17, 1999, art. 15.

During the negotiations, the delegations discussed including a fourth paragraph in this article that would obligate 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.³⁰ It was concluded that a specific provision was unnecessary, but both delegations agreed that the Requested State would be expected to use its best efforts to assist the Requesting State's authorities in obtaining the transfer of items without unnecessary delays that might otherwise be encountered under the Requested State's import and export laws.

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. 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 17—ASSISTANCE IN FORFEITURE PROCEEDINGS

The Treaty will enhance the efforts of both the United States and Ukraine in combating narcotics trafficking. One significant strategy in this effort by United States authorities is action 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 16 of the U.S.-Barbados Mutual Legal Assistance Treaty and Article 17 of the U.S.-Latvia 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 Ukraine, they could be seized under Title 18, United States Code, Section 981 in aid of a prosecution under Title 18, United States Code, Section 2314,³¹ 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 kidnaping, robbery, extortion or a fraud by or against a foreign bank are civilly and criminally forfeitable in the U.S. since

³⁰*Cf.* U.S.-Lithuania Mutual Legal Assistance Treaty, signed at Washington January 16, 1998, entered into force August 26, 1999, art. 15(4).

³¹This 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.

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 States 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 U.S. delegation expects that Article 16 of the Treaty will enable this legislation to be even more effective.

Paragraph 2 states that the States shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses, to restitution to crime victims, and 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. 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, for instance, 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

U.S. 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 State having custody over proceeds or instrumentalities of offenses to transfer forfeited assets, or the proceeds of the sale of such as-

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

³³Article 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, December 20, 1988.

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

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

sets, to the other Contracting State, at the former's discretion and to the extent permitted by their respective laws.

Ukraine's delegation stated that Ukrainian law allows the Government to dispose of proceeds of most crimes, or valuables obtained through illegal activities, and nothing in the law prohibits sharing such crime proceeds with foreign governments. Proceeds of drug offenses, however, ordinarily go into the state treasury. Ukraine's delegation was confident, however, that Ukraine would share a percentage of forfeited proceeds with the United States, on a case-by-case basis.

ARTICLE 18—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 through the internal laws of either country. It also provides that the States may provide assistance pursuant to any bilateral arrangement, agreement or practice that may be applicable. Thus, the Treaty would leave the provisions of U.S. and Ukrainian law on letters rogatory completely undisturbed, and would not alter any pre-existing agreements concerning investigative assistance.³⁶

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 States 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. 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 states that the Treaty is subject to ratification and that the instruments of ratification are to be exchanged at Washington as soon as possible.

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 one Contracting State receives written

³⁶See, e.g., the U.S.-Ukraine Memorandum of Understanding Concerning Cooperation in the Pursuit of Nazi War Criminals, signed at Washington August 26, 1993, entered into force August 26, 1993; U.S.-U.S.S.R. Agreement Relating to Procedure to be Followed on the Execution of Letters Rogatory, signed at Moscow Nov. 22, 1935, entered in force Nov. 22, 1935, 49 Stat. 3840, 11 Bevans 1262, 167 LNTS 303.

termination notification from the other. Similar requirements are contained in our treaties with other countries.

Technical Analysis of the Inter-American Convention on Mutual Legal Assistance in Criminal Matters

On January 10, 1995, the United States signed the Organization of American States (“OAS”) Inter-American Convention on Mutual Legal Assistance in Criminal Matters (“Convention”). This Convention was the first multilateral treaty on mutual legal assistance signed by the United States. It is similar to the bilateral mutual legal assistance treaties which the United States has concluded with other countries in this region and elsewhere.

This Convention grew out of [put in background about Cartagena, Bush/Reagan, etc. 3 treaties—OAS Prisoner Transfer, OAS MLAT, and OAS preventative measures, in return for extraditions] a need to strengthen law enforcement cooperation among members of the OAS, and to support the provisions of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹

The negotiation of the OAS Convention began in 1986, when the OAS Committee on Juridical and Political Affairs established a Working Group to draft an Inter-American Convention on Judicial Assistance. The Working Group’s initial draft of a convention was limited to mutual execution of letters rogatory, and while a treaty with this limited approach was acceptable to civil law Latin American countries, it was of little value to common law countries. In 1988, the United States delegation persuaded the Working Group to rewrite the draft convention along the lines of the U.S.’s bilateral mutual legal assistance treaties (MLATs) to make it more useful to all nations in the hemisphere. The U.S. also encouraged common law countries like Canada and Jamaica to become involved. As a result, the draft was extensively revised, with representatives of countries which have signed bilateral MLATs with the United States (principally Canada, Mexico, Uruguay, Jamaica, and Argentina) taking the lead in formulating provisions for the convention consistent with the terms of the various bilateral MLATs in the region.

The General Assembly of the OAS approved the text of the Convention during its regular session in The Bahamas on May 23, 1993 (Resolution AG/RES. 1168 (XXII-0/92)) and opened it for signature at that time. The United States supported the treaty, but would not sign it until a Protocol mandating assistance for all tax offenses was also opened for signature. The Protocol to this effect was approved by the General Assembly of the OAS during the regular session in Managua, Nicaragua June 6, 1993 and was opened it for signature on January 1, 1994. The Convention entered into force on April 4, 1996. As of August 21, 2000, the Protocol has not yet entered into force.

¹ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, December 20, 1988, and entered into force for the United States November 11, 1990, 28 I.L.M. 493 (March 1989). Article 7 of that Convention obligates the parties to provide “the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings” related to offenses established under the Convention.

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 history. 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.

CHAPTER I—GENERAL PROVISIONS (ARTICLE 1–9)

ARTICLE 1—PURPOSE OF THE CONVENTION

Article 1 obligates the states parties to render mutual assistance in criminal matters.

ARTICLE 2—SCOPE AND APPLICATION OF THE CONVENTION

Paragraph one obligates States to provide assistance in investigations, prosecutions and proceedings that pertain to crimes over which the requesting State has jurisdiction at the time the assistance was requested. The term “investigation” was understood to encompass grand jury proceedings in the United States and the equivalent pre-charge proceedings in other States, as well as committal proceedings and other legal measures taken prior to the filing of formal charges.² The term “proceedings that pertain to crimes” was intended to cover assistance in the full range of proceedings related to criminal charges, including such matters as bail and sentencing hearings.³ Furthermore, the phrase “proceedings that pertain to crimes” is broader than the investigation, prosecution or sentencing process itself, and thus 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 but such proceedings are covered by the Treaty.

