

PREVENTING BILLIONS FROM BEING WASHED OFFSHORE: A GROWING APPROACH TO STOPPING INTERNATIONAL DRUG TRAFFICKING

I. INTRODUCTION

The United States has expended vast amounts of money and resources in trying to eradicate drug trafficking.¹ Despite these efforts, drug trafficking has steadily increased,² prompting the U.S. Government to predict that in 1986, Americans would spend more than \$100 billion for illegal drugs.³

Many of the approaches to stopping the growth of the drug problem have been based on two conflicting theories centered around supply and demand concepts. The United States, in supporting a supply-based approach, has aimed many of its drug programs toward the eradication of the narcotics trade, mainly in marijuana, cocaine and heroin, at the source, mostly Third World countries.⁴ The drug-producing countries, however, advocate a demand-oriented solution where the objective is to wipe out demand by rehabilitating drug users, thus eliminating the need for the supply.⁵

A third solution is now emerging, one that focuses on another aspect of trafficking that controls both supply and demand — money. Government officials are realizing that the lure of huge cash profits keeps the drug world well-populated and economically secure.⁶ Therefore, the development of law enforcement tools to

1. For an excellent discussion of the different U.S. approaches to fighting drugs and their ineffectiveness, see generally Note, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 N.Y.U. J. INT'L L. & POL. 353 (1984).

2. Opium production has tripled since 1984, to 120 tons during 1985-86, while heroin production has increased 10 times in the same period. *U.N. Report Links Drugs, Arms, Traffic, and Terrorism*, N.Y. Times, Jan. 13, 1987, at B7, col. 4.

3. Drug Eradication Act of 1986, H.R. 5484, 99th Cong., 2d Sess. § 532(a)(2), 132 CONG. REC. 11,219 (daily ed. Oct. 17, 1986).

4. This is mainly accomplished through crop substitution in source countries. Note, *supra* note 1, at 404-06.

5. B. FREEMANTLE, *THE FIX* 30 (1985).

6. Official annual estimates of drug-related profits in the United States range from \$20 billion to \$90 billion. Strasser, *Hiding Money Gets Tougher*, Nat'l L.J., Nov. 3, 1986, at 46, col. 2. A former money launderer who became a government informer testified to laundering \$100,000 a day in Miami for a major drug dealer. The dealer had approximately six to eight other people working as daily launderers. *Tax Evasion, Drug Trafficking, and Money Laundering as They Involve Financial Institutions: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Fi-*

attack the illegal profits of drug trafficking can be more effective than trying to regulate the source or the market for drugs.⁷ Seizing a drug operation's profits and assets has proven to be more effective in shutting down the operation than simply putting the trafficker in jail.⁸

In an attempt to help law enforcement officials in this area, Congress recently passed the Money Laundering Control Act,⁹ which makes the laundering of money a separate federal crime. The new law is directly aimed at a drug trafficker's Achilles' heel. In order to enjoy the enormous cash proceeds of illegal drug deals and to escape detection, a trafficker must clandestinely transform the dirty cash into a clean form of wealth.¹⁰

One way to clean illicit cash is to set up a legitimate cash business through which the illegal profits can be channelled and reported as legal income derived from the business. This, however, is considered a risky method.¹¹ Given the huge income a drug dealer can make, reports of such abnormally high profits for a legitimate business usually raise the suspicions of the Internal Revenue Service and state law enforcement officials.¹² In addition, businesses typically used for laundering activities are well known and documented.¹³ Therefore, money laundering cannot succeed unless it is conducted behind an impenetrable veil of secrecy.

In recent years, foreign jurisdictions offering business and bank secrecy laws have created a formidable legal wall behind

nance and Urban Affairs, 99th Cong., 2d Sess. 85-86 (1986) [hereinafter *Money Laundering Hearings*].

7. "The drug business will stop when they can't get anybody to do anything with the money." *Money Laundering Hearings*, *supra* note 6, at 76. No matter how many members of a drug organization are arrested, be they "lieutenants" or the major leaders, there are always others to continue operations. However, if officials can seize the assets and property of the group, then the organization is rendered impotent. *Id.* at 854-55 (statement of Alwin C. Coward, Acting Deputy Assistant Administrator, Drug Enforcement Agency).

8. See *Nantucket Land Seized, Roxbury Cash Escapes*, Boston Globe, Sept. 29, 1985, at 20, col. 1. The article compares two drug investigations, one of which "gave priority to choking the drug flow, not seizing the property." While investigators were able to indict seven members of the drug ring, the assets of a \$10 million operation are still missing. The other investigation followed the dealer through "public documents and financial records in the United States and abroad" and succeeded in "not only dismantling his drug ring but in capturing its profits." *Id.*

9. 18 U.S.C. § 1956 (1986).

10. Comment, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 TEX. INT'L L.J. 133, 136-37 (1985).

11. *Id.* at 137.

12. *Id.*

13. *Id.* These businesses include savings and loan institutions, casinos, construction companies and small restaurants. *Id.*

which a majority of drug traffickers can launder their illegal proceeds.¹⁴ Some estimates indicate that as much as 75 percent of all sophisticated drug trafficking involves the use of offshore secrecy havens.¹⁵

One such haven that has been used extensively by drug traffickers is the Cayman Islands.¹⁶ This British colony is located 460 miles southwest of Miami with a population of 17,000.¹⁷ The Cayman Islands has been considered one of the most difficult secrecy jurisdictions for U.S. authorities investigating drug trafficking/money laundering activities to penetrate.¹⁸ A combination of this reputation for ironclad secrecy, convenient geographic location and an economic climate that has encouraged financial activity, has made the Cayman Islands an international money laundering center.¹⁹

This situation is changing, however, due to recent U.S. pressure and a serious effort by the Cayman Islands Government to avoid drug money.²⁰ In 1986, the United States and the Cayman Islands signed a Mutual Legal Assistance Treaty (MLAT)²¹ regarding criminal matters, which will provide the parties, and ultimately the international community, with an effective tool in combatting the menace of drug trafficking.

This Note will first discuss how a drug trafficker launders money through a secrecy haven such as the Cayman Islands in order to avoid U.S. laws and regulations on money laundering. Second, this Note will examine the development of U.S. law regarding money laundering, with emphasis on the need to access evidence from foreign secrecy jurisdictions regarding the financial transactions and accounts involved. Third, this Note will look at the various methods the United States has used to reach this extraterrito-

14. PERM. SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES, S. REP. NO. 130, 99th Cong., 1st Sess. 4 (1985) [hereinafter CRIME AND SECRECY REPORT].

15. Weiland, *The Use of Offshore Institutions to Facilitate Criminal Activity in the United States*, 16 N.Y.U.J. INT'L L. & POL. 1115, 1118 (1984).

16. CRIME AND SECRECY REPORT, *supra* note 14, at 76.

17. Comment, *supra* note 10, at 134-36.

18. *Id.* at 77.

19. *Id.* at 80. "One IRS official estimated \$3 billion [of] criminal moneys flow there annually; one Justice official estimated up to \$10 billion illicitly flows there each year. Such figures [however] are unsubstantiated." *Id.* at 83.

20. *Id.* at 76.

