

行政院及所屬各機關出國報告
(出國類別：研究)

國際刑事司法互助之理論與實務

服務機關：台灣台北地方法院檢察署

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行政院及所屬各機關出國報告提要

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內容摘要：

有鑑於跨國犯罪日益猖獗，而我國目前僅與數國簽訂引渡條約或國際刑事司法互助協定，對於打擊犯罪成效有限，因此本文試圖從我國、美國、英國等三國比較法之角度切入，針對國際刑事司法互助之法源依據、適用範圍、適用限制等理論基礎，以及三國實務上各個環節運作之狀況，加以

研析，以期作為我國日後發展國際刑事司法互助之些許參考。

目次：

第一章 研究目的	1
第二章 國際刑事司法互助之法源依據及適用範圍	3
第一節 法源依據	3
第二節 適用範圍	5
第三章 我國、美國、英國之刑事司法互助制度之概述	6
第一節 我國、美國、英國之刑事司法互助法源依據	6
第一目 我國之法源依據	6
第二目 美國之法源依據	7
第三目 英國之法源依據	7
第二節 我國、美國、英國之刑事司法互助之範圍	9
第一目 我國刑事司法互助之範圍	9
第二目 美國刑事司法互助之範圍	10
第三目 英國刑事司法互助之範圍	12
第三節 三國相關制度之異同	14
第四章 我國、美國、英國請求他國取得證據供本國使用之程序	16
第一節 我國	16
第二節 美國	17

第三節 英國	19
第五章 我國、美國、英國接受他國請求提供證據之程序	21
第一節 我國	21
第二節 美國	22
第三節 英國	24
第六章 我國、美國、英國為作證或調查等目的解送受拘禁人之程序	25
第一節 我國	25
第二節 美國	26
第三節 英國	27
第七章 我國、美國、英國接受請求執行搜索扣押之程序	29
第一節 我國	29
第二節 美國	30
第三節 英國	31
第八章 我國、美國、英國接受請求將犯罪所得凍結或沒收之程序	33
第一節 我國	33
第二節 美國	34
第三節 英國	37

第九章	國際刑事司法互助實務上遭遇之困難	39
第一節	請求國或接受請求國並非締約國或並非國家	39
第二節	接受請求國拒絕協助之標準訂定問題	40
第三節	請求他國取得證據供本國使用時，證據之形式以何國為準	41
第四節	傳聞證據之問題	42
第五節	取得之國外證據使用上之限制	44
第十章	建議及研究心得	46

附錄：

附件一：	美洲國家間之刑事司法互助協定 (Inter-American Convention on Mutual Assistance in Criminal Matters)	一
附件二：	美國、加拿大間之刑事司法互助條約 (Treaty With Canada on Mutual Legal Assistance in Criminal Matters)	十五
附件三：	美國、墨西哥間之司法互助合作條約 (Mutual Legal Assistance Cooperation Treaty With Mexico)	二三

附件四：西元一九五九年之歐洲刑事司法互助條約
(European Convention on Mutual Assistance in Criminal
Matters 1959)三一

附件五：西元一九七八年制訂，西元一九八二年生效之增補
協定書 (Additional Protocol of 1978 to The European
Convention on Mutual Assistance in Criminal Matters
1959)三六

附件六：西元一九九〇年之英國刑事司法國際合作法
(Criminal Justice International Co-operation Act
1990)三八

附件七：Seeking Assistance in Criminal Matters from The
United Kingdom — Guidelines for Judicial and
Prosecuting Authorities.....四八

第一章 研究目的

筆者擔任檢察官一職以來，雖曾有偵辦過被告或告訴人為外國人之刑事案件之經驗，然較少遇到需要大規模境外調查或證據保全之情況。直至民國九十年十一月份，筆者由臺灣臺北地方法院檢察署偵查組，調派至公訴組，對應臺灣臺北地方法院承辦重大經濟案件專股法官時，隨即於九十一年一月份，得知該法官接獲一件被告六人皆為外國人，被害人遍佈歐洲、美洲、亞洲、非洲、大洋洲等五大洲，人數據統計高達一萬餘人、受害金額亦達新台幣近百億元之國際常業詐欺集團案件。

上開案件之國內外向我國提出告訴之告訴人，目前已達三百人之多，惟本件開庭審理時，卻發生我國實務上前所未見之問題，亦即：（一）外國被害人於我國審判外之陳述，可否逕行採為本件審判之依據？（二）本案一名熟知該國際詐欺集團運作之外國證人，可能為共犯，一旦其自願至我國法庭作證時，可否對其逮捕、拘禁、追訴？（三）犯罪所得均在國外，如何查扣沒收刑事犯罪財產，以利全球被害人受償？

有鑑於此類跨國犯罪案件愈來愈猖獗，往往對國家經濟

產生相當大衝擊，進而筆者對於外國遭遇相似之案件，如何透過國際刑事司法互助，有效發動偵查，迅速查扣沒收刑事犯罪資產，進而保障眾多受害人之權益，產生濃厚之研究興趣。因此本文試圖從我國、美國、英國等三國比較法之角度切入，先探討國際刑事司法互助之法源依據、適用範圍、適用限制等理論基礎，再將三國實務上各個環節運作之狀況，加以研析，以期作為我國日後發展國際刑事司法互助之些許參考。

第二章 國際刑事司法互助之法源依據及適用範圍

第一節 法源依據

國際刑事司法互助係屬國際刑事制度之一環，而國際刑事制度又屬國際法之一部分，是欲探求國際刑事司法互助之法源依據，須先由國際法之法源根據加以剖析。

國際法之法源依據，係規定於國際法院規約(Statute of International Court of Justice)第三十八條，亦即包括國際公約(International Conventions)、國際慣例(International Customs)、一般原理原則(The General Principles)、國際法院判決(Judicial Decisions)，以及知名國際法學者之著作(writings of the most distinguished publicists)¹。然而針對國際刑事系統而

¹ 國際法院規約第三十八條原文如下：

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Available at

http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#CHAPTER_II

言，知名國際法學者之著作並不能成為國際刑事制度之法源之一，因其有違許多國家所肯認之「罪刑法定主義原則」²。此外，有鑑於國際犯罪之追查或刑事判決之執行，除經由國際法庭直接為之外，往往尚須透過國內刑事司法系統之支持，因而國內之法律亦成為國際刑事司法制度之重要環節。

雖然國際刑事司法互助屬於國際刑事司法制度中之一部分，但其法源依據通常卻稍有限縮。亦即國際刑事司法互助之法源基礎，通常不外乎係國際公約，其中較著名者包括國際法院規約³、國際刑事司法互助標準規約（Model Treaty on Mutual Assistance in Criminal Matters）⁴、有關特定國際犯罪之多邊條約（Multilateral treaties concerned with certain international crimes）、有關跨國刑事合作之多邊條約（Multilateral treaties on the specific subject on inter-state cooperation in penal matters）等，以及國內之立法（National legislation）⁵。

² M. Cherif Bassiouni, ET AL., *International Criminal law*, Vol. 1, 4. (2nd edition, 1999)

³ 涉及國際法院規約之相關條文為：第八十六條、八十八條、八十九條、九十條、九十二條、九十四條、九十七條、一百零一條、一百零五條。

⁴ 「國際刑事司法互助標準規約」係聯合國於西元一九八五年召開第七屆聯合國「預防犯罪和罪犯待遇大會」所通過，並經該大會於同年十一月二十九日以決議核准。此規約共有二十一條，涵蓋範圍包括國際刑事司法互助之適用範圍、何時得拒絕提供協助、請求協助之方式、實際執行之模式、費用如何分擔等。基本上世界各國所訂定之多邊或雙邊條約，均以前開規約作為基礎，再加以細部發揮。

⁵ See *Supra* note 2, at 7.

第二節 適用範圍

國際刑事司法互助之適用範圍得分為廣義及狹義兩種。所謂廣義之國際刑事司法互助，通常係指國際刑事司法制度之執行層面，其範圍包括：引渡(Extradition)、刑事法律互助(Mutual legal assistance in penal matters)、移轉在外國遭判刑之本國人犯至本國服刑(transfer of prisoners)、搜索扣押及沒收犯罪所得(Search, Seizure and forfeiture of illicit proceeds of crime)、外國刑事判決之承認(recognition of foreign penal judgments)，以及移轉刑事程序(transfer of penal proceedings)⁶等。

至於狹義之刑事司法互助，則係僅包括前述之刑事法律互助—取得證言或陳述、提供供證之文件、紀錄及物品、確定關係人之所在或確認其身分、送達文件、為作證或調查等目的而解送受拘禁人，以及搜索扣押與沒收犯罪所得。

因引渡所涉及之層面及問題甚多且廣，因而本文之研究範圍，係僅就狹義之刑事司法互助部分加以論述。

⁶ See *Supra* note 2, at 5.

第三章 我國、美國、英國之刑事司法互助制度之概述

第一節 我國、美國、英國之刑事司法互助法源依據

第一目 我國之法源依據

我國目前分別與有邦交之多米尼克、多明尼加、巴拉圭、南非、史瓦濟蘭、馬拉威、哥斯大黎加等國曾簽訂有關引渡方面之雙邊條約⁷，並於民國八十四年間，與南韓簽署「司法文件交換協定」(Agreement on Exchange of Judicial Materials Between The Ministry of Justice of The Republic of China and The Ministry of Justice of The Republic of Korea)。

至於我國與美國間，雖然於民國八十二年一月十四日，有簽訂「北美事務協調委員會與美國在台協會在犯罪偵查與訴追方面合作之瞭解備忘錄」，然該備忘錄僅宣示兩國應針對刑事案件加強合作，如有必要，雙方執法官員得出庭作證等條文，且該備忘錄由文義觀之，應不具法律效力，因而中、美雙邊一直沒有正式之條約或協定，以促進兩國間之刑事司

⁷ 廣義而言，國際刑事司法互助應包括人犯之引渡在內，惟端視國際公約、外國之多邊或雙邊協定，及外國國內立法，均將「引渡」另為獨立之規定，而不納入國際刑事司法互助之相關條約或國內法內。

法互助合作。直至民國九十一年三月間，兩國才正式簽署「駐美國臺北經濟文化代表處與美國在臺協會間之刑事司法互助協定」，進而為兩國之刑事司法協助，展開新頁。

此外，我國目前國內法有關國際刑事司法互助之相關規定，僅有「引渡法」得以遵循，其他相關之法律則付之闕如。

第二目 美國之法源依據

美國迄今已與數十國簽訂司法互助條約(Mutual Legal Assistance Treaties, MLATs)，以作為國際刑事司法互助之法源。至於國內法部分，係規定於美國聯邦法典有關司法程序部分之第一七八一條、第一七八二條、第二四六七條(28, U. S. C. §1781、§1782、§2467)⁸，以及有關刑法及刑事程序部分之第三五〇八條(18, U. S. C. §3508)。

第三目 英國之法源依據

在西元一九五〇年代，歐洲議會部長級委員會(The Committee of Ministers of the Council of Europe)⁹體認

⁸ U.S.C 代表 United States Code，係美國現行有效之聯邦法律。

⁹ 第二次世界大戰結束後五年，歐洲各國為復甦殘破不堪之經濟，以及恢復歐洲在世界上之影響力，並保證戰爭之悲劇不再重演，於是在一九四八年建立歐洲議會，當時被稱為 Congress of Europe，截至目前為止，歐洲議會已有四十五個會員國。

Available at:

到歐洲各國間刑事司法互助之必要性，因而先於西元一九五七年間，草擬「引渡條約」(Convention on Extradition)，復於西元一九五七年至一九五八年間，擬定「刑事司法互助條約」(Convention on Mutual Assistance in Criminal Matters)，之後並開放歐洲議會之會員國於西元一九五九年四月二十日前簽署完成¹⁰。

嗣後歐洲議會又於西元一九七八年通過前開條約之增補協定書 (Additional Protocol)，並於西元一九八二年生效，將刑事司法互助之範圍擴張到適用於財政罰及刑事判決之執行¹¹。

英國一直沒有簽署前開條約或增補協定書，直至西元一九九一年六月二十一日始完成簽署，但同時英國本身也立法通過「刑事司法國際合作法」(The Criminal Justice <International Co-operation> Act)，該法律亦於西元一九九一年十一月二十七日生效。該法律基本上業將歐洲議會所制訂之前揭條約內容涵蓋於其中¹²。

[http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About Council of Europe/A_Short_Story/](http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/A_Short_Story/) 至於歐洲議會部長級委員會則是歐洲議會之主要決策單位，係由歐洲各會員國之外交部長或常任外交代表所組成。

Available at:

http://www.coe.int/t/E/Committee_of_Ministers/Home/General_Information/About_the_C.M/

¹⁰ Christopher Murray & Lorna Harris, Mutual Assistance in Criminal Matters, 6.(2000)

¹¹ Id., at 12.

¹² Id., at 6-7.

由於犯罪活動不斷擴展，需要更多國際合作與之抗衡，因而現今歐盟(European Union)又草擬一份「歐盟會員國間之刑事司法互助條約」(Establishing the Convention on Mutual Assistance on Criminal Matters between the Member States of the European Union)。此外，另草擬針對西元一九五九年公約之第二份增補協定書(Preliminary Draft Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters)。這兩份草擬之條約及第二份增補協定書，除增強原本西元一九五九年公約之效能外，亦尋求解決多年來實務運作上遭遇之問題。然由於該兩份草擬之條約與增補協議書，目前尚在歐盟進行討論中，可望日後將得作為國際刑事司法互助之法源依據¹³。

第二節 我國、美國、英國之刑事司法互助之範圍

第一目 我國刑事司法互助之範圍

根據「駐美國台北經濟文化代表處與美國在台協會間之刑事司法互助協定」第二條規定，中、美兩國刑事司法互助

¹³ Id., at 13.

範圍包括：取得證言或陳述、提供供證之文件、記錄及物品、確定關係人之所在或確認其身分、送達文件、為作證或其他目的而解送受拘禁人、執行搜索及扣押之請求、協助凍結及沒收資產、歸還補償、罰金之執行程序，及不違反受請求方所屬領土內法律之任何形式之刑事協助等。

然上開刑事司法互助之範圍尚有下列適用上之限制，亦即倘所涉行為係觸犯軍法而非觸犯普通刑法、該請求之執行將有害於受請求方所屬領土內之安全、公共秩序或類似之重要利益、該請求與本協定不符，或請求搜索扣押，惟所涉行為在受請求方所屬領土內不構成犯罪等情形時，受請求國得拒絕協助，前揭協定第四條定有明文。

第二目 美國刑事司法互助之範圍

從美國聯邦法典第一七八一條、第一七八二條之法條規定，雖無法非常明顯看出到底司法互助之範圍為何，但在被告暨上訴人為 John Fecarotta 一案中，被告係美國底特律之居民，因其違反加拿大之麻醉藥品管制條例(The Narcotic Control Act of Canada)，旋遭加拿大之檢察官起訴，加拿大政府遂請求美國法院提供被告位於底特律銀行之帳戶明

細，做為證據之用，美國地方法院准予所請，遂簽發令狀，請銀行提供相關文件，被告不服，上訴二審法院，爭執美國聯邦法典第一七八二條並不適用於外國之刑事追訴程序，然而第六上訴巡迴法院法官卻表示：美國早於西元一八五五年，即通過聯邦法案，授權聯邦法院對外國提供司法協助，嗣後復於西元一八六三年，立法通過另一法案，准許聯邦法院針對外國金錢或財產損失之訴訟，取得證言。而該法案於西元一九四八年修正時，則明確規定，該司法協助適用於繫屬於外國法院之民事案件(any civil action pending in any court in a foreign country)。一年後，有關僅適用於民事案件之法文，又遭修正為得適用於任何繫屬於外國法院之司法程序案件(any judicial proceeding pending in any court in a foreign country)。之後在西元一九六四年再度修正時，其立法目的更朝向擴大司法互助之範圍，而此次修正案也成為現行聯邦法典第一七八二條之雛形¹⁴。是由上開案例亦可得知，美國國內法所規定之司法互助範圍，係包括刑事及民事案件。

¹⁴ In Re: Letter Rogatory From The Justice Court, District of Montreal, Canada. – John Fecarotta, Appellant No. 75-1004, United States Court of Appeals for The Sixth Circuit, 523 F.2d 562; 1975 U.S. App. Lexis 12623.

雖然美國聯邦法典所訂定司法互助之適用範圍，廣義地涵蓋民事及刑事案件，然從美國、墨西哥間之司法互助合作條約(Mutual Legal Assistance Cooperation Treaty With Mexico)、美國、加拿大間之刑事司法互助條約(Treaty With Canada on Mutual Legal Assistance in Criminal Matters)，及美洲國家間之刑事司法互助協定(Inter-American Convention on Mutual Assistance in Criminal Matters)觀之，可清楚得知美國與外國所簽立之司法互助協定，均僅限於刑事案件之預防、偵查與追訴方面之協助，且此刑事司法協助並不適用於軍法案件、政治案件、有害美國公共政策或利益及國家安全之案件，或不符合雙邊協定目的之案件¹⁵。

第三目 英國刑事司法互助之範圍

一、西元一九五九年之歐洲刑事司法互助條約

歐洲刑事司法互助條約第一條明文約定：只要請求國對該刑事程序有管轄權時，被請求之締約國應提供刑事互助，但該刑事互助並不適用於逮捕、判決之執行或是軍事刑

¹⁵ 分別詳見附件一、二、三，因美國領土南北分別與墨西哥、加拿大接壤，罪犯容易利用地形之便，從事跨國犯罪，或是加以逃脫，又美國屬美洲國家之一，因此本文特別舉出美墨、美加雙邊刑事司法互助條約，以及美洲國家間之刑事司法互助協定做為代表，加以討論。

法之範疇¹⁶。

二、西元一九八二年生效之增補協定書

依據西元一九八二年生效之增補協定書第一條、第二條之約定，將刑事司法互助之範圍，擴張至財政罰事件，且第三條明文規定，有關刑罰之執行，亦屬司法互助之範疇¹⁷。

三、西元一九九〇年之英國刑事司法國際合作法

該法律第一條、第二條均明定，適用刑事司法互助之範圍，僅限於已繫屬於法院，或已展開偵查之刑事案件¹⁸，其具體內容則規定於同法第三條至第九條，及第二十二條，包括：在國外取得證據供英國使用、在英國取得之證據，供國外使用、為作證或協助調查之目的，移轉英國之人犯至外國、為作證或協助調查之目的，移轉國外之人犯至英國、執行搜索扣押、執行國外之財產沒收命令、引渡人犯等。

四、草擬之歐盟會員國間之刑事司法互助條約，及第二份增補協定書

¹⁶ 請參見附件四。

¹⁷ 請參考附件五。

¹⁸ 請參見附件六。

草擬之歐盟會員國間之刑事司法互助條約，及第二份增補協定書，更放寬刑事司法互助之範圍至行政罰，且將以往須透過國務院等行政系統聯繫，始得請求刑事司法互助之程序，修正為直接得透過兩國間之司法機關直接聯絡，以減少公文往返時間之浪費¹⁹。

第三節 三國相關制度之異同

	我國	美國	英國
法源依據	國際法部分：與外國簽訂雙邊條約； 國內法部分：僅有引渡法	國際法部分：與外國簽訂之雙邊條約； 國內法部分：美國聯邦法典第一七八一條、第一七八二條、第三五〇八條	國際法部分：歐洲多邊條約、與外國簽訂雙邊條約； 國內法部分：英國刑事司法國際合作法

¹⁹ See *Supra* note 10, at 13-14.

適用範圍	刑事案件	國際條約部分：限於刑事案件； 國內法部分：包括民事、刑事案件	包括刑事、財政罰案件
適用之限制	不包括軍法、財政罰案件、有違領土安全、公共秩序或重要利益，及不符合雙邊協定目的之案件	不包括軍法、政治案件、財政罰案件、有違美國公共政策或利益及國家安全之案件、不符合雙邊協定目的之案件	不包括軍法、政治案件

第四章 我國、美國、英國請求他國取得證據供本國使用之程序

第一節 我國

我國倘欲請求美國提供證人之證詞予我國使用時，依據「駐美國臺北經濟文化代表處與美國在臺協會間之刑事司法互助協定」第九條第一、二、三項規定：受請求方（指美國）所屬領土內之人經依本協定受請求自其取得證據者，必要時應強制其出庭、作證或提供包括供證之文件、紀錄及物品在內之證物。受請求而做虛偽證言者，無論以口頭或書面方式，須在受請求方所屬領土內，依該領土內之刑事法規定予以追訴及處罰（第一項）。受請求方之指定代表人於受請求時，應先行提供有關依本條規定取得證言或證據之日期及地點之資料（第二項）。受請求方所屬領土之主管機關在執行請求時，應准許請求中所指明之人在場，並依照受請求方所屬領土之主管機關所同意之方式，准許其詢問作證或提供證據之人，並進行逐字紀錄（第三項）。

此外，如係欲請求他國提供文書，則規定於該協定之第十四條第一項：受請求方所屬領土內之主管機關應盡最大努

力以有效送達請求方之指定代表人依本協定規定所提出與任何協助之請求全部或部分有關之文書。

除得向美國請求提供證人之證言及文書證據外，尚得請求美國將其國人送交至我國領土內應訊或作證，此於上開協定第十二條第一項定有明文。然此條文在適用上有嚴格之限制，亦即同條第二項清楚規定：受請求方之指定代表人可要求請求方之指定代表人承諾，對於依本條被要求至請求方所屬領土內應訊之人員，不得因該人於進入請求方所屬領土前之任何作為、不作為或有罪判決而予以起訴、羈押、傳喚或以其他形式限制其人身自由，亦不應強制該人在該請求所未涉及之任何其他偵查、起訴或訴訟程序中作證或協助，除非事先取得受請求方之指定代表人與該人之同意。

至於請求他國提供證據之形式，原則上應以書面為之，除非緊急情況下，經受請求國之同意以其他方式提出者，不在此限，但以其他方式提出時，除經受請求方之同意外，應於提出請求後十日內以書面確認之，上開協定第五條第一項定有明文。

第二節 美國

美國聯邦法典第一七八一條第(a)項第(2)款、第(b)項第(2)款規定：美國法院得簽署書面請求(letter rogatory)，經由國務院(Department of State)轉交，或自行交由外國之指定法院或人員，請求司法互助²⁰。同法第一七八二條則規定：司法互助範圍包括提供證言及文件，主要作為審判程序或刑事偵查程序之用。

而前開法條雖無明訂法院係依職權或依聲請而向外國請求刑事司法協助，但按照美國之判決顯示，美國法院通常係因檢察機關²¹或被告²²之聲請，始以書面透過國務院或直接向外國法院請求協助。另外，請求他國提供刑事司法互助並非毫無限制，而是必須符合聯邦刑事程序法令(Federal Rules of Criminal Procedure)第十五條關於證人無法到美國作證，但該證言對審判有實質重要性，且不妨害被告憲

²⁰ 美國聯邦法典第一七八一條第(a)項第(2)款、第(b)項第(2)款之法條原文如下：

28 U.S.C. § 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels--

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude--

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

²¹ See *United States v. Drogoul*, 1 F.3d 1546.(11th Cir. 1993)

²² See *United States v. Korogodsky*, 4F. Supp. 2d 262 (S.D.N.Y. 1998).