Paragraph two states that the Convention does not create any new jurisdiction or operational authority on the part of one Party to undertake actions in the territory of the other. This provision is based on Article 2(3) of the 1988 United Nations Convention

²The requirement that assistance be provided under the Convention at the pre-indictment stage is very useful to the United States, 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, and the United States must assist other States under the Convention in connection with investigations prior to charges being filed abroad.

³One U.S. 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 1016 (2nd Cir. 1976); *Fonseca v. Blumenthal*, 620 F.2d 322 (2nd 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.

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

Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and is similar to language found in other U.S. MLATs.⁵

Paragraph three contains a standard provision in United States mutual legal assistance treaties providing that the Convention is intended solely for government-to-government mutual legal assistance. The Convention is not intended to provide a means for private persons to gather evidence abroad. Private litigants in the United States may continue to obtain evidence from other countries by letters rogatory, an avenue of international assistance which the Convention leaves undisturbed. Similarly, this Convention is not intended to create any new right in a private person to suppress or exclude evidence thereunder.

ARTICLE 3—CENTRAL AUTHORITY

Article 3 of the Convention requires that each party designate a “Central Authority” at the time of signature or ratification of this Convention. The Central Authority will be responsible for issuing and receiving requests for assistance. The Central Authority of the United States will make all requests under the Convention on behalf of federal agencies, state agencies and local law enforcement authorities in the United States. Early drafts of the convention did not contain the concept of central authority at all, and this article was one of the U.S. delegation’s major contributions to the negotiations.

The final paragraph establishes that the central authorities shall communicate directly with one another for all purposes of the Convention.

Although this Convention does not specifically designate the Attorney General as Central Authority, the United States and other delegations intended and understood that the U.S. Attorney General would be the U.S. Central Authority, as is the case under all other United States mutual legal assistance treaties. The Attorney General has delegated authority as Central Authority under mutual legal assistance treaties to the Assistant Attorney General in charge of the Criminal Division.⁶

ARTICLE 4—APPROPRIATE AUTHORITIES

This article recognizes that while the Central Authority will formally make and receive all requests, the information in the requests, and the impetus for the invocation of the Convention, will be coming from elsewhere within the Requesting State’s government. Since there are basic differences in the structure of the legal systems of the Parties, a request for assistance from one Party may have a different point of origin than a request for assistance from the other Party. For example, the majority of U.S. requests will be initially brought to the Central Authority’s attention by prosecutors

⁵ U.S.-Mexico Mutual Legal Assistance Treaty, signed at Mexico December 9, 1987, entered into force May 3, 1991, art. 1(2); U.S.-Uruguay Mutual Legal Assistance Treaty, signed at Montevideo May 6, 1991, entered into force April 15, 1994, art. 1(3).

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).

or investigators, whereas requests in civil law countries will often first be suggested to the Central Authority by judges or investigating magistrates. This is because in civil law countries, a judge or magistrate directly oversees many of the duties in connection with criminal investigations which in the United States are performed by prosecutors or law enforcement agents.⁷

It should be noted that while the fundamental differences between the civil law and common law systems were accommodated by this clause in this treaty, it is also the anticipation of the negotiators that in any event the “party in interest” who motivates the request must be one with responsibility for criminal investigations. It was not the anticipation of the negotiators that a Central Authority will seek to invoke the Convention on behalf of legislative investigations, independent Commissions of Inquiry unable to institute prosecutions, or private parties.

ARTICLE 5—DOUBLE CRIMINALITY

Extradition treaties often condition the surrender of fugitives upon a showing of “double 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. The first paragraph of this article establishes the general principle that there is no requirement of double criminality for cooperation under this Convention, and that assistance must be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State. This paragraph is important because there are significant differences in the laws of the various countries in the region, and the double criminality rule would make assistance unavailable in many significant areas.

The second paragraph specifies two measures (sequestration of property, and searches and seizures, including house searches, provided for in Articles 13, 14 and 15) in which the Requested State has the discretion to decline to render assistance unless double criminality is shown. Similar exceptions appear in the European Convention on Judicial Assistance in Penal Matters, and are intended to emphasize that in these cases the procedural and substantive law of the Requested State must be taken into account, e.g., that there may be a requirement of double criminality to effect a warrant to search and/or seize. A similar provision is found in Article 1(2) of the U.S.-Uruguay MLAT.

ARTICLE 6

This article requires that the crime giving rise to the request be punishable by one year or more of imprisonment in the requesting state.

ARTICLE 7—SCOPE OF APPLICATION

This article sets forth a list of the major types of assistance specifically considered by the negotiators. Most of the items listed in

⁷See generally Pahl, *Wanted: Criminal Justice—Colombia’s Adoption of a Prosecutorial System of Criminal Procedure*, 16 *Fordham Int’l Law Rev* 608 (1992); Ploscowe, *The Investigating Magistrate (Juge d’instruction) in European Criminal Procedure*, 33 *Mich. L. Rev.* 1010 (1935); Keedy, *The Preliminary Investigation of Crime in France*, 88 *U. Pa. L. Rev.* 385 (1940).

this article are described in further detail in subsequent articles. This article'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 and reinforced by the final subparagraph.

ARTICLE 8—MILITARY CRIMES

This article permits a Requested State to deny a request if the request relates to a strictly military offense. A similar restriction is found in many of our bilateral mutual legal assistance treaties,⁸ and is also in Article 1(2) of the European Convention on Mutual Assistance in Criminal Matters.⁹

ARTICLE 9—REFUSAL OF ASSISTANCE

Article 9 outlines the circumstances under which a request for assistance may be denied. It should be noted that the Requested State has the discretion to deny assistance on these grounds, but is also free to grant assistance if it wishes. Nevertheless, this article is an important one because it reflects the limitations on each Party's obligation to provide assistance.