21. Cayman Islands Treaty Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, United States-United Kingdom-Northern Ireland, ____ U.S.T. ____, T.I.A.S. No. ____ (not yet in force) [hereinafter Cayman Islands Treaty].

rial evidence, especially in connection with the Cayman Islands. Fourth, this Note will analyze the use of the new treaty between the United States and the Cayman Islands as a tool for money laundering investigators. Fifth, a comparison will be made between the treaty and other extraterritorial methods to show that the treaty offers the best legal approach for the international community to take in fighting the growing problem of drug money laundering. Finally, this Note will conclude that a combination of domestic legislation and international judicial assistance can become the most effective system for combatting the international drug trafficker, whose motivation and security are derived only from the billions of dollars to be made in the trade.

II. THE USE OF OFFSHORE SECRECY HAVENS BY DRUG TRAFFICKERS AND UNITED STATES EFFORTS TO STOP THE PROCESS

A. THE SHIELD OF SECRECY AND A TRAFFICKER'S USE OF OFFSHORE HAVENS

The legal prototype of a secrecy jurisdiction was developed in Switzerland during the 1930's²² as a response to the German Nazi Government's attempts to seize the assets of Jews who were either fleeing the holocaust or had been annihilated by it.²³ Since then, secrecy havens have been created through banking and business laws in jurisdictions all over the world.²⁴ The Cayman Islands enacted their first bank secrecy law in 1966.²⁵ This law made the disclosure of bank information a criminal offense subject to sanctions.²⁶ In 1976, the law was broadened to protect all business information, yet it also provided exceptions to secrecy requirements that allowed access through the consent of the customer or

22. The Swiss base their banking and business secrecy laws on three legal principles: the Civil Code's right to personal privacy; the confidentiality of the contractual relationship between a bank and its customer, found in the Code of Obligations; and criminal liability for violating the secrecy found in the federal banking laws. See Frei, *Swiss Secrecy Laws and Obtaining Evidence From Switzerland*, in 1 TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS 1, 6 (1984).

23. CRIME AND SECRECY REPORT, *supra* note 14, at 33.

24. *Id.* This list includes the Bahamas, Bermuda, the Cayman Islands, the Channel Islands, Hong Kong, Liechtenstein, the Netherlands (including the Netherlands Antilles), Panama, Switzerland and the Turks and Caicos Islands. *Id.* at 33-34.

25. Banking and Trust Law of 1966, § 10, *reprinted* in CRIME AND SECRECY REPORT, *supra* note 14, at 77.

26. *Id.*

an order of the haven's proper authority.²⁷

The Cayman Islands secrecy laws have contributed largely to the colony's rapid growth as an international financial center.²⁸ Other reasons for this development include the absence of income, corporate or property taxes, a stable political environment and reliable transportation and communications services.²⁹ Also, the absence of government disclosure of tax information with other countries and the abolition of all exchange controls has created a currency-free port.³⁰

All of these elements in the Cayman Islands and other secrecy havens have been conducive to drug traffickers looking for more sophisticated and effective methods of laundering their illegal gains.³¹ Since secrecy laws have allowed traffickers to escape prosecution and develop their intricate methods of laundering, very little is known about "the economics of the drug trade,"³² or the intricate process called money laundering.³³

Basic laundering techniques, however, have remained consistent.³⁴ A trafficker first opens an account in a secrecy haven or, if the haven's law allows, the trafficker will form an exempt company and open an account in its name.³⁵ Once the account is open, the trafficker must find a way to smuggle the drug-related cash out of the United States, without creating a paper trail that would link him to the illicit money or to the laundering process itself.³⁶ The crudest way to accomplish this is to physically and surreptitiously

27. Confidential Relationships (Preservation) Law § 3 (1976), *as amended by Act of 1979*, reprinted in *CRIME AND SECRECY REPORT*, *supra* note 14, at 78-79.

28. In 1964, the Cayman Islands had only a few banks and no offshore businesses. *CRIME AND SECRECY REPORT*, *supra* note 14, at 30. By 1984, there were 450 banks and 18,000 corporations. *Id.* at 76.

29. *Id.*

30. *Id.* These conditions are characteristic of the major secrecy havens throughout the world. *Id.*

31. *See generally Drug Barons Hide Billions*, *Boston Globe*, Sept. 22, 1985, at 1, col. 1. One drug trafficker who maintained accounts in the Bahamas and the Cayman Islands confessed at his 1981 sentencing hearing that he had "a lot of ideas" on how to move money into Liechtenstein corporations as well as the Philippines, Taiwan, Hong Kong and Singapore. "[T]his was what I was going to do . . . I was going to send the money out." *Id.* at 25, col. 1.

32. Strasser, *supra* note 6, at 46.

33. *Drug Barons Hide Billions*, *supra* note 31, at 1.

34. *CRIME AND SECRECY REPORT*, *supra* note 14, at 17.

35. Comment, *supra* note 10, at 139. This second procedure provides another layer of secrecy if the haven's laws provide for anonymity for the corporation's owners (or allows bearer stock companies). *Id.*

36. *Id.*

transport the cash out of the haven by plane past U.S. customs officials.³⁷ Another way to get the money out is to deliver the currency to a domestic bank, to be electronically transferred to the offshore bank account.³⁸

Another more sophisticated method includes "structuring" a transaction.³⁹ In order to reduce the large volume of cash, a trafficker hires one or more people to run to different banks to buy cashier's checks for less than \$10,000, so as not to trigger the banks' reporting duties under the Bank Secrecy Act (BSA).⁴⁰ The checks can then be easily transported to the havens and deposited into secret accounts, safely beyond the reach of U.S. investigators.⁴¹

B. U.S. LEGISLATION TO STOP MONEY LAUNDERING

The BSA was enacted as the first major attack on the practice of money laundering.⁴² It took the U.S. Government 10 years, however, to properly enforce the reporting requirements on domestic banks.⁴³ Therefore, it was not until the early 1980's that U.S.

37. *Drug Barons Hide Billions*, *supra* note 31, at 24. One trafficker perfected a technique where his male couriers wore women's pantyhose, stuffed with bundles of cash, and then put regular clothes over the hose. *Id.*

38. Comment, *supra* note 10, at 139-40.

39. This activity is also called "smurfing" and the runners involved are smurfs. *Money Laundering Hearings*, *supra* note 6, at 179 (statement of Richard C. Wassenaar, Internal Revenue Service, Assistant Commissioner, Criminal Investigations).

40. 31 U.S.C. §§ 5311-5322 (1983), as supplemented by 31 C.F.R. § 103 (1984), amended by Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 2135 [hereinafter BSA]; see also *Money Laundering Hearings*, *supra* note 6, at 179 (statement of Richard C. Wassenaar).

The BSA requires financial institutions to file a Currency Transaction Report for every cash transaction above \$10,000. BSA, 31 U.S.C. § 5313. It also has filing requirements whenever someone takes more than \$10,000 into or out of the United States. *Id.* § 5316. Violation of these requirements invokes civil and criminal penalties. *Id.* §§ 5321, 5322. While the statute has been used as an important tool to combat money laundering, there are some limiting factors. See *infra* text accompanying notes 43-47. For a detailed description of smurfing activities, see *Money Laundering Hearings*, *supra* note 6, at 79 (statement of Herb Friedberg, former money launderer).