法上交互詰問之權利為原則之規定²³。

此外，美洲國家間之刑事司法互助協定第十條、第十八條、十九條²⁴、美國、加拿大間之刑事司法互助條約第六條、第七條、第十二條²⁵、美國、墨西哥間之司法互助合作條約第七條、第九條²⁶亦有類似之規定足資參照。

第三節 英國

英國於西元一九九〇年制定之刑事司法國際合作法第三條規定：只要犯罪已發生，或基於合理之懷疑認為犯罪已發生，或該犯罪業遭起訴時，法官經由檢察機關(A prosecuting authority)²⁷或遭起訴被告之聲請，或經指定之檢察機關(A prosecuting authority which is for the time being designated)²⁸本身，以書面請求方式(a letter

²³ 聯邦刑事程序法令第十五條之法條原文如下：

Federal Rules of Criminal Procedure :

Rule 15. Depositions

(a) When taken.

(1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

²⁴ 詳見附件一。

²⁵ 詳見附件二。

²⁶ 詳見附件三。

²⁷ 在此所稱得向法院聲請之「檢察機關」，範圍較廣，包括任何一個檢察機構；此與得獨立申請他國提供證據之「指定檢察機關」，含意略有不同。See *Supra* note 10, at 35.

²⁸ 在此所謂「指定之檢察機關」，包括：英格蘭區及威爾斯區之檢察總長、檢察署首長或任何檢察官、重大詐欺犯罪辦公室之首長、貿易暨工業部部長、海關委員會委員、財政部官員、北愛爾

of request)，轉交由國務卿(Secretary of State)請求他國提供證據。至於書面請求之格式，並未規定於該法中，反而係在西元一九五九年之歐洲刑事司法互助條約第十四條規定，書面請求之內容，最少應包含：(一) 請求機關；(二) 請求之客體及理由；(三) 儘可能指明關係人之身分及國籍；(四) 關係人之姓名及地址；(五) 罪名及犯罪事實之摘要。此外，英國針對書面請求之格式，尚制定一套鉅細靡遺之準則 (Seeking Assistance in Criminal Matters from the United Kingdom: Guidelines for Judicial and Prosecuting Authorities)，供司法機關參酌²⁹。

蘭檢察總長、北愛爾蘭檢察署首長。

²⁹ 詳見附件七。

第五章 我國、美國、英國接受他國請求提供本國證據之程序

第一節 我國

「駐美國臺北經濟文化代表處與美國在臺協會間之刑事司法互助協定」第九條第一、二、三項規定：受請求方（指我國）所屬領土內之人經依本協定受請求自其取得證據者，必要時應強制其出庭、作證或提供包括供證之文件、紀錄及物品在內之證物。受請求而做虛偽證言者，無論以口頭或書面方式，須在受請求方所屬領土內，依該領土內之刑事法規定予以追訴及處罰（第一項）。受請求方之指定代表人於受請求時，應先行提供有關依本條規定取得證言或證據之日期及地點之資料（第二項）。受請求方所屬領土之主管機關在執行請求時，應准許請求中所指明之人在場，並依照受請求方所屬領土之主管機關所同意之方式，准許其詢問作證或提供證據之人，並進行逐字紀錄（第三項）。

前開條文係針對我國接受外國請求，取得國內證人證言之相關規定，如係受外國請求提供文書，則規定於該協定之第十四條第一項：受請求方所屬領土內之主管機關應盡最大努力以有效送達請求方之指定代表人依本協定規定所提出

與任何協助之請求全部或部分有關之文書。

第二節 美國

美國聯邦法典第一七八一條第(a)項第(1)款、第(b)項第(1)款規定：外國法院得簽署書面請求(letter rogatory)，或利害關係人之聲請，經由美國國務院(Department of State)轉交，或自行交由美國之指定法院或人員，請求司法互助³⁰。同法第一七八二條第(a)項則規定：司法互助範圍包括提供證言及文件，主要作為審判程序或刑事偵查程序之用，且本項特別指明，得尋求刑事司法協助的主體，除外國法院外，尚包括訴訟關係人(Litigants, Interested Persons)³¹。

³⁰ 美國聯邦法典第一七八一條第(a)項第(1)款、第(b)項第(1)款之法條原文如下：

28 U.S.C §1781. Transmittal of letter rogatory or request

(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.

(b) This section does not preclude--

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner.

³¹ 美國聯邦法典第一七八二條第(a)項之法條原文如下：

28 U.S.C. §1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other

詳言之，此書面請求之目的，是外國法院透過外交管道，尋求美國法院協助取得證詞、文件或其他證據。而美國國務院則擔任傳遞此項請求之管道，之後國務院再將書面請求交予司法部(Department of Justice)。而司法部所屬之國際事務司刑事組(The Office of International Affairs in the Criminal Division)先將此書面請求充分審閱，確定得在美國現行法律下執行後，便會將此項請求交由證人或證據所在之地方聯邦檢察署(The Office of the U.S. Attorney in the federal judicial district where the witness or evidence requested is located)。之後地方聯邦檢察署即向美國地方法院聲請執行此書面請求。美國地方法院如果同意予以刑事司法協助，此時通常會指派一名美國助理檢察官(Assistant U.S. Attorney)來執行取得證言或文件。但如必要，法院會以強制之方式，亦即簽發傳票，要求提供文書或強制證人至檢察官處提供證詞。此項刑事互助程序，通常需費時三到六個月始得完成³²。

thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

³² Jordan J. Paust ET AL., *International Criminal Law*, 551. (2nd edition, 2000)

第三節 英國

英國於西元一九九〇年制定之刑事司法國際合作法第四條規定：只要犯罪已發生，或基於合理之懷疑認為犯罪已發生，且該犯罪業遭起訴或已展開偵查時，英國國務卿經由外國法院、檢察機關之聲請，得指定適合之法院蒐集證據，並有法警（the court liaison officer）負責安排聯繫證人之出庭作證事宜³³。

但英國並非全盤接受外國之請求，亦即依據刑事司法國際合作法第四條第三項之規定，該外國之請求係涉及財政罰，則英國國務卿即不會行使指定適當法院蒐集證據之權限。另外，依照西元一九五九年之歐洲刑事司法互助條約第二條之規定，倘請求係有關政治犯或財政罰，或是有害於領土、國家安全、公共秩序或其他類似之重要利益時，亦得拒絕提供協助。

³³ 詳見附件六，英國西元一九九〇年刑事司法國際互助法中，Schedule 1 之規定。

第六章 我國、美國、英國為作證或調查等目的 解送受拘禁人之程序

第一節 我國

駐美國台北經濟文化代表處與美國在台協會間之刑事司法互助協定第十一條第一項、第二項規定，基於本協定所定協助之目的，經受請求方所屬領土內主管當局拘禁之人，被請求在請求方所屬領土內出庭者，如經其本人及締約雙方指定代表人之同意，得由受請求方所屬領土解送至請求方所屬領土內；相對地，請求方所屬領土內主管當局拘禁之人請求在受請求方所屬領土出庭者，如經本人及締約雙方指定代表人之同意，得由請求方所屬領土解送至受請求方所屬領土內，以達協助之目的。

此外，為達本條之目的：受移送方所屬領土內之主管機關，除經移送方所屬領土內之當局授權外，應有使被移送之人繼續受拘禁之權力與義務；且受移送方所屬領土內之主管機關，應在解送之日起三十日內，或在情況許可之下，或經雙方指定代表人同意之情形下，儘速將被移送之人解還移送方所屬領土受拘禁；又受移送方所屬領土內之主管機關不得要求移送方所屬領土內之主管機關發動引渡程序以達送還

被移送之人之目的；另被移送之人於受移送方所屬領土內受拘禁期間，應折抵其在移送方所屬領土內所受判決之服刑期間（同條第三項）。

第二節 美國

美國聯邦法典第三五〇八條規定：美國司法部部長如認在美國刑事程序之進行中，有必要讓在外國被羈押之受拘禁人至美國作證，得請求他國將該受拘禁人暫時解送至美國，之後再歸還於外國（第一項）。惟本條並不適用任何引渡方面之程序（第二項）。此外，有關解送受拘禁人之規定，倘有國際條約或協定，優先適用之，若無前開條約或協定，則美國司法部部長經外國及該證人之同意，得以行使第一項所述之解送權限（第三項）³⁴。

³⁴ 美國聯邦法典第三五〇八條之法條原文如下：

18 U.S.C. §3508. Custody and return of foreign witnesses

(a) When the testimony of a person who is serving a sentence, is in pretrial detention, or is otherwise being held in custody, in a foreign country, is needed in a State or Federal criminal proceeding, the Attorney General shall, when he deems it appropriate in the exercise of his discretion, have the authority to request the temporary transfer of that person to the United States for the purposes of giving such testimony, to transport such person to the United States in custody, to maintain the custody of such person while he is in the United States, and to return such person to the foreign country.

(b) Where the transfer to the United States of a person in custody for the purposes of giving testimony is provided for by treaty or convention, by this section, or both, that person shall be returned to the foreign country from which he is transferred. In no event shall the return of such person require any request for extradition or extradition proceedings, or proceedings under the immigration laws.

由於美國與數十國均簽有刑事司法互助協定，舉例言之，美洲國家間之刑事司法互助協定第二十條³⁵、美國與加拿大間之刑事司法互助條約第十五條³⁶，以及美國與墨西哥間之司法互助合作條約第八條³⁷亦對受拘禁人至受請求國作證，定有明文，依據美國聯邦法典第三五〇八條第三項之規定，前揭協定或條約，自得優先適用之。

第三節 英國

英國刑事司法國際合作法第五條第一項、第二項規定：英國國務卿倘認為合適，得簽發令狀(Warrant)，使在英國服刑之受拘禁人，得基於提供外國法院證詞或協助調查等目的，解送至該請求之外國。但除非受拘禁人本人或其法定代理人同意被解送，否則該令狀不會被簽發³⁸。

此外，英國國務院更建議外國在請求解送受拘禁人時，應在書面請求內，詳載下列之資訊：一、受拘禁人在外國法

(c) Where there is a treaty or convention between the United States and the foreign country in which the witness is being held in custody which provides for the transfer, custody and return of such witnesses, the terms and conditions of that treaty shall apply. Where there is no such treaty or convention, the Attorney General may exercise the authority described in paragraph (a) if both the foreign country and the witness give their consent.

³⁵ 請詳見附件一。

³⁶ 請詳見附件二。

³⁷ 請詳見附件三。

³⁸ 請詳見附件六。

院或其他程序中，出庭之開始日期及可能之結束日期；二、為便於取得受拘禁人之同意受解送，另應載明：(一) 是否該受拘禁人先前之犯罪行為，將受到刑事追訴之豁免；(二) 有關解送及歸還受拘禁人之安排細節；(三) 受拘禁人在請求國之安全措施；(四) 在國外如何護衛受拘禁人之細節。三、如受拘禁人係至外國提供證詞，則有關該證言是在法院或警察前提供、是否要具結等，須記載明確，且對於受拘禁人將被詢問何種問題，亦應加以描述³⁹。

英國國務卿並非一經外國之請求，且獲取受拘禁人之同意，即會簽發移轉受拘禁人至外國之令狀，而是倘有危害本國政治、安全或國家利益之情況下，亦得拒絕簽發。另外，倘該受拘禁人在英國之服刑即將屆滿，或即將在英國之法院有訴訟程序要進行，抑或外國之請求將牴觸英國法律時，均得拒絕提供此項刑事協助⁴⁰。

³⁹ See *supra* note 10, at 91.

⁴⁰ See *supra* note 10, at 91-92.

第七章 我國、美國、英國接受請求執行搜索扣押之程序

第一節 我國

駐美國台北經濟文化代表處與美國在台協會間之刑事司法互助協定第十五條規定：如依受請求方所屬領土內之法律，請求方指定代表人所提出搜索、扣押及移轉證物之請求為正當時，受請求方之指定代表人即應執行此等請求（第一項）。每一保管扣押物品之人，於受請求時，應使用本協定附表C，以證明其保管之連續性、證物之辨識及其狀態之完整，毋需提出其他證明。此證明應准許在請求方所代表領土內之法院作為證據使用（第二項）。受請求方之指定代表人得要求請求方之指定代表人同意遵守必要條件以保護第三方對於被移轉證物之權益（第三項）。

本條協定看起來似乎簡單，但實際上，其尚必須符合所謂「雙罰主義」(Dual Criminality)之基本要件，受請求國始得執行搜索扣押。所謂雙罰主義，係指對要進行搜索扣押程序所依據之犯罪，請求國及受請求國雙方，均須有法律明文處罰之規定始得為之。駐美國台北經濟文化代表處與美國在台協會間之刑事司法互助協定第四條第一項第四款即規

定：依第十五條規定所為之請求，其所涉行為在受請求方所屬領土內不構成犯罪者，受請求方之指定代表人的拒絕協助；此外，我國另訂立之「檢察及調查機關執行我國與美國間刑事司法互助協定作業要點」第八點亦明文規定：對於受請求協助之事項，除搜索或扣押需以同一行為在我國亦構成犯罪者為限外，不得以其請求所涉事件之行為在我國不構成犯罪為由，而拒絕提供協助。

第二節 美國

美國聯邦法典針對請求搜索扣押之國際刑事司法互助，並無明文規定，因此有賴其與外國所訂立之多邊或雙邊條約作為法源依據。而根據美洲國家間之刑事司法互助協定第十三條規定，受請求國於受請求時，應執行搜索、扣押，並將所扣得之文件、記錄或物品交付，但該搜索扣押行動，應符合受請求國本國之程序法及實體法之相關規定⁴¹。美國與加拿大簽訂之刑事司法互助條約第十六條、美國與墨西哥簽立之司法合作互助條約第十二條亦有類似之約定⁴²。

此外，搜索扣押之發動，與我國相同，亦應符合「雙罰

⁴¹ 詳見附件一。

⁴² 分別詳見附件二、三。

主義」之構成要件，美洲國家間之刑事司法互助協定第五條第二項定有明文⁴³。

第三節 英國

英國刑事司法國際合作法第七條第一項、第二項規定：外國因犯罪行為請求英國搜索扣押時，該外國之犯罪，亦必須同時構成英國境內可逮捕之嚴重犯罪（a serious arrestable offence）⁴⁴始得為之（第一項）。當英國警官向法官聲請搜索扣押時，必須滿足：外國之刑事訴訟程序已經啟動或刑事偵查程序已經進行、該外國犯罪亦構成英國西元一九八四年警察及犯罪證據法（Police and Criminal Evidence Act 1984）所稱之可逮捕之犯罪、有合理懷疑在英國有與犯罪相關之財產仍在犯罪行為人持有中等要件時，法官才能簽發搜索票授權警官執行搜索扣押⁴⁵。

此外，西元一九五九年之歐洲刑事司法互助條約第五條亦有類似規定，亦即：締約國得於簽訂本條約時，向歐洲議會之常任秘書表明，請求國經由書面請求受請求國執行搜索

⁴³ 請詳見附件一。

⁴⁴ 所謂可逮捕之嚴重犯罪包括：背信罪、殺人罪、擄人勒贖罪、與未滿十三歲幼女姦淫罪、與未滿十六歲少年共同竊盜罪、持槍砲意圖傷害罪、持槍砲意圖犯罪等等，此係規定於英國西元一九八四年警察及犯罪證據法第一一六條，及其法案之附件五中。

⁴⁵ 詳見附件六。

扣押時，應符合下列要件：一、該犯罪必須在請求國及受請求國之法律下，均構成犯罪；二、該犯罪必須是該當受請求國所規定可引渡之犯罪；三、該書面請求之執行，係與受請求國之法律規定一致⁴⁶。

由上述之條文觀之，英國之國內法、西元一九五九年之歐洲刑事司法互助條約，與我國與美國所簽訂之雙邊協定相同，均以「雙罰主義」為前提。

至於外國聲請英國協助搜索扣押之程序，則規定於刑事司法國際互助法第七條第四項，即該聲請必須係由外國法院、檢察機關或有行使該請求全之單位始得為之⁴⁷。

⁴⁶ 詳見附件四。

⁴⁷ 詳見附件六。

第八章 我國、美國、英國接受請求將犯罪所得凍結或沒收之程序

第一節 我國

駐美國台北經濟文化代表處與美國在台協會間之刑事司法互助協定第十七條規定：締約之一方所指定之代表人，知有犯罪所得或犯罪工具在締約他方所屬領土內，且係依締約他方所屬領土內之法律得予沒收或扣押之物者，得通知締約他方之指定代表人。如締約他方所屬領土內之主管機關對沒收或扣押程序有管轄權時，締約他方之指定代表人得對其主管機關提出此等資料俾其決定是否採取適當行動。該主管機關應依其領土內之法律做出決定，並應經由其指定之代表人就其所採取之行動通知對方之指定代表人（第一項）。締約雙方指定之代表人應在所屬領土內之相關法律許可範圍內，在沒收犯罪所得或犯罪工具、被害人求償、刑事判決罰金之執行等程序中，彼此協助。此協助包括在等候進一步程序前之暫時凍結該所得或工具（第二項）。犯罪所得或犯罪工具須依締約雙方所屬領土內之法律規定予以處理。締約之任何一方在其所屬領土內之法律所許可之範

圍，且認為適當時，得移轉該財物、變賣所得之全部或部分予他方（第三項）。

第二節 美國

外國得請求美國沒收犯罪所得之前提要件，必須該外國係「聯合國禁止非法販賣麻醉藥品及精神藥物公約」（The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Known as “The Vienna Convention”）之會員國，或是曾與美國簽訂財產沒收互助條約之國家，始得向美國申請之。而請求沒收財產之程序，則須向美國司法部部長提出書面請求，且於其上載明：犯罪事實、已告知所有利害關係人相關權利之宣誓詞、該判決已不能再上訴之宣誓詞、其他相關之證據或資料，並應附上宣告財產沒收之判決文，美國聯邦法典第二四六七條第（a）、（b）項定有明文⁴⁸。

⁴⁸ 美國聯邦法典第二四六七條(a)、(b)項之法條原文如下：

28 U.S. C. §2467 Enforcement of foreign judgment

(a) Definitions. In this section--

(1) the term "foreign nation" means a country that has become a party to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (referred to in this section as the "United Nations Convention") or a foreign jurisdiction with which the United States has a treaty or other formal international agreement in effect providing for mutual forfeiture assistance; and

(2) the term "forfeiture or confiscation judgment" means a final order of a foreign nation compelling a person or entity--

一旦美國司法部長認為前開請求為適當時，即會代表該外國向美國地方法院提出財產沒收之聲請。然在此值得一提的是，美國地方法院居然對於該外國判決具有實質審查權，亦即倘外國判決並非依正當程序進行、未給予被告對於即將沒收之資產有防衛之權利，或是對被告或犯罪行為欠缺管轄權，抑或該外國判決基於詐欺所獲取時，美國地方法院得不准許執行外國為財產沒收之請求，美國聯邦法典第二四六七條第(c)、(d)項亦有明文規定⁴⁹。

(A) to pay a sum of money representing the proceeds of an offense described in Article 3, Paragraph 1, of the United Nations Convention, any violation of foreign law that would constitute a violation or an offense for which property could be forfeited under Federal law if the offense were committed in the United States, or any foreign offense described in section 1956(c)(7)(B) of title 18, or property the value of which corresponds to such proceeds; or

(B) to forfeit property involved in or traceable to the commission of such offense.

(b) Review by Attorney General.

(1) In general. A foreign nation seeking to have a forfeiture or confiscation judgment registered and enforced by a district court of the United States under this section shall first submit a request to the Attorney General or the designee of the Attorney General, which request shall include--

(A) a summary of the facts of the case and a description of the proceedings that resulted in the forfeiture or confiscation judgment;

(B) certified copy of the forfeiture or confiscation judgment;

(C) an affidavit or sworn declaration establishing that the foreign nation took steps, in accordance with the principles of due process, to give notice of the proceedings to all persons with an interest in the property in sufficient time to enable such persons to defend against the charges and that the judgment rendered is in force and is not subject to appeal; and

(D) such additional information and evidence as may be required by the Attorney General or the designee of the Attorney General.

(2) Certification of request. The Attorney General or the designee of the Attorney General shall determine whether, in the interest of justice, to certify the request, and such decision shall be final and not subject to either judicial review or review under subchapter II of chapter 5, or chapter 7, of title 5 [5 USCS §§ 551 et seq. or 701 et seq.] (commonly known as the "Administrative Procedure Act").

⁴⁹ 美國聯邦法典第二四六七條第(c)、(d)項規定之法條原文如下：
28 U.S.C. §2467 Enforcement of foreign judgment
(c) Jurisdiction and venue.

另外，美洲國家間之刑事司法互助條約中，雖對於財產之凍結或沒收，並無明文約定，惟美國加拿大間之刑事司法互助條約第十七條，及美國墨西哥間之司法互助合作條約第

(1) In general. If the Attorney General or the designee of the Attorney General certifies a request under subsection (b), the United States may file an application on behalf of a foreign nation in district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States.

(2) Proceedings. In a proceeding filed under paragraph (1)-

(A) the United States shall be the applicant and the defendant or another person or entity affected by the forfeiture or confiscation judgment shall be the respondent;

(B) venue shall lie in the district court for the District of Columbia or in any other district in which the defendant or the property that may be the basis for satisfaction of a judgment under this section may be found; and

(C) the district court shall have personal jurisdiction over a defendant residing outside of the United States if the defendant is served with process in accordance with rule 4 of the Federal Rules of Civil Procedure.

