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Developments in International Judicial Assistance and Related Matters

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I. INTRODUCTION

Propelled by the unprecedented growth of international narcotics trafficking in the last six months, significant developments in international judicial assistance have occurred. As the penetration of international drug trafficking into the fabric of society throughout the world and in the United States persists, governments and concerned persons will continue to improvise mechanisms to enable governments and particularly law enforcement officials to perfect international judicial assistance in the investigation and prosecution of international narcotics trafficking.

This paper traces selected developments in international judicial assistance and its role in the pervading illegal narcotics activities currently facing the world community. Since the forum takes place at an American law school, the focus will be on the policies and mechanisms of international judicial assistance in the United States. Since judicial assistance has been most effective in the United States and other common law countries when it is implemented by a treaty, the first part of the paper discusses treaty developments. In particular, the United Nations Drug Convention, which will soon come into force, has tremendous potential for strengthening international judicial assistance. Legislation, the subject of the second section of the paper, has attempted bold strokes of strengthening international judicial assistance. Our legislators, desperate to make up for lost time, are mandating new international cooperation models for not only United States law enforcement agencies, but for foreign law enforcement agencies as well. Unfortunately, our legislators are requiring sanctions too precipitously for nonfulfillment of unrealistic goals in this frontier area. The third section reviews judicial trends. Decisions by U.S. courts in implementing attempts at international judicial assistance are discussed. To have a comprehensive overview of international narcotics policy, one should also look at the role of international actors and their recent development. Unfortunately, time does not permit inclusion of these developments, except in passing.[1]

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1. For a discussion of the role of international organizations in the enforcement of international money laundering, see Zagaris, *Dollar Diplomacy: International Enforcement of*

II. TREATIES

A significant breakthrough has occurred in the treaty area. Two examples are the signing, after several years of negotiation, of the multilateral United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the Mexico-United States Narcotics Agreement. However, the inability of the United States and even the world to agree easily and quickly on appropriate bilateral treaties is exemplified by the difficulty the United States Congress and Administration are having over the composition of the Mutual Legal Assistance Treaties and with which countries the U.S. should have these agreements. This section highlights these recent examples of treaties for combatting international narcotics.

A. *The United Nations Drug Convention*

On December 19, 1988, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was signed.[2] The Convention has far-reaching provisions that go way beyond the prior draft.[3] More importantly, the fact that 106 countries of diverse composition were involved in the negotiations provides enormous political clout to the document. Of great importance are the provisions on money laundering, conspiracy, forfeiture, and adjunctive law aspects.

1. Background to the Adoption of the Convention

The background to the U.N. Drug Convention is that the General Assembly of the United Nations, by its resolution 39/141 of December 14, 1984, requested the Economic and Social Council of the United Nations to request the Commission on Narcotic Drugs to initiate, at its thirty-first session held in February, 1985, as a matter of priority, the preparation of a draft convention against illicit traffic in narcotic drugs that considered the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments.[4] As a result of this request and subsequent action by the Commission on Narcotic Drugs and the Economic and Social Council, the Secretary-General of the United Nations prepared the initial text of a draft Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Based on the

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Money Movement and Related Matters — A United States Perspective, 22 GEO. WASH. J. INT'L L. & ECON. 465 (1989).

2. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted December 19, 1988 (E/Conf./82/15), *reprinted in* 28 I.L.M. 493 (1989) [hereinafter U.N. Drug Convention].

3. For background on a draft of the Convention, see Zagaris, *U.N. Draft Convention against Traffic in Narcotic Drugs*, 2 INT'L ENFORCEMENT L. REP. 247 (1986).

4. For the history of the convention see United Nations Economic and Social Council, Final Act of the United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, Austria, Nov. 25 - Dec. 20, 1988.

comments on that draft at its thirty-second session in 1987, the Secretary-General prepared a consolidated working document which was circulated to all governments in April, 1987, and was considered at two sessions of an open-ended inter-governmental expert group. On December 7, 1987, the General Assembly adopted resolution 42/111 which gave further instructions for advancing the preparation of the draft Convention. Because the expert group had not permitted thorough consideration of all the articles, the General Assembly requested the Secretary-General to consider convening a further intergovernmental expert group, meeting for two weeks immediately prior to the tenth special session of the Commission on Narcotic Drugs in February, 1988, to continue revision of the working document on the draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and, if possible, to reach agreement on the Convention. At its tenth special session, held at Vienna from February 8-19, 1988, the Commission on Narcotic Drugs reviewed the text of the draft. It decided that certain articles thereof should be referred to the Conference to be convened for the adoption of a Convention.

The Economic and Social Council, by its resolution 1988/8 of May 25, 1988, decided to convene a conference of plenipotentiaries for the adoption of a convention against illicit traffic in narcotic drugs and psychotropic substances at Vienna from November 25 to December 20, 1988. Invitations to participate in the Conference were sent to those who had been invited to participate in the International Conference on Drug Abuse and Illicit Trafficking, held at Vienna from June 17-26, 1987. The Economic and Social Council also convened a review group for the Conference to review the draft texts of certain articles and the draft Convention as a whole to achieve overall consistency in the text submitted to the Conference. The United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances met at the Neue Hofburg at Vienna from November 25 to December 20, 1988. The Secretary-General invited to the Conference, *inter alia*: all states, specialized agencies and interested organs of the United Nations, interested inter-governmental organizations to be represented by observers, and interested non-governmental organizations in consultative status with the Economic and Social Council and other interested non-governmental organizations that may have a specific contribution to make to the work of the Conference. In addition to the 106 states represented, a multitude of specialized agencies, intergovernmental organizations, and observers from non-governmental organizations attended. The length of time during which the Convention was considered and the diverse group of participants is expected to provide wide acceptance to the Convention. Nevertheless, some parts of the Convention will be controversial.

2. Scope of the Convention

The scope of the Convention is broad. Signatory parties are required to take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective

domestic legislative systems.[5] Signatory parties are bound to enact legislation and implementing regulations. Signatory parties will carry out their obligations in a manner consistent with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other states. A signatory party must not undertake in the territory of another signatory party the exercise of jurisdiction and performance of functions that are exclusively reserved for the authorities of that other party by its domestic law.[6] Under the U.N. Drug Convention, while signatory parties (i.e., supplying countries) are expected to take action to cooperate, other parties (i.e., consuming countries) are required to respect the sovereign equality and territorial integrity of the other signatory countries.

3. Offenses and Sanctions

Article 3 defines the offenses and sanctions. It obligates the signatory parties to adopt such measures as may be necessary to establish as a crime under its domestic law, when committed intentionally, a series of offenses. Included are the following:

> (a)(i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, 1961 Convention as amended or the 1971 Convention;
>
> (a)(v) The organization, management or financing of any of the offense enumerated in (i), (ii), (iii) or (iv) above.

Two provisions concern money laundering. They are as follows:

> (b)(i) The conversion or transfer of property, knowing that such property is derived from any offense or offenses established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin or the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions;
>
> (b)(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offense or offenses.

The Article goes further and declares additional offenses, although signatory parties are obligated to criminalize the following offenses, subject to the constitutional principles and basic concepts of its legal system:

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5. U.N. Drug Convention, *supra* note 2, art. 2(1).
6. *Id.* art. 2(3).

> (c)(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offense or offenses established in accordance with subparagraph(a) of this paragraph or from an act of participation in such offense or offenses;
>
> (c)(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offenses established in accordance with this article.

Article 3 and particularly Article 3(b)(i) is likely to raise a lot of controversy. It appears to make it an offense to convert or transfer property for the purpose of providing legal counsel and defense to a defendant since it criminalizes transferring or converting money to assist a person to "evade the legal consequences of his actions."[7] This provision would seem to forbid, however, only the transfer or conversion of money to provide legal counsel if the person is guilty. Obviously, if it turns out that the defendant is not guilty for whatever reason, it would appear that the transfer or conversion of funds would be permitted. This is an odd result. Since there is no legislative history at this point, it is difficult to know exactly the meaning of the provision.

The U.N. Drug Convention obligates the parties to ensure their courts and other competent authorities can consider, presumably in providing for punishment and perhaps procedural aspects of the litigation, factual circumstances that make the commission of the offenses particularly serious, such as:

> (a) the involvement in the offense of an organized group to which the offender belongs;
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> (b) the involvement of the offender in other international organized criminal activities;
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> (c) the involvement of the offender in other illegal activities facilitated by commission of the offense;
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> (d) the use of violence or arms by the offender; and
>
> (e) the fact that the offender holds a public office and that the offense is connected with the office in question.

4. Confiscation

The inclusion in a broadly recognized multilateral convention of the crime of money laundering proffers prosecutors a new tool to wield against narcotics traffickers and especially organized criminals. Similarly, inclusion of crimes associated with actual trafficking — the organization, management or financing of the offenses — will help prosecute these organized criminals who are so clever and powerful that they can remove

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7. For background on a draft of the Convention, see Zagaris, *supra* note 3.

themselves from the transportation and initial conversion of the receipts. Significantly, the inclusion of a broad conspiracy provision should assist prosecutors in many countries who cannot show actual sales or even money laundering by some persons but who have strong evidence of participation in the overall scheme.

A key article and one likely to raise controversy concerns confiscation. In particular, the parties must adopt measures as may be necessary to enable the confiscation of:

> (a) proceeds derived from offenses established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds; and
>
> (b) narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offenses covered in Article 3, paragraph 1.[8]

The Convention also requires each party to adopt such measures as may be necessary to enable its competent authorities to identify, trace and freeze proceeds, property, instrumentalities and so forth.[9] To implement the confiscation measures, a country that receives a confiscation request from another country with jurisdiction over a covered offense must submit the request to its competent authorities for confiscation. The requested party must take measures to identify, trace and freeze or seize proceeds, property, instrumentalities or any other things. The requested party will act in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty or arrangement to which it may be bound to the requesting state. The signatory parties are obligated to seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation in confiscation.[10]

When acting in accordance with a confiscation request, a party may give special consideration to concluding agreements on:

> (1) contributing the value of such proceeds and property, or funds derived from the sale of such proceeds of property or a substantial part thereof to intergovernmental bodies specializing in the fight against illicit traffic;
>
> (2) sharing with other parties, on a regular or case-by-case basis, such proceeds of property.[11] The ability to utilize confiscated funds for combatting narcotics is an innovative mechanism to strengthen organizations such as the United Nations Fund for Drug Control (UNFDAC). The actual experience in contributory funds to intergov-

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8. U.N. Drug Convention, *supra* note 2, art. 5(1).

9. *Id.* art. 5(2).

10. *Id.* art. 5(4); Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, United States-Mexico, 28 I.L.M. 58 (1990)[hereinafter "Agreement"].

11. U.N. Drug Convention, *supra* note 2, art. 5(5)(b).

> ernmental bodies combatting narcotics and between states will be a key to continual successful operation by these persons.

If the proceeds have been intermingled with property acquired from legitimate sources, such property will, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds.[12] The U.N. Drug Convention also provides that each party can consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.[13] However, the U.N. Drug Convention states that the confiscation provisions will not be construed as prejudicing the rights of *bona fide* third parties.[14] The confiscation provisions will provide a potent new weapon in the hands of law enforcement officials. The confiscation provisions provide incentives for law enforcement agents to aggressively prosecute offenses and also provide them with the means to fight against the often well funded defendants. The rights of *bona fide* third parties are vital and undoubtedly many persons will focus on the need to strengthen their rights. This provision could be interpreted to protect persons providing legal services to defendants in narcotics cases.

5. International Judicial Assistance

The U.N. Drug Convention has several articles requiring signatory parties to provide international judicial assistance. In particular, it obligates the parties to engage in extradition, mutual legal assistance, transfer of proceedings and other forms of cooperation and training.

The signatory parties agree to include each of the offenses within the U.N. Drug Convention as an extraditable offense in any extradition treaty existing and to be concluded between parties.[15] Hence, the U.N. Drug Convention, if signed by both Columbia and the U.S., could well be the mechanism enabling Columbia to extradite narcotics traffickers to the U.S. For instance, the Convention provides that if a party making extradition conditional on the existence of a treaty is requested to extradite by a party with which it has no treaty, it can consider the U.N. Drug Convention as the legal basis for extradition in respect of any offense to which the convention applies.[16] The parties agree they will try to conclude bilateral and multilateral agreements to implement or improve the effectiveness of extradition.[17] Extradition is subject to the legal conditions of the requested party or by applicable extradition treaties, including the

12. *Id.* art. 5(6)(b).
13. *Id.* art. 5(7).
14. *Id.* art. 5(8).
15. *Id.* art. 6(2).
16. *Id.* art. 6(3).
17. *Id.* art. 6(11).

bases on which extradition can be refused.[18] In line with the principles of international extradition law, a requested state may refuse to extradite if there exists substantial grounds to believe that extradition would facilitate the prosecution or punishment of a relator due to his race, religion, nationality or political opinions or if extradition would cause prejudice for any of those reasons to any person affected by the request.[19] The signatory parties will try to expedite extradition procedures and simplify extradition requirements relating thereto for any offense to which the provisions on extradition or the U.N. Drug Convention apply.[20] If permitted by its domestic law and applicable treaties, a requested party may under urgent circumstances and at the request of a requesting country, arrest or take other appropriate measures to ensure the presence at extradition proceedings of a person who is present in its territory.[21] In the event a requested party does not extradite a person for an offense within the Convention on the basis that the relator is a national or because the offense was allegedly committed in its territory, the requested party must submit the case to its authorities for the purposes of prosecution, unless otherwise agreed with the requested party.[22]