41. Weiland, *supra* note 15, at 1116. A further step in effectively escaping detection is to set up accounts in a number of havens, and then "filter" or "cycle" the money through the different accounts. *Id.* The trafficker is then free to move the money back into the United States under the guise of a legitimate investment such as purchasing real estate, or as a loan to him from the foreign corporation or bank. He may even pay the loan back with interest and illegally deduct the interest on his U.S. tax return statement. Comment, *supra* note 10, at 140.

42. Comment, *supra* note 10, at 140.

43. See *U.S. Failing to Catch Dirty Cash*, Boston Globe, Sept. 25, 1985, at 1, col. 1.

banks substantially responded to the act's requirements.⁴⁴ This improvement was due to the U.S. Government following up on BSA violations and publicly exposing the fact that banks' failures to comply with the act allowed organized criminals to easily launder millions of dollars.⁴⁵

There were other weaknesses in the act which proved troublesome. The act placed reporting duties on the domestic financial institution, not the customer who was the actual launderer.⁴⁶ Up until 1986, a person who engaged in structuring activities to prevent the bank from filing a report generally was not considered guilty of any illegal conduct.⁴⁷ This lack of liability, along with a legitimate concern for their customers' rights to financial privacy, resulted in many, but by no means most, U.S. banks not asking questions when customers came in on a regular basis with huge amounts of cash to buy cashier's checks just under \$10,000. Many banks did not even file currency reports for transactions over \$10,000.⁴⁸

These limitations of the BSA, and a need to place blame where blame is due, prompted Congress to pass the Money Laundering Control Act of 1986 (MLCA),⁴⁹ which makes money laun-

44. *Id.* "[S]ince 1980 bank compliance in reporting cash transactions has jumped from about 10% to 80 or 90%." See also Thornton, *Anticrime Attack Pays Dividends*, Wash. Post, May 24, 1985, at E2.

45. "[T]he Bank of Boston was fined \$500,000 after pleading guilty to failing to report \$1.22 billion in cash transactions with foreign banks — some for companies owned by a local Mafia family." Thornton, *supra* note 44, at E7. By November, 1986, 33 institutions and 34 bank officers and employees had been prosecuted. Strasser, *supra* note 6, at 46; see also *United States v. Bank of New England*, No. 86-1334, slip op. (1st Cir. June 10, 1987) (where the Bank of New England lost on appeal from a conviction of 31 violations of the BSA).

46. *Money Laundering Hearings*, *supra* note 6, at 180 (statement of Richard C. Wassenaar).

47. See *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986). These cases held that "smurfing, at least if conducted at different banks on the same day, or at the same bank on different days, is not a crime" under the BSA. *Money Laundering Hearings*, *supra* note 6, at 179; see also *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986). In *Reinis*, a cash withdrawal exceeding \$10,000, effected by the purchase of several cashier's checks from the same bank, on the same day, but at different times, by several agents of the defendant, was held not reportable since there was no single transfer of funds exceeding \$10,000 to either agent. *But cf. Bank of New England*, where the court held that it was a violation of the BSA to fail to report a transaction where a customer visited the same branch of the same bank once on the same day to present to a single bank teller two to four checks. All of the checks were made payable to cash, "for varying amounts under \$10,000 which, when added together, equalled a sum greater than \$10,000." *Id.*

48. *Money Laundering Hearings*, *supra* note 6, at 98-99 (statement of Herb Friedberg, former money launderer).

49. 18 U.S.C. § 1956 (1986) (MLCA).

dering a separate federal offense.⁵⁰ Basically, the law prohibits anyone from engaging in a financial transaction involving proceeds from an unlawful activity with the intent to promote that activity, conceal the illegal source of the funds, or evade the BSA reporting requirements.⁵¹ In addition to serious civil and criminal sanctions,⁵² the MLCA also authorizes the seizure and forfeiture of the funds or property derived from criminal activity.⁵³

The MLCA also amends the BSA to eliminate one of the BSA's flaws. The amendment prohibits any person from structuring a transaction so as to cause a domestic financial institution not to file a currency report.⁵⁴ In this way, the law preempts previous case law⁵⁵ by placing liability on the actor with the genuine criminal intent.

The MLCA also makes it a crime to transport out of the United States funds or monetary instruments knowingly obtained from an illegal activity or intended for use in an illegal activity.⁵⁶ Section 1956(a)(2) is aimed at stopping the process of money laundering through offshore havens. Yet, its effectiveness is questionable given the creative and successful methods launderers use to move the money out of the country.⁵⁷

While the major effects of the MLCA on money laundering remain to be seen, they should help investigators establish the United States as an unaccommodating place to launder illegal money, especially for drug traffickers. In order to prove that a defendant violated the MLCA in moving the money offshore, investigators will need sufficient information regarding complex laundering schemes and documentary evidence, that will be admissible in court, proving that the illegal transactions took place and that the

50. See generally *Money Laundering Hearings*, *supra* note 6. This law seems closer to serving the goals of law enforcement officials. "[A]n analogy might be that if there were [sic] no federal crime for armed robbery of a bank, then you force . . . prosecutors to use . . . a violation of failure to register a weapon, when the real crime is robbing the bank." *Id.* at 127.

51. MLCA, 18 U.S.C. § 1956(a)(1).

52. The civil penalties are either \$10,000 or the value of the property or funds involved. *Id.* § 1956(b). The criminal sanctions are \$500,000 or twice the value of the transaction and up to 20 years in prison. *Id.* § 1956 (a)(1)-(2).

53. *Id.* §§ 981-982. This provision if enforced properly should prove crippling to drug trafficking operations. See *id.* § 1956.

54. 31 U.S.C. § 5324 (1986).

55. See *supra* note 47.

56. MLCA, 18 U.S.C. § 1956(a)(2).

57. Note, *Extraterritorial Jurisdiction and the Federal Money Laundering Offense*, 22 STAN. J. INT'L L. 389, 393 (1986); see *supra* note 37.

accounts do exist.⁵⁸ The new money laundering law expressly provides extraterritorial jurisdiction over illegal money laundering schemes that occur in part in the United States or are conducted by a U.S. citizen and exceed \$10,000 in value.⁵⁹ This provision, while helpful to U.S. investigators, comes into direct conflict with the secrecy laws of foreign jurisdictions. Therefore, in tracking today's trafficker/lauderer, an effective yet legal approach to extraterritorial investigations of secret bank records is more important than ever.

III. THE SEARCH FOR LEGAL APPROACHES TO OBTAINING FINANCIAL INFORMATION FROM SECRECY HAVENS

The need for extraterritorial investigation and prosecution of criminal matters is becoming a crucial area in the development of international law because of the changing nature of crime. Once considered a local problem dealt with by individual state laws, crime has broadened into a federal and, increasingly, an international problem.⁶⁰ Especially in the case of drug money laundering, the international financial community is extensively utilized by traffickers to escape detection under domestic law.⁶¹

The previous section discussed the development of U.S. law regarding money laundering, which lead to a need for extraterrito-

58. CRIME AND SECRECY REPORT, *supra* note 14, at 16.

59. There is extraterritorial jurisdiction over the conduct prohibited by this section if:
 (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.