(d) Entry and enforcement of judgment.

(1) In general. The district court shall enter such orders as may be necessary to enforce the judgment on behalf of the foreign nation unless the court finds that-

(A) the judgment was rendered under a system that provides tribunals or procedures incompatible with the requirements of due process of law;

(B) the foreign court lacked personal jurisdiction over the defendant;

(C) the foreign court lacked jurisdiction over the subject matter;

(D) the foreign nation did not take steps, in accordance with the principles of due process, to give notice of the proceedings to a person with an interest in the property of the proceedings in sufficient time to enable him or her to defend; or

(E) the judgment was obtained by fraud.

(2) Process. Process to enforce a judgment under this section shall be in accordance with rule 69(a) of the Federal Rules of Civil Procedure.

(3) Preservation of property.

(A) In general. To preserve the availability of property subject to a foreign forfeiture or confiscation judgment, the Government may apply for, and the court may issue, a restraining order pursuant to section 983(j) of title 18, at any time before or after an application is filed pursuant to subsection (c)(1) of this section.

(B) Evidence. The court, in issuing a restraining order under subparagraph (A)-

(i) may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding; or

(ii) may register and enforce a restraining order that has been issued by a court of competent jurisdiction in the foreign country and certified by the Attorney General pursuant to subsection (b)(2).

(C) Limit on grounds for objection. No person may object to a restraining order under subparagraph (A) on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court.

十一條即有規定：締約國間應互相協助，在彼此法律允許之範圍內，執行犯罪所得之凍結、保全與沒收⁵⁰。

第三節 英國

英國西元一九九〇年之刑事司法國際合作法並無凍結或沒收資產程序之相關規定，有關國內立法部分，係規定於西元一九九四年之「毒品交易法」(The Drug Trafficking Act 1994) 第三十九條、西元一九九八年制訂與隨後於西元一九九三年修正之「刑事司法法」(The Criminal Justice Act) 第六章、西元一九九五年之「刑事程序法」(The Proceeds of Crime Act 1995)，及前開法律所授權頒佈之行政命令中⁵¹。

至於國際公約或雙邊條約部分，得作為英國凍結或沒收資產之法源依據，最主要則規定於「聯合國禁止非法販賣麻醉藥品及精神藥物公約」，及「有關洗錢、搜索、扣押、沒收之歐洲議會公約」(The Council of Europe Convention on Laundering, Search, Seizure and Confiscation)⁵²。

基本上，倘外國向英國以書面請求提供凍結或沒收資產之刑事司法互助請求，其執行之前提要件為：一、該外國

⁵⁰ 詳見附件二、三。

⁵¹ See *Supra. note* 10, at 158.

⁵² *Id.*, at 158, 161.

必須係前開國際公約之締約國，或曾與英國簽訂相關之雙邊條約；二、該犯罪必須與毒品犯罪或其他嚴重之犯罪有關。

一旦符合上開前提要件，則英國將代為執行凍結沒收犯罪所得，然其程序可分為偵查中及判決後兩階段，而有所不同：

一、偵查中階段：

外國得僅要求英國提供有關被告犯罪資產之相關資訊，或請求英國之法院簽發限制或凍結財產之命令，以防被告於刑事程序中將犯罪所得脫產。外國以書面請求英國簽立限制或凍結財產命令時，應載明：被告之年籍資料、所觸犯之罪名、所適用之法律及證據、欲凍結之英國特定財產、被告與該財產之連結關係，及被告在英國以外所擁有之財產。

二、判決後階段：

外國得請求英國簽發沒收命令，將被告位於英國之犯罪所得加以沒收。而外國以書面請求英國簽署沒收命令時，亦應記載：被告之年籍資料、犯罪事實及所適用之法律、欲沒收財產之本質、所在地等詳細資料，及有關其他第三人利益之細節⁵³。

⁵³ Id, at 159-163.

第九章 國際刑事司法互助實務上遭遇之困難

第一節 請求國或接受請求國並非締約國或並非國家

從上文觀之，國際刑事司法互助看起來似乎相當頻繁及順暢，但仍有一些實務運作上之問題亟待解決。就我國而言，目前面臨最嚴重之阻礙，即是由於我國外交地位不夠明確，除截至現今，僅與數國簽訂雙邊之引渡或刑事司法互助條約外，亦非聯合國之會員國，因而如向前開簽約國以外之其他國家，請求刑事司法互助，是否會遭到拒絕，即成為相當棘手之問題。

就英國曾遭遇之實務案例而言，在西元一九九三年間，被告 Forsyth 請求英國法院向當時尚未被承認為「國家」之賽浦路斯 (Cyprus)，聲請提供該國證人之證言，做為英國法院審判中使用。但英國法院以如果允准被告之請求，等於間接承認賽浦路斯是一個國家，且依據英國一九九〇年之刑事司法國際合作法第三條之規定，並無擴張解釋得將取得證據之主體，延伸至英國未承認之國家，進而拒絕被告之請求

54。

⁵⁴ R. v. Forsyth, [1997] 2nd Cr. App. R.299, available at http://www.lexis.com/research/retrieve/frames?_m=506a075871d180c26d4c788866e40013&csvc=bl&cform=bool&fmtstr=XCITE&docnum=1&startdoc=1&wchp=dGLbVlb-zSkAk&md5=fc9e5aca9daa1ae49fa6dac11eaa69b9, also see *supra* note 10, at 36-37.

第二節 接受請求國拒絕協助之標準訂定問題

由我國駐美國台北經濟文化代表處與美國在台協會間之刑事司法互助協定、美洲國家間所簽訂之多邊刑事司法互助協定、西元一九五九年之歐洲刑事司法互助條約，或英國西元一九九〇年刑事司法國際合作法觀之，接受請求國，得因請求之案件係涉及政治案件、財政罰案件，或危及國家主權、領土安全或違反公序良俗，進而拒絕提供刑事司法協助。

然而，何謂「政治案件」、「財政罰案件」、「國家主權」、「領土安全」，及「公序良俗」，即有相當大之解釋空間。雖然針對「公序良俗」而言，西元一八九六年海牙國際公約（Hague International Convention）曾訂定：所謂公序良俗，係指不妨礙、擾亂或破壞一國之社會或憲政結構而言⁵⁵，然此段文字反而留有更多討論餘地。

此外，倘該案件性質具有刑事及政治，或刑事與財政罰性質之雙重特性，則是否應予提供刑事司法互助，係賦予接受請求國極大之裁量權限，如此是否有礙國際刑事司法互助之推展，亦值得觀察。

⁵⁵ Council of Europe-Strasbourg, Problems Arising from The Practical Application of The Europe Convention on Mutual Assistance in Criminal Matters, 40.(1971)

第三節 請求他國取得證據供本國使用時，證據之形式以何國為準

有關請求他國取得證據供本國使用時，證據之形式以何國為準之問題，西元一九五九年歐洲刑事司法互助公約第三條係規定，以受請求國法律規定之形式為準⁵⁶，但因而往往造成證據可能無法被請求國採用，故歐盟之法律互助條約草案第四條第一項 (Draft Council Act: Establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union)，即修改成以請求國所要求之形式為準⁵⁷，此乃因為歐洲各國或適用大陸法，或採用英美法，而兩者對於證據形式之認定有極大不同所致⁵⁸。

反觀我國與美國所簽訂之雙邊刑事司法互助協定第九條第三項則規定，證據之形式，係依照受請求國所屬領土之

⁵⁶ 請詳見附件四。

⁵⁷ 歐盟法律互助條約草案第四條第一項法條原文如下：

Article 4 Compliance with the formalities and procedures indicated by the requesting Member States

1. Where mutual assistance is afforded and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member States, the Member States shall undertake to comply, unless otherwise provided in this Convention, for the purposes of executing letters rogatory, with formalities and procedures expressly indicated by the requesting Member State. The requested Member State shall execute the request for assistance as soon as possible and shall take as full account as possible of any deadlines set by the requesting Member State. The requesting Member State shall explain the reasons for the deadline.

⁵⁸ See *Supra* note 10, at 50-51.

主管機關所同意之方式，與前述歐盟條約草案之規定，有所不同。是以倘多邊條約與雙邊條約發生齟齬時，應如何適用有關證據形式之相關規定，即容易產生問題。

第四節 傳聞證據之問題

依據我國今（九十二）年二月新修正通過，且業於同年九月一日開始施行之刑事訴訟法第一百五十九條第一項規定：被告以外之人於審判外之言詞或書面陳述，除法律有規定者外，不得做為證據，此乃傳聞證據不得作為裁判根據之原則規定。雖然刑事訴訟法第一百五十九條之一至第一百五十九條之五，隨即規定有關傳聞證據例外得為採用之情形，但此僅限於被告以外之證人、鑑定人業於司法警察、檢察事務官或檢察官前已為陳述，而該先前之陳述，具有可信性之情況而言。

在此可能產生一個問題，亦即倘一名外國之關鍵證人，倘從未在我國司法警察、檢察事務官或檢察官面前陳述，又不欲至我國法院審理時出庭作證，僅願在其當地司法機關前證述，或僅願以經過公證之書面代替口頭陳述，而我國與該

國又未簽訂刑事司法互助協定時，則其證詞或書面陳述是否屬於傳聞證據，而不得作為我國審判之依據？

從美國聯邦證據法令（Federal Rules of Evidence）第八百零四條第（b）項規定可得知，在證人無法至法院出庭之情況下，除非該名證人曾先前在法院聽審或其他訴訟程序中之證述過、或有瀕死前之陳述、或該先前陳述與該證人有利益衝突、或該先前之證言係與個人或家庭歷史有關等，始得引為傳聞法則之例外，作為法院審判之依據⁵⁹。然按照美國前

⁵⁹ 美國聯邦證據法令第八百零四條第（b）項之法條原文如下：

Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the

開法令之規定，則上揭問題所提及在外國司法機關所作成之證詞，或經公證之書面陳述，將無法成為我國法院裁判之根據。

反之，依據英國西元一九八八年刑事司法法（Criminal Justice Act of 1988）第三十二條，以及歐盟法律互助條約草案第十六條第一項⁶⁰之規定，如果證人無法親自至請求國作證，則得透過電視或電信設備直接傳輸為之，此並有被告 Forsyth 請求以視訊方式詰問證人乙案為例⁶¹。

第五節 取得之國外證據使用上之限制

由於向外國請求刑事司法互助時，應以書面為之，倘書面上請求之內容僅限於調查證據，則可否將之使用擴張至犯罪所得之沒收或扣押或其他用途？依據英國在西元一九九八年之 R. v. Gooch 案例中，被告 Gooch 上訴爭執英國檢察官

declarant as a witness.

⁶⁰ 歐盟法律互助條約第十六條第一項法條原文如下：

Article 16 Requests for interception of telecommunications

1. For the purpose of a criminal investigation, a competent authority in any Member State (the requesting Member State) may, in accordance with the requirements of its domestic law, make a request to a competent authority in another Member State (the requested Member State) for:

(a) the interception and immediate transmission to the requesting Member State of telecommunications; or

(b) the interception, recording and subsequent transmissions to the requesting Member State of the recording of telecommunications.

⁶¹ See *Supra* note 54.

向瑞士及列斯敦士登兩國請求刑事司法互助之範圍，僅限於其販賣毒品之犯罪行為部分，雖該兩國另有提供被告犯罪所得數額，但因不在檢察官書面請求範圍之內，故不得逕作為法官判決財產沒收多寡之依據。上訴審法官根據西元一九九〇年刑事司法國際合作法第三條第七項之規定，認為檢察官如主張該證據如欲擴張適用至被告犯罪所得之沒收，應得瑞士及列斯敦士登兩國之同意，進而認同被告之主張⁶²。

⁶² R. v. Gooch, [1998] 4 All ER 402, [1998] 1 WLR 1100. Available at http://www.lexis.com/research/retrieve/frames?_m=8050ac6943309910a07ee2d6ca7caf41&csvc=bl&cform=bool&fmtstr=XCITE&docnum=1&startdoc=1&wchp=dGLbVlz-zSkAW&_md5=81be6ac409ddadabd0b6be4f7368869f

第十章 建議及研究心得

近年來跨國犯罪日益猖獗，查緝不易，加上我國外交地位特殊，僅與數國簽訂引渡條約或刑事司法互助協定，因此反而成為犯罪者之天堂，亦即作奸犯科之人得知在我國從事跨國犯罪時，通常無法將其引渡回其他國家；反之，其他國家亦無從請求我國提供刑事司法互助。為防範此一嚴重事態之擴大，並加強打擊犯罪之成效，筆者建議有下列數種方法可作為參考：

一、最能夠有效達到前開目標之方法，係盡量透過非官方管道，或是比照我國與美國以駐外單位之名義，簽訂刑事司法互助協定之模式，與更多國家訂定刑事司法互助條約或協定。

二、如因我國國際地位之故，無法順利與外國簽立刑事司法互助協定時，則退一步應強化我國內政部警政署刑事警察局與國際刑警組織（Interpol）之聯繫，期盼透過此管道獲得更多之刑事調查證據之資源。

三、增修我國刑事訴訟法有關傳聞證據例外之規定，將外國證人或告訴人不願至我國作證，但願意在其本國透過電視或電腦視訊設備，接受法庭之交互詰問，抑或願意出具詳細之

書面陳述，並經我國駐外單位公證之情形下，視為傳聞法則之例外，可採為法院裁判之依據。

國際刑事司法互助涉及之層面既深且廣，由於我國目前接受美國請求，提供刑事司法互助之案例並不多，因而似乎尚未顯現此一課題之重要性。但隨著犯罪手法之細緻化、複雜化，國際刑事司法互助必將成為往後檢警單位不得不重視之發展趨向，在此特別企盼更多資源能夠挹注至此一標的，以期達成有效遏止跨國犯罪之目標。

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1992 U.S.T. LEXIS 169

Pages: 25

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Terms: inter-american convention on mutual assistance (Edit Search)

1992 U.S.T. LEXIS 169, *

U.S. Treaties on LEXIS

MULTILATERAL

INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITH RELATED OPTIONAL PROTOCOL

TREATY DOC. 105-25

1992 U.S.T. LEXIS 169

May 23, 1992; June 11, 1993; January 10, 1995, Date-Signed

附件
一

STATUS:

[*1] PENDING: September 3, 1997. Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES

TRANSMITTING **INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE** IN CRIMINAL MATTERS, ADOPTED AT THE TWENTY-SECOND REGULAR SESSION OF THE ORGANIZATION OF AMERICAN STATES (OAS) GENERAL ASSEMBLY MEETING IN NASSAU, THE BAHAMAS, ON MAY 23, 1992, AND THE OPTIONAL PROTOCOL RELATED TO THE **INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE** IN CRIMINAL MATTERS, ADOPTED AT THE TWENTY-THIRD REGULAR SESSION OF THE OAS GENERAL ASSEMBLY MEETING IN MANAGUA, NICARAGUA, ON JUNE 11, 1993. BOTH INSTRUMENTS SIGNED ON BEHALF OF THE UNITED STATES AT OAS HEADQUARTERS IN WASHINGTON ON JANUARY 10, 1995

TEXT:

105TH CONGRESS

1st Session

SENATE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, September 3, 1997.

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the **Inter-American Convention on Mutual Assistance** in Criminal Matters ("the Convention"), adopted at the twenty-second regular session [*2] of the Organization of American States (OAS) General Assembly meeting in Nassau, The Bahamas, on May 23, 1992, and the Optional Protocol Related to the **Inter-American Convention on Mutual Assistance** in Criminal Matters ("the Protocol"), adopted at the twenty-third regular session of the OAS General Assembly meeting in Managua, Nicaragua, on June 11, 1993. Both of these instruments were signed on behalf of the United States at the OAS headquarters in Washington on January 10, 1995. In addition, for the information of the Senate, I transmit the report of the Department of State with respect to the Convention and the Protocol.

When ratified, the Convention and the Protocol will constitute the first multilateral convention between the United States and other members of the OAS in the field of international judicial cooperation in criminal matters. The provisions of the Convention and Protocol are explained in the report of the Department of State that accompanies this message.

The Convention and Protocol will establish a treaty-based system of judicial assistance in criminal matters analogous to that which exists bilaterally between the United States and a number of countries. These instruments [*3] should prove to be effective tools to assist in the prosecution of a wide variety of modern criminals, including members of drug cartels, "white-collar" criminals, and terrorists. The Convention and Protocol are self-executing, and will not require implementing legislation.

The Convention provides for a broad range of cooperation in criminal matters. Mutual assistance available under the Convention includes: (1) taking testimony or statements of persons; (2) providing documents, records, and articles of evidence; (3) serving documents; (4) locating or identifying persons or items; (5) transferring persons in custody for testimony or other purposes; (6) executing requests for searches and seizures; (7) assisting in forfeiture proceedings; and (8) rendering any other form of assistance not prohibited by the laws of the Requested State.

The Protocol was negotiated and adopted at the insistence of the United States Government, and will permit a greater measure of cooperation in connection with tax offenses. I believe that the Convention should not be ratified by the United States without the Protocol. If the Convention and Protocol are ratified, the instruments of ratification would be [*4] deposited simultaneously.

One significant advantage of this Convention and Protocol is that they provide uniform procedures and rules for cooperation in criminal matters by all the states that become Party. In addition, the Convention and Protocol would obviate the expenditure of resources that would be required for the United States to negotiate and bring into force bilateral mutual assistance treaties with certain OAS member states.

I recommend that the Senate give early and favorable consideration to the Convention and the Protocol, and that it give its advice and consent to ratification, subject to the understandings described in the accompanying report of the Department of State.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,

Washington, June 18, 1997.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to transmittal to the Senate for its advice and consent to ratification, the **Inter-American Convention on Mutual Assistance** in Criminal Matters ("the Convention"), and the Optional Protocol Related to the **Inter-American Convention on Mutual Assistance** in Criminal Matters ("the Protocol"). The Convention was [*5] adopted and opened for signature at the twenty-second regular session of the General Assembly meeting of the Organization of American States (OAS) in Nassau, The Bahamas in May 1992. The Protocol was adopted and opened for signature at the twenty-third regular session of the OAS General Assembly meeting in Managua, Nicaragua in June 1993. Both the Convention and the Protocol were signed by the United States on January 10, 1995 at the OAS headquarters in Washington. I recommend that both the Convention and Protocol be transmitted to the Senate for its advice and consent to ratification.

To date, ten states have signed the Convention (Brazil, Canada, Ecuador, Grenada, Nicaragua, Peru, Suriname, the United States, Uruguay and Venezuela). Three states (Venezuela, Peru, and Canada) have ratified, and the Convention entered into force on April 14, 1996. However, only three states (the United States, Brazil, and Ecuador) have signed the protocol, and none has ratified it. Thus, the Protocol is not yet in force.

The Convention and Protocol establish a treaty-based system of mutual assistance among the OAS member states in criminal matters, analogous to that which exists pursuant to bilateral [*6] mutual legal assistance treaties between the United States and a number of countries. This Convention contains many provisions similar to those in our bilateral treaties. It will enhance our ability to investigate and prosecute a variety of offenses, including violent crimes, drug trafficking, fraud and white-collar crimes. The Convention is designed to be self-executing and will not require implementing legislation.

The United States declined initially to sign the Convention because, among other reasons, it limited assistance in cases involving tax offenses. The United States therefore proposed the draft of the Protocol to the Convention for consideration at the twenty-third regular session of the OAS General Assembly, which met in Managua, Nicaragua in 1993. The text of the Protocol that was adopted during that session is generally based on the draft that was proposed by the United States. The relevant U.S. Government agencies believe the Convention should not be ratified by the United States without the Protocol. If both are ratified, the instruments of ratification would be submitted simultaneously.

The Convention consists of forty articles. Chapter I (Articles 1-9) contains the [*7] Convention's general provisions. Article 1 states the purpose of the Convention, which is for the Parties to render to one another mutual assistance in criminal matters, in accordance with the provisions of the Convention.

Article 2 defines the scope and application of the Convention. Specifically, the Parties are obligated to render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the Requesting State has jurisdiction at the time the assistance is requested. In addition, this Article expressly states that the Convention does not authorize any Party to undertake, in the territory of another Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law. Finally, Article 2 stipulates that the Convention's provisions do not create any right on the part of any private person to obtain or exclude any evidence or to impede execution of any request for assistance.

Article 3 provides that each state will designate a central authority that shall be responsible for issuing and receiving requests for assistance. For the [*8] United States, the central authority would be the Attorney General, or such person or persons as the Attorney General may designate. The central authorities shall communicate directly with one another for purposes of implementation of the Convention.

Article 4 specifies that, in light of the diversity of legal systems of the Parties, assistance under the Convention shall be based on requests for cooperation that emanate from those authorities in the Requesting State that are responsible for criminal investigation or prosecution.

Article 5 states that assistance under the Convention shall generally not be subject to a "dual criminality" requirement; that is, assistance shall be rendered even if the act that gives rise to it is not punishable under the legislation of the Requested State. However, the Article authorizes the Requested State to refuse assistance on grounds of lack of dual criminality when the request pertains to either of two measures: (a) immobilization and sequestration of property; and (b) searches and seizures (including house searches). Although the United States generally prefers to avoid the inclusion of dual criminality requirements in its mutual

legal assistance [*9] treaties, the above-cited exceptions in Article 5 will confer on the United States the discretion to decline to provide assistance in connection with certain measures that under U.S. law are subject to constitutional limitations, in cases where the criminal laws of the Requesting State proscribe conduct that is not punishable under United States law.

Article 6 provides that the act that gives rise to the request must be punishable by one year or more of imprisonment in the Requesting State.

Article 7 contains a non-exhaustive list of the major types of assistance to be provided under the Convention, including notification of rulings and judgments; taking of testimony or statements from persons; summoning of witnesses and expert witnesses to provide testimony; immobilization and sequestration of property, freezing of assets, and assistance in procedures related to seizures; searches or seizures; examinations of objects and places; service of judicial documents; transmittal of documents, reports, information, and evidence; and transfer of detained persons for the purposes of the Convention. The Article provides that any other procedure may also be covered by the Convention upon agreement [*10] between the Requesting State and the Requested State.

Article 8 states that the Convention shall not apply to crimes that are subject exclusively to military legislation.

