
Volume 20 | Issue 2

1988

Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy

James I.K. Knapp

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 Case W. Res. J. Int'l L. 405 (1988)
Available at: <https://scholarlycommons.law.case.edu/jil/vol20/iss2/3>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Mutual Legal Assistance Treaties as a Way To Pierce Bank Secrecy

*James I.K. Knapp**

I. INTRODUCTION

In November 1978, computer genius Stanley Mark Rifkin was indicted in Los Angeles, California, for obtaining a transfer code number for an account at the Pacific National Bank in Los Angeles and using it to cause a wire transfer of \$10 million to his Swiss bank account.¹ Shortly before the trial, the judge suppressed Rifkin's statements and the millions of dollars worth of diamonds he purchased with the loot. If the suppression of evidence had occurred one to two years previously, the United States would have been out of court on the most significant counts in the case. But due to the fact that a mutual legal assistance treaty had entered into force with Switzerland in 1977, the United States was able to obtain authenticated copies of the Swiss bank records concerning the wire transfers as well as Swiss depositions on the authenticity of those records. Bank secrecy had been pierced! Rifkin decided to plead guilty and received an eight year prison sentence. Credit for the conviction goes to the existence of the mutual legal assistance treaty with Switzerland ("Swiss Treaty").²

A mutual legal assistance treaty is a treaty which creates a binding obligation on the treaty partners to render assistance to each other in criminal investigations and proceedings. It is a treaty which typically provides for the direct exchange of information between two "central authorities"—the U.S. Department of Justice and its foreign counterpart, bypassing both normal diplomatic channels and the involvement of a U.S., though not always a foreign, court in the making of a request. The first such treaty went into effect with Switzerland only ten years ago, yet this new type of treaty is becoming the most effective means of piercing

* James I.K. Knapp, Deputy Assistant Attorney General, Tax Division, U.S. Department of Justice (since January 1988). Formerly Deputy Assistant Attorney General, Criminal Division, in which capacity he led the Department's delegation in the negotiation of the Mutual Legal Assistance Treaties with the Bahamas and Thailand. A.B. Harvard University, 1964; J.D. University of Colorado, 1967. The views expressed in this article are those of the author and do not necessarily reflect the views of the U.S. Government or the Department of Justice.

¹ *United States v. Rifkin*, No. Cr. 78-1050-WMB (C.D. Cal., indictment filed Nov. 15, 1978).

² *Treaty on Mutual Assistance in Criminal Matters, United States-Switzerland*, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977) [hereinafter *Swiss Treaty*].

the veil of foreign bank secrecy laws for the purpose of combating the laundering of the proceeds of drug trafficking and other serious crimes as well as facilitating the prosecution of the criminals involved.

In the course of this Article, I will explain what mutual legal assistance treaties do, explain the need for using them as opposed to the more traditional forms of international assistance, discuss the history of these treaties or their negotiation status, list the principal issues which arise in the course of negotiating and implementing these treaties, and discuss how these treaties have fared in American appellate courts.³

II. WHAT IS A MUTUAL LEGAL ASSISTANCE TREATY?

As stated above, a mutual legal assistance treaty imposes a binding obligation on the treaty partners to provide specific categories of assistance to each other in designated types of criminal investigations and prosecutions, although the treaties may also cover assistance in certain types of related civil or administrative proceedings as well.⁴ As also stated above, a treaty provides that this assistance will be provided di-

³ For other articles on mutual legal assistance treaties from a historical, treaty-by-treaty perspective, see Nadelmann, *Negotiations on Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467 (1985); Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189 (1985).

⁴ A "mutual legal assistance treaty" is to be distinguished from other types of treaties or executive agreements to share evidence. It is different from a "tax information exchange agreement," like the one authorized by the Caribbean Basin Economic Recovery Act of 1983, 26 U.S.C. § 274(h)(6)(C) (1982), which applies to the exchange of information in criminal and civil tax cases only. We presently have such tax agreements signed or in force with Jamaica, Grenada, St. Lucia, Barbados, and Dominica. The term "tax information exchange agreement" refers broadly to any agreement which provides for the exchange of tax information which is otherwise confidential under U.S. law. See 26 U.S.C. § 6103(k)(4). There is also such a thing as a "tax treaty" which is designed primarily to reduce or eliminate double taxation by the United States and its treaty partner through exemptions, credits, special source rules, and the like, but which usually contains provisions on evidence sharing to prevent evasion and avoidance. For a discussion of the use of this type of treaty to secure evidence, see Crinin, *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 INT'L LAW. 1209 (1986); Seeman, *Exchange of Information under International Tax Conventions*, 17 INT'L LAW. 333 (1983).

A mutual legal assistance treaty could also serve the purpose of a tax information exchange agreement, at least as to criminal offenses (e.g., the Dutch and Italian treaties were characterized as "tax conventions" within the meaning of 26 U.S.C. § 6103(k)(4) in their Senate reports), but usually they are separate treaties negotiated by the Justice and Treasury Departments, respectively, in conjunction with the State Department. Other types of arrangements to share evidence include executive agreements between governments on behalf of specific law enforcement agencies, such as the customs assistance agreements the United States currently has with Austria, Canada, France, Italy, Mexico, Spain and West Germany; or the so-called "Lockheed agreements" of the late 1970s which were separate agreements to exchange evidence with certain foreign nations in a specific investigation.

There is a multilateral mutual legal assistance treaty: European Convention on Mutual Assistance in Criminal Matters, opened for signature, Apr. 20, 1959, 472 U.N.T.S. 185. The Convention

rectly between the U.S. Justice Department and its foreign prosecutorial counterpart outside the normal diplomatic channels and with minimal judicial involvement, at least in the United States.

The most desired form of assistance is the obtaining of documentary evidence, most notably bank or other corporate records. The treaty, once implemented, typically authorizes the foreign prosecutor to either directly, or through court order, obtain the desired records overcoming local bank secrecy or other similar legal restrictions.⁵

“Legal assistance” covers more than the provision of documentary evidence. It covers the provision of the necessary authenticating evidence, like the live or deposed testimony of bank or other corporate officers or some specified form of certification. In addition, a mutual legal assistance treaty will typically provide for the mandatory production of non-privileged public documents and records, the discretionary production of law enforcement records, the location of persons, the service of subpoenas and other documents, the execution of requests for search and seizure, the taking of testimony or depositions, the transportation of prisoners in custody for testimony abroad, the seizure and forfeiture of criminals’ assets, and occasionally the sharing of those assets between the two governments.

The more recent treaties contain on the average about fifteen to twenty articles. In addition to separate articles on each type of assistance covered by the treaty, there will typically be an article defining the scope of covered offenses and proceedings; an article providing safe conduct for witnesses travelling to a requesting state to testify pursuant to the treaty;

does not really create any new procedures for obtaining evidence. It provides a procedure for executing letters rogatory, but does not expand on this mechanism for securing evidence.

Procedures for the exchange of evidence between countries also exist in civil cases. See, e.g., Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 discussed in reference to *Société Nationale Industrielle Aerospatielle v. United States*, 107 S. Ct. 2542 (1987), *infra*, note 96, and accompanying text. The United States is a party to the Convention along with sixteen other countries. Except as relevant to the referenced discussion, this Convention is beyond the scope of this Article. Unlike the treaties which are the subject of this article, the Convention does not provide mandatory procedures for obtaining evidence, nor does it have any effect on the scope of domestic law regarding discovery.

For a discussion of problems in obtaining evidence in civil cases see, e.g., Struve, *Discovery from Foreign Parties in Civil Cases Before United States Courts*, 16 N.Y.U.J. INT’L L. & P. 1101 (1984); Friedman & Wilson, *Representing Foreign Clients in Civil Discovery and Grand Jury Proceedings*, 26 Va. J. of Int’l L. 327 (1986).

⁵ Foreign bank secrecy laws typically provide criminal and/or civil penalties for disclosing to third parties, including foreign governments, customer identity information, transactional information, and other account information. See, e.g., Federal Law on Banks and Savings Organizations, CODE CIVIL [C. Civ.] art. 47 (Switz.); PENAL CODE art. 273 (Switz.); Banks and Trust Companies Regulation Act of 1965, Bah. Act. No. 64, Section 10; the Confidential Relationships (Preservation)(Amendment) Law (Cayman Islands 1979).

an article setting forth limitations on compliance (e.g., if the request concerns a "political offense"; if the request concerns an investigation of a person immune to prosecution due to prior jeopardy); an article setting forth the type of information to be included in a request for assistance; an article specifying who the "central authority" is in each country; an article concerning limitations on use of the information beyond the proceeding for which it is sought; an article concerning the return of the evidence after it is used; an article covering the relation of the treaty to the securing of evidence through other means (e.g., international conventions, letters rogatory); an article concerning allocation of costs; and an article or articles concerning the terms for having the treaty enter into force or denounced.

III. WHY IS A MUTUAL LEGAL ASSISTANCE TREATY NEEDED?

The availability of assistance in obtaining evidence outside of the judicial process is limited. Obviously there is such a thing as "police cooperation"—the direct exchange of law enforcement information between police agencies in two countries. These channels can be direct (e.g., through FBI or DEA attachés stationed in U.S. embassies abroad) or indirect (e.g., through Interpol). While much useful information, including witness information, can be obtained through this process, the ability to obtain evidence in this manner, particularly documentary evidence, in a form that would be admissible in a U.S. judicial proceeding is limited. The foreign police usually may obtain no more evidence than a police agency in this country may obtain. Thus, they may only obtain documents or other information that the holder is both willing and legally able to surrender. Further, the ability to obtain evidence in this manner is limited by the degree of cooperation that exists at a particular moment in time between the concerned police agencies. There is no duty to cooperate. Similar limitations apply, of course, to attempting to contact witnesses or document holders directly. They have no obligation to cooperate and problems of document authentication remain.