MLCA, 18 U.S.C. § 1956(f). It has been suggested that the "in part" language of this provision covers a transaction involving only foreign banks and foreign nationals where the foreign national wires funds from one foreign bank location to another via the United States. See Note, *supra* note 57, at 396. *But see infra* note 93.

60. Olsen, *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 1 TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMODATIONS 774, 776-77 (1984).

As an illustration of the increasing international scope of criminal activities, consider that in the 1960's, the annual number of extradition requests received by the United States seldom exceeded 20; by 1978 this number was approximately 100; and in 1982 the United States received over 330 requests. *Id.*

61. See *supra* note 15 and accompanying text. Sophisticated criminals know that putting evidence abroad makes it more difficult for U.S. officials to obtain it. Chamblee, *International Legal Assistance in Criminal Cases*, in 1 TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMODATIONS 191, 192 (1984).

rial reach by U.S. investigators to track down and stop the laundering flow. This section will briefly describe the past approaches taken by the United States to obtain financial information regarding laundering in secrecy havens. These approaches can be divided into two categories: the traditional methods of judicial assistance in the form of letters rogatory or comity and, the more controversial, unilateral methods of compelled consent and grand jury subpoena enforcement.

A. *THE USE OF JUDICIAL ASSISTANCE THROUGH LETTERS ROGATORY*

Historically there were two types of international mutual assistance for criminal matters: extradition and "other" judicial assistance.⁶² This "other" type of assistance, which included summoning witnesses to testify, serving documents, conducting search and seizures, and producing information or evidence, is provided through the formalized procedure of letters rogatory.⁶³ A letter rogatory is a request by a judicial officer in one country for the performance of a judicial act by a judge in another country.⁶⁴

It was not until 1964 that the United States passed legislation expressly permitting the Department of State to receive and transmit letters rogatory in criminal cases.⁶⁵ Before 1964, judicial assistance developed reluctantly in the United States as well as in other countries mainly because of the conflict of laws rule, that the criminal law of one nation will not give effect to the criminal law of another.⁶⁶ This reluctance began to give way to the growing need for evidence abroad.⁶⁷

Letters rogatory, however, have grown into a "cumbersome and time-consuming process."⁶⁸ They usually present problems in drafting and interpretation because the letters are written by

62. Grutzner, *International Judicial Assistance and Cooperation in Criminal Matters*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW: JURISDICTION AND COOPERATION 189, 196 (M. Bassiouni ed. 1973).

63. Chamblee, *supra* note 61, at 215.

64. *Id.* at 212.

65. 28 U.S.C. § 1782 (1976). "(a) The Department of State has power, directly, or through suitable channels: (1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution" *Id.*

66. See generally *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L L. 189, 197-98 (1985).

67. See *supra* notes 60-61 and accompanying text.

68. Ellis & Pisani, *supra* note 66, at 189.

judges familiar with their own legal vernacular, but not that of the foreign jurisdiction receiving the request.⁶⁹ The process of using letters rogatory is time-consuming because the letters must be delivered through diplomatic channels.⁷⁰ Using letters rogatory also requires the costly services of foreign counsel to represent the Requesting State before the Requested State's judicial proceeding.⁷¹

An important limitation regarding letters rogatory is that major jurisdictions, such as the United Kingdom, the Bahamas and the Cayman Islands, only allow such judicial assistance for trial purposes but not for investigations.⁷² This could hinder an investigation into money laundering activities where evidence of foreign accounts is crucial to obtaining an indictment.

B. U.S. UNILATERAL APPLICATION OF EXTRATERRITORIAL JURISDICTION TO OBTAIN FINANCIAL RECORDS FROM FOREIGN SECRECY HAVENS

Due to the inefficiency and lack of effect that U.S. prosecutors have had with judicial assistance in the form of letters rogatory, the Justice Department has sought unilateral methods to obtain vital financial evidence from secrecy havens. One method has been an attempt to comply with secrecy laws that allow disclosure of banking information when the client signs a consent to release form. The other method, which has proven effective but very controversial, is enforcement of a U.S. grand jury subpoena on the foreign bank to produce the required information.

1. Compelled Consent

In many instances, prosecutors have attempted to obtain financial information by compelling a defendant, or a person whose records are being investigated, to sign a consent to release form.⁷³ Normally, under secrecy haven laws, this is a legitimate form of disclosure.⁷⁴ However, many secrecy jurisdictions consider such a consent invalid when it is compelled or given under protest.⁷⁵

69. Chamblee, *supra* note 61, at 217.

70. *Id.*

71. Olsen, *supra* note 60, at 781.

72. *See id.* at 792.

73. *See, e.g.*, United States v. Davis, 767 F.2d 1025 (2nd Cir. 1985); United States v. Ghidoni, 732 F.2d 814 (11th Cir. 1984); United States v. Browne, 624 F. Supp. 245 (N.D.N.Y. 1985).

74. *See* The Cayman Confidential Relationships (Preservation) Law (Law 16 of 1976), amended by Law 26 of 1979, § 3.

75. This is true in Switzerland. *See* Frei, *supra* note 22, at 11; *see also* Alexander Wins

In practical application, the method of compelled consent requires the suspect to be aware of the government's investigation and/or be under the government's control. This is not a problem when the suspect has been indicted by a grand jury, but it does present difficulties when the information is needed during the investigation phase to get the indictment,⁷⁶ especially when the investigation must be kept confidential.

Another time-consuming and costly problem occurs when the suspect or defendant raises a fifth amendment defense. The Northern District of New York, as well as the Eleventh Circuit, have struck down this defense.⁷⁷ In *United States v. Ghidoni*,⁷⁸ the court held that the directive was not self-incriminating, because it was carefully worded so as not to form a testimonial admission by the defendant of the records' existence, authenticity, or the defendant's control over the records.⁷⁹

Conversely, at least one district court has upheld a fifth amendment challenge when there was no indictment of the suspect. In *In re Doe*,⁸⁰ contrary to *Ghidoni*, the court held that by compelling the suspect to sign the consent, the existence of and control over the accounts would necessarily be admitted; therefore, the suspect would be providing the government with the incriminating link it needed to secure an indictment.⁸¹ This disagreement among the courts, combined with the cost and time spent in litigating a fifth amendment challenge, and some havens' refusal to honor a consent given under protest, limits the compelled consent method as an effective investigative tool.

2. Enforcement of Grand Jury Subpoenas

The most controversial method used by U.S. prosecutors to apply extraterritorial jurisdiction over secrecy havens has been the enforcement of grand jury subpoenas on banks in foreign jurisdic-

Right to Protest Bank Accounts Probe, Syracuse Post-Standard, Feb. 5, 1987, at 1. On appeal, the Second Circuit Court of Appeals held that the ex-mayor of Syracuse could not be forced to authorize the release of information regarding his Panamanian bank accounts unless the banks were aware of the compulsion. United States prosecutors fear that the foreign banks will not honor a compelled consent form. This ruling could "hinder the government's attempts to locate and seize assets . . ." *Id.*

76. See *In re Doe*, 599 F. Supp. 746 (S.D. Tex. 1984).

77. See *Ghidoni*, 732 F.2d at 818; *Browne*, 624 F. Supp. at 248.

78. 732 F.2d 814 (11th Cir. 1984).