It should also be noted that the grounds for denying assistance under this convention are more numerous and a bit broader than the grounds contained in the bilateral mutual legal assistance treaties the United States has signed. This is because the convention is a multilateral agreement, designed to accommodate the varying legal systems of a number of different States in the region. The United States, as only one of the States involved in the negotiations, could not successfully insist that this provision of the treaty reflect U.S. policies alone. Thus, some of the provisions in this article were insisted upon by some OAS States whose internal legislation and jurisprudence place restrictions on international assistance which are not maintained by other OAS states. Other provisions reflect long-standing policies one or two states maintain with respect to cooperation with other states, policies which are not shared generally but which had to be accommodated in order for those states to accede to the convention. In short, the bases for denying assistance found in this provision, while appropriate given the convention's multilateral context, do not necessarily reflect those which the United States would demand in a bilateral mutual legal assistance treaty.

Article 9(a) permits the Requested State to deny a request if the evidence requested is to be used to try a person in the Requesting State on a charge for which that person has already been sentenced or acquitted in the Requesting or Requested State. This paragraph makes it clear that the denial must be specific to the person who is the subject of the request, and may not be applied to deny assistance related to other persons charged with the same offense but not yet sentenced or acquitted.

Article 9(b) permits denial of assistance if the Requested State finds that the investigation has been initiated for the purpose of

⁸ See U.S.-Mexico Mutual Legal Assistance Treaty, signed at Mexico December 9, 1987, entered into force May 3, 1991, art. 1(3)(d); U.S.-Uruguay Mutual Legal Assistance Treaty, signed at Montevideo May 6, 1991, entered into force April 15, 1994, art. 5(1)(a).

⁹ Done at Strasbourg April 20, 1959, European Treaty Series No. 30.

prosecuting, punishing or discriminating against an individual or group of persons for reason of sex, race, social status, nationality, religion, or ideology. This language comes from the American Convention on Human Rights, adopted by the OAS November 22, 1969, entered into force July 18, 1978; United States signed June 1, 1977. The United States delegation did not initially support this broad provision but accepted it as part of an overall agreement on an appropriate text for Article 9.

Article 9(c) permits the Central Authority of the Requested State to deny a request if it relates to an offense considered to be political, to be related to a political offense, or to be prosecuted for political reasons. This is a somewhat more broadly worded political offense limitation clause than those found in most United States bilateral mutual legal assistance treaties, in that it allows (but, on the other hand, does not mandate) the denial of assistance for offenses which are not political in themselves but the requested states concludes that the prosecution is for political reasons. The determination of what is a political offense is to be made by the Requested State, and the United States delegation understood and intended that, for the United States, the Central Authority will make this determination, in consultation with other relevant executive branch agencies.

Article 9(d) permits the Requested State to deny assistance requested by special or ad hoc tribunals. This provision was included because some special or ad hoc tribunals have been implicated in human rights violations.¹⁰ Article 9(d) permits the Requested State to determine, on a case by case basis, whether to provide the same assistance to foreign special or ad hoc tribunals which would be supplied to an ordinary criminal court.

Article 9(e) permits assistance to be refused if the assistance would prejudice the public policy (*ordre public*), security sovereignty, or basic public interests of the Requested State. All U.S. mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice the essential interests of that Party.

The delegations agreed that the phrase "basic public interests" was intended to be limited to very serious reasons for denial. However, it was agreed that these could include interests unrelated to national military or political security. This provision would, for instance, be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Convention. One fundamental purpose of the Convention is to enhance law enforcement cooperation, and attaining that purpose would be hampered if sensitive law enforcement information available under the Convention were to fall into the wrong hands. The United States Central Authority would invoke Article 9(e) to decline to provide information pursuant to a request under this Convention 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

¹⁰ See, e.g., Article 8, The American Convention on Human Rights, adopted by the OAS November 22, 1969; entered into force July 18, 1978, signed by the United States on June 1, 1977.

the information is engaged in a felony, including the facilitation or the production or distribution of illegal drugs.¹¹

Article 9(f) permits the Requested State to deny a request related to a tax offense, with one very important exception: assistance shall be provided if the tax offense is “committed by way of an intentionally incorrect statement” or “by way of an intentional failure to declare income from any other offense covered by this Convention.”

The United States considers criminal tax investigations to be an important aspect of a State’s overall strategy for combating crime, and believes that an exception like Article 9(f) is unwise and unnecessary. Tax investigations are an important weapon in the battle against offenses such as drug trafficking and organized crime. There is a provision like Article 9(f) in the United States’ bilateral treaty with Uruguay, where we were assured that it would be interpreted as a very narrow exception to a general obligation to provide assistance, but no similar clause appears in the other mutual legal assistance treaties which we have signed, including treaties with other countries in the region such as Jamaica, Argentina, Colombia, and Mexico.¹² Moreover, the clear trend in international legal cooperation matters has been to provide greater assistance in criminal tax investigations and prosecutions,¹³ a trend underscored by the many bilateral treaties and agreements on mutual assistance in tax matters in force between the United States and other States in the region. For these reasons, the United States delegation consistently opposed Article 9(f) during the negotiations, and would not sign the Convention until the Optional Protocol requiring assistance for tax offenses was developed and opened for signature.

CHAPTER II—REQUESTS FOR ASSISTANCE, PROCESSING AND EXECUTION (ARTICLES 10–16)

ARTICLE 10—REQUESTS FOR ASSISTANCE

The first paragraph requires that requests be in writing and that requests be executed in accordance with the domestic law of the Requested State. This provision is intended to emphasize that the law of the Requested State is the controlling law in executing a request under the Convention. For the United States, the Convention is intended to be self-executing, and no new legislation is needed to carry out its obligations.

The second paragraph requires that procedures specified in the request be fulfilled insofar as the law of the Requested State is not

¹¹ This is consistent with the Senate resolution of advice and consent to ratification of other recent mutual legal assistance treaties with e.g., Luxembourg, Hong Kong, Poland and Barbados. *See* Cong. Rec. S12985–S12987 (November 1, 1998). *See, also*, Mutual Legal Assistance Treaty Concerning the Cayman Islands, Exec. Rept. 100–26, 100th Cong., 2nd Sess., 67 (1988) (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice).

¹² A few of our bilateral mutual legal assistance treaties do contain provisions allowing the Requested State to deny assistance for requests relating to certain tax offenses. *See* U.S.-Bahamas Mutual Legal Assistance Treaty, signed at Nassau March 9, 1990, entered into force September 22, 1994, art. 2(2); U.S.-U.K. Treaty Concerning the Cayman Islands, signed at Grand Cayman July 3, 1986, entered into force March 19, 1990, art. 3(1)(a).