28 U.S.C. section 1783 permits a federal district court to issue a subpoena for a U.S. citizen or resident alien who is in a foreign country to appear to testify here.⁶ Such subpoenas are typically served by consular officials where permitted by foreign domestic law.⁷ Their utility is limited not only by the nationality of the potential witness, but also by the fact that there is no effective remedy to compel attendance unless the person actually returns to the United States (although the possibility of

⁶ 28 U.S.C. § 1783 (1982). Persons failing to comply with a subpoena are subject to being held in contempt and could even have property forfeited, though this latter step is seldom taken. *See* 28 U.S.C. § 1784 (1982).

⁷ *See* FED. R. CIV. P. 4(i) for provisions governing service of process abroad.

passport revocation or future contempt actions will induce cooperation in many situations).

Rule 15 of the Federal Rules of Criminal Procedure permits the taking of a deposition of a witness abroad.⁸ Again, while useful, this provision is of limited value because there is no way to compel attendance and because it raises the constitutional issue of witness confrontation.⁹ Foreign law may also restrict the manner in which such depositions are conducted. An example of such a restriction is the Swiss requirement that only officials of the foreign country conduct the deposition.¹⁰

The traditional way to compel the production of evidence located abroad, whether in the form of live witnesses or documents, is the use of letters rogatory.¹¹ Letters rogatory are requests submitted, via diplomatic channels, from a judge in one country to a judge in another country to perform a specific act. The act might be ordering a witness to testify, issuing a search warrant, or compelling the production of documents.¹²

This procedure is terribly burdensome. First, it is time consuming. The request must go through diplomatic channels and, once received, requires formal judicial action. It may take months or even years to complete the process, a time frame totally unsatisfactory in criminal litigation. Second, the request must be in a form which satisfies foreign legal requirements and which is understandable to foreign lawyers. American legal terms may not be understood (particularly the peculiar names for major federal offenses) so proper drafting is critical. The language must be simple but the information provided must be sufficient to convince the foreign judge that the evidence is needed. Third, judicial assistance may not be available for a particular offense, particularly

⁸ FED. R. CRIM. P. 15.

⁹ See, e.g., *United States v. Leal*, 509 F.2d 122, 127 (9th Cir. 1975); *United States v. Hay*, 376 F. Supp. 264 (D. Colo. 1974), *aff'd*, 527 F.2d 990 (10th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976). Since the passage of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3505 (1984) has permitted the introduction of foreign records into evidence based on a certificate signed under penalty of perjury. Cooperation is still needed to get this signature.

¹⁰ *Switz. Penal Code art. 271* makes it a crime to take any action on behalf of a foreign government on Swiss territory. This provision has been interpreted to include the taking of depositions. For an account of how the Swiss interpret this provision and treated one "violation" (released after arrest, but deposition transcripts confiscated) see *Frei* (Chief, Section of International Legal Assistance, Federal Office, Police, Department of Justice and Police, Bern, Switzerland), *Swiss Secrecy Laws and Obtaining Evidence from Switzerland*, in 1 FEDDERS, HARRIS, OLSEN & RISTAU, *TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS* 14-15 (A.B.A. Nat'l Inst. 1984).

¹¹ The authority of U.S. courts to respond to foreign letters rogatory is derived from 28 U.S.C. § 1782 (1982). 28 U.S.C. § 1781(a) (1982) gives the U.S. State Department the authority to transmit a letter rogatory issued by a U.S. tribunal to a foreign government.

¹² See, e.g., *United States v. Reagan*, 453 F.2d 165 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972). No notice to the defendants is required to seek documentary evidence abroad.

where it is a *malum prohibitum* offense like a tax, currency, or other fiscal offense. Fourth, and most importantly, letters rogatory may not be useful in securing evidence for grand jury proceedings, as opposed to a trial, because many foreign countries, particularly those with a common law tradition, require that the evidence requested be for a "judicial proceeding" and do not recognize the grand jury as such a judicial proceeding. Fifth, letters rogatory generally will not be sufficient to overcome local bank secrecy or other similar restrictions on producing documents.¹³

These last two problems have become increasingly serious as international drug trafficking has grown in scope and sophistication. Drug trafficking is a multi-billion dollar business.¹⁴ Proceeds from a U.S. drug transaction, for example, may be transmitted either directly by hand or by wire transfer from a bank in the United States to a branch in a foreign bank secrecy jurisdiction. There the proceeds may be left, transmitted to a third country, or "laundered" and returned to the United States in such a manner as to make it appear that the money came from a legitimate source. Tracing the route of the proceeds is critical to establishing who is really behind the drug trafficking organization as well as for directly providing evidence of a violation of U.S. money laundering and currency transaction reporting statutes. Such evidence is not simply the icing on a cake of previously existing evidence so that it can be saved for trial. It is evidence which is needed to develop the *prima facie* case necessary for a grand jury indictment.

The only way to overcome the limitations placed on the traditional methods for securing evidence in bank secrecy, *and indeed in most other, jurisdictions*, is to have in effect a treaty which: 1) expressly permits the use of foreign government process to obtain evidence for the entire investigative and prosecution process, including grand jury proceedings; 2) which expressly permits the use of foreign government process to obtain evidence for nonfamiliar or nonuniversal forms of crime as well as traditional forms of crime; 3) which expressly permits the waiver of foreign bank secrecy privileges under specified conditions; and 4) which provides an expedited means for securing this evidence in an admissible form. Once in force after signature, ratification, or passage of required implementing legislation,¹⁵ a mutual legal assistance treaty can overcome

¹³ See *Worldwide Review of Status of United States Extradition Treaties and Mutual Legal Assistance Treaties: Hearing Before the Task Force on International Narcotics Control of the House Comm. on Foreign Affairs*, 100th Cong. 1st Sess. 26-42 (Oct. 29, 1987) (testimony of Mark Richard).

¹⁴ See, e.g., NATIONAL DRUG ENFORCEMENT POLICY BOARD, NATIONAL AND INTERNATIONAL DRUG LAW ENFORCEMENT STRATEGY 2 (Jan. 1981).

¹⁵ Treaties in most foreign countries, unlike the United States, are not self-executing. In the United States, a treaty takes precedence over a prior existing statute and is self-executing. U.S. CONST. art. VI; *Alvarez y Sanchez v. United States*, 216 U.S. 167 (1910); *Amaya v. Stanolind Oil &*

barriers to obtaining evidence abroad and can be a significant tool to U.S. prosecutors in fighting drug trafficking, money laundering, and other forms of crime.

Why would a foreign country want to enter into such a treaty, particularly when such a treaty might be perceived, rightly or wrongly, as jeopardizing the local banking industry and consequently the local economy? The reasons vary in importance from country to country, but they include: 1) a general aversion to drug trafficking, heightened by increasing local problems with drug addiction and related crime; 2) a desire to obtain evidence from the United States for some specific purpose such as a violation of domestic currency control laws; 3) a reaction to continued diplomatic pressure and a desire to maintain friendly relations with the United States; 4) the possibility of U.S. legislation detrimental to the foreign economy; 5) the influence of a parent country in the case of a dependency; and 6) a desire to find an alternative to U.S. unilateral law enforcement measures, like the service of subpoenas on U.S. branches of foreign banks.¹⁶

Gas Co., 158 F.2d 554 (5th Cir. 1946), *cert. denied*, 331 U.S. 808 (1947). In most foreign countries, implementing legislation is required. *See, e.g.*, Switzerland: Federal Law on the Treaty with the United States of America on Mutual Assistance in Criminal Matters, Oct. 3, 1975.

¹⁶ *See, e.g.*, *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 (1986); United States v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). The courts, however, do require a balancing test in determining whether to require the production of foreign records. *See, e.g.*, United States v. Vetco, 691 F.2d 1281, 1286-90 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). "Courts must balance competing interests in determining whether foreign illegality ought to preclude enforcement of an IRS Summons." *Id.* at 1288. Among the factors to consider are: the relative public interests at stake (e.g., the need to collect taxes v. the interest of a private party); the extent of the hardship (e.g., could the company keep the records in the United States and avoid a possible Swiss prosecution); the location, nationality, and expectation of compliance; the importance of documents; and the availability of alternate means of compliance provided they are likely to be fruitful. *Id.* at 1289-90. The *Vetco* case, it should be noted, did not involve the production of foreign bank records (and thereby implicate foreign bank secrecy laws), but rather the business records of a corporate subsidiary.

But see, In re Sealed Case, 825 F.2d 494, 497-99 (D.C. Cir.), *cert. denied sub nom*, *Roe v. United States*, 108 S. Ct. 451 (1987), which distinguishes the "Bank of Nova Scotia" cases but suggests the D.C. Circuit might not follow them. *Id.* at 498.

See also, United States v. Field, 532 F.2d 404 (5th Cir. 1976), in which the court required a Cayman Islands bank official to testify, after being subpoenaed while traveling in the United States; and United States v. Bowe, 694 F.2d 1256 (11th Cir. 1982), which upheld a similar subpoena on an attorney.

Another recently utilized unilateral enforcement measure is known as the "Ghidoni waiver." In United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984), the Eleventh Circuit upheld the authority of a federal district court to order a grand jury target to sign a "consent" form waiving a foreign bank secrecy privilege and directing the bank to turn over the records. The Supreme Court has sustained the validity of these orders in *Doe v. United States*, 101 L. Ed. 2d 184 (1988).