79. *Id.* at 818.

80. 599 F. Supp. 746 (S.D. Tex. 1984).

81. *Id.* at 748.

tions. This method, while it is supported by U.S. courts and has proven effective for prosecutors, has also hurt U.S. relations with countries such as the Bahamas and Canada.⁸²

In *United States v. Bank of Nova Scotia (Nova Scotia I)*,⁸³ a grand jury subpoena *duces tecum* was served on the Miami branch of the Bank of Nova Scotia, a Canadian-chartered bank, during an investigation into tax evasion and drug trafficking charges.⁸⁴ The subpoena called for the production of banking records from the bank's branches in the Bahamas and Antigua.⁸⁵ The bank refused to comply with the subpoena's request for bank records, on the ground that it would be a violation of Bahamian bank secrecy laws.⁸⁶ On appeal, the district court's order to comply was affirmed based on the balancing test contained in the Restatement (Second) of Foreign Relations Law.⁸⁷ The court held that the importance of a U.S. grand jury criminal investigation outweighed a secrecy haven's interest in protecting financial privacy through its laws.⁸⁸

In 1983, the Bank of Nova Scotia was served with another subpoena demanding the production of financial documents from branches in the Bahamas, Antigua, and the Cayman Islands.⁸⁹ The appeals court, in *Nova Scotia II*, included a discussion of the bank's nationality in its application of the balancing test used in *Nova Scotia I*.⁹⁰ Since the bank chose to conduct widespread business in the United States, it could not hide behind its Canadian nationality in order to escape U.S. jurisdiction and laws.⁹¹ Therefore, the enforcement of the subpoena was valid.⁹²

While the defendant bank in both cases was forced to comply with the subpoenas, the court's holdings were limited to institutions with branch offices in the United States.⁹³ When the records

82. See CRIME AND SECRECY REPORT, *supra* note 14, at 67-70; *Money Laundering Hearings*, *supra* note 6, at 815.

83. 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) (*Nova Scotia I*).

84. *Id.* at 1386.

85. *Id.*

86. *Id.*

87. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).

88. *Nova Scotia I*, 691 F.2d at 1391.

89. *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984) (*Nova Scotia II*).

90. *Id.* at 829.

91. *Id.* at 828.

92. *Id.* at 829.

93. *Money Laundering Hearings*, *supra* note 6, at 186 (statement of Richard C. Wasenaar). Also, while the government prosecutors won, the process of obtaining the information was extremely costly and time-consuming. *Id.*

are located in foreign banks that have no substantial U.S. contacts, summonses and subpoenas are ineffective in breaking through the wall of secrecy.⁹⁴ This restriction is a frustrating problem for prosecutors in money laundering investigations since many launderers can simply set up accounts in banks with no U.S. branches.⁹⁵

The practice of U.S. extraterritorial jurisdiction through the unilateral enforcement of the grand jury subpoena could have more long-term and serious consequences. Foreign jurisdictions have objected strongly to the United States exercise of judicial authority in their territories, claiming that such an approach is a violation of national and territorial sovereignty.⁹⁶ The objecting jurisdictions have reacted by enforcing strong blocking statutes against foreign investigators.⁹⁷

The Cayman Islands poses a typical example of the kind of response aggressive U.S. prosecutors should expect. In 1976, the Fifth Circuit Court of Appeals, in *United States v. Field*,⁹⁸ affirmed contempt sanctions against a non-resident Cayman Islands banker who was served with a subpoena while in the United States.⁹⁹ The banker had refused to testify about certain bank accounts, claiming that doing so could subject him to criminal prosecution in the Cayman Islands.¹⁰⁰ The court, in applying a balancing test between the banker's probable prosecution in the Cayman Islands and the United States interest in enforcing a grand jury subpoena, rejected the defense and held the banker in contempt.¹⁰¹ In response to this ruling, the Cayman Islands legislature passed the

94. *Id.* at 190.

95. The MLCA, however, does provide extraterritorial jurisdiction to cover conduct committed, in part, outside the United States. *See supra* note 59 and accompanying text. The degree to which the MLCA can be enforced against transactions with "purely" foreign banks will depend, however, on how the courts interpret the Act. *See Note, supra* note 57, at 395.

96. Frei, *supra* note 22, at 33.

97. Shine, *Transnational Litigation in Criminal Matters: A Case Study of the Interconex Prosecution*, in 1 *TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS* 533, 567 (1984). A blocking statute prohibits use of local procedures to disclose secret information to foreign authorities. *See, e.g.*, Swiss Penal Code § 273, which states, "[a]ny person who . . . makes a business or manufacturing secret available to foreign authorities, to foreign organizations, private business enterprises or to their agents, shall be punished by imprisonment, in serious cases by penal servitude. In addition to the imprisonment a fine can be imposed."

98. 532 F.2d 404 (5th Cir. 1976).

99. *Id.* at 410.

100. *Id.* at 405.

101. *Id.* at 407.

Confidential Relationships (Preservation) Act¹⁰² which strengthened and transformed the previous *bank* secrecy laws into all-encompassing *business* secrecy laws.¹⁰³

The unilateral enforcement of grand jury subpoenas can, therefore, eventually hinder the development of a transnational criminal enforcement system. When foreign jurisdictions raise claims of violations of sovereignty or strengthen the secrecy or blocking laws that the subpoenas are trying to break through, international cooperation breaks down, and the drug trafficker/money launderer is able to move more freely than ever to hide and clean his illegal profits.¹⁰⁴

Realizing that this trend could irreparably harm relations between them, the United States and the Cayman Islands began to build a system of mutual assistance that culminated in the Mutual Legal Assistance Treaty (MLAT),¹⁰⁵ signed by the two countries in 1986. While the treaty still requires ratification by both parties, it stands ready to become an effective tool for prosecutors as well as an important development in the series of MLAT's the United States has formed with other foreign jurisdictions.

IV. THE UNITED STATES-CAYMAN ISLANDS TREATY ON MUTUAL ASSISTANCE AS A LEGAL APPROACH TO OBTAINING FINANCIAL INFORMATION FROM SECRECY HAVENS

In the past few years, the Justice Department, realizing the need for cooperation in transnational criminal litigation, has made the development of MLAT's and similar executive agreements involving criminal matters, one of its top priorities, especially in its war on drugs.¹⁰⁶ The MLAT's make up a growing series of bilateral agreements into which the United States has entered with other countries, obligating the parties to cooperate with each other in

102. See The Cayman Confidential Relationships (Preservation) Law (Law 16 of 1976), amended by Law 26 of 1979, § 3.

103. CRIME AND SECRECY REPORT, *supra* note 14, at 50.

104. Sophisticated criminals know that putting evidence abroad (a prime example is laundering illegally-obtained money in offshore banks) makes it more difficult for U.S. law enforcement officials to use it against them. Chamblee, *supra* note 61, at 192.