An entire article of the U.N. Drug Convention mandates wide mutual legal assistance in investigation, prosecution and judicial proceedings for criminal offenses within the Convention.[23] Mutual legal assistance may include the following: taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures; examining sites and objects; providing information and evidence; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.[24] Any other forms of mutual legal assistance allowed by the domestic law of a requested country can be furnished.[25] An important breakthrough is that a requested party cannot refuse to render mutual legal assistance on the basis of bank secrecy.[26] Business and bank confidentiality has been a serious impediment to obtaining mutual legal assistance.[27] The assertion of bank secrecy laws as a reason for a mutual legal assistance request has endangered a great deal of litigation and promoted diplomatic tensions.[28] The parties are ob-

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18. *Id.* art. 6(5).
19. *Id.* art. 6(6).
20. *Id.* art. 6(7).
21. *Id.* art. 6(8).
22. *Id.* art. 6(9).
23. *Id.* art. 7(1).
24. *Id.* art. 7(2).
25. *Id.* art. 7(3).
26. *Id.* art. 7(5).
27. For a discussion of problems with bank and business confidentiality, see Tigar & Foyle, *International Exchange of Information in Criminal Cases*, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 61 (1983).
28. The MLATs between both the Bahamas and the Cayman Islands are limited in terms of the scope of crimes in order to safeguard the offshore financial sectors. *See, e.g.*, Zagaris, *U.S. and Cayman Islands Conclude Mutual Assistance Treaty*, 2 INT'L ENFORCE-

ligated to facilitate or encourage, to the extent consistent with their domestic law and practice, the presence availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.[29] If the signatory parties are not bound by a mutual legal assistance treaty, their custom of the provisions of the mutual legal assistance article of the convention will apply.[30] The information which must be included in a mutual legal assistance request is detailed.[31] The requesting party will not transmit nor use information or evidence received for investigation, prosecutions or proceedings other than those stated in the request without the prior consent of the requested party.[32]

A requested party may refuse a request under the following conditions: if not made in conformity with the convention; if compliance would likely prejudice its sovereignty, security, *ordre public*, or other essential interests; if a requested party could not meet the request under domestic law; and if it would be against the legal system of the requested party relating to material legal assistance for the request to be granted.[33] The requested country must provide reasons for any refusal of mutual legal assistance.[34] A requested party can postpone granting a request if it would interfere with an ongoing investigation, prosecution or proceeding. Such a situation requires the requested party to consult with the requesting party to determine if the assistance can still be reduced pursuant to conditions deemed necessary by the requested party.[35] A person from a requested country who travels to the requesting country to give evidence is given safe conduct for fifteen days after his presence is no longer required or for any other period on which the parties agree.[36]

In the Convention, new functions are provided for the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations. In particular, the Commission will be responsible for the review of the operation of the Convention.[37] It may make suggestions and general recommendations based on the examination of the information received from the parties and may call the attention of the International Narcotics Control Board, which was established by the Single Convention on Narcotic Drugs, on any matters which may be relevant to the functions of the Board. The Commission has the obligation, on any matter referred to it by the Board under Article 22, to take such action as it deems appropriate.[38] Finally, the Commission may draw the attention of non-Parties to

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MENT L. REP. 200 (1986).

29. U.N. Drug Convention, *supra* note 2, art. 7(4).
30. *Id.* art. 7(7).
31. *Id.* art. 7(10).
32. *Id.* art. 7(13).
33. *Id.* art. 7(13).
34. *Id.* art. 7(15).
35. *Id.* art. 7(17).
36. *Id.* art. 7(18).
37. *Id.* art. 21(a).
38. *Id.* arts. 21(b)-(d).

decisions and recommendations which it adopts under the Convention, so that they may consider taking action in accordance therewith.[39]

The Board has been given additional responsibilities, as a result of the Convention, with respect to the articles concerning substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances,[40] materials and equipment,[41] and commercial documents and labelling of exports.[42] The Board may call upon the party concerned to adopt such remedial measures, as shall seem necessary under the circumstances, for the execution of the provisions of those Articles.[43] If the Board finds that the party concerned has not taken remedial measures which it has been called upon to take, it may call the attention of the Parties, the Council and the Commission to the matter.[44]

The U.N. Drug Convention provides that many new weapons will be at the disposal of law enforcement officials. The binding language of the Convention, the diversity and number of countries that participated, and the length of time deliberated will make it difficult for countries to ignore the mandates of the Convention. Nevertheless, the controversial provisions, such as the apparent criminalization of the use of proceeds from crimes to pay criminal defense counsel, even before adjudication, is likely to engender debate.

Although the international control system remains an indirect system reliant on the voluntary cooperation of its participant states, the control mechanisms are increased, the ability to battle organized criminals is enhanced (i.e., through confiscation and requirements for harsher penalties), and the authority of international organizations is strengthened. The requirement that signatory parties improve their international judicial assistance, especially extradition and mutual legal assistance procedures, represents valuable progress over the prior scheme.[45]

B. *Narcotics Cooperation Agreement Between Mexico and U.S.*

In what could be a watershed development, the Governments of Mexico and the United States have concluded an agreement to cooperate in combatting narcotics trafficking and drug dependency.[46] The role of the United Nations Fund for Drug Prevention, particularly the U.N. Convention on Illicit Trafficking in Narcotics and Psychotropic Substances and the Comprehensive and Multidisciplinary Plan of Future Activities

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39. *Id.* art. 21(f).
40. *Id.* art. 12(1).
41. *Id.* art. 13.
42. *Id.* art. 16.
43. *Id.* art. 22(b)(i).
44. *Id.* art. 22(b)(iii).
45. For a discussion of prior international controls of drug abuse, see Bassiouni, *International Aspects of Drug Abuse: Problems and a Proposal*, 9 J. MARSHALL J. PRAC. & PROC. 3 (1975).
46. Agreement, *supra* note 10.

in the Control of the Improper Use of Drugs, are acknowledged at the beginning of the Agreement.

The Agreement attacks the narcotics and drug dependency problems from four major areas: (1) prevention and reduction of illicit demand for narcotics and psychotropic substances; (2) control of supply; (3) suppression of illicit traffic; and (4) treatment and rehabilitation. Perhaps the most important provision, especially for facilitating international judicial assistance, is the requirement that the signatory parties adopt the necessary measures to fulfill the obligations of the Agreement. These obligations include legislative and administrative measures which conform to the fundamental provisions of their respective national legal systems. In broad terms the Agreement also safeguards the national integrity of each signatory country. It obligates the signatory parties to fulfill their obligations under the Agreement pursuant to the principles of self-determination, non-intervention in internal affairs, legal equality, and respect for the territorial integrity of States. It also specifies that the signatory parties are not allowed by the Agreement to exercise and perform in the other signatory's jurisdiction the functions or authority exclusively entrusted to the authorities of that other signatory party by its national laws or regulations. The Agreement obligates the signatory parties to consult in advance with each other on actions that one of the parties may intend to undertake which may affect the other party in a manner inconsistent with the objects and purpose of the Agreement.

The Agreement provides that cooperative measures will be undertaken within a framework of joint responsibility and will be defined by the parties according to their budgetary capabilities through a Memorandum of Understanding. Specific areas are set forth for programs that are intended to accomplish the following:

> (a) reduce demand through prevention, treatment, and public awareness activities;
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> (b) eradicate the narcotics cultivation and establish programs for substitute crops;
>
> (c) identify and destroy narcotics processing labs and facilities;
>
> (d) regulate the production, importation, exportation, storage, distribution, and sale of inputs, chemicals, solvents, and other chemical precursors whose use is diverted to the unlawful preparation of narcotics and psychotropic substances;
>
> (e) establish systems for exchanging information on combatting narcotics trafficking and drug dependency;
>
> (f) draft such new legal instruments as the Parties consider appropriate for combatting narcotics trafficking and drug dependency; and
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> (g) in general, undertake all activities that are considered relevant to achieving better cooperation between the Parties.

Institutionally, a principal engine of the cooperation will be the

United States-Mexico Permanent Mixed Commission of Cooperation Against Narcotics Trafficking and Drug Dependency [the Commission] that will begin operating within six months from the entry into force of the Agreement. It will be composed of the coordinating operational and consultative authorities of the Parties. The Parties will designate the operational authorities. The consultative authorities will be the Foreign Ministries of the Parties. The Commission will meet every four months with the principal mission of formulating recommendations to the respective governments on the most effective form in which the cooperation under the Agreement can be provided. The Commission's recommendations will require the approval of each of the Governments to be implemented. The approval will be formalized diplomatically through Memoranda of Understanding that must be executed by the operational coordinating authorities of the Commission. Annually, the Commission will prepare a report on the implementation of the Agreement. It will describe the status of the cooperation between the Parties and will constitute the joint basis for both governments in evaluating the efforts of the Parties in combatting narcotics trafficking and drug dependency.

The Agreement will enter into force when the governments of the Parties notify each other through diplomatic channels that they have completed all their respective constitutional requirements and procedures. The Agreement continues indefinitely and can be terminated by either party at any time, provided notification is given through diplomatic channels in writing, in which case the Agreement will terminate ninety working days from the date of delivery of such notification. The signatory parties can revise the provisions and such revisions will take effect when the Governments of the Parties notify each other through diplomatic channels that they have completed their respective constitutional requirements and procedures.

The Agreement does not specifically cover money laundering related to narcotics trafficking nor does it cover forfeiture of assets. Nevertheless the Agreement is so broad, both in scope and with its Commission, that it could decide to tackle both matters within the Commission's work (i.e., by way of joint programs to exchange information and audit returns of suspected traffickers). The establishment of a Commission may well be a watershed in narcotics cooperation. In other criminal cooperation areas, the establishment of working groups has provided a dynamic element that facilitates intensive cooperation and enables governments to find innovative solutions to new and sometimes unforseen crime problems. The Commission also provides for both countries to bring together persons that will develop relationships and commitments to solving narcotics problems. In the past, as such relationships blossom and develop, they often surpass the nationalistic and domestic blinders that limit cooperation and even cause cooperation to die. Some critics may charge that the U.S. should not do business with a government that has not cooperated in the past or that is indelibly corrupt. It is correct that without the will to administer agreements they are worthless. However, even if one govern-

ment is not willing or is unable to implement an agreement, the existence of an obligation to cooperate under international law can itself cause pressure and ultimately bring down a government. Without an agreement binding a signatory party, both countries lose a potential source of persuasion. Additionally, governments change. This Agreement will continue to exist, and succeeding governments, as well as members of the Commission, may make a positive difference. The Agreement appears to represent a conscious, determined effort by the new Salinas administration to strengthen bilateral cooperation. The U.S. should wholeheartedly welcome this initiative and complement it as much as possible. Indeed, strong forces in Mexico are presently undermining and will continue to undermine this initiative. To succeed, the Mexican Government and bilateral mechanisms will require all the political support they can muster.

C. *Mutual Legal Assistance Treaties*[47]

Mutual Legal Assistance Treaties (MLATs) are vital to international judicial assistance because without them prosecutors must rely on letters rogatory and subpoenas in order to obtain information abroad. Until the last few years, the United States has lagged behind the Western European countries in concluding MLATs. As a result, our prosecutors do not have adequate tools either to obtain or provide international judicial assistance to combat narcotics trafficking. At present six proposed Treaties Relating to Mutual Legal Assistance in Criminal Matters are pending ratification in the United States Congress: the Cayman Islands;[48] Mexico;[49] Canada;[50] Belgium;[51] the Bahamas;[52] and Thailand.[53]

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47. Much of this section is drawn from Zagaris, *supra* note 1.

48. For a discussion of the success of working groups between Italy and the U.S. in the context of an MLAT see, Zagaris & Simonetti, *Judicial Assistance under U.S. Bilateral Treaties*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 219, 226-227 (M. Bassiouni ed. 1988).

49. *See* Treaty Between the United States of America and the United Kingdom of Great Britian and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, S. TREATY Doc. No. 8, 100th Cong., 1st Sess. (1987), *reprinted in* 26 I.L.M. 537 (1987) [hereinafter Cayman MLAT].

50. *See* Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance, Dec. 9, 1987, S. TREATY Doc. No. 13, 100th Cong. 2d Sess. (1988).

51. *See* Treaty Between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, Jan. 28, 1988, S. TREATY Doc. No. 16, 100th Cong., 2d Sess. (1988).

52. *See* Treaty Between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, Aug. 18, 1987, S. TREATY Doc. No. 16, 100th Cong., 2d Sess. (1988)[hereinafter Bahamas MLAT]. *See also* Zagaris, *Bahamas Agrees to a Treaty with the U.S. for Mutual Legal Assistance in Criminal Matters*, 90 TAXES INT'L 3 (1987).

53. *See* Treaty Between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters, Mar. 19, 1987, S. TREATY Doc. No. 18, 100th Cong., 2d Sess. (1988). SEE ALSO Zagaris, *Thai Government Presses U.S. Government For Help in Return of Missing Art*, 4 INT'L ENFORCEMENT L.

In the first hearing on MLATs held April 20, 1988, they appeared to sail through the Senate Foreign Relations Committee with minimal discussion, and it seemed they would be quickly ratified.[54] A MLAT is intended to enable law enforcement authorities to obtain evidence abroad in a form admissible in U.S. courts.[55] It supplements existing international arrangements.[56] Letters rogatory tend to be a slow and relatively inefficient mechanism because the requests must pass through a number of bureaucratic steps, including courts in both countries, foreign ministries, justice ministries, and in some cases, embassies.[57] Also, they can be relatively costly since the U.S. Government has had to employ private lawyers in the foreign country to succeed with the requested assistance.[58]

By contrast, MLATs permit requests to move directly from one law enforcement agency to another. The MLATs provide for a wide variety of assistance, including servicing documents, providing records, locating persons, taking the testimony or statements of persons, producing documents, executing requests for search and seizure, forfeiting criminally-obtained assets, and transfering persons in custody for testimonial purposes.[59] Once ratified, the six pending MLATs will add to the current MLATs in force with Switzerland, the Netherlands, Turkey and Italy. MLATs are more effective than letters rogatory for the following reasons:

1. They obligate each country to provide evidence and other forms of assistance, whereas letters rogatory are expected solely as a matter of comity.