On the *Ghidoni* issue, see also, *In re Grand Jury Proceedings* (Ranauro), 814 F.2d 791 (1st Cir.

This last factor is particularly noteworthy because recent court decisions in the United States permitting the imposition of large fines for non compliance with grand jury subpoenas for bank records located abroad, are perceived as having provided a major impetus for the more recent treaty negotiations with Great Britain, Canada, the Cayman Islands, and the Bahamas.¹⁷ Also, the fact that the first U.S. treaty partner, Switzerland, did not suffer a loss in its banking business as a result of its mutual legal assistance treaty with the United States has made other potential treaty partners less wary of entering into similar arrangements, at least where the offenses covered by the treaty do not include tax offenses which are unrelated to other criminal activity.

Finally, a variety of purely political and economic factors may outweigh a foreign country's concerns about such a treaty. The banking business is more critical in some countries than others. Some governments are sensitive to criticism in the United States about their efforts against drug trafficking due to their proximity to the United States and reliance on the tourist trade. Local political pressures are relevant. Finally, things as mundane as an upcoming visit by a head of state and the desire to have something to sign may have an influence.

IV. TREATY STATUS

As of October 1, 1988, there are four mutual legal assistance treaties in effect between the United States and foreign countries. The first, as noted above, is with Switzerland, and entered into force in 1977. The treaties with Turkey ("Turkish Treaty"),¹⁸ the Netherlands (including the Netherlands Antilles) ("Netherlands Treaty"),¹⁹ and Italy ("Italian Treaty")²⁰ entered into force in 1981, 1983, and 1985 respectively. An interim executive agreement covering only drug offenses, not constituting a formal treaty, has been in effect with the Cayman Islands since 1984,²¹ pending ratification of a full treaty which was negotiated and signed in

1987); *Two Grand Jury Condemnors v. United States*, 826 F.2d 1166 (2d Cir. 1987) (petition for cert. pending as of 6/1/88); *In re N.Y.N.D. Grand Jury Subpoena #86-0351-S*, 811 F.2d 114 (2d Cir. 1987).

¹⁷ See, e.g., *Islands' Bank Secrecy Is Lifted for United States*, N.Y. Times, July 27, 1984, at A3.

¹⁸ Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, United States-Turkey, 32 U.S.T. 3111, T.I.A.S. No. 9891 (entered into force Jan. 1, 1981) [hereinafter Turkish Treaty].

¹⁹ Treaty on Mutual Legal Assistance with the Kingdom of the Netherlands, June 12, 1981, United States-Netherlands, S. Doc. No. 17, 97th Cong., 1st Sess. (entered into force Sept. 15, 1983), [hereinafter Netherlands Treaty].

²⁰ Treaty on Mutual Assistance in Criminal Matters, Nov. 9, 1982, United States-Italy, S. Doc. No. 25, 98th Cong., 2nd Sess., 24 I.L.M. 1536 (entered into force Nov. 13, 1985) [hereinafter Italian Treaty].

²¹ Exchange of Letters Concerning the Cayman Islands and Matters Connected with, Arising From, Related to, or Resulting from any Narcotics Activity Referred to in the Single Convention on

1986.²² Similar interim executive agreements covering only drug offenses have recently entered into force with the Turks and Caicos Islands (1986),²³ Anguilla (1987),²⁴ Montserrat (1987),²⁵ and the British Virgin Islands (1987).²⁶ In addition, interim executive agreements providing for formal liaison procedures for exchanging evidence subject to negotiation of a full mutual legal assistance treaty have been negotiated recently with Haiti (1986),²⁷ Great Britain (1988),²⁸ and Nigeria (1987).²⁹ Additional treaties have been signed with Colombia (1980),³⁰ Morocco (1983),³¹ Canada ("Canadian Treaty") (1985),³² Thailand (1986),³³ the Bahamas

Narcotic Drugs 1961, *as amended* July 26, 1984, United States-United Kingdom, 14 I.L.M. 1110 (entered into force Aug. 29, 1984) [hereinafter Cayman Islands Agreement].

²² Treaty Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, United States-United Kingdom, S. Doc. No. 8, 100th Cong., 1st Sess., 26 I.L.M. 537 (1987) (not yet entered into force) [hereinafter Cayman Islands Treaty].

²³ Exchange of Letters Concerning the Turks and Caicos Islands and Matters Connected With, Arising From, Related To, or Resulting From Any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, *as amended* Sept. 18, 1986 United States-United Kingdom, D.S.B. 6.87 (entered into force Oct. 21, 1986).

²⁴ Exchange of Letters Concerning Anguilla and Matters Connected With, Arising From, Related To, or Resulting From Any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, *as amended* Mar. 11, 1987 United States-United Kingdom, D.S.B. 6.87 (entered into force Mar. 27, 1987).

²⁵ Exchange of Letters Concerning Montserrat and Matters Connected With, Arising From, Related To, or Resulting From Any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, *as amended* May 14, 1987 United States-United Kingdom, D.S.B. 8.87 (entered into force June 1, 1987).

²⁶ Exchange of Letters Concerning the British Virgin Islands and Matters Connected With, Arising From, Related To, or Resulting From any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961, *as amended* Apr. 14, 1987 United States-United Kingdom, 1961, D.S.B. 9.87 (entered into force Aug. 12, 1987).

²⁷ Agreement on Procedures for Mutual Assistance in Law Enforcement Matters, Aug. 15, 1987, United States-Haiti. Unlike the above executive agreements, this one was negotiated directly by the U.S. Justice Department and the Haitian Ministry of Justice. It simply provides for a liaison procedure and calls for the negotiation of a mutual legal assistance treaty some time in the future.

²⁸ Interim Agreement concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Fed. 9, 1988, United States-United Kingdom. This interim agreement creates no new mandatory procedures for obtaining evidence. It provides a detailed liaison procedure for exchanging evidence between the Justice Department and the Home Office and calls for the commencement of negotiations of a full treaty in six months.

²⁹ Agreement on Procedures for Mutual Assistance in Law Enforcement Matters, Nov. 2, 1987, United States-Nigeria, D.S.B. 1.88. This agreement is similar in nature to the British one, *supra* note 28, but is not limited to drug cases.

³⁰ Mutual Legal Assistance Treaty, Aug. 20, 1980, United States-Colombia, T.I.A.S. No. 10734 (not yet entered into force). This treaty has been ratified by the United States but at this point it does not appear Colombia will ratify it due to strong domestic opposition.

³¹ Convention on Mutual Assistance in Criminal Matters Oct. 17, 1983, United States-Morocco, S. Doc. No. 24, D.S.B. 9.84 (not yet entered into force).

³² Treaty on Mutual Legal Assistance in Criminal Matters Mar. 18, 1985, United States-Can-

("Bahamas Treaty") (1987),³⁴ Mexico (1987),³⁵ and Belgium (1988).³⁶ Negotiations with West Germany, Great Britain, Panama, Australia, Sweden, Jamaica, and Israel are at various stages. Within this last group, it is this author's view that Panama is the number one U.S. priority for concluding a treaty because it is a major money laundering center, but the current political unrest there and the recent indictment of the Panamanian military leader, General Noriega, on drug trafficking charges has sidetracked the resumption of negotiations which briefly started and then broke down in 1985.³⁷

V. TREATY EXPERIENCE

The experience with treaties in force has generally been good. In the first six years the Swiss Treaty was in force, the United States made 202 requests under the treaty and the Swiss made 65. This three to one ratio has been maintained.³⁸ But the Swiss are pleased. As stated by Swiss Justice Minister Elisabeth Kopp in a recent interview:

Increasing economic interdependence has led to increased numbers of requests and to requests regarding new forms of criminality. International mutual assistance is, contrary to the popular perception in Switzerland, not a one-sided process. Although U.S. authorities have made three times as many requests as the Swiss, our authorities have been able to obtain search and seizure or freeze orders in the U.S., too.³⁹

ada, S. DOC. No. 14, 100th Cong., 23rd Sess., 24 I.L.M. 1092, D.S.B. 5.88 (not yet entered into force) [hereinafter Canadian Treaty].

³³ Treaty on Mutual Assistance in Criminal Matters, Mar. 19, 1986, United States-Thailand, S. Doc. No. 18, 100th Cong., 2nd Sess., D.S.B. 5.86 (not yet entered into force) [hereinafter Thai Treaty].

³⁴ Treaty on Mutual Assistance in Criminal Matters, Aug. 18, 1987, United States-Bahamas, S. Doc. No. 17, 100th Cong., 2nd Sess., D.S.B. 11.87 (not yet entered into force) [hereinafter Bahamas Treaty].

³⁵ Treaty On Cooperation for Mutual Legal Assistance, Dec. 9, 1987, United States-Mexico, S. Doc. No. 13, 100th Cong., 2nd Sess., D.S.B. 2.88 (not yet entered into force) [hereinafter Mexican Treaty].

³⁶ Treaty on Mutual Assistance in Criminal Matters, Jan. 28, 1988, United States-Belgium, (not yet entered into force) [hereinafter Belgian Treaty].