105. Cayman Islands Treaty, *supra* note 21.

106. Strasser, *supra* note 6, at 47; *Money Laundering Hearings*, *supra* note 6, at 805. In the field of international drug enforcement, MLAT's are "our highest priorities." *Money Laundering Hearings*, *supra* note 6, at 814 (statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, Justice Dep't).

carrying out criminal investigations and prosecutions.¹⁰⁷ The most common form of mutual assistance involves gathering evidence in a foreign country, usually through judicial orders, search and seizure orders, service of process or even arrests of suspects.¹⁰⁸

At the moment, the United States has MLAT's for criminal matters in force with Switzerland,¹⁰⁹ Turkey,¹¹⁰ the Netherlands, including Netherlands Antilles,¹¹¹ and Italy.¹¹² There are similar MLAT's signed but not yet in force, with Columbia,¹¹³ Morocco,¹¹⁴ Canada,¹¹⁵ Thailand¹¹⁶ and the Cayman Islands.¹¹⁷ Treaties with West Germany and Jamaica are being negotiated,¹¹⁸ and plans for negotiations with Nigeria, a major route for heroin trafficking and money laundering, have been recently announced.¹¹⁹

The Cayman Islands Treaty (Treaty), the newest of the signed MLAT's, was developed from a narrower executive agreement between the United States and the Cayman Islands covering drug-related crimes only.¹²⁰ The agreement, signed on July 26, 1984, of-

107. TREATY ON MUTUAL LEGAL ASSISTANCE WITH THE KINGDOM OF THE NETHERLANDS, S. REP. No. 36, 97th Cong., 1st Sess. 1 (1981).

108. Chamblee, *supra* note 61, at 191-93.

109. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter Swiss Treaty].

110. 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.

111. Treaty on Mutual Legal Assistance with the Kingdom of the Netherlands, June 12, 1981, United States-Netherlands, ____ U.S.T. ____, T.I.A.S. No. 10734 [hereinafter Netherlands Treaty].

112. Treaty on Mutual Assistance in Criminal Matters, Nov. 9, 1982, United States-Italy, ____ U.S.T. ____, T.I.A.S. No. ____ (entered into force Nov. 13, 1985) [hereinafter Italian Treaty].

113. Treaty on Mutual Assistance in Criminal Matters, Aug. 20, 1980, United States-Columbia, ____ U.S.T. ____, T.I.A.S. No. ____ (approved by the Senate on Jan. 4, 1982; not yet in force) [hereinafter Columbian Treaty].

114. Convention on Mutual Assistance in Criminal Matters, Oct. 17, 1983, United States-Morocco, ____ U.S.T. ____, T.I.A.S. No. ____ (advice and consent of the U.S. Senate given on June 29, 1984; not yet in force) [hereinafter Moroccan Treaty].

115. Treaty on Mutual Legal Assistance in Criminal Matters, March 18, 1985, United States-Canada, *reprinted in* 24 I.L.M. 1092-99 (No. 4, July 1985).

116. Treaty on Mutual Legal Assistance, March 19, 1986, United States-Thailand, ____ U.S.T. ____, T.I.A.S. No. ____ (not yet in force).

117. Cayman Islands Treaty, *supra* note 21.

118. Telephone interview with James Springer, Staff Attorney, Tax Div., Justice Dep't (Jan. 9, 1987).

119. *Shultz Raises Heroin Issue in Nigeria*, N.Y. Times, Jan. 13, 1987, at A3, col. 3.

120. Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, 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 Narcotic Drugs (1961), *reprinted in* 24 I.L.M. 1110-18 (July 1985) [hereinafter Executive Agreement].

ferred an effective alternative to the approach epitomized by the *Nova Scotia* cases, at least for drug-related crimes.¹²¹

In the 15 months of its limited existence, the agreement essentially provided for a procedure whereby the U.S. Attorney General could sign a request certificate to the Cayman Islands Attorney General, listing the drug-related financial documents needed.¹²² The Cayman Islands Attorney General could then issue a notice requiring production of the documents in a timely fashion.¹²³ The agreement also called for negotiations for a more comprehensive mutual assistance treaty should the agreement prove satisfactory.¹²⁴

On July 3, 1986, such a treaty was signed.¹²⁵ While the agreement had provided a binding diplomatic approach to mutual assistance, the Treaty will create a binding legal approach to mutual assistance in the area of gathering criminal evidence located in foreign secrecy jurisdictions.

The Treaty provides for assistance to be given in the forms of producing documents and records, serving documents, locating persons, executing search and seizure requests, freezing criminally obtained assets, and facilitating proceedings for forfeiture, restitution and collection of fines.¹²⁶ In comparison to the other MLAT's, the Treaty provides the most comprehensive assistance. It also includes provisions regarding forfeiture and immobilization of assets that were considered innovations in other treaties.¹²⁷

As in all of the other MLAT's regarding criminal matters, the Treaty establishes an obligation to provide mutual assistance not only for criminal prosecutions, but also for investigations.¹²⁸ As

A similar agreement with Turkey and the Caicos Islands was signed on Sept. 18, 1986 and is in place. See BULL. OF LEGAL DEV. 175 (No. 16, Sept. 29, 1986).

121. Ironically, one of the reasons for the successful negotiation for the Cayman Islands agreement, and later the treaty, is the United States unilateral actions in the *Nova Scotia* cases in enforcing grand jury subpoenas. *Money Laundering Hearings*, *supra* note 6, at 815-16. Foregoing the enforcement of the grand jury subpoenas for documents covered by the Executive Agreement, and later the treaty, was a major concession by the United States. See CRIME AND SECRECY REPORT, *supra* note 14, at 83-84.

122. Executive Agreement, *supra* note 120, art. 3.1.ii.

123. *Id.* art. 3.2.a. Provisions were also made for authentication of testimony regarding the documents. *Id.* art. 4.

124. *Id.* art. 7. The Executive Agreement led to 65 indictments and \$15 million in forfeiture in the 15 months of its existence. Strasser, *supra* note 6, at 47.

125. Cayman Islands Treaty, *supra* note 21.

126. *Id.* art. 1(2).

127. MUTUAL LEGAL ASSISTANCE WITH ITALY, S. REP. NO. 36, 98th Cong., 2nd Sess. 12 (1984) [hereinafter ITALIAN REPORT]; see *infra* note 151.

128. Cayman Islands Treaty, *supra* note 21, art. 1(1).

stated before, evidence of foreign bank accounts will be crucial in the investigatory phase regarding money laundering charges.

Essentially, the Treaty sets up a central authority in each country empowering them to make and receive requests for assistance.¹²⁹ Article 4 defines, in a straightforward manner, the standard form and content of the requests,¹³⁰ and Article 5 provides for the timely execution of such requests by the authority having the proper jurisdiction in the Requested State.¹³¹

Article 8 of the Treaty allows the United States to have access to secret bank records in the same capacity as Cayman authorities would under Cayman Islands law.¹³² The Treaty, therefore, does away with the need to unilaterally enforce a grand jury subpoena *duces tecum* on a foreign bank when the offense is covered by the Treaty. Article 8(5) also provides for authentication of the foreign documents in the Requested State so as to comply with the authenticating procedures established in Rule 902(3) of the Federal Rules of Evidence.¹³³

The first question to ask when applying the Treaty is whether the criminal offense at issue is covered by it. One of the definitions of a "criminal offense" in article 19(3) is dual criminality: "any conduct punishable by more than one year's imprisonment *under*

129. *Id.* art. 2. This is common to all the other MLAT's. The central authority in the Requested State not only represents the Requesting State in the Requested State, it also determines if the request should be denied under article 3 of the treaty. Denial of assistance is mandatory if the underlying offense is tax-related, with an exception made for tax fraud. *Id.* art. 3(1)(a).