Article 9 sets forth the grounds upon which the Requested State may refuse assistance. Specifically, the Requested State may decline assistance if it determines that the request is being used to prosecute a person on a charge with respect to which the person has already been sentenced or acquitted in a trial in the Requesting or Requested State. Assistance may also be refused if the investigation has been initiated for the purpose of prosecuting, punishing, or discriminating in any way against an individual or group of persons for reason of sex, race, social status, nationality, religion, or ideology. In addition, a request may be denied if it refers to a crime that is political or related to a political crime, or to a common crime prosecuted for political reasons. Article 9 also gives the Requested State the discretion to deny assistance if the request has been issued at the request of a special or ad hoc tribunal; or if public policy (order public), sovereignty, security or basic public interests would be prejudiced. [*11]

Article 9 provides, finally, that a request may be denied if it pertains to a tax crime. However, Article 9 stipulates that assistance in connection with tax crimes shall be granted if the offense is committed by way of an intentionally incorrect statement, whether oral or written, or by way of an intentional failure to declare income derived from any other offense covered by the Convention for the purpose of concealing such income. In addition, cooperation with respect to tax offenses is subject to the terms of the Protocol for those states that are Parties to that instrument.

Chapter II (Articles 10-16) describes procedures for the filing, processing and execution of requests for assistance. Article 10 provides that requests shall be made in writing and executed in accordance with the domestic law of the Requested State.

Article 11 permits the Requested State to postpone execution of any request if doing so is necessary to continue an investigation or proceeding in progress in the Requested State. In such cases, the Requested State must provide an explanation of its grounds for postponing execution of the request.

Article 12 stipulates that documents and objects delivered in compliance [*12] with a request for assistance shall be returned to the Requested State as soon as possible, unless the latter decides otherwise.

Article 13 provides that the Requested State shall execute requests for search, seizure, attachment, and surrender of any items, documents, records, or effects, if the competent authority determines that the request contains information that justifies the proposed action. Such action is subject to the procedural and substantive law of the Requested State. Furthermore, the Article provides that the Requested State shall determine, according to its law, what requirements must be met to protect the interests held by third parties in the items that are to be transferred.

Article 14 authorizes the central authority of any Party to convey to its counterparts in other Parties information it has on the existence of proceeds, fruits, or instrumentalities of a crime in the territory of those Parties.

Article 15 requires the Parties to assist each other, to the extent permitted by their respective laws, in precautionary measures and measures for securing the proceeds, fruits, and instrumentalities of the crime.

Article 16 provides that the Requested State shall set [*13] the date and place for execution of the request for assistance and may so inform the Requesting State. The Article also authorizes officials and interested parties of the Requesting State or their representatives, after informing the central authority of the Requested State, to be present at and participate in the execution of the request for assistance, to the extent permissible under the law of the Requested State's authorities.

Chapter III (Articles 17-23) addresses the subjects of service of judicial decisions, judgments and verdicts, and the appearance of witnesses and expert witnesses. Article 17 provides that, at the request of the Requesting State, the Requested State shall serve notice of decisions, judgments, or other documents issued by the competent authorities of the Requesting State.

Article 18 directs that, at the request of the Requesting State, any person present in the Requested State may be summoned to appear before a competent authority, in accordance with the law of the Requested State, to give testimony or to provide documents, records, or evidence.

Article 19 states that, when the Requesting State requests that a person appear in its territory to give testimony [*14] or a report, the Requested State shall invite the witness or expert witness to appear voluntarily, without the use of threats or coercive measures, before the appropriate authority in the Requesting State.

Article 20 addresses the subject of transfers of persons subject to criminal proceedings. The Article authorizes temporary transfers to the Requesting State, for the purpose of assistance under the Convention, of persons subject to criminal proceedings in the Requested State, but only if the person and the Requested State consent. The article also authorizes transfers to the Requested State of persons subject to criminal proceedings in the Requesting State, but only if the person and both states consent.

The Article enunciates grounds for denial of a request for transfer, including instances in which the individual in custody refuses to consent to the transfer; when the person's presence is necessary in an investigation or criminal proceeding that is under way in the jurisdiction to which he is subject at the time; and when there are other considerations, whether legal or of another nature, as determined by the competent authority of the Requested or Requesting State.

Article 20 [*15] also stipulates that the receiving state shall have the obligation to keep the transferred person in physical custody; that it shall return the transferred person to the sending state as soon as possible or as agreed by the central authorities of the two states; and that the sending state shall not be required to initiate extradition proceedings for the return of the transferred person. In addition, the transferred person shall receive credit toward service of the sentence imposed in the sending state for time served in the receiving state; and the length of time spent by the person in the receiving state shall not exceed the period remaining for service of the sentence or 60 days, whichever is less, unless the person and both states agree to an extension of time.

Article 21 obligates the Parties to render cooperation, to the extent possible, for travel through their territory of the persons mentioned in Article 20, provided that the central authorities of the transit state are given due advance notice and that such persons travel in the custody of agents of the Requesting State (except where air transportation is used and no landing is scheduled in the territory of the Party to be [*16] overflown).

Article 22 requires, upon request of the person being transferred from the sending state, that the receiving state grant safe-conduct to the person. This means that the person shall not be detained or prosecuted for offenses committed prior to the transfer; be required to make a statement or give testimony in proceedings not specified in the request; or be detained or prosecuted on the basis of any statement he makes, except in case of contempt of court or perjury.

Article 23 provides that, in connection with witnesses or expert witnesses, documents containing the relevant questions, interrogatories, or questionnaires shall be forwarded to the extent possible or necessary.

Chapter IV (Articles 24-25) addresses the issue of transmittal of information and records. Article 24 provides that, upon request, the Requested State shall make available to the Requesting State a copy of the public documents, records, or information held by the government agencies or departments of the Requested State. In addition, the Requested State may make available such government information and records that are not public, but only to the same extent as it would make such available to its own [*17] judicial authorities or to others responsible for application of the law.

Article 25 prohibits the Requesting State from disclosing or using any information or evidence obtained in the course of application of the Convention for purposes other than those specified in the request for assistance, unless consent is obtained from the central authority of the Requested State. To ensure that the Convention is implemented consistent with existing U.S. legislation, I recommend that the following understanding to Article 25 be included in the United States instrument of ratification:

The United States understands that Article 25 of the Convention, which limits disclosure or use of information or evidence obtained under the Convention, shall no longer apply if such information or evidence is made public, in a manner consistent with Article 25, in the course of proceedings in the Requesting State.

Article 25 further provides that, when necessary, the Requested State may ask that the information or evidence provided remain confidential according to conditions specified by the central authority.

Chapter V (Articles 26-31) sets forth the procedures that govern the presentation and processing [*18] of requests. Article 26 specifies the information that requests for assistance must contain, including a statement of the crime to which the procedure refers; a summary of the relevant facts; the nature of the proceeding giving rise to the request for assistance; a precise description of the assistance requested and any information necessary for the fulfillment of such request; and, where pertinent, a description of any proceeding or other special requirement of the Requesting State.

Article 26 also provides that when the Requested State is unable to comply with a request, it must return the request to the Requesting State with an explanation of the reasons therefor. The Requested State may request additional information when necessary for fulfillment of the request under its domestic law or to facilitate such fulfillment.

Article 27 eliminates any requirement for certification or authentication of documents, so long as the documents are processed through the central authorities in accordance with the Convention.

Article 28 requires that requests for assistance and their accompanying documentation be translated into an official language of the Requested State.

Article 29 renders the [*19] Requested State responsible for all regular costs of executing a request in its territory, except for fees for expert witnesses, travel costs, and other expenses related to the transportation of persons from the territory of the state to that of the other, which shall be borne by the Requesting State.

Article 30 permits the Parties to exchange information on matters related to the application of the Convention, for the purpose of furthering the treaty's implementation.

Article 31 directs that the domestic law of each Party shall govern liability for damages arising from the acts of its authorities in the execution of the Convention. The Article also exempts the Parties from liability for damages that may arise from the acts committed by the authorities of another Party in the formulation or execution of a request under the Convention.

Chapter VI (Articles 32-40) sets forth the final clauses. Article 32 provides that the Convention shall be open for signature by the member states of the Organization of American States.

Article 33 renders the Convention subject to ratification, and requires that instruments of ratification be deposited with the General Secretariat of the Organization [*20] of American States.

Article 34 opens the Convention to accession by any other state, and requires that instruments of accession be deposited with the OAS General Secretariat.

Article 35 permits each state to make reservations to the Convention at the time of signature, approval, ratification, or accession, provided that each reservation concerns at least one specific provision and is not incompatible with the object and purpose of the Convention.

Article 36 provides that the Convention shall not be interpreted as affecting or restricting obligations in effect under any other bilateral or multilateral convention, or provisions therein, relating to international criminal judicial assistance, or more favorable practices that those states may observe in the matter. The United States wishes to ensure that more favorable provisions in bilateral treaties not be prejudiced by the OAS MLAT, and that accession to this Convention not be interpreted as indicative of the United States Government's willingness to include identical provisions in future bilateral treaties. For these reasons, the United States made a statement at the OAS General Assembly in Nassau, The Bahamas, in 1992, emphasizing [*21] the provisions of this Article. In order to stress this point formally, I recommend that the following understanding be included in the United States instrument of ratification of both the Convention and the Protocol:

The United States understands that the Convention and Optional Protocol are not intended to replace, supersede, obviate or otherwise interfere with any other bilateral or multilateral treaties or conventions, including those that relate to mutual assistance in criminal matters.

Article 37 states that the Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification. For each state that ratifies or accedes to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

Article 38 provides that if a Party has two or more territorial units in which different systems of law govern matters addressed in the Convention, it shall state at the time of signature, ratification, or accession whether the Convention shall apply to all of its territorial units or only [*22] to one or more of them.

Article 39 sets forth the termination clause of the Convention. It states that the Convention shall remain in force indefinitely, but that any Party may denounce or terminate it. The instrument of denunciation must be deposited with the OAS General Secretariat. The Convention shall cease to be in force for the denouncing state one year from the date of deposit of the instrument of denunciation.

Article 40 provides that the English, French, Spanish and Portuguese texts of the Convention are equally authentic, and that the original instruments in each of those languages shall be deposited with the OAS General Secretariat, which shall forward authenticated copies of the text of the United Nations General Secretariat for registration and publication. Finally, this Article indicates that the OAS General Secretariat shall notify the OAS member states, as well as those states that have acceded to the Convention, of the signatures and deposits of instruments of ratification, accession, and denunciation, and of reservations, if any, as well as the statements specified in Article 38 of the Convention.

The Protocol consists of five Articles. The first Article provides [*23] that Parties to the Protocol shall not exercise the right contemplated in Article 9.f of the Convention to refuse a request for assistance from another Party to the Protocol solely on the ground that the request concerns a tax crime.

Article 2 provides that, when acting as a Requested State under the Convention, Parties to the Protocol shall not decline assistance that requires the measures referred to in Article 5 of the Convention, if the act specified in the request corresponds to a tax crime of the same nature under the laws of the Requested State.

Articles 3, 4, and 5 contain the final clauses. Article 3 articulates which states can become Parties or accede to the Convention, and imposes requirements regarding the deposit of instruments of ratification or accession. This Article also specifies conditions for the filing of reservations, and includes a paragraph stating that the Protocol shall not be interpreted as affecting or restricting obligations under other treaties or practices with respect to international criminal assistance. As mentioned above in connection with Article 36 of the Convention, I recommend that the following understanding be included in the United States [*24] instrument of ratification of both the Convention and the Protocol:

The United States understands that the Convention and Optional Protocol are not intended to replace, supersede, obviate or otherwise interfere with any other bilateral or multilateral treaties or conventions, including those that relate to mutual assistance in criminal matters.

Finally, Article 3 sets forth provisions regarding entry into force of the Protocol, and requiring statements by countries with two or more territorial units on the application of the Protocol to such units.

Article 4 provides that the Protocol shall remain in force as long as the Convention does, but that any of the Parties may denounce it. The instrument of denunciation must be deposited with the OAS General Secretariat, and the Protocol would cease to be in effect for the denouncing state one year from the date of such deposit.

Article 5 requires that the original text of the Protocol in the four OAS languages be deposited with the OAS General Secretariat, and that the latter forward authenticated copies of the text to the United Nations Secretariat for registration. Finally, Article 5 directs the OAS General Secretariat to notify the [*25] OAS member states and acceding states of the signatures and deposits of instruments of ratification, accession, and denunciation, as well as reservations, if any, and the statements specified in Article 3.

It is my belief that this Convention and the Protocol would afford substantial benefits to the United States, and would be fully consistent with existing United States legislation.

A Technical Analysis explaining in detail the provisions of the Convention and the Protocol was prepared by the United States negotiating delegation and will be transmitted separately to the Senate Committee on Foreign Relations.

The Departments of Justice and Treasury join the Department of State in recommending that the Convention and the Protocol be transmitted to the Senate at an early date for its advice and consent to ratification, subject to the understandings described above.

Respectfully submitted,

MADELEINE ALBRIGHT.

CONVENCION INTERAMERICANA SOBRE ASISTENCIA MUTUA EN MATERIA PENAL Adoptada en Nassau, Bahamas, el 23 de mayo de 1992, en el Vigésimo Segundo Periodo Ordinario de Sesiones de la Asamblea General

INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS Adopted at Nassau, [*26] Bahamas, on May 23, 1992, at the Second Regular Session of the General Assembly

CONVENCAO INTERAMERICANA SOBRE ASSISTENCIA MUTUA EM MATERIA PENAL Adotado em Nassau, Bahamas, em 23 de maio de 1992, no Vigésimo Segundo Periodo Ordinario de Sessoes da Assembleia Geral

CONVENTION INTERAMERICAINE SUR L'ENTRAIDE EN MATIERE PENALE Adopte a Nassau, Bahamas, le 23 de mai de 1992, lors de la vingt deuxieme Session Ordinaire de l'Assemblee Generale

INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

PREAMBLE

WHEREAS:

The Charter of the Organization of American States, in Article 2.e, establishes that an essential objective of the American states is "to seek the solution of political, juridical, and economic problems that may arise among them"; and

The adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this goal,

THE MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES

Do hereby adopt the following **Inter-American Convention on Mutual Assistance** in Criminal Matters:

CHAPTER 1

GENERAL PROVISIONS

Article 1. PURPOSE OF THE CONVENTION

The states parties undertake to render to one another mutual assistance in criminal [*27] matters, in accordance with the provisions of this convention.

Article 2. SCOPE AND APPLICATION OF THE CONVENTION

The states parties shall render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting state has jurisdiction at the time the assistance is requested.

This convention does not authorize any state party to undertake, in the territory of another state party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other party by its domestic law.

This convention applies solely to the provision of mutual assistance among states parties. Its provisions shall not create any right on the part of any private person to obtain or exclude any evidence or to impede execution of any request for assistance.

Article 3. CENTRAL AUTHORITY

Each state shall designate a central authority at the time of signature or ratification of this convention or accession hereto.

The central authorities shall be responsible for issuing and receiving requests for assistance.

The central authorities shall communicate directly with one another for [*28] all purposes of this convention.

Article 4

In view of the diversity of the legal systems of the states parties, the assistance to which this convention refers shall be based upon requests for cooperation from the authorities responsible for criminal investigation or prosecution in the requesting state.

Article 5. DOUBLE CRIMINALITY

The assistance shall be rendered even if the act that gives rise to it is not punishable under the legislation of the requested state.

When the request for assistance pertains to the following measures: (a) immobilization and sequestration of property and (b) searches and seizures, including house searches, the requested state may decline to render the assistance if the act that gives rise to the request is not punishable under its legislation.

Article 6

For the purposes of this convention, the act that gives rise to the request must be punishable by one year or more of imprisonment in the requesting state.

Article 7. SCOPE OF APPLICATION

The assistance envisaged under this convention shall include the following procedures, among others:

- a. notification of rulings and judgments;
- b. taking of testimony or statements from persons;
- [*29] c. summoning of witnesses and expert witnesses to provide testimony;
- d. immobilization and sequestration of property, freezing of assets, and assistance in procedures related to seizures;
- e. searches or seizures;
- f. examination of objects and places;
- g. service of judicial documents;
- h. transmittal of documents, reports, information, and evidence;
- i. transfer of detained persons for the purpose of this convention; and
- j. any other procedure provided there is agreement between the requesting state and the requested state.

Article 8. MILITARY CRIMES

This convention shall not apply to crimes that are subject exclusively to military legislation.

Article 9. REFUSAL OF ASSISTANCE

The requested state may refuse assistance when it determines that:

- a. The request for assistance is being used in order to prosecute a person on a charge with respect to which that person has already been sentenced or acquitted in a trial in the requesting or requested state;
- b. The investigation has been initiated for the purpose of prosecuting, punishing, or discriminating in any way against an individual or group of persons for reason of sex, race, social status, nationality, religion, [*30] or ideology;
- c. The request refers to a crime that is political or related to a political crime, or to a common crime prosecuted for political reasons;
- d. The request has been issued at the request of a special or ad hoc tribunal;
- e. Public policy (ordre public), sovereignty, security, or basic public interests are prejudiced; and
- f. The request pertains to a tax crime. Nevertheless, the assistance shall be granted if the offense is committed by way of an intentionally incorrect statement, whether oral or written, or by way of an intentional failure to declare income derived from any other offense covered by this convention for the purpose of concealing such income.

CHAPTER II

REQUESTS FOR ASSISTANCE, PROCESSING AND EXECUTION

Article 10. REQUESTS FOR ASSISTANCE

Requests for assistance issued by the requesting state shall be made in writing and shall be executed in accordance with the domestic law of the requested state.

The procedures specified in the request for assistance shall be fulfilled in the manner indicated by the requesting state insofar as the law of the requested state is not violated.

Article 11

The requested state may postpone the execution of any [*31] request that has been made to it, with an explanation of its grounds for doing so, if it is necessary to continue an investigation or proceeding in progress in the requested state.

Article 12

Documents and objects delivered in compliance with a request for assistance shall be returned to the requested state as soon as possible, unless the latter decides otherwise.

Article 13. SEARCH, SEIZURE, ATTACHMENT, AND SURRENDER OF PROPERTY

The requested state shall execute requests for search, seizure, attachment, and surrender of any items, documents, records, or effects, if the competent authority determines that the request contains information that justifies the proposed action. That action shall be subject to the procedural and substantive law of the requested state.

In accordance with the provisions of this convention, the requested state shall determine, according to its law, what requirements must be met to protect the interests held by third parties in the items that are to be transferred.

Article 14. MEASURES FOR SECURING ASSETS

The central authority of any party may convey to the central authority of any other party information it has on the existence of proceeds, fruits, [*32] or instrumentalities of a crime in the territory of that other party.

Article 15

The parties shall assist each other, to the extent permitted by their respective laws, in precautionary measures and measures for securing the proceeds, fruits, and instrumentalities of the crime.

Article 16. DATE, PLACE AND MODALITY OF THE EXECUTION OF THE REQUEST FOR ASSISTANCE

The requested state shall set the date and place for execution of the request for assistance and may so inform the requesting state.

Officials and interested parties of the requesting state or their representatives may, after informing the central authority of the requested state, be present at and participate in the execution of the request for assistance, to the extent not prohibited by the law of the requested state, and provided that the authorities of the requested state have given their express consent thereto.

CHAPTER III

SERVICE OF JUDICIAL DECISIONS, JUDGMENTS, AND VERDICTS, AND APPEARANCE OF WITNESSES AND EXPERT WITNESSES

Article 17

At the request of the requesting state, the requested state shall serve notice of decisions, judgments, or other documents issued by the competent authorities of the requesting [*33] state.

Article 18. TESTIMONY IN THE REQUESTED STATE

At the request of the requesting state, any person present in the requested state shall be summoned to appear before a competent authority, in accordance with the law of the requested state, to give testimony or to provide documents, records, or evidence.

Article 19. TESTIMONY IN THE REQUESTING STATE

When the requesting state requests that a person appear in its territory to give testimony or a report, the requested state shall invite the witness or expert witness to appear voluntarily, without the use of threats or coercive measures, before the appropriate authority in the requesting state. If deemed necessary, the central authority of the requested state may make a written record of the individual's willingness to appear in the requesting state. The central authority of the requested state shall promptly inform the

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central authority of the requesting state of the response of the person.

Article 20. TRANSFER OF PERSONS SUBJECT TO CRIMINAL PROCEEDINGS

A person subject to criminal proceedings in the requested state whose presence in the requesting state is needed for purposes of assistance under this convention shall be [*34] transferred temporarily to the requesting state for that purpose if the person and the requested state consent to the transfer.

A person subject to criminal proceedings in the requesting state whose presence in the requested state is needed for purposes of assistance under this convention shall be transferred temporarily to the requested state if the person consents and both states agree.

The actions set forth above may be denied for the following reasons, among others:

- a. the individual in custody or serving a sentence refuses to consent to the transfer;
- b. as long as his presence is necessary in an investigation or criminal proceeding that is under way in the jurisdiction to which he is subject at the time;
- c. there are other considerations, whether legal or of another nature, as determined by the competent authority of the requested or requesting state.

For purposes of this article:

- a. the receiving state shall have the authority and the obligation to keep the transferred person in physical custody unless otherwise indicated by the sending state;
- b. the receiving state shall return the transferred person to the sending state as soon as circumstances permit or as [*35] otherwise agreed by the central authorities of the two states;
- c. the sending state shall not be required to initiate extradition proceedings for the return of the transferred person;
- d. the transferred person shall receive credit toward service of the sentence imposed in the sending state for time served in the receiving state; and
- e. the length of time spent by the person in the receiving state shall never exceed the period remaining for service of the sentence or 60 days, whichever is less, unless the person and both states agree to an extension of time.

Article 21. TRANSIT

The states parties shall render cooperation, to the extent possible, for travel through their territory of the persons mentioned in the preceding article, provided that the respective central authority has been given due advance notice and that such persons travel in the custody of agents of the requesting state.

Such prior notice shall not be necessary when air transportation is used and no regular landing is scheduled in the territory of the state party or states parties to be overflown.

Article 22. SAFE-CONDUCT

The appearance or transfer of the person who agrees to render a statement or to [*36] testify under the provisions of this convention shall require, if the person or the sending state so requests prior to such appearance or transfer, that the receiving state grant safe-conduct under which the person, while in the receiving state, shall not:

- a. be detained or prosecuted for offenses committed prior to his departure from the territory of the sending state;
- b. be required to make a statement or to give testimony in proceedings not specified in the request; or
- c. be detained or prosecuted on the basis of any statement he makes, except in case of contempt of court or perjury.