³⁷ See generally U.S. TREAS. DEPT., TAX HAVENS IN THE CARIBBEAN BASIN (1984), which discusses the role of Panama as well as the Bahamas and the Cayman Islands as tax havens. In reference to Panama, it was noted at the time that in Panamanian bank transactions with the Federal Reserve Bank about 50% of the dollar value was in \$20.00 or lower denomination bills, something highly unusual in international transactions and which indicates to this author an illegal source generating small denominations of cash. See *id.* at 31. The report noted also that of the IRS criminal tax investigations involving Caribbean Basin countries in the 1978-83 period, 55% involved illegal income, and, of that 55%, 29% involved the Cayman Islands, 28% Panama, 22% the Bahamas, and 11% the Netherlands Antilles. See *id.* at 34. No more recent information is publicly available.

³⁸ These statistics have been provided to the author by the Office of International Affairs, Criminal Division, United States Department of Justice, which processes all treaty requests.

³⁹ Wall St. J., Oct. 28, 1987, at 33.

In a study done by the Office of International Affairs in the Criminal Division in January 1983, it was reported that in the first six years the Swiss treaty was in force, the evidence obtained under the treaty had contributed to about 145 federal and state convictions.⁴⁰ One particularly noteworthy conviction was that of Michelle Sindona for fraud in connection with the collapse of the Franklin National Bank.⁴¹ Three of Sindona's fraudulent transactions had been disguised as time deposits in Swiss banks. Records of these transactions were obtained to demonstrate the fraud involved. Another noteworthy conviction was that of organized crime figure Anthony Giacalone who conspired with two Citibank employees to embezzle \$3 million.⁴² The money was laundered through Swiss and other foreign bank accounts. Swiss bank records revealed the money trail and Swiss hotel records proved the presence of the conspirators in Switzerland at the time the money was distributed.

The greatest problem in implementing the Swiss Treaty has proven to be the delay in obtaining evidence. The Swiss law permits requests to be challenged and litigated through every appellate stage available with objections by different parties considered seriatim rather than jointly.⁴³ One request took two-and-a-half years to litigate and very nearly caused an extension beyond the statute of limitations.⁴⁴

Issues concerning application of the Swiss Treaty have reached the Swiss Federal Tribunal, the highest judicial tribunal in Switzerland. Most litigation there has been successful from the U.S. point of view. The Tribunal has rejected challenges to the accuracy of statements in the request for assistance⁴⁵ and challenges to the good faith of the United

⁴⁰ See *supra* note 38.

⁴¹ *United States v. Sindona*, No. S 75 Cr. 948 (TPG) (S.D.N.Y. indictment filed Mar. 19, 1979), *conviction affirmed*, *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

⁴² *United States v. Giacalone*, No. S 80 Cr. 123 (S.D.N.Y. indictment filed Feb. 6, 1980).

⁴³ The requested state is to notify any person from whom testimonial or documentary evidence is sought of the fact of a request, article 36(a) Swiss Treaty, *supra* note 2. Under article 37, § 2, Swiss law and procedure governs in determining the validity of a treaty request to Switzerland. The Swiss practice of adjudicating each challenge by an interested party seriatim through the various layers of the Swiss government up to the Federal Judicial Tribunal has created a major delay problem in some cases according to attorneys who are familiar with the operation of the treaty.

⁴⁴ See testimony of Mark Richard, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives (Apr. 25, 1984). See, e.g., *United States v. Friedland*, 660 F.2d 919 (3d Cir. 1981). In that case, the defendants got a bank officer to appeal a treaty request that he be deposed to authenticate some bank records. The procedure forced the request beyond the trial date so the evidence could not be used. The new Memorandum of Understanding, *infra* note 104, attempts to deal with this problem by creating streamlined procedures for processing requests.

⁴⁵ Decision of the Swiss Federal Tribunal, Sept. 28, 1979, on appeal of *Generations Holdings Ltd. and Pierre de Charmant*, A 168/78; Decision of the Swiss Federal Tribunal, Feb. 27, 1980, in the case of *Frederick Zuendel*, A 10/80/ha; Decision of the Swiss Federal Tribunal, May 12, 1982, in the *Matter of John M. Seabrook*.

States in requesting evidence for a crime covered by the treaty.⁴⁶ A successful challenge was made on the basis that the offense described in the treaty request was not covered by the treaty under the "dual criminality standard" which is discussed below.⁴⁷

The treaty with the Netherlands is also working well. According to the government attorney responsible for processing requests to and from the Netherlands, roughly twenty-five requests are made under the treaty by the United States on an annual basis now, about half of which are for information contained in the Netherlands Antilles. The Dutch, in turn, are making approximately one-half as many requests to us as we are to them. There have been no particularly noteworthy cases or pertinent appellate court decisions in Dutch courts.

By contrast, as of early 1988, the Turks have made ninety-eight requests while the United States has made only one under the Turkish Treaty. There are no public records concerning the nature of the requests made by Turkey to date, but the author has spoken with the government attorney who is responsible for reviewing those requests, and he has indicated that they cover a wide variety of offenses ranging from very serious felonies to what would be viewed in the United States as relatively insignificant misdemeanors. The Italians have made over twice as many requests to the United States as the United States has to Italy in the first two years that the Italian Treaty has been in force.⁴⁸ The fact that Italy and Turkey, unlike Switzerland and the Netherlands, are making the majority of requests for assistance is not surprising. The United States could be expected to make the majority of the requests under treaties with bank secrecy jurisdictions. Foreign governments can be expected to make the majority of requests when a substantial number of their nationals or their descendants reside in, or travel to, the United States.

None of the requests under the Italian Treaty have resulted in published court opinions to date and no legal issues of interpretation have arisen. However, the treaty, in its short life span, has played a very important role in two recent internationally well-publicized organized crime cases. The United States made numerous requests for assistance from Italy in the so-called "Pizza Connection" prosecution in New York City.⁴⁹ This case involved the operation of a heroin distribution network by major organized crime figures. (The heroin, after being shipped into this country, was distributed through local pizza parlors.) Over twenty

⁴⁶ See, e.g., *Generations Holdings, Ltd. and Pierre de Charmant*, *supra* note 45.

⁴⁷ See, e.g., Decision of the Swiss Federal Tribunal, Nov. 16, 1979, in the case of *Amir Zangenes*, A 352/78/65.

⁴⁸ See *supra* note 38.

⁴⁹ *United States v. Badalamenti*, No. 84-236 (S.D.N.Y. indictment filed Apr. 19, 1984). See *United States v. Badalamenti*, 626 F. Supp. 658 (S.D.N.Y. 1986).

Italian police officers went to New York to testify as a result of some of these requests. Conversely, the Italians made many requests to the United States for assistance in the famous 400 plus defendant "maxi-trial" of Mafia leaders in Sicily.⁵⁰ The assistance consisted largely of fulfilling requests to serve documents on witnesses and to take depositions. Many depositions were taken including the depositions of two of the key cooperating defendants, Tomasso Buscetta and Salvatore Cantorno. While these two individuals ended up testifying at the actual trial, the Italians, in lieu of live testimony, used depositions taken of both undercover and regular agents of U.S. law enforcement agencies. They also utilized depositions of several cooperating individuals, including two money launderers.

The experience with the Cayman Islands Agreement has been particularly good. As of October 1, 1987, fifty-one initial requests and forty follow-up requests have been made to the Cayman Islands.⁵¹ Ninety-five drug traffickers have been convicted with evidence obtained pursuant to these requests, a third of whom were convicted of violating the federal continuing criminal enterprise or "drug kingpin" statute.⁵² (By contrast, only six percent of the total number of defendants charged in the overall federal drug enforcement task force program in the first three months of 1988 were charged with this offense.)⁵³ The evidence has proved extremely valuable in asset forfeiture proceedings as well. In one case, the United States obtained a \$7.3 million forfeiture of cash deposited in a Houston bank account, introducing as evidence the records of the Cayman Islands "shell companies" used by the traffickers to move money in and out of the accounts in the Houston bank.⁵⁴

The success under the interim Cayman Islands Agreement bodes well for further success once final treaties with the Cayman Islands and the Bahamas, two major bank secrecy jurisdictions, enter into force. As of October 1, 1988, ratification of these two treaties, plus the ones with Canada, Mexico, Belgium, Thailand, was pending on the Senate floor, after approval by the Senate Foreign Relations Committee. All but the Thai Treaty are ready to enter into force upon Senate ratification and exchange of notes.

⁵⁰ Giovanni Abate and 467 People, No. 2289-92 (Palermo).

⁵¹ U.S. DEP'T OF JUST., CRIM. DIVISION, LAW ENFORCEMENT ALERT, ACCESS TO EVIDENCE IN THE BRITISH WEST INDIES 4 (Feb. 1988).

⁵² *Id.*

⁵³ U.S. DEP'T OF JUST., ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES STATISTICS AS OF MARCH 31 (1988). As of March 1988, of the 1,160 persons indicted in Task Force cases; 69 of these defendants were charged with a violation of 18 U.S.C. § 848, the so-called Continuing Criminal Enterprise or "drug kingpin" statute. A similar percentage was found in examining the 1987 reports.

⁵⁴ *United States v. Funds Being Held in the Name of European Commodities Ltd.*, Civ. Action No. H-84-2810 (S.D. Tex., filed July 3, 1984).

VI. ISSUES IN MUTUAL LEGAL ASSISTANCE TREATY NEGOTIATIONS

What are the critical issues confronting negotiators of mutual legal assistance treaties? How are these issues addressed in the various treaty texts negotiated to date and how are these texts interpreted after they enter into force?