130. According to article 4, the requests must be submitted in writing and must include the following information: name of the Requesting State's authority to whom the request relates (art. 4, (2)(a)); the subject matter, including the criminal offenses and purpose that gave rise to the request (art. 4, (2)(b), (f)); the names, birthdates and addresses of persons involved (art. 4, (2)(c)); any information supporting the request (art. 4, (2)(d)); a description of the evidence or information sought (art. 4, (2)(e)); and identity of any person from whom evidence is sought (art. 4, (2)(g)).

131. "The Central Authority of the Requested Party shall *promptly* execute any request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the Requested Party shall do everything in their power to execute the request." *Id.* art. 5(1) (emphasis added).

132. "A person requested to testify or to produce documentary information or articles in the territory of the Requested Party may be compelled to do so in accordance with the requirements of the law of the Requested Party." *Id.* art. 8(1). "This obligation is consistent with the treaty's basic requirement that the Requested State follow the same practices and procedures in executing a request for assistance as it normally follows in domestic investigations or proceedings of similar gravity." MUTUAL LEGAL ASSISTANCE TREATY WITH THE REPUBLIC OF COLUMBIA, S. REP. NO. 35, 97th Cong., 1st Sess. 4 (1981) [hereinafter COLUMBIAN REPORT].

133. *Id.*

the laws of both . . . Parties."¹³⁴ In the Swiss Treaty on Mutual Assistance in Criminal Matters, this requirement has caused frustrating problems for U.S. prosecutors involved with insider trading violations.¹³⁵ However, most of the later MLAT's have not required dual criminality for the granting of mutual assistance.¹³⁶

Article 19(3)(C) defines other activities that may not be crimes in both states but are still covered by the Treaty. These include any offenses or civil or administrative proceedings relating to drug trafficking,¹³⁷ and any willful failure to report an international transfer of currency or any currency transaction connected with the unlawful proceeds of any criminal offense.¹³⁸ This is a direct reference to the BSA and its reporting requirements to stop money launderers. Exempting this offense from the dual criminality requirement is beneficial to law enforcement officials, since BSA violations are not considered crimes in other countries.

The wording of section 19(3)(c) could also be interpreted to cover the offense of money laundering, since such an offense is basically defined as a financial transaction connected with unlawful proceeds of a criminal activity.¹³⁹ If such an interpretation of the Treaty proves problematic, U.S. law enforcement officials can look to the broad language of article 19(3)(C) regarding drug offenses.¹⁴⁰ If a money laundering investigation or indictment can be connected with illegal drug activities, then it should fall under this section. Since the Treaty is a result of the success achieved under the executive agreement on drug-related offenses, broad interpretation of article 19, relating to drug money laundering activities, would be consistent with one of the original purposes of the

134. Cayman Islands Treaty, *supra* note 21, art. 19(3)(a) (emphasis added). Dual criminality is usually a standard requirement in extradition treaties. See COLUMBIAN REPORT, *supra* note 132, at 3.

135. See *Marc Rich & Co. v. United States*, 707 F.2d 669 (2d Cir. 1983).

136. See, e.g., Italian Treaty, *supra* note 112; Moroccan Treaty, *supra* note 114; Columbian Treaty, *supra* note 113.

137. Cayman Islands Treaty, *supra* note 21, art. 19(3)(c). "'Narcotics trafficking' . . . means all offenses or ancillary civil or administrative proceedings taken by either of the Parties or their agencies connected with, arising from, related to, or resulting from any narcotics activity covered by the Single Convention on Narcotic Drugs, 1961." *Id.*

138. See *id.* art. 19(3)(f). It is defined as:

[W]illfully or dishonestly failing to make to the Government a report which is required by law to be made to it in respect of an international transfer of currency or other financial transactions connected with, arising from, or related to the unlawful proceeds of an criminal offense falling with [sic] any provision of this Article.

Id.

139. MLCA, 18 U.S.C. § 1956.

140. Cayman Islands Treaty, *supra* note 21, art. 19(3)(c); see *supra* note 136.

Treaty.

The Treaty has other provisions which expressly facilitate mutual cooperation in combatting the trafficking/laundrying system. Article 1 provides that mutual assistance will be given only for civil and administrative proceedings that are drug-related, while the other MLAT's generally allow assistance for all civil and administrative investigations and proceedings.¹⁴¹ By making a drug-related limitation on this type of assistance, the Treaty actually retains the major purpose of the other MLAT's similar provisions — sharing information on the activities of suspected drug traffickers.¹⁴²

Article 16(1) allows for an exchange of information regarding criminally derived proceeds located in the other party's territory.¹⁴³ This could be very beneficial to investigators trying to follow complex laundrying schemes. Article 16(2) imposes an obligation on both parties to assist in the forfeiture of illegal proceeds and the collection of criminally imposed fines.¹⁴⁴ These provisions, therefore, not only allow the United States to bypass the wall of secrecy in the Cayman Islands to determine the volume of laundered proceeds, they also aid law enforcement officials in effectively depriving a major trafficker of those proceeds.

V. A COMPARISON BETWEEN THE CAYMAN ISLANDS TREATY AND OTHER METHODS TO OBTAIN FINANCIAL INFORMATION FROM SECRECY HAVENS

By comparing the characteristics of the three approaches, the MLAT's, as exemplified by the Cayman Islands Treaty, are the most rational and practical legal approach.

A. PRACTICAL BENEFITS OF THE TREATY OVER LETTERS ROGATORY AND COMPELLED CONSENT

As stated previously, letters rogatory are usually very difficult to draft, translate and interpret because they are written by a

141. See Columbian Treaty, *supra* note 113, art. 1(1); Italian Treaty, *supra* note 112, arts. 1(2), 8(3); Moroccan Treaty, *supra* note 114, art. 7(2); Swiss Treaty, *supra* note 109, art. 1(1). Cf. Netherlands Treaty, *supra* note 111.

142. COLUMBIAN REPORT, *supra* note 132, at 1; see also Cayman Islands Treaty, *supra* note 21, art. 16(1).

143. "The Central Authority of one Party may notify the Central Authority of the other Party when it has reason to believe that proceeds of a criminal offense are located in the territory of the other Party." Cayman Islands Treaty, *supra* note 21, art. 16(1).

144. Cayman Islands Treaty, *supra* note 21, art. 16(2)(a), (c). Also, article 1(2)(g) expressly provides for the immobilization of criminally derived assets.

judge who is familiar with his own legal vernacular but not that of a foreign jurisdiction.¹⁴⁵ The formulation of a letter becomes a costly endeavor where the utmost care and skill must be employed. The Treaty, however, provides that a straightforward and standard form be used to make requests for specific pieces of evidence or information.¹⁴⁶

The process of delivering letters rogatory is conducted through diplomatic channels and can be very slow.¹⁴⁷ The Treaty designates one Central Authority in each country for receiving and processing requests from the other country.¹⁴⁸ The authorities, usually the appropriate heads of justice ministries, are permitted to communicate directly with one another thereby curtailing delays and facilitating better understanding of the contents of the requests.¹⁴⁹ Letters rogatory also require the services of foreign counsel.¹⁵⁰ With the system of Central Authorities established in the MLAT's, the foreign governments directly represent each other in their respective jurisdictions, thus eradicating the need for expensive foreign counsel.¹⁵¹

In addition, jurisdictions will not honor letters rogatory that are sent for investigative purposes.¹⁵² Under the Treaty, assistance must be rendered not just for judicial proceedings but also for criminal investigations and administrative investigations and proceedings related to drugs.¹⁵³ This added assistance allows investigators to build a stronger case for an indictment.