The safe-conduct specified in the preceding paragraph shall cease when the person voluntarily prolongs his stay in the territory of the receiving state for more than 10 days after his presence is no longer necessary in that state, as communicated to the sending state.

Article 23

In connection with witnesses or expert witnesses, documents containing the relevant questions, interrogatories, or questionnaires shall be forwarded to the extent possible or necessary.

CHAPTER IV

TRANSMITTAL OF INFORMATION AND RECORDS

Article 24

In cases where assistance is carried out under this convention, [*37] the requested state, upon request and in accordance with its domestic procedure, shall make available to the requesting state a copy of the public documents, records, or information held by the government agencies or departments of the requested state.

The requested state may make available copies of any document, record, or other information held by a government agency or department of that state that is not public in nature, to the same extent as and subject to the same conditions under which they would be made available to its own judicial authorities or to others responsible for application of the law. The requested state, at its own discretion, may deny, in whole or in part, any request made under the provisions of this paragraph.

Article 25. LIMITATION ON THE USE OF INFORMATION OR EVIDENCE

The requesting state may not disclose or use any information or evidence obtained in the course of application of this convention for purposes other than those specified in the request for assistance without prior consent from the central authority of the requested state.

In exceptional cases, if the requesting state needs to disclose and use, in whole or in part, the information or evidence [*38] for purposes other than those specified, it shall request authorization therefor from the requested state, which, at its discretion, may accede to or deny that request, in whole or in part.

The information or evidence that must be disclosed and used to the extent necessary for proper fulfillment of the procedure or formalities specified in the request shall not be subject to the authorization requirement set forth in this article.

When necessary, the requested state may ask that the information or evidence provided remain confidential according to conditions specified by the central authority. If the requesting party is unable to accede to such request, the central authorities shall confer in order to define mutually acceptable terms of confidentiality.

CHAPTER V

PROCEDURE

Article 26

Requests for assistance shall contain the following details:

- a. the crime to which the procedure refers; a summary description of the essential facts of the crime, investigation, or criminal proceeding in question; and a description of the facts to which the request refers;
- b. proceeding giving rise to the request for assistance, with a precise description of such proceeding;
- c. where pertinent, [*39] a description of any proceeding or other special requirement of the requesting state;
- d. a precise description of the assistance requested and any information necessary for the fulfillment of that request.

When the requested state is unable to comply with a request for assistance, it shall return the request to the requesting state with an explanation of the reason therefor.

The requested state may request additional information when necessary for fulfillment of the request under its domestic law or to facilitate such fulfillment.

When necessary, the requesting state shall proceed in accordance with the provisions of the last paragraph of Article 24 of this convention.

Article 27

Documents processed through the central authorities in accordance with this convention shall be exempt from certification or authentication.

Article 28

Requests for assistance and the accompanying documentation must be translated into an official language of the requested state.

Article 29

The requested state shall be responsible for all regular costs of executing a request in its territory, except for those listed below, which shall be borne by the requesting state:

- a. fees for expert [*40] witnesses; and

b. travel costs and other expenses related to the transportation of persons from the territory of one state to that of the other.

If it appears that the processing of the request might entail unusual costs, the states parties shall confer to determine the terms and conditions under which the assistance could be rendered.

Article 30

To the extent that they find it useful and necessary for furthering the implementation of this convention, the states parties may exchange information on matters related to its application.

Article 31

The domestic law of each party shall govern liability for damages arising from the acts of its authorities in the execution of this Convention.

Neither party shall be liable for damages that may arise from the acts committed by the authorities of the other party in the formulation or execution of a request under this Convention.

CHAPTER VI

FINAL CLAUSES

Article 32

This convention shall be open for signature by the member states of the Organization of American States.

Article 33

This convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of [*41] American States.

Article 34

This convention shall remain open for accession by any other state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 35

Each state may make reservations to this convention at the time of signature, approval, ratification, or accession, provided that each reservation concerns at least one specific provision and is not incompatible with the object and purpose of the convention.

Article 36

This convention shall not be interpreted as affecting or restricting obligations in effect under any other international, bilateral, or multilateral convention that contains or might contain clauses governing specific aspects of international criminal judicial assistance, wholly or in part, or more favorable practices which those states might observe in the matter.

Article 37

This convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each state that ratifies or accedes to the convention after the deposit of the second instrument of ratification, the convention shall enter into force on the thirtieth day after [*42] deposit by such state of its instrument of ratification or accession.

Article 38

If a state party has two or more territorial units in which different systems of law govern matters addressed in this convention, it shall state at the time of signature, ratification, or accession whether this convention will apply to all of its territorial units or only to one or more of them.

Such statements may be amended by way of subsequent statements, which shall expressly indicate the territorial unit or units to which the convention shall apply. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 39

This convention shall remain in force indefinitely, but any of the states parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of

the instrument of denunciation, the convention shall cease to be in effect for the denouncing state, but shall remain in effect for the other states parties.

Article 40

The original instrument [*43] of this convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward authenticated copies of the text to the United Nations General Secretariat for registration and publication, in accordance with Article 102 of the United Nations Charter. The General Secretariat of the Organization of American States shall notify the member states of that Organization and those states that have acceded to the convention of the signatures and deposits of instruments of ratification, accession, and denunciation, as well as of reservations, if any. It shall also transmit to them the statements specified in Article 38 of this convention.

ORGANIZATION OF AMERICAN STATES

WASHINGTON, D. C.

GENERAL SECRETARIAT

Certifico que el documento preinserto es copia fiel y exacta de los textos autenticos en espanol, ingles, portugues y frances de la Convencion Interamericana sobre Asistencia Mutua en Materia Penal, suscrita en Nassau, Bahamas, el 23 de mayo de 1992, en el vigesimo segundo periodo ordinario de sesiones de la Asamblea General de la Organizacion de los Estados [*44] Americanos, y que los textos firmados de dichos originales se encuentran depositados en la Secretaria General de la Organizacion de los Estados Americanos.

26 de marzo de 1996

I hereby certify that the foregoing document is a true and faithful copy of the authentic texts in Spanish, English, Portuguese and French of the **Inter-American Convention on Mutual Assistance** in Criminal Matters, signed at Nassau, Bahamas, on May 23, 1992, at the Twenty-second Regular Session of the General Assembly of the Organization of American States, and that the signed originals of these texts are on deposit with the General Secretariat of the Organization of American States.

March 26, 1996

Certifico que o documento transcrito e copia fiel e exata dos textos autenticos em espanhol, ingles, portugues e frances da Convencao Interamericana sobre Assistencia mutua em Materia Penal, assinado em Nassau, Bahamas, em 23 de maio de 1992, no Vigesimo Segundo Periodo Ordinario de Sesseos da Assembleia Geral, e que os textos originais assinados encontram-se depositados na Secretaria-Geral da Organizacao dos Estados Americanos.

26 de marco de 1996

Je certifie que le document qui precede est une copie fidele [*45] et conforme aux textes authentiques francais, anglais, espagnol, et portugais de la Convention interamericaine sur l'Entraide en Matiere Penale, adopte a Nassau, Bahamas, le 23 mai 1992, lors de la vingt-deuxieme Session ordinaire de l'Assemblee generale, et que des originaux signes de ces textes sont deposees aupres du Secretariat general de l'Organisation des Etats Americains.

26 mars 1996

Por el Secretario General

For the Secretary General

Pelo Secretario-Geral

Pour le Secretaire general

William M. Berenson

Subsecretario de Asuntos Juridicos Interino

Acting Assistant Secretary for Legal Affairs

Sub-Secretario Interino de Assuntos Juridicos

Sous-secretaire interimaire pour les questions juridiques

District of Columbia

:SS

Subscribed and sworn to before me this 28th day of 1996

Maria-Cristina

Notary Public

My Commission expires May 14, 2000

OPTIONAL PROTOCOL RELATED TO THE INTER-AMERICAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

The member states of the Organization of American States,

BEARING IN MIND the **Inter-American Convention on Mutual Assistance** in Criminal Matters adopted at Nassau on May 23, 1992 (hereinafter referred to as "the Convention"),

HAVE AGREED [*46] to adopt the following Optional Protocol related to the **Inter-American Convention on Mutual Assistance** in Criminal Matters:

ARTICLE 1

The states parties to this Protocol shall not exercise the right provided for in Article 9.f of the Convention to refuse a request for assistance solely on the ground that the request concern a tax crime in any case in which the request is from another state party to this Protocol.

ARTICLE 2

The states parties to this Protocol, when acting as a requested state under the Convention, shall not decline assistance which requires the measures referred to in Article 5 of the Convention, if the act specified in the request corresponds to a tax crime of the same nature under the laws of the requested state.

FINAL CLAUSES

ARTICLE 3

1. This Protocol shall be open for signature by member states of the Organization of American States at the OAS General Secretariat on and after January 1, 1994, and shall be subject to ratification or accession only by states parties to the Convention.
2. This Protocol shall remain open for accession by any other state that accedes to or has acceded to the Convention under the conditions set forth in this article. [*47]
3. The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.
4. Each state may make reservations to this Protocol at the time of signature, ratification, or accession, provided that each reservation is not incompatible with the object and purpose of the Protocol.
5. This Protocol shall not be interpreted as affecting or restricting obligations in effect under other international, bilateral, or multilateral conventions that contain clauses governing any specific aspect of international criminal assistance, wholly or in part, or more favorable practices which those states might observe.
6. This Protocol shall enter into force on the thirtieth day following the date on which two states parties have deposited their instruments of ratification or accession, provided that the Convention has entered into force.
7. For each state that ratifies or accedes to the Protocol after the deposit of the second instrument of ratification or accession, the Protocol shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession, provided that such state is a party to the [*48] Convention.
8. If a state party has two or more territorial units in which different systems of law govern matters addressed in this Protocol, it shall state at the time of signature, ratification, or accession whether this Protocol shall apply to all of its territorial units or only to one or more of them.
9. Statements referred to in paragraph 8 of this Article may be amended by way of subsequent statements which shall expressly indicate the territorial units to which the Protocol shall apply. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of receipt.

ARTICLE 4

This Protocol shall remain in force as long as the Convention remains in force, but any of the states parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of the deposit of the instrument of denunciation, the Protocol shall cease to be in effect for the denouncing state, but shall remain in effect for the other states parties.

ARTICLE 5

The original of this Protocol, the English, [*49] French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward authenticated copies of the text to the United Nations Secretariat for registration.

The General Secretariat of the Organization of American States shall notify the member states of the Organization and those states that have acceded to the Convention and Protocol of the signatures and deposits of instruments of ratification, accession, and denunciation as well as reservations, if any. It shall also transmit to them the statements specified in Article 3 of this Protocol.

DONE IN MANAGUA, NICARAGUA, the eleventh day of June, one thousand nine hundred and ninety-three.

I hereby certify the foregoing document is a true and faithful copy of the authentic text in Spanish, English, French and Portuguese of the Optional Protocol Related to the **Inter-American Convention on Mutual Assistance** in Criminal Matters, adopted at Managua, Nicaragua, on June 11, 1993, at the twenty third regular session of the General Assembly of the Organization of American States, and that the above mentioned instrument is on deposit [*50] with the General Secretariat of the Organization of American States.

June 11, 1997

Jean Michel Arrighi

Acting Assistant Secretary for Legal Affairs

Organization of American States

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1 of 1

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1992 U.S.T. LEXIS 169

Pages: 25

Source: [Legal > Area of Law - By Topic > International Law > Treaties & International Agreements > U.S. Treaties on LEXIS](#)

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1985 U.S.T. LEXIS 230

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Terms: [treaty with canada on mutual legal assistance in criminal matters](#) ([Edit Search](#))

1985 U.S.T. LEXIS 230, *

U.S. Treaties on LEXIS

CANADA

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二

TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

TREATY DOC. 100-14

1985 U.S.T. LEXIS 230

March 18, 1985, Date-Signed

STATUS:

[*1] PENDING: February 22, 1988. Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES

TRANSMITTING THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, WITH ANNEX, SIGNED AT QUEBEC CITY ON MARCH 18, 1985

TEXT:

100TH CONGRESS

SENATE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *February 22, 1988.*
To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, with Annex, signed at Quebec City on March 18, 1985. I transmit also, for the information of the Senate, the report of the Department of State with respect to the Treaty.

The Treaty is one of a series of modern mutual legal assistance treaties being negotiated by the United States in order to counter more effectively criminal activities. The Treaty should be an effective [*2] tool to prosecute a wide variety of modern criminals including members of drug cartels, "white-collar criminals," and terrorists. The Treaty is self-executing and utilizes existing statutory authority.

The Treaty provides for a broad range of cooperation in criminal matters. Mutual assistance available under the treaty includes: (1) the taking of testimony or statements of witnesses; (2) the provision of documents, records and evidence; (3) the execution of requests for searches and seizures; (4) the serving of documents; and (5) the provision of assistance in proceedings relating to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.

I recommend that the Senate give early and favorable consideration to the Treaty and give its advice and consent to ratification.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE, *Washington, February 11, 1988.*

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, [*3] with Annex (the "Treaty"), signed at Quebec City on

12

March 18, 1985. I recommend that the Treaty be transmitted to the Senate for its advice and consent to ratification.

The Treaty covers mutual legal assistance in criminal matters. In recent years, similar bilateral treaties have entered into force with Italy, the Netherlands, Switzerland and Turkey; and others have been concluded (but not yet entered into force) with Colombia, Morocco, Mexico, Thailand, Belgium, the Bahamas and the United Kingdom on behalf of the Cayman Islands. The Treaty contains many provisions similar to those in the other treaties as well as some innovations.

The Treaty will not require further implementing legislation and will utilize the existing authority of the Federal courts, particularly 28 U.S.C. 1782.

Article I contains the necessary definitions. It defines a "request" under the Treaty and provides for a Central Authority in each State, which is responsible for complying with requests made by a Competent Authority or transmitting them to the Competent Authorities to do so. For the United States, the Attorney General or officials designated by him will be the Central Authority. For Canada, the Minister of Justice or officials designated by him will be the Central Authority. The Competent Authorities for both countries shall be law enforcement authorities with responsibility related to the investigation and prosecution of offenses. The article defines an offence within the scope of the Treaty, for the United States, as felonies and misdemeanors other than petty offenses, and for Canada, as any offense that may be prosecuted upon indictment or an offense created by the Legislature of a Province in a category specified in the Annex. The Annex states that the term offence includes securities, wildlife protection, environmental protection and consumer protection offences under the law of Canada or the United States. Article I also defines the "public interest" as "any substantial interest related to national security or other essential public policy."

Article II provides for assistance in the "investigation, prosecution and suppression of offences." The Treaty thereby provides for assistance at the investigative stage (such as grand jury proceedings), as well as after formal charges have been filed. Assistance under the Treaty will include: taking [*5] testimony or statements of persons; provision of documents records and evidence; executing requests for searches and seizures; obtaining of witness testimony; and other forms of assistance. The article explicitly states that it is not intended to create rights in private parties either to gather evidence or secure other assistance or to suppress or exclude in civil or criminal proceedings evidence obtained under the Treaty.

Article III provides that the parties may provide each other assistance pursuant to any other agreements, arrangements or practices, and, in exceptional cases, pursuant to the Treaty, provide assistance in respect of illegal acts that do not constitute offenses as defined in the Treaty.

Article IV states that when a party seeks documents, records or other articles of evidence known to be located in the territory of the other party, except when assistance is sought pursuant to other arrangements, agreements or practices, it shall request assistance under the Treaty. The parties shall consult in the event of the denial of a request or delay in its execution that jeopardizes successful completion of an investigation or prosecution. Unless otherwise agreed, at the end [*6] of 30 days after they were requested, consultations shall be deemed to have terminated and the parties to have fulfilled their obligations under this article.

Article V specifies the limited bases under the Treaty in which assistance may be denied by the Requested State. These bases are when the request is not in conformity with the Treaty or when execution of the request is contrary to the Requested State's "public interest," as determined by its Central Authority. The Requested State may postpone execution of a request if its execution would interfere with an ongoing investigation or prosecution. This article also provides that, before the Central Authority of the Requested State refuses a request, it should try to determine whether there is a way to render the assistance, subject to specified terms and conditions. If the Requesting State accepts the assistance subject to limitations, it must comply with those limitations.

Article VI provides that requests shall be made directly from one Central Authority to the other, and shall contain the information required by the Requested State to execute the request, including but not limited to, the subject matter and the nature of the investigation [*7] or proceeding to which the request relates, a description of the evidence, information or other assistance sought, and the purpose for which it is sought. It provides that when use of compulsory process is required in the Requested State, requests shall be made in writing, except that in urgent circumstances requests may be made orally, but they must be confirmed in writing "forthwith." The article provides that the Requested State shall use its "best efforts" to keep confidential a request and its contents, except when otherwise authorized.

Article VII obligates each party to execute requests promptly and, to the extent not prohibited by its law, in accordance with the directions of the Requesting State. It also provides that the courts of the Requested State shall have authority to issue all orders necessary to execute a request.

Article VIII provides that the Requested State shall pay all ordinary costs relating to the execution of the request within its territory, except for the lawful fees of expert witnesses, the travel and incidental expenses of witnesses travelling to that State, and for translation and transcription expenses. The article also provides for consultation when [*8] expenses of an extraordinary nature are required to execute a request.

Article IX authorizes the Requested State, after consultation, to require that information or evidence furnished to the Requesting State be kept confidential or disclosed or used only subject to terms or conditions it may specify. Moreover, absent the prior consent of the Requested State, it restricts the disclosure or use of any information or evidence obtained under the Treaty to the investigation, prosecution or suppression of criminal offenses stated in the request. However, once the Requested State has consented to disclosure or has become public, the Requesting State may use the information for any purpose.

Article X obligates the parties to make best efforts to ascertain the location and identity of persons specified in the request.

Article XI creates an obligation on the part of the Requested State to serve any legal document transmitted by the Central Authority of the Requesting State. The Requesting State must transmit a document relating to a response or appearance in the Requesting State within a reasonable time before the scheduled response or appearance. A request for the service of a document relating [*9] to the appearance of a person in the Requesting State must include such notice as the Central Authority in the Requesting State is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

Article XII provides that the Requested State may compel the taking of testimony or production of documents for the Requesting State by means available under and in accordance with the Requested State's laws. It also provides that every person whose attendance is required for the purpose of giving testimony under the article is entitled to the fees and allowances provided for by the laws of the Requested State.

Article XIII states that the Requested State shall provide the Requesting State with copies of publicly available records of government departments and agencies and may provide any other record or information in the possession of a government office or agency to the same extent and under the same conditions as it would be available to the Requested State's own law enforcement or judicial authorities.

Article XIV provides for the certification and authentication of documents and records in any manner required by the Requesting [*10] State or in any other mutually agreeable manner.

Article XV provides that the Requested State shall transfer a person in its custody to the Requesting State, for purposes under the Treaty, unless the Requested State has a reasonable basis to object or the person in custody does not consent. The Requesting State must keep that person in custody at all times and return that person immediately after the execution of the request.

Article XVI establishes a formal procedure for handling requests for the search and seizure of objects located in the Requested State for use as evidence in the Requesting State.

Article XVII requires that one Central Authority notify the other when it believes the proceeds of a criminal offense are in the territory of the other State. In addition, it provides that, to the extent permitted by their respective laws, the parties shall assist each other in proceedings relating to the forfeiture of proceeds, restitution to victims of crimes and the collection of fines imposed as a sentence for an offense.

Article XVIII provides that the parties shall consult periodically on the implementation of the Treaty and on developing other specific agreements or arrangements [*11] on mutual legal assistance.

Article XIX provides that the treaty shall enter into force on the date of the exchange of the instruments of ratification.

Article XX establishes termination procedures.

The Department of Justice joins the Department of State in favoring approval of this Treaty by the Senate as soon as possible.

Respectfully submitted,

GEORGE P. SHULTZ.

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the United States of America and the Government of Canada,

Desiring to improve the effectiveness of both countries in the investigation, prosecution and suppression of crime through cooperation and mutual assistance in law enforcement matters,

Have agreed as follows:

ARTICLE I

Definitions

For the purposes of this Treaty:

"Central Authority" means--

- (a) for Canada, the Minister of Justice or officials designated by him;
- (b) for the United States of America, the Attorney General or officials designated by him;

"Competent Authority" means any law enforcement authority with responsibility for matters related to the investigation or prosecution of offenses;

"Offence" [*12] means--

- (a) for Canada, an offense created by a law of Parliament that may be prosecuted upon indictment, or an offense created by the Legislature of a Province specified in the Annex;

(b) for the United States, an offence for which the statutory penalty is a term of imprisonment of one year or more, or an offence specified in the Annex;

"Public Interest" means any substantial interest related to national security or other essential public policy;

"Request" means a request made under this Treaty.

ARTICLE II

Scope of Application

1. The Parties shall provide, in accordance with the provisions of this Treaty, mutual legal assistance in all matters relating to the investigation, prosecution and suppression of offences.

2. Assistance shall include:

- (a) examining objects and sites;
- (b) exchanging information and objects;
- (c) locating or identifying persons;
- (d) serving documents;
- (e) taking the evidence of persons;
- (f) providing documents and records;
- (g) transferring persons in custody;
- (h) executing requests for searches and seizures.

3. Assistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes [*13] an offence or may be prosecuted by the Requested State.

4. This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of a private party to obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE III

Other Assistance

1. The Parties, including their competent authorities, may provide assistance pursuant to other agreements, arrangements or practices.

2. The Central Authorities may agree, in exceptional circumstances, to provide assistance pursuant to this Treaty in respect of illegal acts that do not constitute an offence within the definition of offence in Article I.

ARTICLE IV

Obligation To Request Assistance

1. A Party seeking to obtain documents, records or other articles known to be located in the territory of the other Party shall request assistance pursuant to the provisions of this Treaty, except as otherwise agreed pursuant to Article III(1).

2. Where denial of a request or delay in its execution may jeopardize successful completion of an investigation or prosecution, the Parties shall promptly consult, at the instance of either Party, to [*14] consider alternative means of assistance.

3. Unless the Parties otherwise agree, the consultations shall be considered terminated 30 days after they have been requested, and the Parties' obligations under this Article shall then be deemed to have been fulfilled.