¹³ For example, the European Convention on Mutual Assistance, opened for signature on 20 April 1959, had a provision similar to 9(f), making assistance in tax crimes discretionary. However, a Protocol to this multilateral convention was agreed to and opened for signature on 17 March 1978, making assistance for tax offenses mandatory.

violated. Unless the requested procedures are incompatible with the Requested State's law, those procedures must be used to execute the request. However, neither Party is expected to take any action pursuant to a request which would be prohibited under its laws. It is contemplated that forms for authentication, for example, or specific procedures in taking testimony or collecting or verifying evidence may be required by the Requesting State to ensure the admissibility and usefulness of the evidence in court proceedings in the Requesting State. A similar provision is found in several other U.S. Mutual Legal Assistance Treaties.¹⁴ It is also similar to provisions in other mutual legal assistance treaties that provide for the use of specific forms to authenticate requested documents as well as following the method of execution specified in the request, if not prohibited by the laws of the Requested State.

ARTICLE 11

This article allows the Requested State to postpone the execution of a request, with an explanation of the grounds for doing so if necessary in certain circumstances. It is understood that the Central Authority of the Requested State will determine when to apply this provision.

For example, a request for assistance need not be executed immediately if execution would interfere with an ongoing investigation, prosecution, or proceeding in the Requested State. It is understood that the Central Authority of the Requested State will determine when to apply this provision. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence which might otherwise be lost before the conclusion of the investigation or legal proceeding taking place in that State. The fact that this is authorized only "if necessary," indicates that the Central Authority of the Requested State is also obliged to consider granting assistance immediately but subject to appropriate conditions (e.g., that the evidence provided be kept confidential) rather than postponed.

ARTICLE 12

This procedural article provides that any documents or objects furnished under the Convention must be returned to the Requested State as soon as possible, unless that State decides otherwise. It is anticipated that the Requested State will usually waive return unless original records or objects of value are involved, but this is a matter best left to the development of practice. Article 13—Search, Seizure, Attachment and Surrender of Property

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. U.S. courts can execute such requests now, under Title 28, United States Code, Sec-

¹⁴See, e.g., U.S.-Argentina Mutual Legal Assistance Treaty, signed at Buenos Aires December 4, 1990, entered into force February 9, 1993, art. 5(3).

tion 1782.¹⁵ Article 13 creates a formal framework for reciprocal assistance in such matters.

In this respect, the United States very rarely finds it necessary to conduct a search and seizure at the request of foreign law enforcement authorities, and, of course, we would not seek to do so unless it were necessary. In some foreign states, evidence is routinely obtained by searches and seizures rather than *subpoena duces tecum*. Thus, the U.S. delegations anticipate that this provision will be considerably more valuable to the U.S. than it is to the other parties, as it ensures that our treaty partner will have authority can obtain for U.S. law enforcement authorities what they need from abroad even if the provision is rarely used here on behalf of foreign law enforcement authorities.

The article requires that the search and seizure request include "information that justifies the proposed action. That action shall be subject to the procedural and substantive law of the requested state." This means that normally a request to the United States from another State will have to be supported by probable cause for the search. A United States request to another State would have to satisfy the corresponding evidentiary standard there. The request would be carried out in strict accordance with the law of the State in which the search is being conducted.¹⁶

Under the second paragraph of the article, the Requested State need not surrender any articles it has seized unless it is satisfied that any interests that third parties may have in the seized items are adequately protected. This permits the Requested State, for instance, to insist that the Requesting State promise that the article will be returned to the Requested State at the conclusion of the proceedings. This article is similar to articles in many of the United States' extradition treaties.¹⁷

ARTICLE 14—MEASURES FOR SECURING ASSETS

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

Article 14 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 a serious offense including drug trafficking. These terms were intended to include 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.

¹⁵ See, e.g., *United States Ex Rel Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst*, Case No 84-67-Misc-018 (M.D. Fla., Orlando Div.) (search warrant issued February 24, 1984 based on a request under Title 28, United States Code, Section 1782).

¹⁶ The United States delegation had *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in mind as Article 13(1) was being negotiated. In that case, the U.S. Supreme Court ruled that the Fourth Amendment did not apply to a search by U.S. investigators of property located in Mexico and owned by a person with no close ties to the United States. The opinion overruled a lower court decision which had excluded evidence obtained during the search because the investigators did not obtain a U.S. search warrant before asking Mexican police for permission to conduct the search.

¹⁷ U.S.-Canada Extradition Treaty, signed at Washington December 3, 1971, entered into force March 22, 1976, art. 15; U.S.-Mexico Extradition Treaty, signed at Mexico City May 4, 1978, entered into force January 25, 1980, art. 19. See also U.S.-U.K. Extradition Treaty, signed at London June 8, 1972, entered into force January 21, 1977, art. XIII.

Upon receipt of notice under this article, the Central Authority of the State in which the proceeds are located may take whatever action is appropriate under the law in that State. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in another State, they could be seized in aid of prosecution under Title 18, United States Code, Section 2314,¹⁸ or be made 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 in question are the fruits of drug trafficking, the Contracting Parties will be especially willing to help one another. Legislation in the United States expands the authority of law enforcement officials to seize the proceeds of drug trafficking. Title 18, United States Code, Section 981(a)(1)(B) also authorizes the forfeiture to the United States of property which represents proceeds obtained directly or indirectly from 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 would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.¹⁹ There is a growing trend among nations toward enacting legislation of this kind in the battle against narcotics trafficking.²⁰

ARTICLE 15

Article 15 states that the Parties to this Convention may aid one another in proceedings leading to the forfeiture of the proceeds of crime. The Parties also assume an obligation to aid one another, on request, in proceedings leading to the forfeiture of illegally obtained assets, restoring illegally obtained funds or articles to their rightful owners.

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 in the Requesting State, the Convention encourages the Requested State to do so. The language of the article is carefully selected, however, so as not to require any State to take any action which would go beyond "the extent permitted by their respective laws." It does not, for instance, mandate institution of forfeiture proceedings in either country against property identified

¹⁸This 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.