A. *Scope of Covered Offenses*

Clearly, the most critical issue is the scope of offenses for which assistance will be made available to a requesting country pursuant to a particular treaty. There is no question that traditional crimes like murder, theft, and drug selling should be covered. But many U.S. federal crimes such as conspiracy,⁵⁵ RICO,⁵⁶ mail fraud,⁵⁷ continuing criminal enterprise,⁵⁸ ITAR,⁵⁹ and money laundering,⁶⁰ are defined in non traditional terms. These are the crimes which are most likely to be the offenses for which assistance is sought in a particular U.S. case. The term "conspiracy" poses a special problem because it is either unknown in foreign legal systems or is known under different and usually more restrictive terminology.

The typical historic approach under extradition treaties has been to require that there be "dual criminality" for an offense to be covered by a particular treaty. In other words, the offense in question must be one that is punishable under the laws of both treaty partners. This standard has been subject to both narrow and broad interpretation. Under the narrow approach, the actual elements of the crime must be identical, hence a mail fraud charge would not be the basis for an extradition because the notion of "interstate activity" is unknown in foreign law.⁶¹ Under a broad approach, a statute like mail fraud might pass muster because the foreign court reviewing an extradition request would look to the actual conduct involved—fraud—and find that the conduct alleged is one that is illegal in both countries though under different names.⁶²

⁵⁵ 18 U.S.C. § 371.

⁵⁶ 18 U.S.C. § 1962.

⁵⁷ 18 U.S.C. § 1341.

⁵⁸ 18 U.S.C. § 848.

⁵⁹ 18 U.S.C. § 1952.

⁶⁰ 18 U.S.C. § 1956, 1957.

⁶¹ In one notorious case, a French court denied an extradition request on an arson charge, because the defendant, who had fire bombed a commercial establishment, would not have been chargeable under French law with "arson" but with a different fire bombing offense. *Tchakhutian, Vicken*, No. 1088-82 (Cour d'Appel de Paris), Aug. 18, 1982.

⁶² See, e.g., *Request for Judicial Assistance (re Santa Fe Int'l Corp.)*, A 1/84 (Swiss Federal Court, First Court of Public Law), May 16, 1984. The Swiss court granted assistance in an insider trading case. It ruled that there was no equivalent statute in Swiss law and that the conduct in

However, some RICO or money laundering offenses, might not pass muster even under a broad "dual criminality" standard, because the conduct involved in the offense would not be criminal if committed in the foreign country.⁶³

A modern extradition or mutual legal assistance treaty will implicitly or explicitly cover "conspiracy."⁶⁴ A modern extradition or mutual legal assistance treaty will explicitly adopt a broad dual criminality interpretation, so that, for example, courts will not question the use of a treaty in mail fraud cases.⁶⁵ These safeguard provisions are sought in modern extradition, as well as mutual legal assistance, treaty negotiations.

Dual criminality remains the governing principle in extradition as opposed to mutual legal assistance treaties. The reason for the distinction is that it is more controversial to arrest and surrender a "person" to another country for conduct which would not be illegal locally, than to simply secure physical "evidence" and turn that over. U.S. extradition treaty negotiators try to insure coverage of so-called "peripheral" crimes (e.g., conspiracy, federal mail or wire fraud)—crimes that involve conduct covered by both countries' laws but in a different manner. U.S. mutual legal assistance treaty negotiators, by contrast, try to achieve a treaty which will cover offenses which would usually not even be covered by a broad dual criminality standard.

The principal issue in mutual legal assistance treaty negotiations usually relates to the inclusion or exclusion of so-called tax or other fiscal offenses. It is in the interest of the United States to seek assistance in tax matters in order to avoid the use of foreign bank accounts by U.S. citizens to avoid payment of income taxes. As the U.S. Supreme Court itself has said, "Taxes are the lifeblood of government."⁶⁶ Even if this greater goal cannot be achieved, some treaty partners agree to provide assistance in the prosecution of criminals like drug traffickers for tax offenses even

question would not constitute fraud in Switzerland. However, it would be a violation of Swiss law to reveal confidential business information, so on that basis dual criminality was established and assistance was granted.

⁶³ Both the RICO (18 U.S.C. § 1962) and the money laundering statutes (18 U.S.C. § 1956) are defined by reference to the commission of specified underlying crimes commonly referred to as "predicate offenses." If the underlying crime is not a crime in the foreign country, dual criminality would not exist. Further, in the case of the money laundering statute, even if the underlying crime or crimes are covered by foreign law, the act of "laundering" the proceeds itself may not be covered absent the existence of a foreign statute applicable to a particular fact situation. Such a statute might be one which penalizes the receipt of stolen property or which penalizes conduct constituting being an accessory after the fact.

⁶⁴ Thai Treaty, *supra* note 33, art. 15.

⁶⁵ See, e.g., Swiss Treaty, *supra* note 2, art. 4, § 2. Mutual legal assistance treaties are generally not limited by the dual criminality standard as discussed below.

⁶⁶ *Bull v. United States*, 295 U.S. 247, 259 (1935).

when the underlying drug or other criminal activity cannot be prosecuted due to a lack of evidence.

On the other hand, most foreign governments are not concerned with evasion of U.S. tax laws. The economies of many foreign countries are dependent in part, and in a few cases almost entirely, on a local banking industry which thrives for the very reason that banking transactions will be treated as confidential. A proper balance must be struck between the needs and priorities of the two treaty partners.

The first mutual legal assistance treaty with Switzerland states that it is applicable to all offenses except antitrust, tax and other fiscal offenses like customs duties and exchange controls.⁶⁷ It goes on, however, to state that assistance will be provided for the excepted offenses where they were committed "in furtherance of the purposes of an organized criminal group."⁶⁸

By contrast, the mutual legal assistance treaty with the Netherlands is very broad. It places only two specific limitations on treaty scope: (1) requests for search and seizure have to be predicated on offenses for which there is dual criminality using a broad standard of interpretation;⁶⁹ and (2) the Netherlands reserves the right to declare the treaty inapplicable to fiscal offenses where the information was in the Netherlands Antilles, although this restriction may always be changed by diplomatic note.⁷⁰

The Italian Treaty is also very broad. It covers all criminal investigations and proceedings without regard to dual criminality,⁷¹ subject only to the traditional limitations for "political" or "military" offenses that apply in all treaties and a catchall limitation if execution of the request would prejudice "the security or other essential public interests of the requested state."⁷² The Turkish Treaty and the recently negotiated treaties with Canada and Belgium are similarly broad in scope.⁷³

The two significant recently negotiated treaties with the Bahamas and the Cayman Islands, both major banking industry centers, illustrate, in different ways, the balance that is struck between the desire of the United States to prosecute drug traffickers, money launderers and major

⁶⁷ Swiss Treaty, *supra* note 2, art. 1, § 1(a), and art. 2, § 1. However, "compulsory measures" were generally limited to offenses for which dual criminality exists or which were listed on an attached schedule. *See id.* art. 4.

⁶⁸ *Id.* art. 2, § 2.

⁶⁹ Netherlands Treaty, *supra* note 19, art. 6, § 2.

⁷⁰ *Id.* art. 20, § 2. The reservation was exercised before the treaty entered into force.

⁷¹ Italian Treaty, *supra* note 20, art. 1, § 3.

⁷² *Id.* art. 5, § 1.

⁷³ Turkish Treaty, *supra* note 18, art. 21, § 2; Canadian Treaty, *supra* note 32, art. I, art. II, §§ 1, 3; Belgian Treaty, *supra* note 36, art. I, § 3.

criminals in every way possible and the desire of countries or dependencies to preserve bank secrecy.

The Cayman Islands Treaty embraces the following classes of criminal offenses: (a) felony conduct satisfying the dual criminality standard; (b) "racketeering" conduct which it carefully defines; (c) "narcotics trafficking" which is defined to cover all offenses "arising from, related to or resulting from" narcotics activity—a phrase designed to embrace conspiracy and CCE charges; (d) the use of fraud to obtain currency in connection with a scheme to promote a tax shelter (though that precise terminology is not used); (e) false statements to tax authorities in reference to a tax matter arising from the unlawful proceeds of a criminal offense; (f) failure to make a currency transaction report; (g) insider trading offenses; (h) fraudulent securities practices; (i) foreign "corrupt practices"; (j) any U.S. criminal offense predicated on the use of mails or other interstate facilities; (k) any offense later agreed to in a diplomatic note; and (l) any attempt or conspiracy for any of the above or being an accessory after the fact to any of the above.⁷⁴ While this definition excludes tax offenses not covered by (d) or (e) above, it is sufficiently broad to cover almost any other offense in which U.S. authorities have a current interest.

The Bahamas Treaty provision defining what the treaty terms "offenses" is shorter and somewhat less specific, but can reasonably be interpreted to cover conduct in any of the Cayman Islands categories. An "offense" is any conduct which satisfies the dual criminality standard or which is felony conduct "which arises from, relates to, results from, or otherwise includes": 1) drug trafficking; 2) theft (including the obtaining of money by false representations, pretenses, or by embezzlement); 3) violence; 4) fraud—including fraud on the government; and 5) a violation of a law relating to currency or financial transactions which is integrally related to the commission of another type of criminal activity covered by the treaty.⁷⁵ Tax offenses are excluded from coverage to the extent that their commission is unrelated to the commission of offenses in any of the categories listed above.

Even though the United States typically prefers the broadest possible mutual legal assistance treaty, it has accepted treaties which cover only: 1) drug trafficking offenses; 2) traditional forms of crime like fraud and theft; and 3) tax and other fiscal offenses, but only insofar as they relate to either 1) or 2).⁷⁶ While undoubtedly there is the potential for diplomatic or judicial disputes concerning the application of this last cat-

⁷⁴ Cayman Islands Treaty, *supra* note 22, art. 19, § 3.