ARTICLE V

Limitations on Compliance

1. The Requested State may deny assistance to the extent that--

- (a) the request is not made in conformity with the provisions of this Treaty; or
- (b) execution of the request is contrary to its public interest, as determined by its Central Authority.

2. The Requested State may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested State.

3. Before denying or postponing assistance pursuant to this Article, the Requested State, through its Central Authority--

(a) shall promptly inform the Requesting State of the reason for considering denial or postponement; and

(b) shall consult with the Requesting State to determine whether assistance may be given subject to such terms and conditions as the Requested State deems necessary.

4. If the Requesting State accepts assistance subject to the terms and conditions referred to in paragraph 3(b), it shall comply with said terms and conditions.

ARTICLE VI

Requests

1. Requests shall be made by the Central Authority of the Requesting State directly to the Central Authority of the Requested State.

2. Requests shall be made in writing where compulsory process is required in the Requested State or where otherwise required by the Requested State. In urgent circumstances, such requests may be made orally, but shall be confirmed in writing forthwith.

3. A request shall contain such information as the Requested State requires to execute the request, including--

(a) the name of the competent authority conducting the investigation or proceeding to which the request relates;

(b) the subject matter and nature of the investigation or proceeding to which the request relates;

(c) a description of the evidence, information or other assistance sought;

(d) the purpose for which the evidence, information or other assistance is sought, and any time limitations relevant thereto; and

(e) requirements for confidentiality.

4. The Courts of the Requesting State shall be authorized to order lawful disclosure of such information as is necessary to enable the Requested State to execute the request.

5. The Requested State shall use its best efforts to keep confidential a request and its contents except when otherwise authorized by the Requesting State.

ARTICLE VII

Execution of Requests

1. The Central Authority of the Requested State shall promptly execute the request or, when appropriate, transmit it to the competent authorities, who shall make best efforts to execute the request. The Courts of the Requested State shall have jurisdiction to issue subpoenas, search warrants or other orders necessary to execute the request.

2. A request shall be executed in accordance with the law of the Requested State and, to the extent not prohibited by the law of the Requested State, in accordance with the directions stated in the request.

ARTICLE VIII

Costs

1. The Requested State shall assume all ordinary expenses of executing a request within its boundaries, except--

(a) fees of experts;

(b) expenses of translation and transcription; and

(c) travel and incidental expenses of persons travelling to the Requested State to attend the execution of a request.

2. The Requesting State shall assume all ordinary expenses required to present evidence from the Requested [*17] State in the Requesting State, including--

(a) travel and incidental expenses of witnesses travelling to the Requesting State, including those of accompanying officials; and

(b) fees of experts.

3. If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

4. The Parties shall agree, pursuant to Article XVIII, on practical measures as appropriate for the reporting and payment of costs in conformity with this Article.

ARTICLE IX

Limitations of Use

1. The Central Authority of the Requested State may require, after consultation with the Central Authority of the Requesting State, that information or evidence furnished be kept confidential or be disclosed or used only subject to terms and conditions it may specify.

2. The Requesting State shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested State.

3. Information or evidence made public in the Requesting State [*18] in accordance with paragraph 2 may be used for any purpose.

ARTICLE X

Location or Identity of Persons

The competent authorities of the Requested State shall make best efforts to ascertain the location and identity of persons specified in the request.

ARTICLE XI

Service of Documents

1. The Requested State shall serve any document transmitted to it for the purpose of service.

2. The Requesting State shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting State within a reasonable time before the scheduled response or appearance.

3. A request for the service of a document pertaining to an appearance in the Requesting State shall include such notice as the Central Authority of the Requesting State is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

4. The Requested State shall return a proof of service in the manner required by the Requesting State or in any manner agreed upon pursuant to Article XVIII.

ARTICLE XII

Taking of Evidence in the Requested State

1. A person requested to testify and produce documents, records or other articles in [*19] the Requested State may be compelled by subpoena or order to appear and testify and produce such documents, records and other articles, in accordance with the requirements of the law of the Requested State.

2. Every person whose attendance is required for the purpose of giving testimony under this Article is entitled to such fees and allowances as may be provided for by the law of the Requested State.

ARTICLE XIII

Government Documents and Records

1. The Requested State shall provide copies of publicly available documents and records of government departments and agencies.
2. The Requested State may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement and judicial authorities.

ARTICLE XIV

Certification and Authentication

1. Copies of documents and records provided under Article XII or Article XIII shall be certified or authenticated in the manner required by the Requesting State or in any manner agreed upon pursuant to Article XVIII.
2. No document or record otherwise admissible in evidence in the [*20] Requesting State, certified or authenticated under paragraph 1, shall require further certification or authentication.

ARTICLE XV

Transfer of Persons in Custody

1. A person in custody in the Requested State whose presence is requested in the Requesting State for the purposes of this Treaty shall be transferred from the Requested State to the Requesting State for that purpose, provided the person in custody consents and the Requested State has no reasonable basis to deny the request.
2. The Requesting State shall have the authority and duty to keep the person in custody at all times and return the person to the custody of the Requested State immediately after the execution of the request.

ARTICLE XVI

Search and Seizure

1. A request for search and seizure shall be executed in accordance with the requirements of the law of the Requested State.
2. The competent authority that has executed a request for search and seizure shall provide such certifications as may be required by the Requesting State concerning, but not limited to, the circumstances of the seizure, identity of the item seized and integrity of its condition, and continuity of possession thereof.
3. Such certifications [*21] may be admissible in evidence in a judicial proceeding in the Requesting State as proof of the truth of the matters certified therein, in accordance with the law of the Requesting State.
4. No item seized shall be provided to the Requesting State until that State has agreed to such terms and conditions as may be required by the Requested State to protect third party interests in the item to be transferred.

ARTICLE XVII

Proceeds of Crime

1. The Central Authority of either Party shall notify the Central Authority of the other Party of proceeds of crime believed to be located in the territory of the other Party.
2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.

ARTICLE XVIII

Improvement of Assistance

1. The Parties agree to consult as appropriate to develop other specific agreements or arrangements, formal or informal, on mutual legal assistance.
2. The Parties may agree on such practical measures as may be necessary to facilitate the implementation of this Treaty. [*22]

ARTICLE XIX

Ratification and Entry Into Force

1. This Treaty shall be ratified, and the instruments of ratification shall be exchanged at Washington, D.C., as soon as possible.

2. This Treaty shall enter into force upon the exchange of instruments of ratification.

ARTICLE XX

Termination

Either Party may terminate this Treaty by giving written notice to the other Party at any time. Termination shall become effective six months after receipt of such notice.

Annex

The definition of offence includes offences created by the Legislature of a Province of Canada or offences under the law of the United States in the following categories:

- (1) securities;
- (2) wildlife protection;
- (3) environmental protection; and
- (4) consumer protection.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

DONE in duplicate, in the English and French languages, each language version being equally authentic, at Quebec City, this 18th day of March, 1985.

RONALD REAGAN,

For the Government of the United States of America.

BRIAN MULRONEY,

For the Government of Canada.

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1 of 1

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1985 U.S.T. LEXIS 230

Pages: 14

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1987 U.S.T. LEXIS 208

Pages: 13

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1987 U.S.T. LEXIS 208, *

U.S. Treaties on LEXIS

MEXICO

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MUTUAL LEGAL ASSISTANCE COOPERATION TREATY WITH MEXICO

TREATY DOC. 100-13

1987 U.S.T. LEXIS 208

December 9, 1987, Date-Signed

STATUS:

[*1] Signed at Mexico City December 9, 1987; approved by Senate (see 135 Cong Rec S 13887, S 13888-S 13889, October 24, 1989); entered into force May 3, 1991, 100th Cong., 2d Session.

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES

TRANSMITTING THE TREATY ON COOPERATION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES FOR MUTUAL LEGAL ASSISTANCE, SIGNED AT MEXICO CITY ON DECEMBER 9, 1987

TEXT:

100TH CONGRESS

SENATE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, February 16, 1988.
To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance, signed at Mexico City on December 9, 1987.

I transmit also, for the information of the Senate, the report of the Department of State with respect to the Treaty.

The Treaty is one of a series of modern mutual legal assistance treaties being negotiated by the United States in order to counter more effectively trans-border criminal activities. The Treaty should be an effective tool to combat a wide variety of modern criminals [*2] including members of drug cartels, "white-collar criminals," and terrorists. The Treaty is self-executing and utilizes existing statutory authority.

The Treaty provides for a broad range of cooperation in criminal matters. Mutual assistance available under the Treaty includes: (1) the taking of testimony or statements of witnesses; (2) the provision of documents, records, and evidence; (3) the execution of requests for searches and seizures; (4) the serving of documents; and (5) the provision of assistance in procedures regarding the immobilizing, securing, and forfeiture of the proceeds, fruits, and instrumentalities of crime.

I recommend that the Senate give early and favorable consideration to the Treaty and give its advice and consent to ratification.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE, Washington, DC, January 25, 1988

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you the Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance, signed at Mexico City on December 9, 1987. On December 29, 1987, the Mexican

Congress approved the Treaty. I recommend that the [*3] Treaty be transmitted to the Senate for its advice and consent to ratification.

The Treaty covers mutual legal assistance in criminal matters. In recent years, similar bilateral treaties have entered into force with Italy, the Netherlands, Switzerland and Turkey; others have been signed with the Bahamas, Canada, Colombia, Morocco, Thailand, and the United Kingdom concerning the Cayman Islands. The Treaty contains many provisions similar to those in the other treaties as well as some innovations.

The Treaty will not require implementing legislation, and will utilize the existing authority of the Federal courts, particularly 28 U.S.C. 1782.

Article 1 provides for assistance in the "prevention, investigation and prosecution of crimes" and in other criminal and ancillary proceedings arising from the criminal acts in question. The Treaty thereby provides for assistance at the investigative stage (such as grand jury proceedings), as well as after formal charges have been filed. Assistance under the Treaty will include: taking of testimony or statements of persons; provision of documents, records and evidence; executing requests for searches and seizures; [*4] obtaining of witness testimony; taking of measures to immobilize, secure, or forfeit assets; and other forms of assistance.

Article 1 also specifies the limited bases under the Treaty on which assistance may be denied by the requested Party. These bases include: when execution of the request would prejudice the requested Party's "security or other essential public policy or interest"; when the request relates to political or military offenses; or when the request does not comply with the Treaty's provisions. The article explicitly states that it is a mechanism for government to government mutual assistance in criminal matters and that it does not authorize one Party's authorities to undertake in the territory of the other Party the exercise and performance of functions exclusively entrusted to the authorities of the other party. Furthermore, the Treaty is not intended to create rights in private parties either to gather evidence or secure other assistance or to suppress or exclude in civil or criminal proceedings evidence obtained under the Treaty.

Article 2 provides for a Coordinating Authority in each State which is responsible for complying with requests or transmitting them to [*5] the competent authorities to do so. For the United States, the United States Department of Justice will be the Coordinating Authority. For the United Mexican States, the *Procuraduria General de la Republica* (Attorney General) will be the Coordinating Authority.

Article 3 provides that, before the Coordinating Authority of the requested Party refuses a request it should try to determine if there is a way to render the assistance. If the requesting Party accepts the assistance subject to limitations, it shall comply with such limitations.

Article 4 first states what information must be included in each request for assistance and then states what information should be provided "to the extent necessary and possible." The article provides for oral requests in urgent cases and the confidentiality of requests, in certain circumstances.

Article 5 provides that the requested Party shall pay all costs relating to the execution of the request--except for the lawful fees of witnesses and expert witnesses.

Article 6 provides that the requesting Party shall not use any information or evidence obtained under the Treaty for purposes other than those stated in the request without the prior consent [*6] of the requested Party and establishes mechanisms for the requested Party to request that information or evidence furnished be kept confidential.

Article 7 provides that the requesting Party may compel the taking of testimony or production of documents, records, and objects "to the same extent as in criminal investigations or proceedings in that State." It establishes mechanisms to take such testimony in Mexico in accordance with Mexican law and in such a way that the witness will be subject to cross-examination in a manner that satisfies U.S. constitutional and other legal requirements.

Article 8 provides a formalized framework for transferring persons in custody for testimonial or identification purposes.

Article 9 obligates the requested Party to invite witnesses needed in the requesting State to appear in person in the requesting State.

Article 10 states that the requested Party shall provide the requesting Party with copies of publicly available records of government departments and agencies in the requested State and may provide the requesting Party with any other record or information in the possession of a government office or agency to the same extent and under the same conditions [*7] as it would be available to the requested Party's own law enforcement or judicial authorities.

Article 11 provides that the Coordinating Authority of either Party may notify the Coordinating Authority of the other Party when the proceeds, fruits, or instrumentalities of a criminal offense are believed to be in the territory of the other Party, in order that the Parties shall, to the extent permitted by their respective laws, assist each other in procedures regarding forfeiture or restitution of proceeds (e.g. money, property) or instruments of an offense or procedures regarding the collection of fines imposed as a sentence for an offense. The provision is consistent with the recently enacted U.S. legislative provision which applies, to the extent provided by treaty, to permit equitable sharing of forfeited property with a foreign government in order to reflect that government's contribution in narcotics investigations leading to seizure or forfeiture.

Article 12 establishes a formal procedure for handling requests for the search, seizure, and returning of objects located in the requested State for use as evidence in the requesting State.

Article 13 obliges the requested Party to take [*8] all necessary measures to locate or identify persons, such as witnesses and experts, who are of importance to the requesting Party in connection with an investigation, prosecution, or proceeding covered by the Treaty.

Article 14 creates an obligation on the part of the requested Party to serve any legal document (e.g. summons, complaint, subpoena) transmitted by the Coordinating Authority of the requesting Party.

Article 15 states that the assistance and procedures provided by this Treaty shall not prevent or restrict assistance available under any other international convention or agreement to which the United States and Mexico are parties or under the provisions of their national laws (e.g. the use of letters rogatory).

Article 16 provides that the Treaty shall enter into force on the date of the exchange of the instruments of ratification. Article 17 establishes termination procedures. Article 18 provides that the parties shall consult periodically on the implementation of the Treaty.

The United States Delegation, consisting of representatives for the Departments of State and Justice, has prepared a Technical Section-by-Section Analysis of the Treaty. That analysis will be transmitted [*9] separately to the Senate Committee on Foreign Relations.

The Department of Justice joins the Department of State in favoring approval of this treaty by the Senate as soon as possible.

Respectfully submitted,

GEORGE P. SHULTZ.

TREATY ON COOPERATION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES FOR MUTUAL LEGAL ASSISTANCE

The Governments of the United States of America and the United Mexican States (the Parties),

Desiring to cooperate in the framework of their friendly relations, and to undertake mutual legal assistance to provide for the best administration of justice in criminal matters,

Have agreed as follows:

ARTICLE 1

SCOPE OF THE TREATY

1. The Parties shall cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters, in accordance with the terms of this Treaty and subject to the limitations of their respective domestic legal provisions. Such assistance shall deal with the prevention, investigation and prosecution of crimes or any other criminal proceedings arising from acts which are within the competence or jurisdiction of the requesting Party at the time [*10] the assistance is requested, and in connection with ancillary proceedings of any other kind related to the criminal acts in question.

2. This Treaty does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations.

3. Subject to the provisions of paragraph 1 of this Article, requests for assistance under this Treaty will be executed, except that the requested Party may deny a request to the extent that:

(a) execution of the request would require the requested Party to exceed its legal authority or would otherwise be prohibited by the legal provisions in force in the requested State, in which case the Coordinating Authorities referred to in Article 2 of this Treaty shall consult with each other to identify alternative lawful means for securing assistance;

(b) execution of the request would in the judgment of the requested Party prejudice its security or other essential public policy or interest;

(c) the Executive of the requested Party regards the request as concerning an offense which is political [*11] or of a political character;

(d) the request relates to military offenses, except those which constitute offenses under ordinary criminal law; or

(e) the request does not comply with the provisions of this Treaty.

4. In conformity with this Article and in accordance with the other provisions of this Treaty, such assistance will include:

(a) the taking of testimony or statements of persons;

- (b) the provision of documents, records and evidence;
- (c) the legal execution of requests for searches and seizures as ordered by the judicial authorities of the requested Party in accordance with its constitutional and other legal provisions;
- (d) the legal execution of requests for the taking of measures to immobilize, secure, or forfeit assets as ordered by the judicial authorities of the requested Party in accordance with its constitutional and other legal provisions;
- (e) the voluntary transferring of persons in custody for testimonial or identification purposes;
- (f) serving documents;
- (g) locating or identifying persons;
- (h) exchanging information; and
- (i) other forms of assistance mutually agreed by the Parties, in conformity with the object and purpose of this Treaty.

5. This Treaty **[*12]** is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

ARTICLE 2

COORDINATING AUTHORITIES

1. With the purpose of ensuring due cooperation between the Parties in providing to each other mutual legal assistance which falls within the scope of this Treaty, the United Mexican States designates as its Coordinating Authority its *Procuraduria General de la Republica*, and the United States of America designates as its Coordinating Authority the Central Authority of the United States Department of Justice. The Coordinating Authority of the requested State shall promptly comply with the requests or, when appropriate, shall transmit them to other competent authorities to do so. The competent authorities of the requested State shall take all necessary measures to promptly execute the requests in accordance with Article 1.
2. The Coordinating Authorities shall consult regularly with each other in order to secure the most effective implementation of this Treaty and to anticipate and resolve problems **[*13]** that may arise in its application.
3. For those purposes, the Coordinating Authorities shall meet at the request of either one of them and at a time and place to be mutually agreed.

ARTICLE 3

LIMITATIONS ON ASSISTANCE

1. Before refusing the execution of any request pursuant to this Treaty, the Coordinating Authority of the requested Party shall determine whether there are conditions whose satisfaction would make possible the rendering of assistance. If the requesting Party accepts the assistance subject to those conditions, it shall comply with them.
2. The Coordinating Authority of the requested Party shall promptly inform that of the requesting Party of the reason for denying the execution of a request.

ARTICLE 4

CONTENTS OF THE REQUEST FOR MUTUAL ASSISTANCE

1. Requests for assistance will be submitted in writing and translated into the language of the requested State. In urgent cases, the request may be submitted orally and the requested Party will take the necessary measures it is competent to undertake, with the understanding that as soon as possible the request will be formalized in writing.
2. The request will include the following data:

- (a) the name of the competent authority **[*14]** conducting the investigation, prosecution or proceeding to which the request relates;
- (b) the subject matter and nature of the investigation, prosecution or proceeding;
- (c) a description of the evidence or information sought or the requested acts of assistance;
- (d) the purpose for which the evidence, information, or other assistance is sought; and

(e) the method of execution to be followed.

3. To the extent necessary and possible, a request shall also include:

- (a) available information on the identity or physical description and whereabouts of a person to be located;
- (b) the identity or physical description and location of a person to be served, that person's relationship to the investigation, prosecution or proceeding, and the manner in which service is to be made;
- (c) the identity or physical description and location of persons from whom evidence is sought;
- (d) a precise description of the search to be conducted and of the objects to be seized; and
- (e) any other information necessary under the laws of the requested Party to permit the execution of the request.

4. In cases of requested service of documents that are to be processed by the Coordinating Authority, those documents [*15] will be attached to the request and duly translated, certified, and authenticated.

5. The requested State shall keep confidential a request and its contents unless otherwise authorized by the Coordinating Authority of the requesting Party. If the request cannot be executed without breaching the required confidentiality, the Coordinating Authority of the requested Party shall so inform the Coordinating Authority of the requesting Party, which shall then determine whether the request should nevertheless be executed.

ARTICLE 5

COSTS

The requested Party shall pay all costs relating to the execution of the request, except for the lawful fees of witnesses and expert witnesses and the expenses related to travel of witnesses pursuant to Articles 8 and 9 of this Treaty, which fees and expenses shall be borne by the requesting Party.

ARTICLE 6

LIMITATIONS ON USE OF INFORMATION OR EVIDENCE

1. The requesting Party shall not use any information or evidence obtained under this Treaty for purposes other than those stated in the request without the prior consent of the Coordinating Authority of the requested Party.

2. When necessary, the requested Party may request that information or evidence furnished [*16] be kept confidential in accordance with conditions which its Coordinating Authority shall specify. If the requesting Party cannot comply with such a request, the Coordinating Authorities shall consult to determine mutually agreeable conditions of confidentiality in accordance with Article 1 of this Treaty.

3. The use of any information or evidence obtained under this Treaty which has been made public in the requesting State in a proceeding resulting from the investigation or proceeding described in the request shall not be subject to the restriction referred to in paragraph 1 of this Article.

ARTICLE 7

TESTIMONY IN THE REQUESTED STATE

1. A person in the requested State whose testimony is requested shall be compelled by subpoena, if necessary, by the competent authority of the requested Party to appear and testify or produce documents, records, and objects in the requested State to the same extent as in criminal investigations or proceedings in that State.

2. Any claim of immunity, incapacity, or privilege under the laws of the requesting State shall be resolved exclusively by the competent authorities of the requesting Party. Accordingly, the testimony shall be taken in the requested [*17] State and forwarded to the requesting Party where such claims will be resolved by its competent authorities.

3. The Coordinating Authority of the requested Party shall inform that of the requesting Party of the date and place for the taking of the testimony of the witness. When possible the Coordinating Authorities shall consult in order to secure a mutually agreeable date.

4. The requested Party shall authorize the presence in the taking of the testimony of such persons as specified by the Coordinating Authority of the requesting Party in its request.

5. Documents, records, and copies thereof shall be certified or authenticated in accordance with the procedures specified in the request. If certified or authenticated in such manner, they shall be admissible in evidence as proof of the truth of the matters set forth therein.

ARTICLE 8

TRANSFERRING PERSONS IN CUSTODY FOR TESTIMONIAL OR IDENTIFICATION PURPOSES

1. A person in custody in the requested State who is needed as a witness or for purposes of identification in the requesting State shall be transported to that State if such person consents and if the Coordinating Authority of the requested Party has no reasonable basis to deny [*18] the request.

2. For purposes of this Article:

(a) the requesting Party shall have the authority and obligation to keep the person transferred in custody unless otherwise authorized by the requested Party;

(b) the requesting Party shall return the person transferred to the custody of the requested Party as soon as circumstances permit or as otherwise agreed between the Coordinating Authorities;

(c) the requesting Party shall not require the requested Party to initiate extradition proceedings to secure the return of the person in custody; and

(d) the person transferred shall receive credit for service of the sentence imposed in the requested Party for time served in the custody of the requesting Party.