2. MLATs, either by themselves or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale criminal activity, such as narcotics trafficking and white collar crime.

REP. 49 (1988).

54. For a discussion of the first set of hearings, see Zagaris *Senate Foreign Relations Gives Favorable Response to 6 MLATs*, 4 INT'L ENFORCEMENT L. REP. 197 (1988).

55. *See* Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in II INTERNATIONAL CRIMINAL LAW 151 (C. Bassiouni ed. 1986).

56. For a discussion of developments in U.S. MLAT policy, see Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467 (1985).

57. For a discussion of the use of letters rogatory to obtain assistance in criminal cases, see Chamblee, *International Legal Assistance in Criminal Case*, in I TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 188, 215-219 (Fedders ed. 1984)[hereinafter "Fedders"].

58. For a discussion of the need to employ private attorneys abroad to succeed in letters rogatory, see Elsen, *An Overview of the Use of the Compulsory Process by Federal Agencies to Gather Evidence in Administrative, Civil, and Criminal Cases — Bank of Nova Scotia, Marc Rich, Toyota Motor Corp., and Banca Della Svizzera Italiana Examined*, in Fedders, *supra* note 57, at 775, 780.

59. For a useful and comprehensive, although somewhat dated, review of the types of mutual assistance under MLATs, see Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in II A TREATISE ON INTERNATIONAL CRIMINAL LAW 189 (Bassiouni & Nanda eds. 1973).

3. A MLAT can include procedures that will allow the U.S. to obtain evidence in a form that will be admissible in U.S. courts. For example, the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad.

4. U.S. MLATs are structured to streamline, and make more effective, the process of obtaining evidence.

5. The MLAT procedure is more direct and streamlined compared to the multiple, cumbersome and uncertain procedure of the letters rogatory.

Each of the MLATs have different provisions. For instance, in the case of Canada the MLAT provides more cooperation than the others due to the shared borders, the resultant volume of criminal cases and the similarity of legal systems. Regarding Belgium, Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, applauded the fact that the U.S. had an opportunity to negotiate, in a rather short period, a MLAT with a European country that is a major commercial and financial center. In doing so, the U.S. has set the stage for MLAT negotiations with neighboring countries having legal systems similar to those of Belgium.[60]

The MLAT with Switzerland has been utilized to overcome problems with Swiss bank secrecy.[61] Similarly, MLATs may be important when dealing with inbound investment from other offshore jurisdictions, such as the Cayman Islands and the Bahamas.

Some important limitations prevent certain types of cooperation on inbound investment in both the Cayman and the Bahamas MLATs. The Cayman MLAT, which was preceded by a supplementary agreement of July 26, 1984, to the Single Convention on Narcotic Drugs, 1961, and by tremendous diplomatic friction arising out of attempts by the U.S. to enforce grand jury subpoenas against Cayman entities, including the two *Bank of Nova Scotia* cases, applies to offenses that are crimes in both the U.S. and the Cayman Islands and are punishable by more than one year's imprisonment.[62] The information may also be used in civil proceedings

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60. Hearings on Mutual Legal Assistance Treaties before the Senate Committee on Foreign Relations, 101st Cong., 1st Sess. 57 (1988) (statements of Mary V. Mochary, Principal Deputy Legal Advisor, and Mark M. Richard, Deputy Assistant Attorney General), *reprinted in* Exec. Rep. No. 8, 101st Cong., 1st Sess. 57 (1988).

61. For a discussion of the US-Swiss MLAT and Swiss banking secrecy laws, see Tigar & Doyle, *supra* note 27, at 66; Nadelmann, *supra* note 56, at 470. For a Swiss view, see Frei, *Swiss Secrecy Laws and Obtaining Evidence from Switzerland*, in Fedders, *supra* note 57, at 1.

62. In re Grand Jury Proceedings: United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); In re Grand Jury Proceedings: United States v. Bank of Nova Scotia, 722 F.2d 657 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1984); In re Grand Jury Proceedings, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1984). For a discussion of the Bank of Nova Scotia cases in the context of securing evidence abroad, see Elsen, *supra* note 68, at 782; Zagaris & Papavizas, *Recent Decisions by United States Courts on the Exercise of Subpoena Powers to Secure Evidence Abroad in*

for the recovery of unlawful proceeds from a crime within the scope of the treaty or for the collection of tax or enforcement of tax penalties resulting from the knowing receipt of such unlawful proceeds. Importantly, the agreement excludes any matters relating, directly or indirectly, to the imposition, calculation, or collection of taxes, unless this involves the unlawful proceeds of a crime covered by the treaty. The proposed Cayman MLAT applies to all offenses of ancillary civil or administrative proceedings taken by the U.S. Government or its agencies connected with, arising from, related to, or resulting from any narcotics activity referred to in Article 36 of the Single Convention on Narcotics Drugs of 1961, as amended by the protocol of 1972.

The proposed MLAT requires that, to obtain assistance, the requesting country (e.g., the U.S.) must present a request to a judge of a Grand Court in the Cayman Islands, sitting as an administrative tribunal. His decision will be final. Under the 1984 Agreement, the Assistant U.S. Attorney General was required to merely issue a certificate to the Attorney-General of the Cayman Islands. The latter was required then to issue a notice to the person within 14 days of the date of the receipt of the certificate. It was not possible to deny or even inquire about the legitimacy of the certificate. In essence, the Cayman Government gave the U.S. attorney *carte blanche* authority to ask for assistance. The proposed MLAT allows a requested state power to deny requests under five broad areas. The MLAT provides that a party cannot take compulsory measures, including a grand jury subpoena, to obtain documents located in the other's territory in respect of a criminal offense within the scope of the treaty unless the treaty obligations have first been fulfilled. Only when the possibilities of assistance under the treaty have been exhausted will the parties be able to make use of measures under other international treaties which are applicable to both.[63] The MLAT specifically provides that the treaty does not create any right on the part of a private person to obtain, suppress or exclude any evidence or to impede the execution of a request.[64]

The proposed Bahamas MLAT has limitations similar to those in the proposed Cayman MLAT. The preamble limits its purpose to that of providing cooperation relating to serious crimes, such as narcotics trafficking. The type of assistance covered is unusually broad, and encompasses the immobilization and forfeiture of assets and any other matters mutually agreed upon. It also states that it is not intended or designed to provide mutual assistance to private parties and does not allow private parties to obtain, suppress or exclude any evidence or to impede the execution of a

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Criminal Matters, in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 301, 307 (V. Nanda & M. Bassiouni eds. 1987) [hereinafter INTERNATIONAL CRIMINAL LAW].

63. Cayman MLAT, *supra* note 48, art. 17.

64. *Id.* art. 1(3).

request.[65] The crimes covered are even narrower than the proposed Cayman MLAT. Only certain enumerated crimes must be a crime in both countries and be punishable by one year's imprisonment or more. The grounds for a requested state to refuse a request is much broader than in the proposed Cayman MLAT and in other U.S. MLATs which reflects the recent uncertain criminal assistance history between the Bahamas and the U.S.

The proposed Bahamas MLAT provides that in urgent circumstances, requests may be made orally but shall be confirmed in writing. This provision allows the requesting state to take quick action (i.e., to obtain information including the immobilization of assets in the requested country). Like the proposed Cayman MLAT, the proposed Bahamas MLAT would limit the information obtained under the treaty for purposes other than those stated in the request without the prior consent of the requested state. In addition, it requires confidentiality except to the extent that the information or evidence is needed for investigations or proceedings forming part of the prosecution of a criminal offense. Once information is transmitted to a requesting state and is used in a trial, it also can be used in the requesting state for related purposes, including recovery of unlawful proceeds and the collection of tax, or enforcement of tax penalties, resulting from knowingly receiving the unlawful proceeds of an offense. The authorization of the use of information and evidence for related criminal, civil and administrative proceedings, especially for tax matters, is a significant accomplishment for the U.S.[66] The treaty provides for assistance in forfeiture proceedings. These provisions would apply, for instance, to the *Carlos Lehder* case where the U.S. would like to forfeit alleged assets of Lehder in the Bahamas.[67]

However, in May 1988, the Senate Foreign Relations Committee delayed the scheduled mark-up of the six pending MLATs at the request of Senator Jesse Helms (R-N.C.).[68] Senator Helms has effectively blocked ratification of the MLATs because of the following issues:

> 1. Many MLATs combine civil and criminal matters resulting in a tendency to reduce individual safeguards in the implementation of these treaties.
>
> 2. Foreign governments make greater use of MLATs and, in the fu-

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65. Bahamas MLAT, *supra* note 52, art. 18(3).

66. For the utility of treaties in international enforcement of tax matters, see Pansius, *Tax Crimes and Extraterritorial Discovery*, INTERNATIONAL CRIMINAL LAW, *supra* note 62, at 105, 135; Wassenaar, *Current Enforcement Priorities of the Internal Revenue Service*, in CRIMINAL TAX FRAUD 9 (BNA 1986 course handbook).

67. For a discussion of the Lehder case and the potential use of the Bahamas-US MLAT to forfeit assets in the Bahamas, see Zagaris, *Lehder Conviction Calls Into Play Proposed Bahamas MLAT*, 4 INT'L ENFORCEMENT L. REP. 151 (1988).

68. For a discussion of the controversy over the right of criminal defendants to have access to MLATs, see Zagaris, *Sen. Helms' Inquiries over Individual Rights in MLATs Delay Mark-up*, 4 INT'L ENFORCEMENT L. REP. 160 (1988).

ture, the U.S. may receive many applications from overseas to deal with individuals who may be using tax shelters in the U.S. that are considered criminal evasion abroad.

3. The U.S. has used MLATs as a fishing expedition for wholesale discovery but precludes them from procuring documents for those Americans accused by foreign governments. Additionally, MLATs do not benefit the accused when foreign governments bring the accusations. Defendants in criminal cases are not allowed to make use of these treaties. Exculpatory evidence obtained by the requesting government is not provided to the accused who is prohibited from using that evidence.

4. MLATs do not provide for cross examination of witnesses in the authentication of documents, as required by the 6th Amendment of the U.S. Constitution.

5. The MLATs do not provide for safe conduct to potential witnesses. As a result, the governments rely upon depositions rather than the appearance of witnesses at trial, which is guaranteed by the Bill of Rights. Three pending MLATs contain safe conduct provisions so a person whose appearance and testimony in the requesting country is requested under a treaty receives safe conduct while he or she is in the requesting country for such purposes.

6. Foreign governments and the U.S. rely on the word of the other treaty partner, rather than upon knowledgeable individuals, in obtaining documentary information.

7. The U.S. Government is not required to demonstrate probable cause to obtain documents under the treaties from a government thereby violating the 4th Amendment of the Constitution.[69]

On June 14, 1988, as a result of the Helms' requests, the Senate Foreign Relations Committee held additional hearings on several policy issues.[70] The focus of the hearings was the right of criminal defendants to use the Mutual Legal Assistance Treaty (MLAT) to gather and introduce evidence in criminal trials. An ancillary issue was whether the Senate should strengthen the safe conduct provisions for witnesses. Two of the witnesses, Robert Pisani, Executive Director, International Legal Defense Counsel, Philadelphia, and this writer, recommended that the Committee give its advice and consent to the MLATs despite the problems in the proposed treaties because of the important role the six countries play in solving narcotics and money laundering crimes.[71] In particular, Pisani and this writer recommended access by defendants to MLATs for criminal trials and the inclusion of safe conduct provisions to encourage witnesses

69. Helms, Remarks before the Senate Foreign Relations Committee regarding the need to review MLATs (undated and on file with the author).

70. For a discussion of the second MLAT hearings, see Ferrera, *Second MLAT Hearings Spark Debate on Policy Issues*, 4 INT'L ENFORCEMENT L. REP. 197 (1988).

71. *See* separate statements of Robert Pisani and Bruce Zagaris to the Senate Committee on Foreign Relations, June 14, 1988, *supra* note 60, at 165.

to voluntarily appear and testify in the requesting country. Philip T. White, former Director of the Office of International Affairs, U.S. Department of Justice, strongly supported each of the treaties and urged that the Committee recommend to the Senate that it give its advice and consent to the MLATs.[72] A lively debate ensued among Committee members, including Senators Helms, Kerry, and Adams, over the desirability of MLATs without recommended changes.[73]

The controversy delayed the report of the Senate Foreign Relations Committee on the six MLATs, and the inability to put them on the consent calendar in the waning days of the current Session meant that they would not be ratified until 1989.[74] Ironically, the Bahamas Government, on October 17, made press releases and sent a letter to Senator Claiborne Pell, Chairman, Committee on Senate Foreign Relations, castigating the U.S. Senate for not being able to ratify the MLAT after the U.S. and the Committee so soundly criticized the Bahamas for its lack of cooperation.[75] In recognition of the need for improved MLAT policy, the Anti-Drug Abuse Act of 1988 mandates that the Attorney General prepare model MLATs. More than likely, the Senate will ratify all of the pending MLATs in this session of Congress.

The treaty and related agreements area has experienced a dynamic development with the signing of the U.N. Drug Convention. The potential for cooperation with countries such as Mexico through bilateral agreements remains significant. Institutionally, the Commissions in both the U.N. Drug Convention and the U.S.-Mexico Agreement can play important roles. For instance, in the U.S.-Mexico Agreement the Commission has both operative and consultative functions. The preparation of annual report enables it to engage in planning. Only by enabling dedicated professionals in law enforcement to work together over time will cooperative law enforcement personnel be able to triumph over organized traffickers. Much work and progress remains in the MLAT area. However, since Congress in the Anti-Drug Abuse Act has requested the Department of Justice to give priority to preparation of model extradition agreements and MLATs, the U.S. should make progress in this area.

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72. *See* statement of Philip T. White to the Senate Committee on Foreign Relations, June 14, 1988, *Id.* at 207.