¹⁹For example, Section 981(a)(1)(B) was among the grounds argued in an action to forfeit a bank account in the United States containing funds generated by a Peruvian drug trafficking organization. *United States v. All Monies (\$477,048.62) in Account No. 90-3617-3*, 754 F. Supp. 1467 (D. Ha. 1991). In that case, the United States produced a declaration from an informant alleging, that, inter alia, money had been exchanged for coca paste in Peru. Also submitted was a declaration from a legal expert stating that the activities described by the informant constituted both a violation of Peruvian law and a foreign drug felony for purposes of Section 981(a)(1)(B). However, the court relied on other grounds to forfeit the accounts.

²⁰Many OAS members, including the United States, have signed and ratified the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, Done at Vienna December 20, 1988, and entered into force for the United States November 11, 1990, 28 I.L.M. 493 (March 1989), and Article 3 of that Convention obliges the parties to enact legislation to confiscate drug proceeds.

by the other if the relevant prosecuting authorities do not deem it proper to do so.

It was anticipated that the parties would apply this provision in any case “permitted by their respective laws,” including money laundering and racketeering offenses for the United States.

Although asset sharing has become a critically important area for the United States, the U.S. delegation decided not to propose language in the Convention to cover asset sharing, because it was felt that the sharing of assets is best worked out on a country by country basis. Therefore, the language “measures for securing . . .” was not intended to include asset sharing without other relevant intergovernmental arrangements.

ARTICLE 16—DATE, PLACE AND MODALITY OF THE EXECUTION OF
THE REQUEST FOR ASSISTANCE

This article authorizes the requested state to furnish information about the execution of a request for assistance.

The second paragraph of this article allows representatives of the Requesting State to be present at and participate in the execution of the request to the extent not prohibited by the laws of the Requested State so long as the Requested State expressly consents. For example, a United States request might ask that the government and defense attorneys from the United States, and perhaps the defendant, be present for the taking of the testimony. A request to the United States may ask that the judge from the Requesting State be present for the taking of testimony in the United States. The phrase “be present at and participate in the execution of the request for assistance, to the extent not prohibited by the law of the requested state, and provided that the authorities of the requested state have give their express consent thereto” (emphasis added) was included to provide for restrictions on direct questioning of witnesses under the law of some member countries.²¹ Thus, the law of the Requested State controls the manner in which questions are posed and the procedure for taking the requested testimony.

CHAPTER III—SERVICE OF JUDICIAL DECISIONS, JUDGMENTS, AND VERDICTS, AND APPEARANCE OF WITNESSES AND EXPERT WITNESSES (ARTICLES 17–23)

ARTICLE 17—SERVICE OF JUDICIAL DECISIONS, JUDGMENTS, AND VERDICTS, AND APPEARANCE OF WITNESSES AND EXPERT WITNESSES

Article 17 requires the Central Authority of the Requested State to arrange for or effect the service of notice of decisions, judgments, or other documents issued by competent authorities of the Requesting State, at the request of the Central Authority of the Requesting State.

It is expected that when the United States is the Requested State, the Central Authority will arrange to execute requests for

²¹ While restrictions under the laws of some countries require a lawyer of that country to propound the questions to the witness, it is understood that U.S. lawyers may be present and may pose questions, if not directly to the witness, then in accordance with the legal procedure of that country, either through a lawyer or judge of that country.

service under the Convention by registered mail (in absence of any request to follow a specified procedure for service) or by the United States Marshals Service when personal service is requested.

ARTICLE 18—TESTIMONY IN THE REQUESTED STATE

Article 18 states that a person in the Requested State shall be summoned to appear, in accordance with the law of the Requested State to give testimony or provide documents, records or evidence.

Under most U.S. MLATs, the person questioned in the Requested State is entitled to raise any evidentiary privileges normally available under the law of that State. However, if the witness attempts to invoke evidentiary privileges available only under the law of the Requesting State, the evidence shall nonetheless be taken, and transmitted to the Requesting State along with notice that it was obtained over a claim of privilege.²² Some OAS delegations felt that the privileges of both Requesting and Requested State should apply in such proceedings. Others, like the United States, did not agree. The United States delegation did not want the Convention to require U.S. authorities to adjudicate questions of the applicability of foreign privileges in foreign requests to the United States. The consensus reached was that the Convention would be silent on this point, allowing each Party to follow whatever approach its implementing legislation directs on this matter, which means that the United States would neither be forbidden from nor obliged to recognize privileges which exist only under foreign law.

ARTICLE 19—TESTIMONY IN THE REQUESTING STATE

Article 19 provides that upon request, the Requested State shall invite witnesses who are located in its territory 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 Requested State is obliged to inform the Requesting State promptly of the response of the witness.

ARTICLE 20—TRANSFER OF PERSONS SUBJECT TO CRIMINAL PROCEEDINGS

In some recent criminal cases, a need has arisen for the testimony at a trial in one country of a witness serving a sentence in another country. In some instances, the country involved has been willing to “lend” the witness to the United States Government, provided the witness would be carefully guarded while in the United States and returned at the conclusion of his testimony. In several situations, the Justice Department has been able to arrange for federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings.²³ Article 20 provides an express legal basis for cooperation in these matters.

²²This approach enables the execution of the request to move forward swiftly and efficiently, and allows the applicability of the privilege to be determined in the Requesting State, where the scope of the privilege and the policy reasons underlying it are best understood.

²³For 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 one states that if both the person whose presence is requested and the Requested State consent, the person in custody “shall be transferred” for the purpose articulated in the request for assistance from the Requesting State.

There have also been recent situations in which a person in custody in the United States on a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with the case. The second paragraph of Article 20 addresses this situation.²⁴

A request for transfer may be denied if the individual refuses to consent to the transfer, if the individual’s presence is needed for an investigation or criminal proceeding, or for other considerations of a legal or another nature.

This article contains the express authority and obligation for the receiving State to maintain the person in custody throughout his stay there, unless the other State specifically authorizes release. This is consistent with current Federal law on this subject, found in Title 18, United States Code, Section 3508. The article also requires the receiving State to return the person in custody to the other State, and provides that this return will occur as soon as circumstances permit, or as otherwise agreed. The transfer of a prisoner under this article requires the consent of the person involved and of both States, but the provision does not require that the prisoner consent again to his return to the State where the transfer began.