ARTICLE 9

APPEARANCE IN THE REQUESTING STATE

When the appearance of a person who is in the requested State is needed in the requesting State, the Coordinating Authority of the requested Party shall invite the person to appear before the appropriate authority of the other Party, and shall indicate the extent to which the expenses will be paid. The Coordinating Authority of the requested Party shall communicate the response of the person promptly to that of the requesting Party.

ARTICLE [*19] 10

PROVIDING RECORDS OF GOVERNMENT AGENCIES

1. The requested Party shall provide the requesting Party with copies of publicly available records of government departments and agencies in the requested State.

2. If its legal provisions do not prohibit it, the requested Party may provide any record or information in the possession of a government office or agency, but not publicly available, to the same extent and under the same conditions as it would be available to its own law enforcement or judicial authorities.

3. Documents, records and copies thereof shall be certified or authenticated in accordance with the procedures specified in the request. If certified or authenticated in such manner, they shall be admissible in evidence as proof of the truth of the matters set forth therein.

ARTICLE 11

IMMOBILIZING, SECURING AND FORFEITURE OF ASSETS

1. The Coordinating Authority of either Party may notify that of the other when it has reason to believe that proceeds, fruits or instrumentalities of crime are located in the territory of the other Party.

2. The Parties shall assist each other, to the extent permitted by their respective laws, in procedures relating to the immobilizing, securing [*20] and forfeiture of the proceeds, fruits and instrumentalities of crime, restitution and collection of fines.

ARTICLE 12

SEARCH AND SEIZURE

1. A request for search, seizure and delivery of any object acquired thereby to the requesting State shall be executed if it includes the information justifying such action under the laws of the requested Party.

2. The authority that has executed a request for search and seizure shall provide to the Coordinating Authority such certification as may be specified in the request concerning the identity of the object seized, the integrity of its condition, and the continuity of custody thereof. Such certification shall be admissible in evidence in the requesting Party as proof of the truth of the matters set forth therein.

ARTICLE 13

LOCATION OR IDENTIFICATION OF PERSONS

1. The requested Party shall take all necessary measures to locate or identify persons who are believed to be in that State and who are needed in connection with an investigation, prosecution, or proceeding within the scope of this Treaty.
2. The Coordinating Authority of the requested Party shall promptly communicate the results of its inquiries to the Coordinating Authority of the [*21] requesting Party.

ARTICLE 14

SERVING DOCUMENTS

1. The requested State shall cause to be served any legal document transmitted by the Coordinating Authority of the requesting Party for the purpose of service.
2. Any request for the service of a document requiring the appearance of a person before an authority in the requesting State shall be transmitted within a reasonable time before the scheduled appearance.
3. The requested State shall return proof of service as specified in the request.

ARTICLE 15

COMPATIBILITY OF THIS TREATY WITH OTHER INTERNATIONAL AGREEMENTS AND DOMESTIC LAWS

Assistance and procedures provided by this Treaty shall not prevent a Party from granting assistance through the provisions of other international agreements to which it may be a party or through the provisions of its national laws. The Parties may also provide assistance pursuant to any bilateral or multilateral arrangement, agreement, or practice which may be applicable.

ARTICLE 16

RATIFICATION AND ENTRY INTO FORCE

1. This Treaty shall be ratified by the Parties in accordance with their respective constitutional procedures and the instruments of ratification shall be exchanged at Washington, as soon as [*22] possible.
2. This Treaty shall enter into force on the date of the exchange of the instruments of ratification.

ARTICLE 17

TERMINATION

Either Party may terminate this Treaty by giving written notice through diplomatic channels to the other Party at any time. Unless otherwise agreed by the Parties, termination shall become effective six months after the date such notice is given. The requests for assistance that may be pending at the termination of the Treaty may be executed if agreed by both Parties.

ARTICLE 18

REVIEW

The Parties shall meet at least every two years from the date of entry into force of this Treaty, at a time and place to be mutually agreed upon, in order to review the effectiveness of its implementation and to agree on whatever individual and joint measures are necessary to improve its effectiveness.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Treaty.

DONE at Mexico City, on the ninth day of the month of December of the year of nineteen hundred and eighty seven, in two originals, in the English and Spanish languages, both texts being equally authentic.

For the Government of the United States of America: [*23]

CHARLES J. PILLIOD, Jr.,

Ambassador.

For the Government of the United Mexican States:

SERGIO GARCIA RAMIREZ,
Attorney General of the Republic.


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1987 U.S.T. LEXIS 208

Pages: 13

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Chapter	Short title	Extent of repeal
1987 c. 43	The Criminal Justice (Scotland) Act 1987	In section 5(2) the words from "at the date" to the "first occurs)", the words "on that date" and the words "as at that date".
1988 c. 33	The Criminal Justice Act 1988	Section 29.
1989 c. 33	The Extradition Act 1989	In section 22(4)(b)(ii) the word "and"; In Schedule 1, in paragraph 15(h) the word "or" where it last occurs.

216
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APPENDIX B

EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, 1959

Source: Council of Europe, Strasbourg

PREAMBLE

The Governments signatory hereto, being Members of the Council of Europe,
Considering that the aim of the Council of Europe is to achieve greater unity among its Members;
Believing that the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim;
Considering that such mutual assistance is related to the question of extradition, which has already formed the subject of a Convention signed on 13th December 1957,
Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1

1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
2. This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.

Article 2

Assistance may be refused:

- (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence;
- (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

CHAPTER II

LETTERS ROGATORY

Article 3

1. The requested Party shall execute in the manner provided for by its law any letters rogatory relative to a criminal matter and addressed to it by the judicial authorities of the requesting

Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.

3. The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request.

Article 4

On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.

Article 5

1. Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions:

- (a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;
- (b) that the offence motivating the letters rogatory is an extraditable offence in the requested country;
- (c) that execution of the letters rogatory is consistent with the law of the requested Party.

2. Where a Contracting Party makes a declaration in accordance with paragraph 1 of this Article, any other Party may apply reciprocity.

Article 6

1. The requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings.

2. Any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting Party to the requested Party as soon as possible unless the latter Party waives the return thereof.

CHAPTER III

SERVICE OF WRITS AND RECORDS OF JUDICIAL VERDICTS - APPEARANCE OF WITNESSES, EXPERTS AND PROSECUTED PERSONS

Article 7

1. The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party.

Service may be effected by simple transmission of the writ or record to the person to be served. If the requesting Party expressly so requests, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.

2. Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested Party that service has been effected and stating the form and date of such service. One or other of these documents shall be sent immediately to the requesting Party. The requested Party shall, if the requesting Party so requests, state whether service has been effected in accordance with the law of the requested Party. If service cannot be effected, the reasons shall be communicated immediately by the requested Party to the requesting Party.

3. Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, request that service of a summons on an accused person who is in its territory be transmitted to its authorities by a certain time before the date set for appearance. This time shall be specified in the aforesaid declaration and shall not exceed 50 days.

This time shall be taken into account when the date of appearance is being fixed and when the summons is being transmitted.

Article 8

A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.

Article 9

The allowances, including subsistence, to be paid and the travelling expenses to be refunded to a witness or expert by the requesting Party shall be calculated as from his place of residence and shall be at rates at least equal to those provided for in the scales and rules in force in the country where the hearing is intended to take place.

Article 10

1. If the requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested Party shall invite the witness or expert to appear.

2. The requested Party shall inform the requesting Party of the reply of the witness or expert. In the case provided for under paragraph 1 of this Article the request or the summons shall indicate the approximate allowances payable and the travelling and subsistence expenses refundable.

3. If a specific request is made, the requested Party may grant the witness or expert an advance. The amount of the advance shall be endorsed on the summons and shall be refunded by the requesting Party.

Article 11

1. A person in custody whose personal appearance as a witness or for purposes of confrontation is applied for by the requesting Party, shall be temporarily transferred to the territory where the hearing is intended to take place, provided that he shall be sent back within the period stipulated by the requested Party and subject to the provisions of Article 12 in so far as these are applicable.

- (a) if the person in custody does not consent,
- (b) if his presence is necessary at criminal proceedings pending in the territory of the requested Party,
- (c) if transfer is liable to prolong his detention, or

- (d) if there are other overriding grounds for not transferring him to the territory of the requesting Party.
2. Subject to the provisions of Article 2, in a case coming within the immediately preceding paragraph, transit of the person in custody through the territory of a third State, Party to this Convention, shall be granted on application, accompanied by all necessary documents, addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the Party through whose territory transit is requested.
- A Contracting Party may refuse to grant transit to its own nationals.
3. The transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party to whom transfer is requested applies for his release.

Article 12

1. A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party.
2. A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons.
3. The immunity provided for in this Article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned.

CHAPTER IV JUDICIAL RECORDS

Article 13

1. A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case.
2. In any case other than that provided for in paragraph 1 of this Article the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party.

CHAPTER V PROCEDURE

Article 14

1. Requests for mutual assistance shall indicate as follows:
- the authority making the request,
 - the object of and the reason for the request,
 - where possible, the identity and the nationality of the person concerned, and
 - where necessary, the name and address of the person to be served.
2. Letters rogatory referred to in Articles 3, 4 and 5 shall, in addition, state the offence and contain a summary of the facts.

Article 15

1. Letters rogatory referred to in Article 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.
2. In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this Article.
3. Requests provided for in paragraph 1 of Article 13 may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.
4. Requests for mutual assistance, other than those provided for in paragraphs 1 and 3 of this Article and, in particular, requests for investigation preliminary to prosecution, may be communicated directly between the judicial authorities.
5. In cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol).
6. A Contracting Party may, when signing this Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary General of the Council of Europe, give notice that some or all requests for assistance shall be sent to it through channels other than those provided for in this Article, or require that, in a case provided for in paragraph 2 of this Article, a copy of the letters rogatory shall be transmitted at the same time to its Ministry of Justice.
7. The provisions of this Article are without prejudice to those of bilateral agreements or arrangements in force between Contracting Parties which provide for the direct transmission of requests for assistance between their respective authorities.

Article 16

1. Subject to paragraph 2 of this Article, translations of requests and annexed documents shall not be required.
2. Each Contracting Party may, when signing or depositing its instrument of ratification or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, reserve the right to stipulate that requests and annexed documents shall be addressed to it accompanied by a translation into its own language or into either of the official languages of the Council of Europe or into one of the latter languages, specified by it. The other Contracting Parties may apply reciprocity.
3. This Article is without prejudice to the provisions concerning the translation of requests or annexed documents contained in the agreements or arrangements in force or to be made between two or more Contracting Parties.

Article 17

Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.

Article 18

Where the authority which receives a request for mutual assistance has no jurisdiction to comply therewith, it shall, *ex officio*, transmit the request to the competent authority of its country and shall so inform the requesting Party through the direct channels, if the request has been addressed through such channels.

Article 19

Reasons shall be given for any refusal of mutual assistance.

Article 20

Subject to the provisions of Article 10, paragraph 3, execution of requests for mutual assistance shall not entail refunding of expenses except those incurred by the attendance of experts in the territory of the requested Party or the transfer of a person in custody carried out under Article 11.

CHAPTER VI

LAYING OF INFORMATION IN CONNECTION WITH PROCEEDINGS

Article 21

1. Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministers of Justice concerned unless a Contracting Party avails itself of the option provided for in paragraph 6 of Article 15.
2. The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.
3. The provisions of Article 16 shall apply to information laid under paragraph 1 of this Article.

CHAPTER VII

EXCHANGE OF INFORMATION FROM JUDICIAL RECORDS

Article 22

Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministers of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.

CHAPTER VIII

FINAL PROVISIONS

Article 23

1. Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.
2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

Article 24

A Contracting Party may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purposes of the Convention, deem judicial authorities.

Article 25

1. This Convention shall apply to the metropolitan territories of the Contracting Parties.
2. In respect of France, it shall also apply to Algeria and to the overseas Departments and, in respect of Italy, it shall also apply to the territory of Somaliland under Italian administration.
3. The Federal Republic of Germany may extend the application of this Convention to the Land of Berlin by notice addressed to the Secretary General of the Council of Europe.
4. In respect of the Kingdom of the Netherlands, the Convention shall apply to its European territory. The Netherlands may extend the application of this Convention to the Netherlands Antilles, Surinam and Netherlands New Guinea by notice addressed to the Secretary General of the Council of Europe.
5. By direct arrangement between two or more Contracting Parties and subject to the conditions laid down in the arrangement, the application of this Convention may be extended to any territory, other than the territories mentioned in paragraphs 1, 2, 3 and 4 of this Article, of one of these Parties, for the international relations of which any such Party is responsible.

Article 26

1. Subject to the provisions of Article 15, paragraph 7, and Article 16, paragraph 3, this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties.
2. This Convention shall not affect obligations incurred under the terms of any other bilateral or multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field.
3. The Contracting Parties may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.
4. Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary General of the Council of Europe accordingly.

Article 27

1. This Convention shall be open to signature by the Members of the Council of Europe. It shall be ratified. The instruments of ratification shall be deposited with the Secretary General of the Council.
2. The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.
3. As regards any signatory ratifying subsequently the Convention shall come into force 90 days after the date of its instrument of ratification.

Article 28

1. The Committee of Ministers of the Council of Europe may invite any State not a Member of the Council to accede to this Convention, provided that the resolution containing such invitation obtains the unanimous agreement of the Members of the Council who have ratified the Convention.
2. Accession shall be by deposit with the Secretary General of the Council of an instrument of accession which shall take effect 90 days after the date of its deposit.

Article 29

Any Contracting Party may denounce this Convention in so far as it is concerned by giving notice to the Secretary General of the Council of Europe. Denunciation shall take effect six months after the date when the Secretary General of the Council received such notification.

Article 30

The Secretary General of the Council of Europe shall notify the Members of the Council and the Government of any State which has acceded to this Convention of:

- (a) the names of the Signatories and the deposit of any instrument of ratification or accession;
- (b) the date of entry into force of this Convention;
- (c) any notification received in accordance with the provisions of Article 5 – paragraph 1, Article 7 – paragraph 3, Article 15 – paragraph 6, Article 16 – paragraph 2, Article 24, Article 25 – paragraphs 3 and 4, or Article 26 – paragraph 4;
- (d) any reservation made in accordance with Article 23, paragraph 1;
- (e) the withdrawal of any reservation in accordance with Article 23, paragraph 2;
- (f) any notification of denunciation received in accordance with the provisions of Article 29 and the date on which such denunciation will take effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

DONE at Strasbourg, this 20th day of April 1959, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to the signatory and acceding Governments.

APPENDIX C
UNITED KINGDOM

Reservations and Declarations handed over at the time of the deposit of the instrument of ratification on 29 August 1991 – Or. Engl.

RESERVATIONS

Article 2

In respect of Article 2, the Government of the United Kingdom reserves the right to refuse assistance if the person who assistance has been convicted or acquitted in the United Kingdom of an offence which arises from the same conduct as that giving rise to the State in respect of that Person.

Article 3

In respect of Article 3, the Government of the United Kingdom reserves the right not to take the evidence of witnesses in Ireland reserves the right not to take the evidence of witnesses in the production of records or other documents where its law recognises a privilege, non-compellability or other exemption from giving evidence.

Article 5 paragraph 1

In accordance with Article 5, paragraph 1, the Government of the United Kingdom reserves the right to make the execution of letters rogatory for search and seizure of property dependent on the following conditions:

- a. that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the United Kingdom; and
- b. that execution of the letters rogatory is consistent with the law of the United Kingdom.

Article 11 paragraph 2

The Government of the United Kingdom of Great Britain and Northern Ireland is unable to grant requests made under Article 11, paragraph 2 for a person in custody to transit through its territory.

Article 12

The Government of the United Kingdom of Great Britain and Northern Ireland will only consider the granting of immunity under Article 12 where this is specifically requested by the person to whom the immunity would apply or by the appropriate authorities of the party from whom assistance is requested. A request for immunity will not be granted where the judicial authorities of the United Kingdom consider that granting it would not be in the public interest.

Article 21

The Government of the United Kingdom reserves the right not to apply Article 21.

Paragraph 1 is based on paragraph 1 of Article 28 of the European Convention on Extradition. Under Article 15 (7) and Article 16 (3), the provisions of former treaties relating to the direct transmission of requests for assistance and the translation of requests and annexed documents will remain in force.

Paragraph 2 lays down that clauses relating to specific aspects of mutual assistance in bilateral or multilateral conventions shall not be affected by the present Convention. The Contracting Parties will therefore be bound to respect these clauses. However, if these international conventions are incomplete in this respect, the corresponding provisions of this Convention will have to be applied accordingly. As a general rule, however, the provisions of these conventions shall to the extent they deal with particular aspects of mutual assistance always take precedence with regard to these particular aspects over those of the Council of Europe.

Paragraph 3 is based on paragraph 2 of Article 28 of the European Convention on Extradition. It was accepted that the "agreements" referred to in this paragraph could provide for keeping in force certain provisions of international instruments superseded by virtue of paragraph 1.

Paragraph 4 is based, mutatis mutandis, on paragraph 3 of Article 28 of the European Convention on Extradition. Thus Parties having a system of mutual assistance "on the basis of uniform legislation" (Scandinavian countries) may regulate their mutual relations exclusively in accordance with that system. The reference to a "special system providing for the reciprocal application in their respective territories of measures of mutual assistance" was inserted in order to protect any reciprocal arrangements that might exist between Ireland and the United Kingdom.

Article 27

This Article which concerns the signature, ratification and entry into force of the Convention, reproduces the text of Article 29 of the European Convention on Extradition.

Article 28

This Article which concerns accession reproduces the text of Article 30 of the European Convention on Extradition.

Article 29

This Article which concerns denunciation of the Convention reproduces the text of Article 31 of the European Convention on Extradition.

Article 30

This Article which concerns notifications corresponds to Article 32 of the European Convention on Extradition.

附件 2

APPENDIX E
ADDITIONAL PROTOCOL OF 1978 TO THE
EUROPEAN CONVENTION ON MUTUAL
ASSISTANCE IN CRIMINAL MATTERS, 1959

Source: Council of Europe, Strasbourg

The member States of the Council of Europe, signatory to this Protocol, Desirous of facilitating the application of the European Convention on Mutual Assistance in Criminal Matters opened for signature in Strasbourg on 20 April 1959 (hereinafter referred to as "the Convention") in the field of fiscal offences; Considering it also desirable to supplement the Convention in certain other respects, Have agreed as follows:

CHAPTER I

Article 1

The Contracting Parties shall not exercise the right provided for in Article 1 of the Convention to refuse assistance solely on the ground that the requesting Party is not a Party, which the requested Party considers a fiscal offence.

Article 2

1. In the case where a Contracting Party has made the execution of letters rogatory for seizure or seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party, this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party.

2. The request may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party.

CHAPTER II

Article 3

The Convention shall also apply to:

- a. the service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings;

- b. measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement.

CHAPTER III

Article 4

Article 22 of the Convention shall be supplemented by the following text, the original Article 22 of the Convention becoming paragraph 1 and the below-mentioned provisions becoming paragraph 2:

"2. Furthermore, any Contracting Party which has supplied the above-mentioned information shall communicate to the Party concerned, on the latter's request in individual cases, a copy of the convictions and measures in question as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measures at national level. This communication shall take place between the Ministries of Justice concerned."

CHAPTER IV

Article 5

1. This Protocol shall be open to signature by the member States of the Council of Europe which have signed the Convention. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. The Protocol shall enter into force 90 days after the date of the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, accepting or approving subsequently, the Protocol shall enter into force 90 days after the date of the deposit of its instrument of ratification, acceptance or approval.

4. A member State of the Council of Europe may not ratify, accept or approve this Protocol without having, simultaneously or previously, ratified the Convention

Article 6

1. Any State which has acceded to the Convention may accede to this Protocol after the Protocol has entered into force.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect 90 days after the date of its deposit.

Article 7

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Protocol to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of a territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect six months after the date of receipt by the Secretary General of the Council of Europe of the notification.

Article 8

1. Reservations made by a Contracting Party to a provision of the Convention shall be applicable also to this Protocol, unless that Party otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to the declarations made by virtue of Article 24 of the Convention.

2. Any State may, at the time of signature or when depositing its instrument of ratification acceptance, approval or accession, declare that it reserves the right:

- a. not to accept Chapter I, or to accept it only in respect of certain offences or certain categories of the offences referred to in Article 1, or not to comply with letter b. not to accept Chapter II;
- b. not to accept Chapter II;
- c. not to accept Chapter III.

3. Any Contracting Party may withdraw a declaration it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

4. A Contracting Party which has applied to this Protocol a reservation made in respect of a provision of the Convention or which has made a reservation in respect of a provision of this Protocol may not claim the application of that provision by another Contracting Party; it may, however, if its reservation is partial or conditional claim the application of that provision in so far as it has itself accepted it.

5. No other reservation may be made to the provisions of this Protocol.

Article 9

The provisions of this Protocol are without prejudice to more extensive regulations in bilateral or multilateral agreements concluded between Contracting Parties in application of Article 26 paragraph 3, of the Convention.

Article 10

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Protocol and shall do whatever is needful to facilitate friendly settlement of any difficulty which may arise out of its execution.

Article 11

1. Any Contracting Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

3. Denunciation of the Convention entails automatically denunciation of this Protocol

Article 12

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to the Convention of:

In short, mutual recognition is by no means an easy option; but it is one which I believe deserves very serious consideration as being a method of proceeding incrementally rather than trying to force major changes in all our countries at one time. I would see this being taken forward under a long term coherent programme which would be designed to achieve full mutual recognition for judicial co-operation over a period of years – and I will not attempt at this stage to specify how many. I would hope, however, that agreement might be reached soon on a timetable and priorities.”

15.30 Most recently, in October 1999, at a special meeting of the European Council in Tampere, Finland, on the creation of an area of freedom, security and justice, the commitment of the European Council to reinforce the fight against serious organised and transnational crime was emphasised. It was agreed that a balanced development of Union-wide measures against crime should be achieved while protecting the freedom and legal rights of individuals and economic operators.