73. *See* transcript of the hearing before the Senate Foreign Relations Committee (June 14, 1988), at 12-55 (on file with the Committee and the author).

74. For a discussion of the attempts to report them out of the Committee, see *Senate Foreign Relations Committee MLAT Vote Postponed*, 4 INT'L ENFORCEMENT L. REP. 266 (1988); Zagaris, *Senate Committee Approves the Bahamas And Mexico MLATs Over Helms Objections*, 4 INT'L ENFORCEMENT L. REP. 308 (1988).

75. For a discussion of the Bahamas Government complaints over the lack of cooperation by the U.S., see Zagaris, *Bahamas Government Criticizes Inability of U.S. Government to Ratify the U.S.-Bahamas MLAT*, 4 INT'L ENFORCEMENT L. REP. 16 (1988).

III. LEGISLATIVE DEVELOPMENTS

During the last five years, at least three significant pieces of legislation have substantially improved opportunities for U.S. law enforcement officials and courts to engage in international judicial assistance. The three pieces of legislation are the Comprehensive Crime Control Act, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Act of 1988. This discussion is limited primarily to discussing the most recent statute — The Anti-Drug Abuse Act of 1988.

A. *Comprehensive Crime Control Act of 1984*

Part of the difficulty in effective international judicial assistance in international narcotics enforcement lies in the limitations imposed by U.S. internal legislation. The U.S. can improve its ability to engage in international judicial assistance by improving its own legislation. In 1984, a series of hearings on money laundering and tax evasion due to offshore tax havens called attention to limits on the international judicial cooperation due to the federal rules. As a result of provisions added at the last minute to the Comprehensive Crime Control Act of 1984, the U.S. substantially eliminated many of these obstacles. The Act liberalizes the rules concerning introduction of foreign business records in U.S. federal courts. It makes authentication of foreign business records easier and eliminates the need for live testimony in most cases. The Act also provides for the suspension of the statute of limitations for up to three additional years in criminal cases if the U.S. Government can make a reasonable showing that evidence is located in a foreign country and if it has made an official request for the evidence. The new law also authorizes federal courts to extend the "Speedy Trial Act" deadline by up to one year and the statute of limitations for up to three years when foreign evidence is sought. Exchange of information is mandated by requiring that the Department of Justice be notified when a pleading is filed in a foreign country in opposition to the U.S. Government's official request for evidence for use in a U.S. criminal proceeding.[76]

B. *1988 Anti-Drug Abuse Act*

In the 1988 Anti-Drug Abuse Act,[77] Congress strengthened the reporting and monitoring required by financial institutions. Congress also ordered the Department of Treasury to attempt to create an international currency control agency to assist with enacting uniform money laundering laws and to collect and analyze the currency transaction reports. The same legislation requires the conclusion of agreements by the U.S. with countries to expand access to information on transactions involving large

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76. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

77. For a discussion regarding the Anti-Drug Abuse Act §§ I - III(B), see Zagaris, *supra* note 1.

amounts of U.S. currency. It also requires the conclusion of agreements by the U.S. with countries to expand access to information on transactions involving large amounts of U.S. currency and requires the instigation of sanctions against countries which refuse to conclude such agreements. Congress requires the Department of Justice to prepare model extradition and mutual legal assistance treaties. The Act calls for the negotiation of an agreement with Western Hemisphere countries to form a multinational force to conduct actions against illegal drug smuggling organizations and calls also for international negotiations to establish an international drug force to pursue and apprehend major international drug traffickers. More emphasis could and should have been placed on international criminal courts. Most importantly, for purposes of international judicial assistance, the Act requires the President begin discussions with foreign governments to investigate the establishment of an international criminal court for persons accused of engaging in international drug trafficking or having committed international crimes. Another important component of international judicial assistance in the Act is that several provisions call for technical assistance to other governments. The technical assistance will be provided bilaterally through intergovernmental organizations.

1. Creation of International Agency To Collect, Monitor and Analyze Currency Reporting

The Act requires the Secretary of the Treasury to negotiate with finance ministers of foreign countries to establish an international currency control agency ("ICCA").[78] Its purpose would be to:

> (1) Serve as a central source of information and database for international drug enforcement agencies;
>
> (2) collect and analyze currency transaction reports filed by the ICCA's member countries; and
>
> (3) encourage the enactment of uniform cash transaction and money laundering statutes by member countries.

This provision appropriately identifies and requires U.S. leadership towards the establishment of a multilateral regulatory approach. The establishment of the ICCA will probably take at least a few years since it is a new idea and confidentiality is a priority and a sensitive matter among many governments.

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78. For a discussion of the US-Swiss MLAT and Swiss banking secrecy, see Tigar & Doyle, *supra* note 27, at 66; Nadelmann, *supra* note 56, at 470; for a Swiss view, see Frei, *Swiss Secrecy Laws and Obtaining Evidence from Switzerland*, in Fedders, *supra* note 57, at 1.

2. Kerry Amendment to Restrict International Laundering of U.S. Currency

A last-minute amendment by Sen. Kerry (Amendment No. 3697) was adopted by a vote of 85-3 in the Senate version. It requires the United States Government to undertake international negotiations to expand access to information on transactions involving large amounts of U.S. currency, wherever those transactions occur worldwide.[79] At the beginning of the section Congress makes the finding that international currency transactions, especially in U.S. currency, which involve the proceeds of narcotics trafficking, are the engine of narcotics trade in the U.S. and worldwide and hence is a threat to the national security of the U.S. The amendment requires the Treasury to enter into negotiations with the appropriate financial supervisory agencies and other officials of all foreign countries, the banks and other financial institutions which do business in U.S. currency. It obligates Treasury to assign highest priority to countries whose financial institutions the Secretary of the Treasury determines, in consultation with the Attorney General and the National Director of Drug Policy, may be engaged in currency transactions involving the proceeds of international narcotics trafficking, particularly U.S. currency from drug sales in the U.S.

The provisions state that the purposes of negotiations are:

> (1) To conclude one or more international agreements to ensure that foreign banks and other financial institutions maintain adequate records of large U.S. currency transactions; and
>
> (2) to establish a mechanism whereby such records may be made available to U.S. law enforcement officials.

In particular, the Treasury is to further cooperative efforts, voluntary information exchanges, the use of letters rogatory, and mutual legal assistance treaties.

The section requires reports to determine non-compliance by foreign governments. Not later than one year after the enactment, the Secretary of Treasury must submit an interim report to the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Committee on Banking, Housing, and Urban Affairs of the Senate, on progress in the negotiations. Not later than two years after enactment, the Secretary must submit a final report to such Committees and to the President on the outcome of those negotiations and identify countries whose financial institutions the Secretary has cause to believe are engaging in currency transactions involving the proceeds of international narcotics trafficking, and who have not reached agreement with U.S. authorities on a mechanism for exchanging adequate records on international currency transactions in connection with narcotics investigations and

79. Anti-Drug Abuse Act of 1988, 31 U.S.C. § 5311 (1988).

proceedings.

The President must mete out stiff penalties on recalcitrant governments. If, after receiving the advice of the Secretary of the Treasury and in any case at the time of receipt of the Secretary's report, the Secretary determines that a foreign country:

> (1) Has jurisdiction over financial institutions that are substantially engaging in currency transactions affecting the U.S. which involve the proceeds of international narcotics trafficking;
>
> (2) such country has not reached agreement on a mechanism for exchanging adequate records on international currency transactions in connection with narcotics investigations and proceedings; and
>
> (3) such country is not negotiating in good faith to reach such an agreement.

The President must impose appropriate penalties and sanctions including temporarily or permanently:

> (1) Prohibiting such persons, institutions or other entities in such countries from participating in any U.S. dollar clearing or wire transfer system; and
>
> (2) prohibiting such persons, institutions or entities in such countries from maintaining an account with any bank or other financial institution chartered under the laws of the United States or any State.

However, the President may certify to Congress that it is in the national interest that these penalties should be delayed or waived. In addition, financial institutions in such countries that maintain adequate records will be exempt from such penalties and sanctions.

For purposes of the section, U.S. currency is defined as Federal Reserve Notes and U.S. coins. The term "adequate records" is defined as records of U.S. currency transactions in excess of $10,000, including written documentation by the person initiating the transaction of the source of the currency being deposited or transferred, or other records of comparable effect.

The section is designed to strike a blow at jurisdictions where money laundering occurs and to cut their ties to the U.S. banking system through sophisticated wire transfer systems. Although the purpose of the Kerry amendment is laudable, its thrust is misdirected. The legislative history admits even with strict record keeping requirements in the U.S., it is difficult to trace money laundering. In effect, the legislation seeks to impose on foreign governments the requirements of the U.S. Bank Secrecy Act. Ironically, although the U.S. Government, and particularly Congress, castigated the Bahamas, the Cayman Islands, Mexico and other governments for not concluding agreements, the efforts of the U.S. Government have been deplorable in this connection. The Criminal Division of the U.S. Department of Justice has insufficient resources to conclude extraditions and MLATs. The Senate Foreign Relations Committee is so

divided, including indecision on the desirability of even having treaties with governments such as the Bahamas and Mexico, that the Senate did not ratify the six pending MLATs, many of which were concluded more than two years ago. In effect, the Kerry section duplicates section 1363 of subtitle H of the Anti-Drug Abuse Act of 1986. In particular, section 1363 provided that the Treasury, in consultation with the Board of Governors of the Federal Reserve System, must initiate discussions with the central banks, or other appropriate government authorities of other countries, and propose that an information exchange system be established to assist the efforts of each participating country to eliminate the international flow of money derived from illicit drug operations and other criminal activities. Two years after the enactment of section 1363, little, if any, progress is evident. Not one agreement has been concluded on an information exchange system. Nor are any agreements imminent.[80]

3. Provisions on Extradition

Section 7087 of the ADAA amends 18 U.S.C. section 3184 to allow the filing of an extradition complaint and the issuance by a judge or magistrate of the United States District court for the District of Columbia of a warrant of apprehension for a person charged whose whereabouts within the U.S. are not known.[81] Prior to the amendment, a judge or a duly authorized magistrate could only issue a warrant of apprehension for a person whose extradition was sought from the U.S. if the complainant "reasonably and in good faith" believed the person could be found within the court's jurisdiction.[82] If the requesting country did not know where in the U.S. the relator (charged person) might be found, or whether the person was in the U.S. at all, no warrant of apprehension could be issued.

4. Title IV — Cooperation with International Organizations and Assistance to Foreign Governments

The enactment of the Anti-Drug Abuse Act has significant international law policy provisions in Title IV, referred to as "international narcotics control."[83]

Section 4101 calls for the coordination of efforts by member nations of the Organization of American States (OAS) to fight the illegal drug trade. The section explains that events in drug source and transit coun-

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80. For a discussion of § 1363 of the money laundering provisions of the Anti-Drug Abuse Act of 1986, see Zagaris, *supra* note 1, at 470.

81. For a discussion of the extradition provisions of the new Act on which this account relies in part, see Abbell, *Congress Passes First Substantive Amendment to United States Extradition Laws In More than 100 Years*, 4 INT'L ENFORCEMENT L. REP. 414 (1988).

82. Shapiro v. Ferrandina, 478 F.2d 894, 899 (2d Cir. 1973), *cert. denied*, 414 U.S. 884 (1973).

83. For a discussion in the Act on its bill form, see Smith, *Omnibus Drug Bill Passes and Has International Implications*, 4 INT'L ENFORCEMENT L. REP. 297 (1988); Ferrera, *Omnibus Drug Bill II: On a Fast Track*, 4 INT'L ENFORCEMENT L. REP. 1980 (1988).

tries in the Western Hemisphere require international agreement on the formation of a multinational force to conduct operations against illegal drug smuggling organizations. It states that the U.S. Government should try to initiate diplomatic discussions through the OAS to establish and operate a Western Hemisphere anti-narcotics force. The Act prescribes an important limitation to the participation of the U.S. It provides that the U.S. will provide operations of such an anti-narcotics force, but believes that the personnel for such a force should be provided by the countries with the most serious threat from drug trafficking operations. Section 4101(e) also urges the President to seek the establishment "in each of the relevant regions of the world" of other multilateral anti-narcotics forces.

Section 4102 supports the United Nations efforts to stop illegal drug trafficking. It encourages the U.N. to explore ways and means to establish an international mechanism aimed at stopping the trafficking of illegal drugs. Section 4103 asks the President to call for international negotiations to establish an international drug force that will pursue and apprehend major international drug traffickers. In section 4104 Congress directs the President to convene, as soon as possible, an international conference on combatting illegal drug production, trafficking and use in the Western Hemisphere, involving the highest-ranking law enforcement officers, and other appropriate officials from every government in the Western Hemisphere. Section 4106 states that the Assistant Secretary of State for International Narcotics Matters should seek to establish a regional anti-narcotics training center in the Caribbean. In this regard, it should contribute funds or other resources to such a center and seek such contributions from other countries.

The Act contains authorizations to accomplish the international criminal cooperation initiatives. It authorizes the appropriation of $3 million for fiscal year 1989, under section 301 of the Foreign Assistance Act of 1961, for U.S. contributions to multilateral and regional drug abuse control programs. The $3 million is allocated as follows:

> (1) $2 million for a U.S. contribution to the United Nations Fund for Drug Abuse Control;
>
> (2) $600,000 for the OAS Inter-American Drug Abuse Control Commission (CICAD) Legal Development Project. The proportion of the U.S. contribution to the total funds of this project may not exceed the proportion of the U.S. contribution to the OAS budget as a whole for that fiscal year;[84]
>
> (3) $400,000 for the CICAD Law Enforcement Training Project, with

84. For a discussion of the CICAD legal development project, see Zagaris, *Inter-American Drug Abuse Commission Progresses on Legal Development Project*, 4 INT'L ENFORCEMENT L. REP. 186 (1988); Zagaris, *Inter-American Drug Abuse Control Commission Holds 3rd Session*, 4 INT'L ENFORCEMENT L. REP. 114 (1988).

the same limitation.[85]

Section 4108 calls for the President to begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court for persons accused of having engaged in international drug trafficking or having committed international crimes.[86]

Section 4204 earmarks no less than $2 million to implement chapter 5, part II of the Foreign Assistance Act of 1961. This section relates to international military education and training for the limited purposes of education and training in the operation and maintenance of equipment used in narcotics control interdiction and eradication in eligible countries in Latin America and the Caribbean. Eligible countries are only those that are major illicit drug-producing or major drug-transit countries that have democratic governments and whose law enforcement agencies do not engage in a consistent pattern of gross violations of internationally recognized human rights. Section 660 of the Foreign Assistance Act of 1961 relating to police training is waived.