⁷⁵ Bahamas Treaty, *supra* note 34, art. 2, § 1.

⁷⁶ Initial discussions with Panama broke down when the Panamanians attempted to limit a possible mutual legal assistance treaty to drug offenses. The United States made an exception in the case of the interim agreements with the Cayman Islands and the other British dependencies dis-

egory in a particular fact situation, the experience to date suggests that this problem should be limited as long as the United States acts in good faith in making requests and the concerned foreign governments maintain a general attitude of cooperation.

B. *Scope of Covered Proceedings*

Assistance, of course, is needed principally for criminal trials. As noted above, assistance is also needed at the investigative and grand jury stage. All mutual legal assistance treaties cover grand jury proceedings either expressly⁷⁷ or by implication through the provision for assistance in "investigations" as well as "court proceedings."⁷⁸

However, there are other types of proceedings which are quasi-criminal in nature—that is to say, they are ancillary to enforcement of the criminal laws but may be civil or administrative in nature. Forfeiture proceedings are one example. The Swiss Treaty covers both criminal "investigations or court proceedings" and forfeiture proceedings involving the forfeiture of items obtained through criminal offenses.⁷⁹ The Netherlands Treaty does not cover forfeiture proceedings.⁸⁰ The Netherlands, unlike Switzerland, did not have a broad forfeiture law, and forfeiture, at the time of the negotiations in the late 1970s, was not the major tool against drug traffickers that it has become today.

The more recent treaties are broader in terms of the proceedings to which they are potentially applicable. The Cayman Islands Treaty covers civil and administrative proceedings relating to drug trafficking, as well as criminal proceedings.⁸¹ The Bahamas Treaty covers judicial or administrative forfeiture of drug trafficking proceeds or instrumentalities and, in the discretion of the requested state, proceedings to impose or enforce restitution orders or fines, and proceedings to impose civil or administrative sanctions on an offender.⁸²

C. *Forfeiture of Confiscated Assets*

Assistance in forfeiture proceedings can extend beyond the mere provision of evidence. It can extend to an obligation to immobilize or forfeit the asset, and it can extend to an obligation to return the forfeited asset, or the proceeds of its sale, to the requesting state.

cussed above, limiting them to drug cases, but only on the condition that they be a prelude to negotiation of a full mutual legal assistance treaty.

⁷⁷ See, e.g., Bahamas Treaty, *supra* note 34, art. 2, § 3(b).

⁷⁸ See, e.g., Swiss Treaty, *supra* note 2, art. 1, § 1(a).

⁷⁹ Swiss Treaty, *supra* note 2, art. 1, § 1.

⁸⁰ Netherlands Treaty, *supra* note 19, art. 1, § 1.

⁸¹ Cayman Islands Treaty, *supra* note 22, art. 1, § 1.

⁸² Bahamas Treaty, *supra* note 34, art. 2, § 2.

The Swiss Treaty, as noted above, is expressly applicable to forfeiture proceedings.⁸³ Switzerland has a law which permits the forfeiture to the government of the proceeds of foreign drug violations and, after the mutual legal assistance treaty entered into force, took great advantage of this capability.⁸⁴

The Italian Treaty is unique in that it explicitly provides that not only does a requested state have authority "in emergency situations" to immobilize the assets of criminals who have committed a foreign violation which are subject to forfeiture, but that the requested state "shall have authority" to order the forfeiture of those assets to the requesting state.⁸⁵ In other words, it was contemplated by the negotiators that seized property would be transferred, or sold and the proceeds transferred, to the other country. While this transfer of forfeited assets sounds good in theory, it raises serious concerns about the possibility of foreign governments owning property in the United States, about forfeiting property for violations of statutes which if violated here would not warrant forfeiture, and about a lack of mutuality of interest where a government is forced to undertake what could be a protracted judicial proceeding, and assume administrative responsibility for managing property, in which it has no present or potential future interest.

Until November 1986, the United States had no authority to forfeit the proceeds of foreign crimes in general or to implement the Italian treaty provision in particular. Thus, the United States could not do what the Swiss could do—forfeit foreign drug proceeds. With the passage of a new provision in the Anti-Drug Abuse Act of 1986, there is now statutory authority: (1) to forfeit the proceeds of a foreign drug trafficking offense;⁸⁶ and, (2) when a treaty so authorizes, to sell the property and transfer the proceeds to a foreign country (at least when there has been joint participation in the investigation leading to the forfeiture.)⁸⁷ Italy, as of October 1988, has yet to pass its implementing legislation.

It is the author's view that it is better for the country where forfeited assets are located to keep those assets. This way, the problems noted above can be avoided. However, if there has been joint cooperation in an investigation the United States ought to be able to share conveyances like

⁸³ See *supra* note 79.

⁸⁴ Switzerland: Federal Law on Narcotics, art. 24. The propriety of such an action in drug cases was affirmed by the Swiss Federal Tribunal, Decision in the case of *David Miller*, No. A 410/81. See also statement of Elisabeth Kopp, *supra* note 39, which specifically notes the importance to Switzerland of this provision. However, if assets seized belong to an individual victim, as in a fraud case, they are returned to the victim. See generally Wirth, *Attachment of Swiss Bank Accounts: A Remedy for International Debt Collection*, 36 BUS. LAW. 1029 (1981).

⁸⁵ Italian Treaty, *supra* note 20, art. 18.

⁸⁶ 18 U.S.C. § 981(a)(1)(B)(Supp. IV 1986).

⁸⁷ 18 U.S.C. § 981(i)(1)(Supp. IV 1986).

boats and planes, or the proceeds of other forfeited assets, with participating foreign law enforcement agencies. The Anti-Drug Abuse Act of 1986 permits this limited sharing but requires the existence of a formal treaty provision authorizing the sharing of assets between the treaty partners.

Obviously such a treaty provision could appear in a mutual legal assistance treaty, as it does in the Italian one, but three treaties negotiated since November 1986, the ones with Mexico, Belgium, and the Bahamas, do not include a provision covering the sharing of forfeited assets. The more recently negotiated treaties simply provide: (1) for the provision of evidence for forfeiture proceedings; (2) some form of language calling on a state where forfeitable property is located to notify the other of that fact; and (3) to make a determination as to whether the institution of domestic forfeiture proceedings is appropriate in such instances.⁸⁸ This approach is the best approach in my opinion. A foreign state is obligated to affirmatively consider the possibility of seeking forfeiture but is not obligated to actually seek it. By analogy, in extradition cases there is an obligation to extradite, but never an obligation to prosecute the offender himself. A greater obligation to actually prosecute a person would be, arguably, an infringement on domestic sovereignty and on the exercise of domestic prosecutorial discretion. An obligation to forfeit property on behalf of, and for the benefit of, a foreign government regardless of how the local prosecutor views the available evidence, is likewise an infringement on domestic sovereignty and prosecutorial discretion in my opinion.

D. Exclusivity

A major issue is whether treaty partners should exclusively use the treaty provisions to obtain evidence abroad. It is a very sensitive issue, particularly with West European countries. This issue is one aspect of a much larger debate over the extraterritorial application of U.S. laws.⁸⁹

The Swiss treaty contains no provision obligating the parties to exclusively use its provisions to obtain evidence. In 1983 there was a major diplomatic debate when, as part of the Marc Rich tax investigation, a

⁸⁸ See, e.g., Bahamas Treaty, *supra* note 34, art. 14; Canadian Treaty, *supra* note 32, art. XVII; Thai Treaty, *supra* note 33, art. 15. The interim agreement signed this past February with Great Britain, *supra* note 28, at art. 10, § 3, provides that either party "may transfer forfeited assets, or the proceeds of their sale to the other Party, to the extent permitted by their respective laws. . . ." Since this agreement is not a formal treaty, it is doubtful that the requirements of 18 U.S.C. § 981 (i)(1)(Supp. IV 1986) for a transfer have been satisfied.

⁸⁹ See, e.g., Dam, *Economic and Political Aspects of Extraterritoriality*, 19 INT'L LAW. 887 (1985); Robinson, *Compelling Discovery and Evidence in International Litigation*, 18 INT'L LAW. 533 (1984); Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983).

grand jury subpoena was issued to the New York branch of Marc Rich, Inc., a Swiss corporation, to produce certain corporate records which were located in Switzerland, and fines of \$50,000 a day were imposed for noncompliance.⁹⁰ The Swiss Government ordered Rich not to comply with the subpoena and on three separate occasions even seized various documents sought to be produced. The Swiss claimed that the United States could obtain the documents pursuant to a new law enacted in 1981 in Switzerland called the Swiss Federal Act on Mutual Assistance.⁹¹ The U.S. position was that neither the mutual legal assistance treaty nor the subsequently enacted Swiss domestic legislation authorized assistance for the type of tax fraud with which Marc Rich was charged.⁹² The two *Bank of Nova Scotia* cases have made it clear that so-called extraterritorial subpoenas are appropriate and that sanctions may be imposed for noncompliance even when compliance might cause a violation of a foreign bank secrecy statute.⁹³

Does the mere existence of a mutual legal assistance treaty solve the problem of access to foreign bank records so that use of these subpoenas should be abandoned? Not necessarily. A treaty may not cover the of-

⁹⁰ *United States v. Marc Rich & Co., A.G.*, No. 83 Cr. 579 (S.D.N.Y. 1983). Use of subpoenas and imposition of fines affirmed, *United States v. Marc Rich & Co., A.G.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).

⁹¹ Swiss Federal Act of Mutual Assistance in Criminal Matters (IMAC), entered into force on Mar. 20, 1981.