Perhaps the most important improvement the MLAT's contain over the more traditional letters rogatory is the concept of *obligation* rather than *discretion*. Once a letter rogatory reaches a foreign judge, he uses his discretion in deciding whether or not to

145. See *supra* note 69 and accompanying text.

146. Cayman Islands Treaty, *supra* note 21, art. 4.

147. See *supra* note 70 and accompanying text.

148. Cayman Islands Treaty, *supra* note 21, art. 2.

149. ITALIAN REPORT, *supra* note 127, at 3.

150. See *supra* note 71 and accompanying text.

151. Olsen, *supra* note 60, at 781; see *supra* note 129. "The Central Authorities have the responsibility to insure that requests comply with the requirements of the Treaty, are executed promptly, and are returned promptly to the requesting country, together with the information and evidence obtained, upon execution by the competent authorities of the requested country." ITALIAN REPORT, *supra* note 127, at 3.

152. See *supra* note 72 and accompanying text.

153. Cayman Islands Treaty, *supra* note 21, art. 1.

honor it,¹⁵⁴ a decision which is rarely appealable.¹⁵⁵ On the other hand, the Treaty, as an agreement between two equal states, establishes a binding obligation on each party to honor the other party's properly submitted request.¹⁵⁶ If there is any foreign litigation, the focus will be on interpreting the Treaty, not trying to persuade a foreign court to override a foreign judge's discretion.

As mentioned before, the method of compelled consent has a major drawback — it requires the suspect to be under the government's control and, therefore, be aware of an investigation against him.¹⁵⁷ These limitations are avoided by the Treaty, since it requires no action by the person under investigation. If an investigation is confidential or undercover, as many drug-related investigations are, article 7(3) allows the Requesting State to ask that the Requested State treat a request for assistance with confidentiality.¹⁵⁸

The Treaty's design avoids the practical problems of both the letters rogatory and the compelled consent methods. Its streamlined procedures and binding quality will also facilitate the relations of the United States and the Cayman Islands under international law and, thereby, reverse the consequences of the U.S. enforcement of grand jury subpoenas.

B. THE INTERNATIONAL LEGAL BENEFITS OF THE TREATY OVER ENFORCEMENT OF U.S. GRAND JURY SUBPOENAS

The benefits of the Treaty over the grand jury subpoena are a mix of political and legal concerns. While the *Nova Scotia* cases

154. Olsen, *supra* note 60, at 792.

155. *Id.* But see *United States v. Carver*, No. 81-00342 (D.C. 1981), *aff'd. sub nom. United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (where the Cayman Islands judge's decision to deny execution of a letter rogatory was reversed on appeal).

156. Cayman Islands Treaty, *supra* note 21, art. 1(1): "The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the investigation, prosecution, and suppression of criminal offenses of the nature and in the circumstances set out in this Treaty, including the civil and administrative proceedings referred to in paragraph 3(c) of Article 19 [Narcotics Trafficking]." *Id.*

157. See *supra* note 76 and accompanying text.

158. According to article 7(3),

The Central Authority of the Requesting Party may request that the application for assistance, its contents and related documents, and the granting of assistance be kept confidential. If the request cannot be executed without breaking confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party which shall then determine whether the request should nevertheless be executed.

Id.

were successful in results, their long-term consequences could considerably diminish their importance. Foreign countries will react either by negotiating for a treaty on cooperation such as the Cayman Islands did, or by imposing stronger secrecy or blocking statutes,¹⁵⁹ making the wall of secrecy around their jurisdictions more impregnable — a situation most beneficial to the trafficker/launderer. Countries have also raised the considerable claim that such subpoenas are violations of their sovereignty under international law.¹⁶⁰ The United States justifies the enforcement approach through a balance of interests between the U.S. criminal justice system and the other country's privacy interests.¹⁶¹ This balance of interests, however, leads to a disregard for another nation's laws.

The Treaty, by creating an obligation to cooperate and then by providing a flexible and relatively simple system for the execution of assistance, replaces this balanced disregard with a respect for, and employment of, both countries' laws. The Cayman Islands wall of secrecy remains intact, but rather than a hole being crashed through, the wall now has a door that the United States can unlock when needed.

The effect of the Treaty is limited, however, to only those offenses it defines.¹⁶² Despite this, the Treaty remains a workable instrument because of article 19(3)(k). This provision allows the governments of both parties to increase the number of offenses covered under the Treaty.¹⁶³

For drug trafficking and money laundering concerns, a second limitation is more troubling. The Treaty is limited to the United States and the Cayman Islands only. Once the Treaty with the Cayman Islands is in force, there is nothing to stop a launderer from shifting to a secrecy haven that does not have a treaty with the United States. This problem can only be solved by the development of more treaties with other havens. This proposed system of bilateral agreements would then need to be interlocked thereby creating a network of obligation to grant mutual legal assistance

159. See *supra* note 103 and accompanying text.

160. Shine, *supra* note 9, at 566.

161. See *supra* notes 87-88 and accompanying text.

162. A major concern of the United States regarding the use of secrecy havens is tax violations; the Cayman Islands Treaty, however, specifically exempts tax evasion other than fraud from its coverage. See Cayman Islands Treaty, *supra* note 21, art. 3(1)(a).

163. Under article 19(3)(k), " 'Criminal offense' means:

(k) such further offenses as may from time to time be agreed upon by exchange of diplomatic notes between the United States and the United Kingdom, including the Cayman Islands." *Id.* art. 19(3)(k).

among the havens themselves.

VI. CONCLUSION

For a drug trafficker, money is not only a prime motivation but it also operates as a vital form of security.¹⁶⁴ Therefore, a trafficker's need to launder these profits is his Achilles' heel. Due to the fact that U.S. laws on money laundering have recently been sharpened and strengthened, the United States is becoming a very unaccommodating place to store or launder illegal cash. The trafficker, however, has learned to direct an entire global network of illegal operations by moving with anonymous ease through the international community.

MLAT's have become the newest weapon for investigators and prosecutors in tracking down illegal drug money. At the moment, there are a relatively small number of these treaties. These numbers, however, already have defied the gloomy predictions made a few years ago regarding the effectiveness of the treaties.¹⁶⁵ As the number of treaties grow, so will their effectiveness, because there will be fewer and fewer accommodating places for traffickers to clean their illicit cash without risking exposure.

In a larger sense, the treaties are also creating an obligation to cooperate on an international level to fight criminal activities. This obligation could form a solid foundation upon which a system of international criminal justice can be built. International assistance, supplemented by strong local laws, could deliver the crushing blow in the war on drugs.

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164. See generally B. FREEMANTLE, *supra* note 5.

165. See Weiland, *supra* note 15, at 1115-16.