Given the obligation to return a person so transferred, the article also provides that the sending state shall not be required to initiate extradition proceedings before the status quo is restored by the return of the person transferred. The prisoner will receive credit for time served while in the custody of the receiving State.

Finally, the article requires that the stay in the Requesting State shall not exceed the lesser of either the time remaining of the sentence or 60 days. This time can be extended only if the individual and both States agree.

ARTICLE 21—TRANSIT

This article gives each country the power to authorize transit through its territory of persons being transferred to or from a third State. Notice of transit is to be made in advance of travel and agents of the Requesting State are to maintain custody of the person traveling.

Paragraph 2 provides that when air transportation is used and no landing is scheduled on the territory of the other country, no advance transit authorization is necessary.

ARTICLE 22—SAFE CONDUCT

This article provides “safe conduct” for a person who is in the Requesting State to testify pursuant to this Convention, upon advance request by the person or the sending State. Under this safe

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

²⁴See 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.

conduct, the person shall be immune from criminal prosecution and detention for acts or convictions which preceded the witness' departure from the Requested State, and shall not be required to make statements or give testimony in proceedings not mentioned in the request while he is in the Requesting State. Furthermore, the person is not to be detained or prosecuted on the basis of any statement he makes, except for contempt of court or perjury. The safe conduct would not prevent prosecution for any other crime committed while in the Requesting State pursuant to the Convention or thereafter.

This article's applicability to a person transferred under Article 21 is necessarily limited, since Article 21 requires that a person be kept in custody unless the State from which he was transferred has consented to his release.

The final paragraph states that the safe conduct guaranteed in this article expires ten days after the sending State has been notified that his presence is no longer required. It is also understood that it would not apply if he leaves the Requesting State and thereafter returns to it.

CHAPTER IV—TRANSMITTAL OF INFORMATION AND RECORDS (ARTICLES 23–25)

ARTICLE 23

This article requires that the request for testimony be accompanied with written questions or interrogatories to the extent possible or necessary.

ARTICLE 24—TRANSMITTAL OF INFORMATION AND RECORDS

This article describes the obligation to produce and provide information from the files of its government departments and agencies. The term "government departments and agencies" includes executive, judicial, and legislative units at the Federal, State and local level in the Requested State.

The first paragraph of this article obliges each State to furnish the other, upon request, with copies of publicly available records of its government agencies or departments.

The second paragraph provides that the Requested State may share with its treaty partner copies of non-public information in government files. The undertaking under this provision is discretionary. Moreover, this subsection states that the Requested State may utilize its discretion to turn over information in the files of its government departments or agencies only "to the same extent as and subject to the same conditions" as it would impose in providing such documents to its own authorities. It is intended that the Central Authority of the Requested State determines to what extent and under what conditions the information will be provided. The discretionary nature of this provision was deemed necessary because government files in each State contain certain types of information which would be available to investigative authorities in that State, but which would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or en-

danger an informant, prejudice sources of information needed in future investigations, or reveal information which was given to the Requested State in return for a promise that it not be divulged. Therefore, assistance can be denied under this paragraph and the Requested State is not required to give the reasons for the denial.

The U.S. delegation specifically discussed whether this article should serve as a basis for exchange of tax information under Title 26 United States Code, Section 6103(k)(4). It was the intention of the U.S. delegation that the United States be able to provide assistance under the Convention in tax matters and such assistance would include tax return information when appropriate. Therefore, the U.S. delegation was satisfied that this Convention 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 under this article to provide tax return information to other States.

ARTICLE 25—LIMITATIONS ON THE USE OF INFORMATION OR EVIDENCE

The first paragraph of Article 25 requires that information provided under the Convention not be used for any purpose other than that stated in the request (as required under Article 26(b)) without the prior consent of the Requested State. When the requesting State needs to disclose and use the information or evidence, in whole or in part, for purposes other than those specified, the second paragraph requires it to request authorization to do so from the requested State. The Requested State may accede to or deny the request, in whole or in part.

The overall purpose of the Convention is the production of evidence for trial, which would be frustrated if the Requested Party could let the Requesting Party see valuable evidence but could impose restrictions preventing the Requesting Part from using the evidence. For this reason, the third paragraph of this article contains an exception to these limitations for evidence "that must be disclosed and used to the extent necessary for proper fulfillment of the procedure or formalities specified in the request. . . ." This also includes some situations in which the due process guarantees of the U.S. Constitution would require disclosure of information exculpatory to the accused.²⁵ In the event that disclosure of evidence obtained under the Convention is required in a proceeding involving a matter other than that described in the request, the United States would consult in advance with the Requested State in order to seek to fashion a method of disclosure consistent with the requirements of both States.

The final paragraph states that the Requested State may request that information it provides to the Requesting State be kept confidential. Conditions of confidentiality are to be imposed only when necessary, and are to be 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 may choose to limit access to information which might endanger the safety of an informant, or unduly prejudice the interests of persons

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

not connected in any way with the matter being investigated in the Requesting State. This provision would also permit imposition of conditions of confidentiality required by the law of the Requested State. For instance, information obtained from a grand jury might be provided to OAS members only upon agreement by the latter to maintain the same degree of secrecy to which the information would be entitled in the United States.

Similar to the exception set forth in the third paragraph of this Article, the second sentence of this final paragraph recognizes that the requesting State may not always be able to maintain such confidentiality. In the event that the requesting State cannot accede to such a request, the Central Authorities shall confer in order to define mutually acceptable terms of confidentiality.

The U.S. delegation understood that this article of the Convention was not intended to apply to information which has been revealed to the public in the course of a trial or other proceeding in the requesting state, in good faith compliance with the terms of the Convention. When evidence obtained under the Convention has been revealed to the public, that information effectively becomes part of the public domain. The information is likely to become a matter of wide and common knowledge; it may be cited or described in the press and can be obtained by anyone from the court record. When that occurs, it is impossible as a practical matter for the Central Authority of the Requesting State to block the use of that information. Indeed, any effort to interfere with the use of information which is in the public domain could raise serious Constitutional problems in the United States, and that was not the intention of the negotiators. Because this issue was not formally addressed in the Convention, however, an Understanding has been proposed for inclusion in the U.S. instrument of ratification stating that the limitation will no longer apply if information or evidence is made public, in a manner consistent with Article 25, in the course of proceedings in the Requesting State.