Under section 4205, military assistance is provided to improve the ability of so-called friendly governments to control illegal narcotics production and trafficking. It is also used to strengthen the bilateral links of the U.S. with friendly governments by offering concrete assistance in this area, and it strengthens respect for internationally recognized human rights and the rule of law in efforts to control illicit narcotics production and trafficking. A limited waiver is also provided from section 660(a) of the Foreign Assistance Act of 1961.

Section 4206 requires the reallocation of funds appropriated for security assistance from those countries not taking adequate steps to halt illicit drug production or trafficking to those countries that have met their illicit drug eradication targets or have otherwise taken significant steps to halt illicit drug production or trafficking.

Individual sections in the Act provide assistance for Bolivia, Peru, Mexico, Columbia, Pakistan, Afghanistan and Laos. In addition, $1 million is earmarked for fiscal year 1989 to provide more narcotics control assistance to countries that are drug-transit countries but are not major drug-transit countries.

Subtitle G requires the State Department to become more active. In section 4602, $5 million is authorized for appropriation without fiscal year limitation for use in paying rewards for information. Section 4603 provides that a passport cannot be issued to an individual who is convicted

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85. For a discussion of the proposals for CICAD to conduct training, see Zagaris, *Inter-American Drug Abuse Commission Holds First Session*, 4 INT'L ENFORCEMENT L. REP. 123, 125 (1987).

86. For a discussion of the provisions in the Act calling for initiation of discussions by the U.S. on the feasibility and advisability of establishing an international criminal court, see Zagaris, *Senate Resolution Instructs President to Begin Discussions on the Creation of an International Criminal Court*, 4 INT'L ENFORCEMENT L. REP. 348 (1988).

of a felony drug offense under state or federal law, or of a misdemeanor offense in an individual case. Section 4603 cannot be used for a first conviction misdemeanor that involves only possession of a controlled substance. A federal drug offense includes violations of the Bank Secrecy Act or the Money Laundering Act if the Secretary of State determines that the violation is related to illicit production of, or trafficking in, a controlled substance.

Section 4604 requires the Department of State, Customs Service and the Immigration and Naturalization Service to develop a comprehensive machine-readable travel and identity document border-security program that will improve border entry and departure control through automated data capture of machine-readable travel and identity documents. It requires these agencies to submit to Congress and the President, within sixty days, a detailed implementation plan for the program. The program must include an integrated cooperative data exchange system that will incorporate law enforcement data on narcotics traffickers, terrorists, convicted criminals, fugitives and others currently documented in the "Lookout Systems" of all three agencies and departments. Developing the program requires integration of the following documents which must be machine-readable: border crossing cards, alien registration, pilot's licenses, passports and visas. The agencies designated to contribute to the integrated cooperative data-exchange system and to update such information on no less than a monthly basis are: the Drug Enforcement Administration; the Department of Alcohol, Tobacco and Firearms; the Internal Revenue Service; the Federal Aviation Administration; the U.S. Marshals Service; and the U.S. Coast Guard. $23 million is authorized for the program ($7 million for Customs; $7 million for I.N.S.; and $9 million for the State).

Section 4605 finds that the Secretary of State, under section 1233 of the Foreign Relations Authorization Act, fiscal years 1986 and 1987, is required to increase U.S. efforts to negotiate updated extradition and mutual legal assistance treaties, relating to narcotics offenses, with each major drug-producing country. Section 4606 requires that U.S. diplomatic missions in each major illicit drug-producing or drug-transit country expand their investigative activities with respect to illicit drug use and trafficking by U.S. Government personnel and their dependents. The section appropriately notes that much greater international law enforcement cooperation is required in combating the illicit drug problem. Section 4606 requires the Secretary of State and the Attorney General to jointly develop a model extradition treaty with respect to narcotics-related violations (including extradition of host country nations), a model mutual legal assistance treaty and model comprehensive anti-narcotics legislation. The Secretary of State must report to Congress not later than six months after the Act on actions taken to implement section 4605.

Congress in section 4607, urges the Secretary of State to permit the assignment of additional DEA agents to U.S. diplomatic missions in foreign countries in which illicit narcotics production or trafficking is, or is

likely to become, a significant problem. Section 4801 (subtitle I) provides that it is the consensus of Congress that agencies of the intelligence community should be more actively involved in the effort to combat illicit international drug trafficking.

The Act also contains provisions which, on their face, have no international criminal law implications but which will be significant in an international law context. For instance, section 7001 of Title VII prescribes the death penalty for drug-related killings. Many governments refuse extradition on the grounds that the relator is likely to incur the death penalty.[87] The abolition of the death penalty is based on humanitarian considerations and public policy. In Western Europe the extradition policy on cases wherein the death penalty can occur is based on a long history of opposition to the death penalty. The policy is contained in a number of constitutions, such as those of the Federal Republic of Germany, Italy, the Netherlands and the Scandinavian countries. The prohibition against extradition, in cases where the death penalty may be imposed, is also contained in the Draft Inter-American Convention on Extradition,[88] and the Harvard Research Draft on extradition.[89] It violates public policy to indirectly reach the same outcome through extradition if the requesting state has the death penalty. This is not the case if the requesting state promises not to execute the relator once extradited.[90]

If the United States wants to extradite and obtain mutual assistance in international cases, as it obviously must in order to prosecute cases against major drug kingpins such as Carlos Lehdrer, it will need to increasingly conclude conventions with conditional extradition provisions for death penalty cases. Otherwise, it will lose ground on obtaining international cooperation. A case that is now pending involves an extradition request by the U.S. Government from Canada, for Charles Ng, a 27-year old former U.S. marine.[91] Mr. Ng is wanted for the murders of at least twelve people in California. The extradition treaty between the U.S. and Canada allows Canada to invoke a provision that enables it to refuse extradition or require the U.S. to guarantee that the relator will not be executed. There have been at least two other cases involving extradition requests by the U.S. to Canada, where the death penalty was potentially at issue.

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87. For an excellent discussion of the death penalty and extradition see BASSIOUNI, II INTERNATIONAL EXTRADITION UNITED STATES LAW AND PRACTICE, ch. VIII, § 5.

88. For an example of the conditional extradition, see the Extradition Treaty between the United States and Israel, Dec. 10, 1962, art. VII, 14 U.S.T. 1707, T.I.A.S. No. 5476 (entered into force Dec. 5, 1963).

89. O.A.S. Doc. OEA/ser. P./AF./doc. 326/73, art. 10 (1973).

90. *Draft Convention on Extradition*, 29 AM. J. INT'L L. 188 (Supp. 1935). For the European perspective, see Bassiouni, Lahey & Sang, *La peine de mort aux Etats Unis-L'Etat de la questions en 1972*, in REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 23 (1973).

91. For a discussion of the Ng and other Canadian cases, see Burns, *With Death at Issue, Can Canada Wash Its Hands?* N.Y. Times, Nov. 1, 1988, at A4, col. 3.

In 1985, the U.S. requested the extradition of Mr. Kindler, one of two Philadelphia men convicted in 1984 for first-degree murder of a robbery accomplice who had been beaten to death with a baseball bat and dumped into the Delaware River. John Crosbie, the Justice Minister of Canada, approved his extradition in January, 1986, "to discourage those who commit murder in a foreign state and seek haven in Canada hoping to avoid the death penalty." However, Kindler escaped in October, 1986. Last month he was arrested again in New Brunswick. The Canadian court has stayed the minister's order on the basis that extraditing Kindler may deny him his rights to "life, security and liberty" under Canadian law.

In 1983, the request to extradite Tony Ng (no relation to the above) to the U.S. was granted only after the State of Washington agreed it would not seek the death penalty even though the crime involved the murder of thirteen people in a Chinese gambling club in Seattle. Mr. Ng eventually received seven consecutive life terms for his role in the affair.

5. Transportation of Witnesses in Custody in Foreign Countries to the U.S. to Testify in Criminal Proceedings

The Act added a new section 3508 to Title 18 of the U.S. Code. The new section authorizes the Attorney General to transport a witness who is in custody in a foreign country to the United States, in custody, for the purposes of appearing and testifying in a state of federal criminal proceeding. The Attorney General is to return the witness to a foreign country upon completion of his testimony in the U.S.

Before this new provision, such a person in foreign custody could only be brought to the U.S. under a state or a federal material witness statute.[92] Because the federal statute does not allow the detention of a witness if his testimony can be adequately obtained under a deposition, it was often debatable if sufficient reasons existed to hold such a witness in custody for a federal criminal proceeding.[93] An additional problem was that the prior law makes it difficult for the U.S. to return a witness to the country from which he was in custody, due to complications in the extradition and immigration laws.

If a mutual assistance agreement exists between the U.S. and the foreign country in which the witness is in custody, and the MLAT provides for the transfer and return of the witness, section 3508 will not apply. The new section 3508 will not work if the foreign country does not want to send the witness. Unless a treaty covers the case, a government will not require a person in custody in that country to go, in custody, to the United States and remain under custody in the U.S. pending his appear-

92. For a discussion of the material witness statute, see 18 U.S.C. § 3144. *See also* Zagaris, *Inquiries over Individual Rights in MLATs Delay Mark-Up*, 4 INT'L ENFORCEMENT L. REP. 160 (1988).

93. For a discussion of the requirements for bringing such a witness from abroad, see 18 U.S.C.A. § 3508 (West Supp. 1989).

ance as a witness. One commentator points out that the statute gives the Attorney General total discretion whether to request the temporary transfer to the U.S. of a witness in custody in a foreign country.[94] Although this discretion could be exercised to the detriment of a defendant whose case requires the testimony of a witness, courts hopefully will supervise this provision so that it applies fairly to both sides.

6. Transfer of Americans Convicted in Foreign Countries of Offenses Committed After October 31, 1987

The Act adds a new section 4106A to Title 18 of the United States Code. The new section allows the transfer of Americans convicted in foreign countries of offenses committed after October 31, 1987. Prior implementing legislation did not specify how such offenders could be released on parole or supervised release in the U.S. prior to completion of their full sentence less credits for good time. The new section will assist in facilitating continued transfers to the U.S. of American offenders convicted in foreign countries with which the U.S. has prisoner transfer treaties in force.

Under section 4106A, the U.S. Parole Commission will make the release determination for a returning offender by applying the sentencing guidelines as if the offender were convicted of the same offense in the U.S. and sentenced by a U.S. district court. The Parole Commission must consider the recommendation of the U.S. Probation Service, on the basis of an investigation analogous to a presentence investigation done pursuant to 18 U.S.C. section 3552 and information that the sentencing country will provide. The Parole Commission can make a determination outside the guideline range on the basis that a court may depart from that range. The legislative history explains that the Parole Commission can take into account disparate conditions in foreign prisons and the treatment of persons arrested by foreign authorities (i.e., torture in the country or even abuse during interrogation). Although not mentioned in the legislative history, the considerably excellent conditions (i.e., dinners and sex brought from the outside, virtually unlimited visitors and visits) can influence the Parole Commission to treat a returning American more harshly.

Within 45 days of the Parole Commission's determination, the offender and the U.S. can appeal the determination as if it were a sentence imposed by a U.S. District Court on a defendant convicted of an offense committed after October 31, 1987.[95] Under section 4106A(b)(3), the supervision of a transferred offender lies in the U.S. district court for the

94. For a discussion of such a MLAT provision, see Mutual Legal Assistance Treaty, June 12, 1981, United States-Netherlands, art. VII, T.I.A.S. No. 10734.

95. For a useful discussion and policy commentary on new § 3508, see Abbell, *Congress Passes Statute to Permit Witnesses in Custody in Foreign Countries to Come to the United States to Testify in Criminal Proceedings*, 4 INT'L ENFORCEMENT L. REP. 418 (1988).

district in which the offender resides.

Several other changes were made to enhance the operation of U.S. prisoner transfer treaties. 18 U.S.C. section 4109 is amended and the counsel can be appointed and compensated for work under the Criminal Justice Act (18 U.S.C. section 3006A) for an indigent transferee in connection with the Parole Commission's determination of such transferee's period of incarceration and supervised release, pursuant to 18 U.S.C. section 4106A, and in connection with the appeal of that determination. 18 U.S.C. section 4100(b) as amended allows the appointment of a guardian *ad litem* on behalf of an American offender abroad who is believed, by the officer who verifies the consent of such offender to transfer to the U.S., to be mentally incompetent or otherwise incapable of knowingly and voluntarily consenting to the transfer. 18 U.S.C. section 4109 as amended permits the payment of travel expenses and compensation to a guardian *ad litem* for an indigent U.S. offender whose consent to transfer to the U.S. under a prisoner transfer treaty must be given by such a guardian.