For one statement of the Swiss position see, *In re Marc Rich & Co., A.G.*, 736 F.2d 864, 866 (2d Cir. 1984). The Swiss appeared as *amicus curiae* in an appeal by Rich from a denial of a motion in district court to terminate the fines. The court declined to rule on the merits of the Swiss position in this opinion primarily because the relevance of the Swiss law and actions had not been timely raised by Rich. *Id.* at 867.

⁹² For a complete statement as to why the various alternatives suggested formally and informally by the Swiss Government were perceived as unsatisfactory by the United States, see Olsen, *An Overview of the Use of 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 *TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS* 792-93 (1984) [hereinafter *TRANSNATIONAL LITIGATION*]. Mr. Olsen, at that time a Deputy Assistant Attorney General in the Tax Division of the Justice Department, argued: (1) the mutual legal assistance treaty was inapplicable to tax matters; (2) the new Swiss legislation was not in effect when the subpoena was served; and (3) the regular tax treaty with Switzerland, while providing for the exchange of evidence, did not provide for it to be furnished in admissible form.

The author has been informed that in June, 1984, the documents were requested pursuant to this new legislation, but that only some were produced six months later and not in a form to be of any value in trial. Rich, though indicted, has never been tried. He resides in Switzerland which will not extradite for tax offenses.

For a good narrative of the Marc Rich investigation see Tully, *The Lifestyle of Rich, The Infamous, Fortune* (Dec. 22, 1986) at 39-42.

⁹³ See *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1388 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1986); *United States v. Bank of Nova Scotia*, 740 F.2d 817, 828 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

fense being investigated. Subpoenas create an immediate obligation to produce. A treaty request might take weeks during which a bank or individual might remove or alter records. A treaty request may not ultimately be honored. Sanctions, like fines for contempt, are available against a bank officer for noncompliance with a subpoena but obviously not against a foreign official for noncompliance with a treaty request.

The issue of exclusivity has arisen in several court decisions, but not in the context of a mutual legal assistance treaty. The court in the second *Bank of Nova Scotia* case,⁹⁴ rejected an argument by a Canadian bank that a so-called nonbinding, informal "gentlemen's agreement" entered into in 1982 between U.S. and Cayman Islands officials establishing a procedure for obtaining bank records protected by Cayman Islands bank secrecy laws, constituted the exclusive or even the first means for securing those records. The court noted that, to the extent the agreement was binding or applicable at all, it did not purport to limit existing law enforcement investigative methods like the grand jury subpoena.⁹⁵

The Supreme Court recently rejected an argument in a civil case that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters constituted an exclusive method for obtaining evidence.⁹⁶ The Court held that the plaintiffs could rely on traditional discovery devices provided by the Federal Rules of Civil Procedure even when the evidence seized was located abroad.⁹⁷ The Court left open, on a case-by-case basis, the possibility that a trial court should insist on resorting to the Convention, under its supervisory powers in the discovery process, to minimize undue burdensomeness on the opposing party.⁹⁸

Four Justices issued a strong partial dissent. They stated that the Convention ought to be resorted to first in most cases even though they acknowledged that the Convention did not purport to provide a method

⁹⁴ *United States v. Bank of Nova Scotia*, 740 F.2d at 829-30. While no court has expressly ruled on an exclusivity issue in the context of a mutual legal assistance treaty, a federal district court which was ruling on the admissibility of certain out-of-court declarations in the *Badalamenti* case rejected a defense argument that the declarants should have been produced in court under the United States-Italian mutual legal assistance treaty, which provides procedures for compelling foreign prisoners to travel abroad to testify. See *United States v. Badalamenti*, 626 F. Supp. 658, 664 (S.D.N.Y. 1986). The court noted that the particular individuals were facing trial in Italy, and that, under the treaty, Italy has the right to refuse to produce them, which it had.

⁹⁵ *Id.* at 830. This "gentlemen's agreement" really amounted to an exchange of letters in one of which the Cayman Islands stated that requests for records would be reviewed by the Governor and the Council. The agreement was unenforceable. As a result of this decision, however, steps were taken diplomatically which led to the negotiation of the interim agreement, discussed above, *supra* note 21 and accompanying text. Accord *United States v. Vetco, Inc.*, 691 F.2d at 1286, which held that the United States-Swiss Tax Treaty did not foreclose the use of an IRS summons for the records of the Swiss subsidiaries of an American corporation.

⁹⁶ *Société National Industrielle Aérospatiale v. United States*, 107 S. Ct. at 2542.

⁹⁷ *Id.* at 2553-55.

⁹⁸ *Id.* at 2556.

of first or exclusive resort.⁹⁹ The fact that four Justices joined in this dissent could create a motive for defendants or witnesses to pursue the exclusivity issue in the context of a mutual legal assistance treaty. However, as noted below in the discussion of *Cardenas v. Smith*,¹⁰⁰ the treaties generally expressly foreclose standing for private parties to allege treaty violations, at least when no constitutional issues are raised.

The issue of exclusivity is addressed in some of the more recent treaties. The Canadian Treaty creates an obligation to "request assistance" pursuant to the treaty. If denial or delay could jeopardize successful completion of an investigation, consultation is to occur. If not otherwise agreed, the obligation to consult is considered terminated after thirty days and no further obligation exists.¹⁰¹ At no point is there an express restriction on the use of subpoenas. It is undoubtedly contemplated that their enforcement, as opposed to imposition, would not occur until "consultations" were concluded unsuccessfully.

The Cayman Islands Treaty also creates an obligation to seek assistance under the treaty for an offense covered by its terms. Enforcement of compulsory measures like grand jury subpoenas (as opposed to issuance) is expressly stayed. If denial or unreasonable delay occurs, the requesting party will give the other party forty-five days notice that its "obligations . . . under this [a]rticle . . . have been fulfilled." In no event may enforcement occur before the lapse of ninety days from the date assistance was first requested.¹⁰²

The Bahamas Treaty provides no formal procedure for dealing with issues of exclusivity.¹⁰³ However, in article 18, section 2, there is an express obligation to request assistance pursuant to the treaty without a prohibition on the use of other forms of evidence procurement.

Finally, spurred on by the *Marc Rich* case, the United States and Switzerland entered into a long period of negotiations on the issue of exclusivity. A "Memorandum of Understanding" was signed in November of 1987 between U.S. Attorney General Meese and Swiss Justice Minister Elisabeth Kopp on use of the treaty.¹⁰⁴ The agreement provides that the requesting party will first seek assistance pursuant to the treaty or the informal views of the requested party regarding the availability of the treaty to secure the evidence.¹⁰⁵ Where denial or unreasonable delay

⁹⁹ *Id.* at 2558.

¹⁰⁰ 733 F.2d 909 (D.C. Cir. 1984). See *infra* note 127 and accompanying text.

¹⁰¹ Canadian Treaty, *supra* note 32, art. 4, § 1.

¹⁰² Cayman Islands Treaty, *supra* note 22, art. 17.

¹⁰³ Bahamas Treaty, *supra* note 34.

¹⁰⁴ Memorandum of Understanding Between the Government of the United States of America and the Government of Switzerland on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings, signed Nov. 10, 1987.

¹⁰⁵ *Id.* at § III, 2.

would prejudice an investigation, the parties will consult over a thirty day period to try to resolve the matter.¹⁰⁶ After that period, a requesting party is to use "moderation and restraint" in undertaking enforcement of unilateral compulsory measures to secure the evidence in question.¹⁰⁷ Conversely, in resisting the use of "unilateral compulsory measures," the requested party commits to exercising "moderation and restraint."¹⁰⁸

E. *Incompatible Legal Systems*

A significant "technical" problem in negotiating mutual legal assistance treaties is the reconciliation of conflicting legal systems. The United States has a system under which executive branch officials investigate and then prosecute in an adversary setting. In countries with a civil law tradition like Switzerland and Italy, independent magistrates conduct an investigation, once it has been referred to them by the police, in an inquisitorial manner—they are both judges and prosecutors at the same time.¹⁰⁹ The original Swiss treaty, forty-one articles long, was very detailed in terms of how various requests would be implemented under the treaty. Subsequent treaties tend to be less specific, leaving details of implementation open.

Another example of incompatibility has plagued the negotiations with Mexico, which resumed in 1985 after an earlier breakdown in 1980 due in large part to a problem concerning depositions. The ability to compel attendance at a deposition to secure oral testimony is critical to the value of a mutual legal assistance treaty. Mexico took the position that, under its Constitution, compulsory attendance is unconstitutional unless there is evidence of a violation of Mexican law as well as foreign law.¹¹⁰ This problem may be easy to avoid when international drug trafficking or money laundering occurs, but with other crimes it will not be so easy to demonstrate a violation of Mexican law. The treaty, as finally negotiated, simply provides that testimony in the requested state shall be compelled "to the same extent as in criminal investigations or proceedings" in that state.¹¹¹

Many countries, like Switzerland, require that any questioning be

¹⁰⁶ *Id.* at § III, 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ For a good description of the investigative role played by Swiss magistrates, see Chamblee, *International Legal Assistance in Criminal Cases*, in *TRANSNATIONAL LITIGATION* *supra* note 10, at 195-202.

¹¹⁰ See MEX. CONST., art. 16, reprinted in G. FITZGERALD, *CONSTITUTIONS OF LATIN AMERICA* 147-48 (1968). That article states in part that there can be no detention or compulsion except upon order of judicial authority which must be preceded by a complaint, accusation, or denunciation based on an act which the law will punish.