CHAPTER V—PROCEDURE (ARTICLES 26–31)

ARTICLE 26

This article outlines the specific information which must be included in each request. It also provides that the Requested State may request additional information when necessary for fulfillment of the request and requires that, if the Requested State cannot comply with a request, it must return the request with an explanation.

ARTICLE 27

This article states that in keeping with the intention of the Parties that requests be as simple and straightforward as possible, there is no requirement under the Convention that a request be legalized or certified.

ARTICLE 28

This article requires that requests be translated into an official language of the Requested State. It is understood that requests to the United States will be translated into English.

ARTICLE 29

Article 29 of the Convention proceeds from the basic principle that the Requested State should bear all expenses incurred in the execution of a request. However, the Requesting State is to pay fees of expert witnesses and travel costs related to transportation of persons. If it appears that execution may entail unusual costs, the Parties are to confer.

ARTICLE 30

Experience has shown that as the Parties to a Convention of this kind work together over the years, they become aware of various practical ways to make the Convention more effective and their own efforts more efficient. This article encourages States to share those ideas with one another. It is anticipated that the Central Authorities for the respective parties will work closely together and that consultation between the Central Authorities is to be especially encouraged.

ARTICLE 31—LIABILITY

Some countries impose personal liability on their judges for damages resulting from action that was taken in the execution of official duties, such as freezing bank accounts, seizing records, etc. Some foreign judges do not enjoy as broad protection for official acts as that which exists for U.S. judges and prosecutors under U.S. law. Because of this potential liability, some foreign judges may hesitate to execute requests from the United States. Therefore, this article was included to shield authorities in the requested state from liability when properly executing a request under the Convention in which an inadvertent error (e.g., transposed numbers in a bank account) may have been made by an official in the requesting state. Consequently, the second paragraph of this article provides that neither Party is liable for damages that may arise from acts committed by the other Party in the formulation or execution of a request.

This article in no way creates additional liability for any official of the United States or for the United States Government, and does not alter current U.S. law in any way.²⁶

CHAPTER VI—FINAL CLAUSES (ARTICLES 32–40)

ARTICLE 32

This article contains standard language on signature by members.

²⁶See U.S.-Uruguay Mutual Legal Assistance Treaty, signed at Montevideo May 6, 1991, entered into force April 15, 1994, art. 26.

ARTICLE 33

This article contains standard language providing for ratification by OAS member States.

ARTICLE 34

This article contains standard language on accession by other States.

ARTICLE 35

This article allows reservations to be made at the time of signature, approval, ratification or accession. Reservations must concern at least one specific provision and may not be incompatible with the object and purpose of the Convention.

ARTICLE 36

Article 36 provides that this Convention shall not be interpreted as affecting or restricting obligations in effect under any other international, bilateral or multilateral convention with clauses governing specific aspects of international criminal judicial assistance, or more favorable practices of the States. This provision is important to the United States, which has signed bilateral mutual legal assistance treaties with numerous States in the region. The United States has found bilateral treaties to be especially useful instruments for bilateral law enforcement cooperation, and anticipate the negotiation of additional bilateral treaties in the future. The United States is also a party to several important multilateral conventions such as the 1988 United Nations Convention on Narcotic Drugs and Psychotropic Substances,²⁷ which provide for or affect international assistance.

Article 36 makes clear that the assistance and procedures set forth in this Inter-American Convention on Mutual Assistance in Criminal Matters shall not prevent any of the Contracting Parties from granting assistance to another Party through the provisions of other international agreements, or bilateral treaties, or through the provisions of national laws. The Parties also may provide assistance pursuant to any bilateral arrangement, agreement, or practice which may be applicable. Thus, the Convention is not intended to replace, supersede, obviate, or otherwise interfere in any way with any other bilateral or multilateral conventions on this topic which are currently in force or which may be negotiated in the future.

ARTICLE 37

This article contains standard language on entry in force of the Convention.

ARTICLE 38

This article provides that each Party with two or more territorial units in which different systems of law govern matters addressed

²⁷ Done at Vienna December 20, 1988, and entered into force for the United States November 11, 1990, 28 I.L.M. 493 (March 1989).

in this convention must state whether the Convention applies to all its territorial units.

ARTICLE 39

This article contains the standard provision concerning the procedure for denouncing the Convention. The requirement that a State must give one year's notice of intent to denounce the Convention is not unusual in multilateral conventions, and is consistent with other international conventions such as the 1988 Vienna Convention on Narcotic and Psychotropic Substances.

ARTICLE 40

This article contains language on procedures for deposits of instruments of ratification, accession, denunciation as well as reservations.

Technical Analysis of the Optional Protocol Related to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters

In May of 1992, the OAS opened for signature the Inter-American Convention on Mutual Legal Assistance in Criminal Matters (the "OAS MLAT"). The United States delegation supported the conclusion of the OAS MLAT, but also publicly expressed the view that the United States government would be unlikely to become a party unless a protocol providing for assistance in tax proceedings was agreed upon and also opened for signature.

While the OAS MLAT would be a valuable tool for obtaining assistance in a wide variety of criminal matters, it contains certain limitations regarding assistance in cases involving tax offenses. Most significantly, under Article 9(f) of the MLAT, a party may decline assistance in investigations and proceedings involving certain tax offenses. The United States delegation consistently opposed this provision during negotiations of the MLAT, but ultimately joined consensus on the Article as a whole. The United States considers criminal tax investigations to be an important aspect of a State's overall strategy for combating crime. Such investigations are also an increasingly important weapon in the battle against offenses such as drug trafficking and organized crime. As discussed below, the first article of the Protocol removes the discretion of Protocol signatories to refuse assistance on the grounds that a tax offense is involved. The second article clarifies that the limited dual criminality provision in Article 5 of the OAS MLAT should be interpreted liberally in cases involving tax offenses.

This Protocol follows a trend in international legal cooperation matters to provide greater assistance in criminal tax cases and investigations. For example, the European Convention on Mutual Assistance, opened for signature on April 20, 1959, had a provision similar to Article 9(f), making assistance in tax crimes discretionary. However, a Protocol to this multilateral convention was agreed to and opened for signature on March 17, 1978, making assistance for tax offenses mandatory.