Some Americans serving time abroad, despite the new provisions, may be reluctant to return with the new sentencing guidelines offering less flexibility than the term previously under the pre-November 1, 1987 guidelines.[96]

The United States has made significant gains in enacting legislation making the use of foreign evidence easier. The initiative by Congress to create an international currency agency to collect, monitor and analyze currency transaction reports is laudable. Although it will take some time to reach an international accommodation, U.S. leadership is helpful. The Kerry Amendment to restrict international laundering of U.S. currency is misdirected and has a taste of imperialism that will generate a negative response. However, Title IV of the Anti-Drug Abuse Act, which mandates increased cooperation with international organizations and technical assistance to foreign governments, is a step in the right direction. However, an approach which encompasses more resources and is more broadly directed is required. For instance, rather than a strike force, law enforcement needs a comprehensive approach that includes criminal justice policy, legislative policy, law enforcement policy to implement the goals, laws and agreements, and courts to adjudicate disputes. Obviously, a strike force is only a small part of the criminal justice system. More importantly, an international court to resolve disputes is badly needed, especially when government leaders and government entities are charged with offenses of narcotics and narcotics related matters. Regionally, the Council of Europe and the European Committee on Crime Problems serves as a model that does many of the comprehensive criminal policy that is required. The U.S. has an important role to play in providing technical assistance in law enforcement, especially in areas such as asset forfeiture

96. For a discussion of the legislative history of this section, see 134 Cong. Rec. H11256 (daily ed. Oct. 21, 1988).

and technology for investigation.

IV. JUDICIAL DEVELOPMENTS

In the last year or so, the courts have been much more amenable to allowing U.S. and foreign prosecutors to obtain information on business and bank records when money laundering and narcotics trafficking is concerned. They have started allowing compelled consent decrees whereby grand jury targets are required to sign a statement allowing foreign banks to provide account information. However, as the recent decision of the District of Columbia Circuit demonstrates, the willingness of U.S. courts to enforce grand jury subpoenas for foreign bank records depends on the factual showing that is made. This discussion includes cases that deal not only with narcotics trafficking, but also related penetration of money launderers and persons charged with financial crimes.

A. *Enforceability of Grand Jury Subpoenas for Foreign Bank Records*[97]

Many cases involving organized traffickers concern efforts by U.S. prosecutors to obtain financial information from foreign banks in order to prosecute alleged traffickers and their managers on money laundering, racketeering, and tax crimes. Since the managers and bosses of the organized drug rings are smart enough to hire carriers (also known as "mules") and smurfs to launder drug profits, the U.S. and other governments can often only successfully establish enough evidence to convict them of financial crimes. This often involves penetrating foreign bank records.

A U.S. Court of Appeals for the District of Columbia Circuit opinion has come to a much different conclusion from the Court of Appeals for the 11th Circuit on the propriety of a United States court enforcing a subpoena requiring a bank to produce records located abroad relating to transactions taking place abroad. The case *In re: Sealed Case*, Nos. 87-5208 and 87-5209 (August 7, 1987) involves a grand jury subpoena for documents created and held in the bank's branch office in "Country Y," a bank secrecy jurisdiction.[98] The bank itself does business in many countries, including the U.S. and Country Y, and is owned by "Country X." In response to the bank's refusal to comply with the subpoena on the basis that it would violate the laws of Country Y, and with a subsequent U.S. district court order to do so, the district court held a show cause hearing and issued an order holding the bank in civil contempt. To enforce its order, the court ordered the bank to pay a fine of $50,000 per day, until it complied with the court's production order. It stayed its order pending appeal. On appeal the Court of Appeals held that the contempt order

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97. Subsections A and B of this section appear in Zagaris, *supra* note 1.

98. For a useful discussion of the case on which this portion of the paper is based, see Abbell, *U.S. Court of Appeals for District of Columbia Differs with 11th Circuit on Enforceability of Grand Jury Subpoenas for Foreign Bank Records*, 3 INT'L ENFORCEMENT L. REP. 317 (1987).

should not stand. Although it stated that it would not, in this case, decide the issue of whether a court may ever order action in violation of foreign laws, it stated that it was not comfortable believing that a court should order a violation of law, particularly in a foreign country. The Court noted the bank that was the subject of the order was not the focus of the criminal investigation. Additionally, the bank was not merely a private foreign entity, but rather an entity owned by the government of Country X. The Court distinguished the 11th Circuit decisions in the *Bank of Nova Scotia* cases primarily on the basis of the lack of good faith of the Bank of Nova Scotia in responding to the subpoenas that were the subject of those decisions. The Court also stated that, in deference to comity, it wanted to refrain from judging the acts of the government of another within its territory.

The opinion also concerned the ability of an individual to assert that the Fifth Amendment right not to incriminate oneself includes the right not to incriminate oneself under the laws of a foreign country. It arose because the grand jury subpoenaed not only the foreign bank documents, but also the former assistant manager of the branch of the bank in Country Y who is currently an employee of the bank in the United States. The former assistant manager, besides having personal knowledge of many of the bank transactions that were the subject of the grand jury investigation, was a personal friend and former business associate of several of the targets of the investigation. He testified about his knowledge of the targets and their activities which he learned in his personal capacity. However, he sought to assert his Fifth Amendment privilege with respect to the targets' banking activities in Country Y. Upon his refusal to comply with the court's order that he testify, the court held a show cause hearing and held him in civil contempt. It stayed its order committing him for civil contempt pending appeal.

The Court of Appeals refused to concur with the District Court's holding that the grand jury secrecy provisions of Rule 6(e), Fed. R. Crim. P., afford the assistant manager sufficient protection to remove any real concern of foreign prosecution. However, it did hold that he had no real concern of prosecution because the offense for which he could be prosecuted in Country Y is not an extraditable one. Hence, Country Y could prosecute him only if he voluntarily returned there. It further held that protection against such voluntarily assumed danger is not within the scope of protection afforded by the Fifth Amendment.

B. *9th Circuit Upholds Use of Cayman Bank Records in a Tax Case*

In *United States v. Mann*, 829 F.2d 849 (9th Cir. 1987), the U.S. Court of Appeals for the 9th Circuit upheld the conviction of defendants on tax charges arising from narcotics offenses. In doing so, the Court made two holdings which are harmful to offshore jurisdictions. It held that the Cayman Islands bank statute, and particularly its confidentiality provisions, do not provide the customer with reasonable expectation of privacy for purposes of the Fourth Amendment of the U.S. Constitution,

and the Single Convention on Narcotic Drugs and Letter Agreements do not create a right by non-governments such as financial institutions or their customers to challenge the authenticity of the U.S. Attorney General's certification for bank records.

A defendant and bank customer, in this case, entered a conditional guilty plea arising from an indictment for income tax evasion, filing of false income tax returns, and failure to disclose foreign financial interests. The U.S. District Court denied the Customer's motion to suppress bank records obtained from the Cayman Islands bank account. The defendant Mann and his wife were indicted as a result in part from records of funds deposited in Mann's account with Barclay's Bank, Grand Cayman Island. The information was obtained under the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol. In particular, Attorney General Meese issued a certificate for Mann's bank records on the basis of the following reasons: (1) the I.R.S. was unable to find a legitimate source for Mann's income; (2) Mann refused to identify the source of the income; (3) an informant identified Mann as the operator of a boat used by a convicted marijuana importer; and (4) the I.R.S. had reason to believe that Mann maintained a bank account in the Cayman Islands. On the basis of the Barclay's Bank records, the Mann's were indicted. The defendants' motion to suppress was denied in part due to their lack of standing to contest the acquisition of the records.

The Court of Appeals rejected the claim that the Mann's had a protected Fourth Amendment right in the Cayman account. The Court concluded while the Cayman Islands statute provides for a general privilege against the disclosure of bank records, it is subject to many exceptions. The Court also reasoned that the existence of exceptions to foreign privacy, since the customer knows that access to these records may be possible in a variety of situations. The Court also found that the documents requested by the Attorney General were authorized by the letter agreement and were relevant to the investigation.

The Court also upheld the decision of the District Court that Mann had no right to challenge the Attorney General's certification under the treaty. It noted that the district court failed to differentiate the analysis between the standing of a defendant under the treaty from the separate issue of whether he had a Fourth Amendment right in a treaty. If the treaty does not indicate such intent, only the foreign sovereign has the right to protest. The Court concluded that the treaty and letter agreement do not appear to establish any individual right in *Mann*. The Court noted that the letter agreement merely recognizes the ability of contracting states to request records from financial institutions in other contracting states for offenses "connected with, arising from, related to, or resulting from any narcotics activity."

The result in *Mann* seems correct since the bank secrecy laws are not intended to protect persons when the treaty party establishes evidence of narcotics offenses by the defendant in cases in which the Single Narcotics Convention applies. The inability of the defendant in *Mann* to have

standing to challenge procedure under the treaty, although a correct application of the agreement is questionable policy.[99] It would seem preferable to allow individuals to challenge misapplication of the treaty. It would also seem preferable to allow individuals to provide defendants with the right to use the agreement to secure information. Conferring such rights on defendants would achieve a just result. The case should also have a beneficial impact for law enforcement since increasingly persons will realize that, notwithstanding bank secrecy legislation, the U.S. and foreign governments can penetrate and obtain information about their accounts in offshore jurisdictions where criminal matters, especially relating to crimes such as narcotics trafficking, are at stake. Because the U.S. Department of Justice and U.S. law enforcement officials in general do not begin to have enough resources to effectively prosecute cases with foreign aspects, cases such as this should deter some would be criminals.[100]

C. *Assistance under Bilateral Tax Treaties*

In a unanimous decision the U.S. Supreme Court has held that the Internal Revenue Service (I.R.S.) can issue a summons to obtain tax information in response to a request from Canadian authorities without the need to demonstrate that a Canadian tax investigation had not reached a stage analogous to a referral of the U.S. Department of Justice. In particular, the Court found that neither the 1942 double tax convention nor the applicable U.S. legislation on the issuance of third-party summons under the Internal Revenue Code required such a determination provided the I.R.S. can show that the following requirements have been fulfilled: The investigation is relevant to a legitimate purpose; the I.R.S. does not already possess the information; and it has followed the statutorily required administrative steps. As long as the summons fulfills the statutory requirements and is issued in good faith, the Court held that compliance is mandated, whether or not the Canadian tax investigation is directed toward criminal prosecution under Canadian law.

The case arose out of a bank account maintained by Philip George Stuart, a Canadian citizen, in the Northwestern Commercial Bank in Bellingham, Washington. The Canadian Department of Revenue (Revenue Canada) initiated a tax investigation of Stuart attempting to ascertain his Canadian income tax liabilities for 1980, 1981, and 1982. In January 1984, the I.R.S. received from Revenue Canada a request pursuant to Articles XIX and XXI of the 1942 Canada-U.S. income tax treaty to provide it with information about certain bank accounts. The I.R.S. Director of Foreign Operations, the U.S. competent authority, found the requests were within the 1942 treaty's scope and, therefore, served administrative sum-

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99. For a criticism of the failure to allow private parties or non-governmental parties the right to use MLATs, see Hearing on Mutual Legal Assistance Treaty Concerning Cayman Islands before the Senate Committee on Foreign Relations, 100th Cong., 2d Sess. (1988)(statements of Bruce Zagaris and Bob Pisani).

100. United States v. Stuart, 489 U.S. ___, 103 L.Ed 2d 388, 109 S.Ct. 1183 (1989).

monses on the bank.

At Stuart's direction, the bank refused to comply. Pursuant to 26 U.S.C. section 7609(b)(2), respondents, Canadian citizens and residents who maintained the bank accounts in question, petitioned the District Court to quash the summonses contending that section 7602(c) of the Internal Revenue Code forbids the I.R.S. from issuing a summons to further its investigation of a U.S. taxpayer when a Justice Department referral for possible criminal prosecution is in effect. Additionally, Stuart argued that Revenue Canada's investigation of him was "a criminal investigation, preliminary stage." He contended that U.S. law forbade the use of a summons to obtain information for Canadian authorities regarding respondent's U.S. bank accounts.

The District Court denied the petition and ordered the bank to comply with the summonses. In particular, the Magistrate found that, even if the legal claims of the respondents were assumed to have merit, they had failed to carry their burden of demonstrating that the Canadian authorities' investigation had progressed that far. The Ninth Circuit reversed, holding that, before the I.R.S. could fulfill a request for information under the 1942 Canadian treaty, it had to determine that Revenue Canada was acting in good faith and that its investigation had not reached a stage analogous to a Justice Department referral by the I.R.S.[101] In this regard, the Ninth Circuit stated that the burden of proof on this point rests initially with the I.R.S. rather than the taxpayer attempting to quash a summons. The Ninth Circuit then ruled that the affidavit submitted by the I.R.S. failed to state that such a determination had been made with respect to Revenue Canada's investigation of Stuart. The U.S. Supreme Court granted certiorari to resolve a conflict between the Ninth Circuit's decision in this case and the Second Circuit's holding in *United States v. Manufactures & Traders Trust Co.*[102]

The U.S. Supreme Court's opinion concluded that, although at the time of the assistance by the I.R.S. no Justice Department referral was in effect, the I.R.S. affidavits did satisfy the requirement of good faith of *United States v. Powell.*[103] In scrutinizing I.R.S., section 7602(c), the Court concluded that Congress did not mean to make enforcement of a treaty summons depend on the foreign tax investigation not having reached a stage analogous to a Justice Department referral. Justice Brennan, the author of the opinion, concluded that the purpose behind Articles XIX and XXI of the 1942 treaty, the reduction of tax evasion by permitting signatories to demand information from each other, shows that such provisions should not limit inquiry in the manner Stuart wants. Justice Brennan's opinion also held that section 7602 of the Internal Revenue Code is directed at investigations of possible violations of U.S. reve-

101. United States v. Stuart, 813 F.2d 243 (9th Cir. 1988).
102. United States v. Manufacturers & Traders Trust Co., 703 F.2d 47 (2d Cir. 1983).
103. United States v. Powell, 379 U.S. 48 (1964).

nue laws, prohibiting the issuance of a summons "if a Justice Department referral is in effect." Since the summons in the *Stuart* case was not directed at the U.S., but rather at Canadian revenue laws, section 7602(c) does not bar the enforcement of the summonses at issue.