¹¹¹ Mexican Treaty, *supra* note 35, art. 7, § 1.

conducted by their own officials.¹¹² This requirement can create problems because questions have to be asked to satisfy U.S. evidentiary requirements—e.g., laying a foundation for the admission of business records. Good communication and understanding is required.

F. Issues With Political Overtones

Politically sensitive issues will occasionally emerge. These include the scope of the political and military offense exceptions to the treaty, the true meaning of the “essential public interest” exception found in some treaties, and other possible exceptions to requests for treaty compliance like the existence of a racial, religious, or political opinion motivation for a prosecution. To date there has been no formal litigation on the application of these exceptions in the context of mutual legal assistance treaties (in large part because the United States reserves the right to assert these exceptions to the executive branch, not to the courts), although there is substantial litigation on the scope of the political and military offense exceptions in extradition treaties.¹¹³

Sensitive issues like the identification of the proper central authority can arise if there is more than a single government agency responsible for investigations and prosecutions.¹¹⁴ The U.S. Justice Department prefers to deal with a single entity. A particular foreign government may find the issue sensitive domestically. Another sensitive issue might be the applicability of a treaty to a territory which is disputed with a third country.¹¹⁵

VII. MUTUAL LEGAL ASSISTANCE TREATIES IN AMERICAN COURTS

There have been a limited number of published opinions to date which discuss issues relating to mutual legal assistance treaties. Most concern the application of specific provisions or the effect of the treaty on a person's constitutional rights.

The Second Circuit, for example, in *United States v. Johnpoll*,¹¹⁶ rejected the argument that a constitutional confrontation of witnesses problem exists when a Swiss deposition, taken pursuant to the treaty, is

¹¹² See *supra* note 10.

¹¹³ See, e.g., *In re Mackin*, 668 F.2d 22 (2d Cir. 1981); *Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986). See also Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61 (1979).

¹¹⁴ This issue arose in the U.S.-Thai negotiations. The Thai Ministries of Justice and Interior both wished to be the Central Authority as each had separate responsibilities relevant to obtaining evidence under Thai law. The United States rejected a Thai proposal to create two central authorities. Ultimately, the Interior Ministry was designated, but only on the eve of signing.

¹¹⁵ An obvious example is East Jerusalem.

¹¹⁶ 739 F.2d 702 (2d Cir. 1984).

admitted in a U.S. criminal trial, provided the defendant had the opportunity to attend the deposition at government expense and failed to do so.¹¹⁷ The court also rejected an argument that the treaty was violated when the defendant was prosecuted for an offense not covered by the treaty, provided he was also prosecuted for the offense for which the evidence was obtained and there was an appropriate limiting instruction confining the use of the evidence to the offense for which the evidence was obtained from Switzerland.¹¹⁸

In a recent Ninth Circuit opinion, *United States v. Mann*,¹¹⁹ the court rejected the argument of defendant taxpayer that his constitutional right to freedom from unlawful search and seizure under the fourth amendment was violated when documentary evidence was obtained under the Cayman Islands Agreement in alleged violation of the Cayman Islands bank secrecy statute. The court held the defendant had no standing to assert a fourth amendment claim based on the Cayman Islands statute because the statute contained "exceptions" to bank secrecy there negating any reasonable expectation of privacy.¹²⁰ The court noted the earlier Supreme Court decision of *United States v. Payner*,¹²¹ which held there was no reasonable expectation of privacy in Bahamian bank records because the Bahamian bank secrecy statute was "hedged with exceptions."¹²²

The *Mann* opinion curiously overlooks the fact that one of the clearly applicable "exceptions" to the Cayman Islands secrecy statute is the existence of a request under the interim agreement.¹²³ The court simply noted that the existence of "a vast array of exceptions" within the actual bank secrecy statute itself negates any reasonable expectation of privacy.¹²⁴

The court in *Mann* separately rejected the right of the defendant to challenge the validity of the request itself, noting that the agreement did not "establish direct, affirmative, and judicially enforceable rights" in individuals as opposed to treaty partners.¹²⁵

Despite the holding in *Mann* on the issue of standing, one subject area which could pose litigation problems for the United States is alleged

¹¹⁷ *Id.* at 710.

¹¹⁸ *Id.* at 714.

¹¹⁹ 829 F.2d 849 (9th Cir. 1987).

¹²⁰ *Id.* at 852.

¹²¹ 447 U.S. 727 (6th. Cir. 1980).

¹²² *Mann*, 829 F.2d at 852.

¹²³ Narcotic Drug (Evidence) (United States of America) Law, 1984 (Law 17 of 1984) (Cayman Islands), especially §§ 8, 9. The court, rather than straining to hold that the existence of some unspecified exceptions negated an expectation of privacy, should simply have pointed to these sections which explicitly negate it in this situation.

¹²⁴ *Mann*, 829 F.2d at 852.

¹²⁵ *Id.*

violations of constitutional rights by foreign officials. The traditional rule is that the fourth amendment exclusionary rule is not applicable to searches by foreign officials. However, there are two exceptions. The first is when the activity is unconscionable and the second is when U.S. law enforcement officials participated in the act to such an extent that an agency relationship can be inferred.¹²⁶

This issue was highlighted in the D.C. Circuit Court opinion in *Cardenas v. Smith*,¹²⁷ a civil action for injunctive relief and damages brought against the Attorney General, after the Swiss government froze the plaintiff's bank account. The United States had apparently sought assistance in the grand jury investigation of the plaintiff's brother. The documentation submitted contained information which caused the Swiss to freeze the plaintiff's account.

The court first rejected the argument that the plaintiff had any cause of action based on a treaty violation itself, noting that the treaty history made clear that private parties could not assert violations of treaty restrictions.¹²⁸ However, the court held the treaty did not expressly foreclose the assertion of a violation of a U.S. constitutional or statutory right.¹²⁹ (The court questioned whether the treaty could have validly foreclosed judicial review of a constitutional issue relating to the use of the treaty).¹³⁰ The court remanded the case to the district court to determine whether or not the United States had in some manner participated in the action to freeze the plaintiff's bank accounts. If the United States had so participated, a cause of action for damages was permissible. Subsequently, the action was dismissed upon the plaintiff's motion in the district court for reasons not relevant to the merits of the case.

The Second Circuit has recently ruled that an actual request by the United States to the Swiss Government to freeze a defendant's bank account pursuant to article 4 of the Treaty, is not a violation of due process.¹³¹

Another issue which has arisen concerns a defendant's right to contest the authentication procedures for documents received from abroad pursuant to a mutual legal assistance treaty. Article 18 of the Swiss Treaty establishes a detailed procedure for an *ex parte* hearing by an official in the foreign country at which the appropriate foundational questions are asked and transcribed. A final certification is provided either by

¹²⁶ See, e.g., *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 396 U.S. 870 (1969); *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985); *United States v. Delaplane*, 778 F.2d 570 (10th Cir. 1985).

¹²⁷ 733 F.2d 909 (D.C. Cir. 1984).

¹²⁸ *Id.* at 917-18.

¹²⁹ *Id.* at 919.

¹³⁰ *Id.*

¹³¹ *Barr v. United States*, 819 F.2d 26, 27 (2d Cir. 1987).

a designated foreign official or U.S. official stationed in the foreign country. A defendant then has the burden of establishing the lack of genuineness of such a document.

In *United States v. Davis*,¹³² the Second Circuit rejected the defendant's challenge to this procedure on the grounds that his constitutional right to confront the witnesses against him had been violated. It held that the certification procedure assured that any statement would bear sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration so there was no confrontation problem.¹³³ A defendant need not, therefore, be afforded an opportunity to be present at the authentication hearing. The *Davis* opinion also held that the Swiss Treaty did not confer standing on individuals to assert noncompliance with treaty procedures as a basis for excluding evidence.¹³⁴

VIII. CONCLUSION

Despite occasional glitches, the mutual legal assistance treaties which have already been entered into force have been faithfully implemented and have proven to be extremely valuable to all the treaty partners. The reason for this success has been the fact there was a basic mutuality of interest—a strong desire on the part of both treaty partners to obtain evidence for their own and each others' judicial proceedings and to thwart crime.

It will be interesting to see how well the treaties work with the Bahamas and Mexico, once they enter into force. Both nations are immediate neighbors of the United States. Both nations are important transshipment points for narcotics flowing to the United States. The Bahamas is a major banking center as well. Both nations have been the subject of significant criticism by members of Congress and the media in the past for lack of full cooperation in drug enforcement matters. Yet both nations' leaders have pledged to cooperate with the United States in wiping out the drug trade and stopping money laundering by providing evidence for criminal investigations. Success in using these treaties will constitute a significant blow to money laundering.

Regardless of what occurs in the course of implementing these two treaties, it is already clear that mutual legal assistance treaties are the wave of the future, if not already the present, in terms of providing American prosecutors with the best means to secure evidence from for-

¹³² 767 F.2d 1025 (2d Cir. 1985). U.S. law now establishes a procedure for authenticating foreign records in all criminal cases. See *supra* note 9 accord, *Bernstein v. IDT Corp.*, 638 F. Supp. 916 (S.D.N.Y. 1986), which also permitted a bankruptcy trustee to use documents in a civil proceeding that had been obtained initially from the Swiss for a criminal trial.

¹³³ *Davis*, 767 F.2d at 1031-32.

¹³⁴ *Id.* at 1030.

eign jurisdictions, particularly bank secrecy jurisdictions, in an admissible form. To the extent that these treaties can be negotiated and faithfully implemented with all the major bank secrecy jurisdictions, a major tentacle—the money tentacle—of the drug trade and organized crime will be cut off.