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 history.

ARTICLE 1

Article 1 obligates parties to the Protocol to forego the exercise of the discretion provided to parties in the OAS MLAT to refuse assistance solely on the grounds that a tax offense is involved. Thus, those States which are parties both to the OAS MLAT and the Protocol may not deny assistance solely because the matter under investigation is a tax offense in the Requesting State or would be a tax offense in the Requested State. Of course, each State retains any other lawful basis for denying assistance, which is contained in the OAS MLAT or in its internal law.

ARTICLE 2

Article 2 provides that the limited dual criminality provision in Article 5 of the OAS MLAT should not be interpreted in an unduly narrow manner in cases involving tax offenses. This article mandates that parties to the Protocol not decline assistance based on dual criminality if “the act specified in the request corresponds to a tax crime of the same nature under the law of the Requested State.”

ARTICLE 3

Paragraph one through four of this article contain standard final clauses on issues such as signature, accession, ratification and reservations.

Paragraph five of this article contains language that is particularly important to the United States. The U.S. has signed bilateral mutual legal assistance treaties with numerous States in the region, with fourteen such treaties currently in force. The United States has found bilateral treaties to be especially useful instruments for bilateral law enforcement cooperation, and anticipates the negotiation of additional bilateral treaties in the future. The United States is also a party to several important multilateral conventions such as United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, with annex and final act, done at Vienna, December 20, 1988, and entered into force for the United States November 11, 1990, 28 I.L.M. 493 (March 1989), which provide for or otherwise enhance international judicial assistance.

Therefore, it is the understanding of the United States that the assistance and procedures set forth in this Protocol shall not prevent any of the Contracting Parties from granting assistance to another Party through the provisions of other international agreements, or bilateral treaties, or through the provisions of national laws. The Parties also may provide assistance pursuant to any bilateral arrangement, agreement, or practice which may be applicable. Thus, the Protocol is not intended to replace, supersede, obviate, or otherwise interfere in any way with any other bilateral or multilateral

conventions on this topic which are currently in force or which may be negotiated in the future.

Paragraphs six and seven of this article contain standard language on entry in force of the Protocol. Paragraphs eight provides that if a state party has two or more territorial units in which different systems of law govern matters addressed in the Protocol, it shall state at the time of signature, ratification or accession whether this Protocol shall apply to all of its territorial units or only to one or more of them. Paragraph nine on statements made by parties pursuant to paragraph eight is thus also not relevant to the United States.

ARTICLE 4

This article contains a standard provision concerning the procedure for denouncing the Protocol and states that the Protocol shall remain in force as long as the Convention remains in force. The requirement that a State must give one year notice of intent to terminate the effectiveness of the Protocol is not unusual and is consistent with the Convention and other international conventions such as the 1988 Vienna Convention on Narcotic and Psychotropic Substances.

ARTICLE 5

This article contains language on procedures for deposits of the Protocol with the General Secretariat of the OAS and notifications to Parties of signatures and deposits of instruments of ratification, accession, denunciation as well as reservations.

VIII. TEXT OF THE RESOLUTIONS OF RATIFICATION

Agreement with Cyprus

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 Cyprus on Mutual Legal Assistance in Criminal Matters, signed at Nicosia on December 20, 1999 (Treaty Doc. 106–35), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with Egypt

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 Arab Republic of Egypt on Mutual Legal Assistance in Criminal Matters, signed at Cairo on May 3, 1998 (Treaty Doc. 106–19), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with France

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 France on Mutual Legal Assistance in Criminal Matters, with an explanatory note, signed at Paris on December 10, 1998 (Treaty Doc. 106-17), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with Greece

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 Hellenic Republic on Mutual Legal Assistance in Criminal Matters, signed at Washington on May 26, 1999 (Treaty Doc. 106-18), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with Nigeria

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 Federal Republic of Nigeria on Mutual Legal Assistance in Criminal Matters, signed at Washington on September 13, 1989 (Treaty Doc. 102–26), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with Romania

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 Romania on Mutual Legal Assistance in Criminal Matters, signed at Washington on May 26, 1999 (Treaty Doc. 106–20), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 Trea-

ty 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with South Africa

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 South Africa on Mutual Legal Assistance in Criminal Matters, signed at Washington on September 16, 1999 (Treaty Doc. 106-36), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Agreement with Ukraine

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 Ukraine on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Kiev on July 22, 1998 (Treaty Doc. 106–16), 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 provisos, which shall not be included in the instrument of ratification:

(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 interests, 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 this 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.

Inter-American Convention on Mutual Assistance in Criminal Matters with Related Protocol

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Inter-American Convention on Mutual Assistance in Criminal Matters (“the Convention”), adopted at the Twenty-Second Regular Session of the Organization of American States (“OAS”) General Assembly meeting in Nassau, The Bahamas, on May 23, 1992, and the Optional Protocol Related to the Inter-American Convention on Mutual Assistance in Criminal Matters (“the Optional Protocol”), adopted at the Twenty-Third Regular Session of the OAS General Assembly meeting in Managua, Nicaragua, on June 11, 1993, both instruments signed on behalf of the United States at OAS Headquarters in Washington on January 10, 1995 (Treaty Doc. 105–25), subject to the understandings of subsection (a), the declaration of subsection (b) and the proviso of subsection (c).

(a) UNDERSTANDINGS.—The Senate’s advice and consent is subject to the following understandings, which shall be included in the instrument of ratification:

(1) IN GENERAL.—The United States understands that the Convention and Optional Protocol are not intended to replace, supersede, obviate or otherwise interfere with any other existing bilateral or multilateral treaties or conventions, including those that relate to mutual assistance in criminal matters.

(2) ARTICLE 25.—The United States understands that Article 25 of the Convention, which limits disclosure or use of information or evidence obtained under the Convention, shall no longer apply if such information or evidence is made public, in a manner consistent with Article 25, in the course of proceedings in the Requesting State.

(3) PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance it may provide under the Convention or the Optional Protocol 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 contemplated in the Statute adopted in Rome, Italy, on July 17, 1998, unless the Statute establishing that 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 upon 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) PROVISIO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification:

SUPREMACY OF THE CONSTITUTION.—Nothing in this Convention or the Optional Protocol 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.