Before the Brennan opinion examined whether the 1942 Convention, in conjunction with section 7602(c), narrows the class of legitimate purposes for which the I.R.S. may issue an administrative summons, it found that the affidavits submitted by the I.R.S. in the respondents' cases satisfied the requirements of good faith set forth in the *Powell* case. In this connection, the I.R.S. Director of Foreign Operations stated under oath that the information sought was not within the possession of U.S. or Canadian tax authorities, that it might be relevant to the computation of respondents' Canadian tax liabilities, and that the same type of information could be obtained by Canadian authorities under Canadian law.

Brennan's opinion first examined the legislative history of section 7602(c) and found that the restriction for issuing a summons if a Justice Department referral is in effect with respect to a person about whom information is sought by means of the summons was intended uniquely to protect persons who might be subject to grand jury investigation. Congress, according to the Brennan opinion, did not intend to make the enforcement of a treaty summons contingent on the foreign tax investigation's not having reached a stage analogous to a Justice Department referral. Additionally, the Court examined the text of the 1942 treaty and its legislative history. In particular, Articles XIX and XXI of the treaty oblige the U.S. competent authority to furnish, on request, relevant information that it is "in a position to obtain under its revenue laws." Respondents unsuccessfully argued that, since the I.R.S. would not be able, under American law, to issue an administrative summons to gather information for use by the Government once a Justice Department referral was in effect, the I.R.S. is not in a position to obtain such information once the Canadian authorities have reached a corresponding stage in their investigation. The Court looked without help for interpretative aids in the legislative history. The Court was somewhat persuaded that the U.S. Government's regular compliance with requests for information by Canadian authorities had not inquired whether they intended to use the information for criminal prosecution. The Brennan opinion seemed to hang its hat on the absence of a procedure comparable to the U.S. grand jury system in Canada and even the difficulty of discerning precisely in any country whether their system has the equivalent of a Justice Department referral.

In his concurring opinion, Justice Scalia found the convention completely in disposition of the issue and demonstrating that the U.S. Government's position was proper.

The opinion seems a proper interpretation of the statute and treaty. To change the result will require explicit wording in a tax treaty or new legislation. Neither are likely. However, signatory parties to conventions and memoranda of understanding are more carefully reviewing the do-

mestic legislation of the treaty partner and determining how the convention or memorandum of understanding would interact with the domestic law. In some cases, a negotiating team will request an opinion from the other team on the probable interpretation of gray areas.

Interestingly, the cases litigating the letters rogatory provisions in the U.S. have also focused on the stage at which the foreign proceeding should be before the requesting state is capable of petitioning for assistance under the letters rogatory. The letters rogatory cases also address the issues of whether the U.S. Government or even the requesting state must demonstrate that the investigations have matured to such a level that they merit assistance from the U.S.[104] More than likely, appellate courts and even the U.S. Supreme Court may have to make some pronouncements on the letters rogatory statute. In the meantime, this decision represents an important victory for the U.S.

D. *Use of Letters Rogatory in the U.S. When Foreign Investigations Are at a Preliminary, Non-Adjudicatory Stage*

In a case decided in July, 1988, the Eleventh Circuit Court of Appeals has upheld the subpoena by the U.S. Government for the bank records of a depositor in a U.S. bank based on a letters rogatory request even though the investigation abroad was preliminary and without any adjudicatory procedures.[105] The decision is significant because it would allow the U.S. Government to fulfill requests without requiring any standards of due process abroad and apparently would provide for better pretrial discovery for foreign governments than for U.S. law enforcement agencies in the U.S.[106] The decision conflicts with the holdings of the Second Circuit.[107] The Second Circuit cases hold that letters rogatory only apply to a tribunal that has adjudicatory powers and not to pre-indictment investigations. The latter are not deemed a "proceeding" within the meaning of the letters rogatory provisions. The better policy would seem to ensure due process abroad. Additionally, financial privacy in the U.S. should be safeguarded to meet the normal expectations of foreign

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104. *See, e.g.*, In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, ___ U.S. ____, 102 L.Ed.2d 776, 109 S.Ct. 784 (1989); Zagaris and Razdan, *Florida Bankers are Concerned About Judicial Assistance to Law Enforcement Officials in the Absence of a Treaty and a Court Request*, 4 INT'L ENFORCEMENT L. REP. 366 (1988).

105. Trinidad and Tobago, *supra* note 104.

106. See the discussion in Zagaris and Razdan, *supra* note 103. One court has already held that foreign governments are in some instances entitled to more discovery than U.S. persons, including the U.S. Government, since they are exempt from the Right to Financial Privacy Act when applying for letters rogatory. *See* Zagaris, *Court of Appeals Upholds Exemption of Letters Rogatory from Financial Privacy Act*, 5 INT'L ENFORCEMENT L. RPTR. 288 (1989).

107. *See* Fonesca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980)(per curiam) (Superintendent of Exchange Control of Colombia); In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017 (2d Cir. 1967)(Indian Income Tax Officer).

investors.

E. *U.S. Circuit Court Considers Letters Rogatory From Scotland Yard*

The absence of a well developed network of MLATs has put pressure on the use of letters rogatory when both the U.S. and other countries want to cooperate in the prosecution of drug or financial crimes. A potentially precedential case concerning the use of letters rogatory is now pending in the U.S. Court of Appeals for the District of Columbia Circuit.[108] It involves an appeal from an order of March 21, 1988, in which U.S. District Judge John Garrett Penn denied motions of the D.C. counsel for lawyer Thomas J. Ward to quash the appointment of Commissioners and the outstanding subpoenas or, alternatively, for a protective order limiting the disclosure and use of the information requested by Scotland Yard. The appeal appears to raise the issue of whether the letters rogatory statute can be used to provide assistance to foreign policy investigations prior to the initiation of proceedings, and whether non-tribunals can obtain assistance under the statute.

1. Proceedings in the District Court

The case began on September 30, 1987, when F.J. Coford, a Crown Prosecutor from the British Crown Prosecution Service, sent a letter requesting assistance in the transmission of certain information. The letter described a police investigation that was then being conducted in London concerning allegations of stock manipulation during a British takeover by Guinness of the distillers company and involving an American citizen, Thomas J. Ward, an attorney in the District of Columbia. The letter explained that the inquiry was still in the stage of a police investigation and the only criminal proceeding that then existed concerned Ernest Saunders, the former Chief Executive of Guinness, who was charged with obstruction for allegedly destroying documents relevant to the criminal stock manipulation investigation. The letter of request explained that they needed interviews of, and documents from, specified U.S. residents employed by businesses and law firms in D.C. The letter requested that a police officer from Scotland Yard be allowed to attend and participate when the requested inquiries were made. On January 21, 1988, pursuant to an *ex parte* request from the Assistant Harris, Associate Director, Office of International Affairs, Criminal Division, U.S. Department of Justice, as Commissioners of the Court, Judge Penn issued such an order. Thereafter, the Commissioners issued subpoenas and Mr. Ward, through his attorneys, moved to quash.

At the district court level, the issues were: (1) whether section 1782 allowed a U.S. District Court to compel U.S. citizens privately to provide testimony and documents to foreign police for use in a foreign criminal

108. This section is a reprint of the article by Zagaris & Gardner, *U.S. Circuit Court Considers Letters Rogatory from Scotland Yard*, 5 INT'L ENFORCEMENT L. REP. 12 (1989).

investigation; and (2) even if testimony could be compelled (in a private interrogation in the U.S. Attorney's office) to assist a foreign criminal investigation, whether the district court should limit the use and disclosure of that information to prevent the abuse of section 1782, as well as the statutes controlling the manner in which U.S. and foreign authorities, agencies and civil litigants properly may gather information. On March 21, 1988, the District Court denied Mr. Ward's motion.[109]

Subsequently, Mr. Ward contacted the Commissioners to request the right to attend and participate in depositions scheduled to obtain the requested information. After the Commissioners refused, Mr. Ward again petitioned the District Court, seeking to participate in the depositions. The Court denied his request.

2. Appellate Brief

On appeal the Ward brief, written by David D. Aufhauser the lead attorney for Williams & Connolly, framed the issue as whether 28 U.S.C. section 1782 authorizes a U.S. court to compel U.S. citizens to be interrogated privately by foreign police who are conducting a criminal investigation of a U.S. subject, in the absence of any proceeding against the subject in a foreign tribunal. The appellate brief focused on the fact that the plain meaning and legislative history of letters rogatory under section 1782 is limited to allowing U.S. court-ordered assistance to foreign litigation. The appellate brief underscored the lack of any authority in the statute for assisting foreign police conducting a foreign criminal investigation in the United States. It noted that four of the five opinions on this issue have so held and argued that the fifth decision granted judicial assistance based on factual findings not present here.

The appellate brief framed the second and final issue as whether 28 U.S.C. section 1782 authorizes a court to compel U.S. citizens to give testimony to an Assistant U.S. Attorney, acting without a properly convened grand jury, where such testimony may be used:

> (a) In a U.S. prosecution;
>
> (b) by U.S. agencies such as the Securities Exchange Commission, acting without a properly instituted enforcement action; and
>
> (c) by civil litigants in U.S. courts, acting in disregard of discovery procedures provided by the Federal Rules of Civil Procedure.

The appellate brief, in answering the second issue, contended that even using the elimination in the 1964 amendment to the letters rogatory statute (section 1782), such a revision would at most have permitted the Court to provide for assistance to certain specified litigants who seek to take discovery to preserve evidence prior to filing their complaint. Such a

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109. For the District Court opinion, see In Re Letter of Request from the Crown Prosecution Service of the United Kingdom, 683 F.Supp. 841 (D.D.C. 1988).

procedure would be analogous to what is permitted under Federal Rule of Civil Procedure 27(a). In this connection, the appellate brief argued that error occurred when the District Court denied Mr. Ward's request for a protective order limiting the use and disclosure of the information to be gathered by the Commissioners. The brief noted that without such an order the information could be shared with U.S. prosecutors, the U.S. Securities and Exchange Commission, the British regulatory agencies, and Guinness, a civil litigant in a suit against Mr. Ward, in violation of section 1782 and other applicable laws.[110]

3. Appellee Brief

The appellee brief framed the first issue as whether the district court correctly ruled that assistance to foreign governments pursuant to section 1782 can occur in support of both "pending" and "not yet pending" proceedings against Ward and Ernest Saunders, against whom proceedings already existed at the time of the letters rogatory. The brief relies for its authority on the recent *Azar* case, known formally as *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago.*[111] The appellee brief noted that none of the four decisions cited by the Ward brief addresses the issue of distinguishability on grounds expressly and succinctly stated by the District Court. They deal with the question of who or what constitutes a "tribunal." Prosecution Services was never claimed to be a tribunal (the issue in the other four cases) but only "an interested person" under section 1782(a). Essentially, the U.S. Government argues that a "pending" proceeding in a foreign country is not necessary to invoke section 1782, but only the contemplation of a proceeding in a foreign country.

The appellee brief provided three additional alternative grounds for affirming the decision. The brief explained that, although there were, and still are, no proceedings pending against Ward, such proceedings were pending against Saunders when the letters rogatory were issued. Secondly, the brief argued that Ward does not have standing to intervene under Fed. R. Civ. P. 24 because he does not have a protectable "interest" since he is not the subject of a subpoena, and his only goal is to monitor or derail an investigation. Finally, responding to the lack of limitations over the Commissioners' powers and the potential for the information obtained in the investigation to be transmitted to other investigators, the appellee brief argued that section 1782 is a flexible, open-textured statute, and its principal safeguard against abuses is the admin-

110. For a discussion of civil actions involving Ward, see Pelham, *Ward Keeps U.K. Inquiry at Bay*, Legal Times, Dec. 5, 1988, at 7.

111. 648 F. Supp. 464 (S.D. Fla. 1986), 848 F.2d 1151 (11th Cir. 1988), *petition for cert. filed*, (No. 88-559). For a discussion of the Azar case, see Zagaris & Razdan, *Florida Bankers Are Concerned about Judicial Assistance to Law Enforcement Officials in the Absence of a Treaty and a Court Request*, 4 INT'L ENFORCEMENT L. REP. 366 (1988); Smith, *International Decisions*, 82 AM. J. INT'L L. 816 (1988).

istration of that flexibility, under the statutory scheme, by U.S. District Judges.

4. Reply Brief

In the Reply Brief, attorneys for Mr. Ward charge the U.S. Government has tried to rewrite and reinterpret the record below by claiming for the first time that a British proceeding, and not simply a criminal investigation, was either pending or imminent, and also that Mr. Ward lacked standing. The Reply Brief argued that, because it agreed to the relevant facts at the district court level, the United States must abide by the record it helped create. The Reply Brief then cites the letter of request for its argument that everyone below recognized and agreed that the letter of request sought assistance in the conduct of a criminal investigation only and not for use in British litigation or any other form of adversarial proceeding. The Reply Brief contended that the letter rogatory was directed at Ward only and that the charges against Mr. Saunders were unrelated to the assistance sought by Scotland Yard.

5. Oral Argument and Order for Supplemental Briefing

At the oral argument, the panel seemed confused by the disparate facts presented by the parties. As a result the panel issued an order requiring the Government to brief the following. Specifically, the court ordered the filing of a supplemental brief for the United States addressing these questions:

> (a) What inquiry does the United States (Department of State and/or Department of Justice) make prior to forwarding to the district court a request (letter rogatory or application) for assistance in a criminal matter under 28 U.S.C. section 1782?
>
> (b) Does the U.S. Attorney's presentation to the district court of a request in a criminal matter under 28 U.S.C. section 1782 indicate that the United States is satisfied that the prerequisites to assistance under section 1782 are met?
>
> (c) Define the individuals or authorities who, under 28 U.S.C. section 1782, qualify to present as an "interested person" requests for assistance on criminal matters.
>
> (d) In criminal matters, what qualifies as "a proceeding . . . in a tribunal" within the meaning of 28 U.S.C. section 1782? If no proceeding is pending at the time of a request for assistance, what indication must there be that a proceeding will commence? (Include reference to the time period, if any, within which the "proceeding . . . in a tribunal" must be anticipated to commence.)
>
> (e) In a criminal matter for which assistance is properly requested under 28 U.S.C. section 1782, what authority does the district court have to set terms and conditions under which (1) the proof (testimony, statement, documentary production) will be taken; and (2) the proof may be used in a proceeding in the United States civil or crimi-

nal courts?

The Government filed a brief answering the questions and Mr. Ward's attorneys had until February 9 to respond.

In the wake of the decision of the 11th Circuit in the *Azar* case, an affirmance by the D.C. Circuit Court could have an effect on the persons to whom assistance can be provided and the timing when such assistance can be provided. Many important issues exist. The Subcommittee and Committee on White Collar Crime should continue to monitor this and the *Azar* case. Although the Subcommittee considered the potential of recommending the filing of an amicus brief, it unanimously was decided that the facts do not permit the proper ventilation of the issues. In particular, the existence of a case against Saunders at the inception of the request precludes the court from conclusively determining such issues and is likely to result in an affirmance of Judge Penn's decision.

F. *Ninth Circuit Court of Appeals Rejects Specialty Doctrine in Applying Swiss Court's Extradition Order Enjoining Prosecution for Fiscal Offenses*

U.S. courts will increasingly adjudicate requests to extradite or give judicial assistance for financial crimes such as money laundering, racketeering, and tax crimes based on illegal narcotics transactions. One of the issues is whether the offenses, many of which are new, violate the specialty doctrine in the applicable agreements. This issue was recently decided by a U.S. Court of Appeals. On February 5, 1989, the United States Court of Appeals for the Ninth Circuit, in a two to one decision, affirmed the conviction on various drug related charges, holding, *inter alia*, that the prosecution did not violate the doctrine of specialty. The defendant and appellant Oscar Fernando Cuevas, *alias* Gomez, received from the U.S. sizable amounts of narcotics revenues at a Switzerland address.[112] Currency Monetary Instruments Reports (CMIRs) had not been filed as required. Ernesto Zawadski coordinated the collection of narcotics revenues in the U.S. He recorded the transactions in a ledger and disseminated the narcotics revenues to cash couriers Guzman, Onate, and Lozano, for transport to Cuevas. Zawadski's letter reflected that he had dispatched cash couriers to London regularly for contact with Cuevas who then "laundered" the American bills at London banks. Courier Spiteri testified that he delivered without CMIR's $400,000 in cash to Cuevas. Zawadski and Guzman were then arrested. The cash they carried was tainted with the scent of cocaine. No CMIR was filed. Cuevas denied having knowledge of Zawadski or Guzman or knowing of the criminal charges pending against them. Cuevas was then arrested in Zurich. The Swiss court issued an extradition order for him identifying the alleged narcotics

112. This section is a reprint of the article by Zagaris, *Ninth Circuit Court of Appeals Rejects Specialty Doctrine in Applying Swiss Court's Extradition Order Enjoining Prosecuting for Fiscal Offenses*, 5 INT'L ENFORCEMENT L. REP. 58 (1989).

violations and currency transaction relating thereto as the basis for the extradition. The order also contained an "injunction" advising U.S. authorities not to prosecute Cuevas for "the fiscal aspect of the factual circumstances of the indictment." "Fiscal aspect" was not defined in the order and Cuevas was subsequently convicted.

The doctrine of specialty prohibits the requesting country from prosecuting the extradited individual for any offense other than that for which the requested state agreed to extradite.[113] The order states that Cuevas is to be extradited on the fifteen-count indictment, including currency violations. The order has appended an injunction prohibiting prosecution or punishment concerning the fiscal aspect of the indictment.

In affirming, the appellate court's opinion explained that the Swiss Government does not oppose prosecution to the full extent of the fifteen count indictment. The court found that prosecution for the money hauls or currency transactions derived from narcotics should not by themselves lead to the payment of taxes, fees or any fiscal penalties. Similarly, the court found that taxes, fees or fiscal penalties relating to the money hauls should not be imposed surreptitiously through narcotics conspiracy penalties. The opinion held that, since the appropriate test is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited, and since the Swiss court consistently characterizes the narcotics and currency reporting conspiracies as integrally related,[114] the prosecutor did not violate the doctrine of specialty. In this connection, the court explained that, despite a substantial overlap in the proof offered to establish the crimes, two offenses are not the same offense for double jeopardy purposes if each provision requires proof of an additional fact which the other does not. The court also explained the Swiss extradition order acknowledged that counts 2 through 15 involved "transporting proceeds from drug dealings without a permit" suggesting that the Swiss court never intended to sever the currency violation counts from the narcotics conspiracy count.

An interesting aspect of the case is that Cuevas was allowed to raise the doctrine of specialty. Since the requested state benefits from the doctrine and has the right to claim its enforcement, some courts in the U.S.

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113. For background of the doctrine of specialty in U.S. extradition law, see BASSIOUNI, INTERNATIONAL EXTRADITION UNITED STATES LAW AND PRACTICE, ch. VII, § 6-1 (1983). For a discussion of the principal generally in international law, see SHEARER, EXTRADITION IN INTERNATIONAL LAW 146 (1971). For the principle of specialty in the Council of Europe's extradition treaty, see The European Force April 18, 1960, *reprinted in* MULLER-RAPPARD & BASSIOUNI, EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS ch. 2 (1987). For a discussion of the principle in European extradition law, see *European Committee on Crime Problems*, LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES 20 (1970).

114. For the test of whether the extraditing country would consider the counts for which the defendant was prosecuted as independent from those for which he was extradited as the appropriate test of the doctrine of specialty, see United States v. Paroutian, 299 F. 2d 486, 491 (2d Cir. 1962).

have found that the absence of protests or objections by the requested (surrendering) state will deprive the relator of the benefit of the doctrine.[115] The modern and sensible view is to allow the relator to raise the doctrine.[116]

Another secondary issue was whether sufficient evidence was introduced to support the jury's finding that Cuevas knew that the vast quantities of small bills, which he regularly deposited at British banks, derived from the narcotics conspiracy. Here, the court found ample evidence to support the inference of knowledge: Cuevas was integrally involved in and familiar with Zawadski's activities; Cuevas repeatedly gave false information concerning his own activities to bank officials, to couriers and to law enforcement officers on matters which showed he knew the nature of the illegality in which he was the pivotal international participant; Cuevas adopted a false name; and Cuevas gave the bank officials false information concerning the source of the small bills he deposited saying they were derived from "family coffee" and "sugar" businesses.

Another procedural battle over which a strong dissenting opinion was filed concerned the decision of the lower court not to permit an expert witness to testify. In particular, Cuevas sought to have the testimony of Professor Gerald Nickelsburg, who has expertise in the currency controls of South American countries and the international transactions necessitated by those controls. The trial court concluded that the proffered testimony was irrelevant because the case involved only money transaction in the United States, the United Kingdom and Switzerland, and that there was no evidence of any money transactions originating in any of the South American countries. A key factor in affirming the trial court on this issue was the standard that an appellate court does not disturb the decision not to permit an expert witness to testify unless it is manifestly erroneous.[117]

The majority found that the witness admitted possessing no knowledge of currency laws or transactions involving London, Zurich and the United States, no knowledge on "money laundering," and no knowledge of Cuevas or of Cuevas' activities. According to the majority opinion, the witness was proffered to testify only on currency exchange law in Colombia. The trial judge found this proposed testimony not relevant and also potentially confusing.

The dissent found that the proffered testimony would have been ma-

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115. For a discussion of the requirement that the surrendering state object to prosecution for an offense not thought to be included in the extradition order, see Ficconi and Kella v. Attorney General of the United States, 462 F.2d 475 (2d Cir. 1973), *cert. denied*, 414 U.S. 884 (1973); U.S. ex rel. Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935).

116. For a discussion of the principle that the relator should be able to raise and benefit from the doctrine of specialty, see Bassiouni, *supra* note 1, at ch. VII, § 6-7. *See also* Bassiouni, *International Extradition in the American Practice and World Public Order*, 36 TENN. L. REV. 1 (1968).

117. *See, e.g.*, United States v. Langford, 802 F.2d 1176, 1179 (9th Cir. 1986).

terial to Cuevas' defense that he was engaged in a legitimate currency exchange service for Colombian businesses and that the laundered funds had a non-narcotics origin. The dissent pointed out that, contrary to the characterization of the facts as limited to money transactions in the U.S., U.K. and Switzerland, at least one witness, Patricia Villa, testified on currency transactions that originated in Colombia. The dissent explained that the location of the transaction was not the only fact in the case. Proof that the money was derived from drug sales and that the defendant knew of that fact were also relevant to at least four counts in the indictment if not to all counts. The dissent disagreed with the majority's conclusion that the proffered expert witness could not have explained the necessity for transporting U.S. dollars to Europe. The dissent stated that Mr. Nickelsburg could have provided a legitimate and non-criminal explanation for Cuevas' currency exchange activities. By excluding Nickelsburg's testimony, the dissent takes the position that the District Court deprived Cuevas of his fundamental right to defend against the offense alleged in his indictment. There was an appeal issue on the use of hearsay evidence in the testimony of the U.S. Government's witness. Increasingly, money laundering and currency violations cases involve a series of expert witnesses who explain the mode and reasons for international currency transactions.

V. CONCLUSION

In reviewing recent developments in international narcotics policy, one can see mixed results. Overall, the policy does not seem to be working since more drugs are being sold, more people are becoming addicted, resulting in violent crime and misery throughout our own and many other countries. Indeed, so powerful have the traffickers become that the United Nations Crime Prevention Branch has reported recently that a new breed of organized criminal has arisen. However, the concluding of the U.N. Drug Convention represents one bright spot. In the bilateral agreement area, the U.S. must become more active in international organizations and using diplomacy to achieve its purposes. For instance, the initiatives by the U.S. in the Economic Summit in Toronto and in the last General Assembly of Interpol to put cooperation in money laundering as a priority has had positive effects. However, imposing sanctions and threatening governments for noncooperation is a dangerous gambit because the U.S. itself by its own admissions recently has accommodated persons accused of participating in high-level narcotics and money laundering transactions, such as General Noriega. The U.S. would be better off to work through international fora against governments and government leaders that are active in drug trafficking or that fail to cooperate. To be successful, diplomacy must have legitimacy. To establish legitimacy often requires time and forceful marshalling of evidence and arguments. To short cut the process and try to impose realpolitik may be counterproductive. Treaties and international assistance remain areas in which developments in enforcement have the most potential because no large

country other than the U.S. has so few treaties and yet so much rhetoric about international cooperation.

In legislation the moves to facilitate the use of foreign evidence in trials is positive. The effort to buttress asset forfeiture has been effective against some organized traffickers. The U.S. must be careful not to erode too drastically the rights of innocent third parties. The erosion of civil liberties in criminal defense cases seems a foregone conclusion when the system is breaking down due to overload. Unless a way is found to relieve the system, legislation will probably continue to erode civil liberties. Except for decriminalization, no proposals exist for relieving the court and criminal justice system of its overload. In fact, the political trend is in the opposite direction — the imposition of more criminal and civil sanctions. Another legislative problem is that Congress is increasingly providing overlapping and burdensome provisions on financial institutions, professionals, and other persons by frequently amending both law and regulations provisions in the Bank Secrecy Act (Title 31), the Anti-Money Laundering Act (Title 18), and the section 6050I currency transaction reporting requirements in the tax code (Title 26). Many experts believe that the fury of legislative activity has eclipsed the ability of regulators in the executive, legislative and judicial branches and of the private sector to understand and properly implement the legislation. Because the political dynamics require action, regulators are wont to continue pressing forward. The time has come for an agency independent of the agencies implementing these laws (i.e., the General Accounting Office) to determine whether Title 31 remains an effective tool against money-laundering or whether the U.S. has enough with 18 U.S.C. sections 1956 and 1957. At issue is whether the U.S. Government is effectively using its resources, since a backlog of between seven to eight months exists before CTRs are reviewed. A backlog exists from the time that CTRs are reviewed and when they are reviewed to other agencies. Rather than enacting new legislation and requirements against money laundering, it may be more effective for law enforcement agencies to consolidate and fine tune the existing tools.

In 1989 and thereafter, some of the best enforcement work and biggest cases will come from the many projects that have been brewing in the interagency task forces. In this connection, some of the offshore jurisdictions traditionally known for their secrecy will be bad places to invest, since they have been, and will continue to be, targets for investigation.

In the next few years the interaction of legislation, treaties, cases, administrative regulations and activities of international organizations provide a rich source of opportunities and challenges for law and criminal justice professionals. Much more research and resources should go towards to interaction of international organizations involved in narcotics enforcement. Some global interactions are begun and sustained primarily by governments of nation states. Other interactions, such as narcotics and money laundering transactions, involve nongovernmental, governmental and inter-governmental actors. One of the pre-requisites for prosecuting

successfully a campaign against international narcotics traffickers is to view the law enforcement community as an actor in a world politics paradigm and contrast it with the state-centric paradigm.[118] More research and planning must be done to chart the role and growth of various international organizations, so that they can become effective players against narcotics traffickers.[119] Unless world leaders and concerned citizens begin to view the law enforcement community as an actor in a world politics paradigm and plan for its sustenance and growth, the world will have difficulty in winning the ongoing battle with organized narcotics traffickers and their associates.

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118. *See, e.g.*, R.O. KEOHANE & J.O. NYE, POWER AND INDEPENDENCE 3 (1977). The authors explain that many scholars see the territorial state being eclipsed by international actors such as multinational corporations, transnational social movements and international organizations. *See also* Keohane & Nye, *Transnational Relations and World Politics: An Introduction*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS xii (R.O. Keohane & J.O. Nye eds. 1981).

119. For additional discussion of the role of the world paradigm on a regional level, see Zagaris & Papavizas, *Using The Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 119 (1986).