15.31 One of the conclusions of the Tampere Council took a stage further the idea of Eurojust which has been referred to above (page 184). The text of the conclusion is as follows (conclusion No. 46)

“To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates or police officers of equivalent competence, detached from each Member State according to its legal system. EUROJUST should have the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol’s analysis, as well as of co-operating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001”.

15.32 Mutual recognition (discussed at paragraph 15.29 above) also featured in the Tampere conclusions (conclusion No. 35) as follows

“Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities”.

15.33 It is inevitable therefore with the political impetus of Tampere, and continuing developments in practice that considerable change will continue to take place in the field of international mutual legal assistance in the coming months and years.

附件六

APPENDIX A CRIMINAL JUSTICE (INTERNATIONAL CO-OPERATION) ACT 1990

(1990, c. 5)

ARRANGEMENT OF SECTIONS

PART I

CRIMINAL PROCEEDINGS AND INVESTIGATIONS

Mutual service of process

- Section
1 Service of overseas process in United Kingdom
2 Service of United Kingdom process overseas

Mutual provision of evidence

- 3 Overseas evidence for use in United Kingdom
4 United Kingdom evidence for use overseas
5 Transfer of United Kingdom prisoner to give evidence or assist investigation overseas
6 Transfer of overseas prisoner to give evidence or assist investigation in the United Kingdom

Additional co-operation powers

- 7 Search etc for material relevant to overseas investigation
8 Search etc for material relevant to overseas investigation: Scotland
9 Enforcement of overseas forfeiture orders.

Supplementary

- 10 Rules of court
11 Application to courts-martial etc

PART II

THE VIENNA CONVENTION

Offences at sea

- 18 Offences on British ships
20 Enforcement powers
21 Jurisdiction and prosecutions

Supplementary

- 22 Extradition
24 Interpretation of Part II

PART IV
GENERAL

- 30 Expenses and receipts
31 Consequential and other amendments, repeals and revocation
32 Short title, commencement and extent

SCHEDULES

- Schedule 1 — United Kingdom Evidence for Use Overseas: Proceedings of Nominated Court.
Schedule 3 — Enforcement Powers in Respect of Ships
Schedule 4 — Consequential Amendments
Schedule 5 — Repeals

to enable the United Kingdom to co-operate with other countries in criminal proceedings and investigations; to enable the United Kingdom to join with other countries in implementing the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and to provide for the seizure, detention and forfeiture of drug trafficking money imported or exported in cash [5 April 1990]

PART I

CRIMINAL PROCEEDINGS AND INVESTIGATIONS

*Mutual service of process**Service of overseas process in United Kingdom*

1.—(1) This section has effect where the Secretary of State receives from the government of, or other authority in, a country or territory outside the United Kingdom—

- (a) a summons or other process requiring a person to appear as defendant or attend as a witness in criminal proceedings in that country or territory; or
(b) a document issued by a court exercising criminal jurisdiction in that country or territory and recording a decision of the court made in the exercise of that jurisdiction.

together with a request for it to be served on a person in the United Kingdom.

(2) The Secretary of State or, where the person to be served is in Scotland, the Lord Advocate may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer of police for the area in which that person appears to be to cause it to be personally served on him.

(3) Service by virtue of this section of any such process as is mentioned in subsection (1)(a) above shall not impose any obligation under the law of any part of the United Kingdom to comply with it.

- (4) Any such process served by virtue of this section shall be accompanied by a notice—
(a) Stating the effect of subsection (3) above;
(b) indicating that the person on whom it is served may wish to seek advice as to the possible consequences of his failing to comply with the process under the law of the

- (c) indicating that under that law he may not, as a witness, be accorded the same rights and privileges as would be accorded to him in criminal proceedings in the United Kingdom.

(5) Where a chief officer of police is directed under this section to cause any process or document to be served he shall after it has been served forthwith inform the Secretary of State or, as the case may be, the Lord Advocate when and how it was served and (if possible) furnish him with a receipt signed by the person on whom it was served, and if the chief officer has been unable to cause the process or document to be served he shall forthwith inform the Secretary of State or, as the case may be, the Lord Advocate of that fact and of the reason.

(6) In the application of this section to Northern Ireland for references to a chief officer of police there shall be substituted references to the Chief Constable of the Royal Ulster Constabulary.

Service of United Kingdom process overseas

2.—(1) Process of the following descriptions, that is to say—

- (a) a summons requiring a person charged with an offence to appear before a court in the United Kingdom; and
(b) a summons or order requiring a person to attend before a court in the United Kingdom for the purpose of giving evidence in criminal proceedings.

may be issued or made notwithstanding that the person in question is outside the United Kingdom and may be served outside the United Kingdom in accordance with arrangements made by the Secretary of State.

(2) In relation to Scotland subsection (1) above applies to any document which may be served on any accused person or on any person who may give evidence in criminal proceedings.

(3) Service of any process outside the United Kingdom by virtue of this section shall not impose any obligation under the law of any part of the United Kingdom to comply with it and accordingly failure to do so shall not constitute contempt of any court or be a ground for issuing a warrant to secure the attendance of the person in question or, in Scotland, for imposing any penalty.

(4) Subsection (3) above is without prejudice to the service of any process (with the usual consequences for non-compliance) on the person in question if subsequently effected in the United Kingdom.

*Mutual provision of evidence**Overseas evidence for use in United Kingdom*

3.—(1) Where on an application made in accordance with subsection (2) below it appears to a justice of the peace or a judge or, in Scotland, to a sheriff or a judge—

- (a) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and
(b) that proceedings in respect of the offence have been instituted or that the offence is being investigated.

he may issue a letter ("a letter of request") requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the proceedings or investigation.

(2) An application under subsection (1) above may be made by a prosecuting authority or, if proceedings have been instituted, by the person charged in those proceedings.

(3) A prosecuting authority which is for the time being designated for the purposes of this section by an order made by the Secretary of State by statutory instrument may itself issue a letter of request if—

- (a) it is satisfied as to the matters mentioned in subsection (1)(a) above; and
(b) the offence in question is being investigated or the authority has instituted proceedings in respect of it.
(4) Subject to subsection (5) below, a letter of request shall be sent to the Secretary of State

- (a) to a court or tribunal specified in the letter and exercising jurisdiction in the place where the evidence is to be obtained; or
- (b) to any authority recognised by the government of the country or territory in question as the appropriate authority for receiving requests for assistance of the kind to which this section applies.

(5) In cases of urgency a letter of request may be sent direct to such a court or tribunal as is mentioned in subsection (4)(a) above.

(6) In this section "evidence" includes documents and other articles.

(7) Evidence obtained by virtue of a letter of request shall not without the consent of such an authority as is mentioned in subsection (4)(b) above be used for any purpose other than that specified in the letter; and when any document or other article obtained pursuant to a letter of request is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to such an authority unless that authority indicates that the document or article need not be returned.

(8) In exercising the discretion conferred by section 25 of the Criminal Justice Act 1988 (exclusion of evidence otherwise admissible) in relation to a statement contained in evidence taken pursuant to a letter of request the court shall have regard—

- (a) to whether it was possible to challenge the statement by questioning the person who made it; and
- (b) if proceedings have been instituted, to whether the local law allowed the parties to the proceedings to be legally represented when the evidence was being taken.

(9) In Scotland evidence obtained by virtue of a letter of request shall, without being sworn to by witnesses, be received in evidence in so far as that can be done without unfairness to either party.

(10) In the application of this section to Northern Ireland for the reference in subsection (1) to a justice of the peace there shall be substituted a reference to a resident magistrate and for the reference in subsection (8) to section 25 of the Criminal Justice Act 1988 there shall be substituted a reference to Article 5 of the Criminal Justice (Evidence, Etc) (Northern Ireland) Order 1988.

United Kingdom evidence for use overseas

4.—(1) This section has effect where the Secretary of State receives—

- (a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside the United Kingdom or a prosecuting authority in such a country or territory; or
- (b) from any other authority in such a country or territory which appears to him to have the function of making requests of the kind to which this section applies.

a request for assistance in obtaining evidence in the United Kingdom in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in that country or territory.

(2) If the Secretary of State or, if the evidence is to be obtained in Scotland, the Lord Advocate is satisfied—

- (a) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and
- (b) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there.

he may, if he thinks fit, by a notice in writing nominate a court in England, Wales or Northern Ireland or, as the case may be, Scotland to receive such of the evidence to which the request relates as may appear to the court to be appropriate for the purpose of giving effect to the request.

(2A) Except where the evidence is to be obtained as is mentioned in subsection (2B) below, if the Secretary of State is satisfied—

- (a) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and
- (b) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there.

and it appears to him that the request relates to an offence involving serious or complex fraud, he may, if he thinks fit, refer the request or any part of the request to the Director of the Serious Fraud Office for him to obtain such of the evidence to which the request or part referred relates as may appear to the Director to be appropriate for giving effect to the request or part referred.

(2B) Where the evidence is to be obtained in Scotland, if the Lord Advocate is satisfied as to the matters mentioned in paragraphs (a) and (b) of subsection (2A) above and it appears to him that the request relates to an offence involving serious or complex fraud, he may, if he thinks fit, give a direction under section 51 of the Criminal Justice (Scotland) Act 1987.

(3) Where it appears to the Secretary of State or, as the case may be, the Lord Advocate that the request relates to a fiscal offence in respect of which proceedings have not yet been instituted he shall not exercise his powers under subsection (2) [(2A) or (2B)] above unless—

- (a) the request is from a country or territory which is a member of the Commonwealth or is made pursuant to a treaty to which the United Kingdom is a party; or
- (b) he is satisfied that the conduct constituting the offence would constitute an offence of the same or a similar nature if it had occurred in the United Kingdom.

(4) For the purpose of satisfying himself as to the matters mentioned in subsection (2)(a) and (b) [or (2A)(a) and (b)] above the Secretary of State or, as the case may be, the Lord Advocate shall regard as conclusive a certificate issued by such authority in the country or territory in question as appears to him to be appropriate.

(5) In this section "evidence" includes documents and other articles.

(6) Schedule 1 to this Act shall have effect with respect to the proceedings before a nominated court in pursuance of a notice under subsection (2) above.

Note

(2A), (2B) and the words in square brackets in sub-s. (3), (4) were inserted by the Criminal Justice and Public Order Act 1994, s. 164(1).

Transfer of United Kingdom prisoner to give evidence or assist investigation overseas

5.—(1) The Secretary of State may, if he thinks fit, issue a warrant providing for any person ("a prisoner") serving a sentence in a prison or other institution to which the Prison Act 1952 or the Prisons (Scotland) Act 1989 applies to be transferred to a country or territory outside the United Kingdom for the purpose—

- (a) of giving evidence in criminal proceedings there; or
- (b) of being identified in, or otherwise by his presence assisting, such proceedings or the investigation of an offence.

(2) No warrant shall be issued under this section in respect of any prisoner unless he has consented to being transferred as mentioned in subsection (1) above and that consent may be given either—

- (a) by the prisoner himself; or
- (b) in circumstances in which it appears to the Secretary of State inappropriate, by reason of the prisoner's physical or mental condition or his youth, for him to act for himself, by a person appearing to the Secretary of State to be an appropriate person to act on his behalf.

but a consent once given shall not be capable of being withdrawn after the issue of the warrant.

(3) The effect of a warrant under this section shall be to authorise—

- (a) the taking of the prisoner to a place in the United Kingdom [??] his delivery at a place of departure from the United Kingdom into the custody of a person representing the appropriate authority of the country or territory to which the prisoner is to be transferred; and
- (b) the bringing of the prisoner back to the United Kingdom and his transfer in custody to the place where he is liable to be detained under the sentence to which he is subject.

(4) Where a warrant has been issued in respect of a prisoner under this section he shall be deemed to be in legal custody at any time when, being in the United Kingdom or on board a British ship, British aircraft or British hovercraft, he is being taken under the warrant to or from any place or being kept in custody under the warrant.

(5) A person authorised by or for the purposes of the warrant to take the prisoner to or from any place or to keep him in custody shall have all the powers, authority, protection and privileges—

- (a) of a constable in the part of the United Kingdom in which that person is for the time being; or
 - (b) if he is outside the United Kingdom, of a constable in the part of the United Kingdom to or from which the prisoner is to be taken under the warrant.
- (6) If the prisoner escapes or is unlawfully at large, he may be arrested without warrant by a constable and taken to any place to which he may be taken under the warrant issued under this section.
- (7) In subsection (4) above—

“British aircraft” means a British-controlled aircraft within the meaning of section 92 of the Civil Aviation Act 1982 (application of criminal law to aircraft) or one of Her Majesty’s aircraft;

“British hovercraft” means a British-controlled hovercraft within the meaning of that section as applied in relation to hovercraft by virtue of provisions made under the Hovercraft Act 1968 or one of Her Majesty’s hovercraft;

“British ship” means a British ship for the purposes of the [Merchant Shipping Act 1995] or one of Her Majesty’s ships;

and in this subsection references to Her Majesty’s aircraft, hovercraft or ships are references to aircraft, hovercraft or, as the case may be, ships belonging to or exclusively employed in the service of Her Majesty in right of the Government of the United Kingdom.

(8) In subsection (6) above “constable”, in relation to any part of the United Kingdom, means any person who is a constable in that or any other part of the United Kingdom or any person who, at the place in question has, under any enactment, including subsection (5) above, the powers of a constable in that or any other part of the United Kingdom.

(9) This section applies to a person in custody awaiting trial or sentence and a person committed to prison for default in paying a fine as it applies to a prisoner and the reference in subsection (3)(b) above to a sentence shall be construed accordingly.

(10) In the application of this section to Northern Ireland for the reference in subsection (1) to the Prison Act 1952 there shall be substituted a reference to the Prison Act (Northern Ireland) 1953.

Note
The words in square brackets in sub-s (7) were substituted by the Merchant Shipping Act 1995, s. 314(2), Sched. 13, para. 87.

Transfer of overseas prisoner to give evidence or assist investigation in the United Kingdom
6.—(1) This section has effect where—

- (a) a witness order has been made or a witness summons or citation issued in criminal proceedings in the United Kingdom in respect of a person (“a prisoner”) who is detained in custody in a country or territory outside the United Kingdom by virtue of a sentence or order of a court or tribunal exercising criminal jurisdiction in that country or territory; or
- (b) it appears to the Secretary of State that it is desirable for a prisoner to be identified in, or otherwise by his presence to assist, such proceedings or the investigation in the United Kingdom of an offence.

(2) If the Secretary of State is satisfied that the appropriate authority in the country or territory where the prisoner is detained will make arrangements for him to come to the United Kingdom to give evidence pursuant to the witness order, Witness summons or citation or, as the case may be, for the purpose mentioned in subsection (1)(b) above, he may issue a warrant under this section.

(3) No warrant shall be issued under this section in respect of any prisoner unless he has consented to being brought to the United Kingdom to give evidence as aforesaid or, as the case may be for the purpose mentioned in subsection (1)(b) above but a consent once given shall not be capable of being withdrawn after the issue of the warrant.

- (4) The effect of the warrant shall be to authorise—
 - (a) the bringing of the prisoner to the United Kingdom;

(b) the taking of the prisoner to, and his detention in custody at, such place or places in the United Kingdom as are specified in the warrant; and

- (c) the returning of the prisoner to the country or territory from which he has come.
- (5) Subsections (4) to (8) of section 5 above shall have effect in relation to a warrant issued under this section as they have effect in relation to a warrant issued under that section.
- (6) A person shall not be subject to the Immigration Act 1971 in respect of his entry into or presence in the United Kingdom in pursuance of a warrant under this section but if the warrant ceases to have effect while he is still in the United Kingdom—
- (a) he shall be treated for the purposes of that Act as if he has then illegally entered the United Kingdom; and
 - (b) the provisions of Schedule 2 to that Act shall have effect accordingly except that paragraph 20(1) (liability of carrier for expenses of custody etc of illegal entrant) shall not have effect in relation to directions for his removal given by virtue of this subsection.

(7) This section applies to a person detained in custody in a country or territory outside the United Kingdom in consequence of having been transferred there—

- (a) from the United Kingdom under the Repatriation of Prisoners Act 1984; or
 - (b) under any similar provision or arrangement from any other country or territory.
- as it applies to a person detained as mentioned in subsection (1) above.

Additional co-operation powers

Search etc for material relevant to overseas investigation
7.—(1) Part II of the Police and Criminal Evidence Act 1984 (powers of entry, search and seizure) shall have effect as if references to serious arrestable offences in section 8 of and Schedule 1 to that Act included any conduct which is an offence under the law of a country or territory outside the United Kingdom and would constitute a serious arrestable offence if it had occurred in any part of the United Kingdom.

(2) If, on an application made by a constable, a justice of the peace is satisfied—

- (a) that criminal proceedings have been instituted against a person in a country or territory outside the United Kingdom or that a person has been arrested in the course of a criminal investigation carried on there;
- (b) that the conduct constituting the offence which is the subject of the proceedings or investigation would constitute an arrestable offence within the meaning of the said Act of 1984 if it had occurred in any part of the United Kingdom; and
- (c) that there are reasonable grounds for suspecting that there is on premises in the United Kingdom occupied or controlled by that person evidence relating to the offence other than items subject to legal privilege within the meaning of that Act, he may issue a warrant authorising a constable to enter and search those premises and to seize any such evidence found there.

(3) The power to search conferred by subsection (2) above is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence as is there mentioned.

(4) No application for a warrant or order shall be made by virtue of subsection (1) or (2) above except in pursuance of a direction given by the Secretary of State in response to a request received—

- (a) from a court or tribunal exercising criminal jurisdiction in the overseas country or territory in question or a prosecuting authority in that country or territory; or
- (b) from any other authority in that country or territory which appears to him to have the function of making requests for the purposes of this section.

and any evidence seized by a constable by virtue of this section shall be furnished by him to the Secretary of State for transmission to that court, tribunal or authority.

(5) If in order to comply with the request it is necessary for any such evidence to be accompanied by any certificate, affidavit or other verifying document the constable shall also furnish for transmission such document of that nature as may be specified in the direction given by the Secretary of State.

(6) Where the evidence consists of a document the original or a copy shall be transmitted, and where it consists of any other article the article itself or a description, photograph or other representation of it shall be transmitted, as may be necessary in order to comply with the request.

(7) The Treasury may by order direct that any powers which by virtue of this section are exercisable by a constable shall also be exercisable by, or by any person acting under the direction of an officer commissioned by the Commissioners of Customs and Excise under section 6(3) of the Customs and Excise Management Act 1979; and the Secretary of State may by order direct that any of those powers shall also be exercisable by a person of any other description specified in the order.

(8) An order under subsection (7) above shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(9) In the application of this section to Northern Ireland for references to the Police and Criminal Evidence Act 1984, to Part II and section 8 of and to Schedule 1 to that Act there shall be substituted references to the Police and Criminal Evidence (Northern Ireland) Order 1989, to Part III and Article 10 of and to Schedule 1 to that Order.

Search etc for material relevant to overseas investigation: Scotland

8.—(1) If, on an application made by the procurator fiscal, it appears to the sheriff—

- (a) that there are reasonable grounds for believing that an offence under the law of a country or territory outside the United Kingdom has been committed; and
- (b) that the conduct constituting that offence would constitute an offence punishable by imprisonment if it had occurred in Scotland.

the sheriff shall have the like power to grant warrant authorising entry, search and seizure by any constable as he would have at common law in respect of any offence punishable at common law in Scotland.

(2) No application for a warrant shall be made by virtue of subsection (1) above except in pursuance of a direction given by the Lord Advocate in response to a request received by the Secretary of State—

- (a) from a court or tribunal exercising criminal jurisdiction in the overseas country or territory in question or a prosecuting authority in that country or territory; or
- (b) from any other authority in that country or territory which appears to him to have the function of making requests for the purpose of this section.

and any evidence seized by the constable by virtue of this section shall be furnished by him to the Lord Advocate for transmission to that court, tribunal or authority.

(3) If in order to comply with the request it is necessary for any such evidence to be accompanied by any certificate, affidavit or other verifying document the constable shall also furnish for transmission such document of that nature as may be specified in the direction given by the Lord Advocate.

(4) Where the evidence consists of a document the original or a copy shall be transmitted, and where it consists of any other article the article itself or a description, photograph or other representation of it shall be transmitted, as may be necessary in order to comply with the request.

(5) The Treasury may by order direct that any powers to enter, search or seizure granted by virtue of subsection (1) above which may be exercised by a constable shall also be exercisable by, or by any person acting under the direction of, an officer commissioned by the Commissioners of Customs and Excise under section 6(3) of the Customs and Excise Management Act 1979; and the Secretary of State may by order direct that any of those powers shall also be exercisable by a person of any other description specified in the order.

(6) An order under subsection (5) above shall be made by statutory instruments subject to annulment in pursuance of a resolution of either House of Parliament.

Enforcement of overseas forfeiture orders

9.—(1) Her Majesty may by Order in Council provide for the enforcement in United Kingdom of any order which—

- (a) is made by a court in a country or territory outside the United Kingdom designated for the purposes of this section by the Order in Council;
- (b) is for the forfeiture and destruction, or the forfeiture and other disposal, of anything

in respect of which an offence to which this section applies has been committed, or which was used (or intended for use) in connection with the commission of such an offence.

(1A) Without prejudice to the generality of subsection (1) above the provision that may be made by virtue of that subsection includes provision which, for the purpose of facilitating the enforcement of any order that may be made, has effect at times before there is an order to be enforced.]

(2) Without prejudice to the generality of subsection (1) above an Order in Council under this section may provide for the registration by a court in the United Kingdom of any order as a condition of its enforcement and prescribe requirements to be satisfied before an order can be registered.

(3) An Order in Council under this section may include such supplementary and incidental provisions as appear to Her Majesty to be necessary or expedient and may apply for the purposes of the Order (with such modifications as appear to Her Majesty to be appropriate) any provisions relating to confiscation or forfeiture orders under any other enactment.

(4) An Order in Council under this section may make different provision for different cases.

[(5) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

(6) This section applies to any offence which corresponds to or is similar to an offence under the Misuse of Drugs Act 1971, a drug trafficking offence as defined in [section 1(3) of the Drug Trafficking Act 1994], an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates or (an offence to which Part VI of the Criminal Justice Act 1988 applies or an offence to which Part I of the Proceeds of Crime (Scotland) Act 1995 applies or an offence in respect of which a suspended forfeiture order may be made under section 18 of the said Act of 1995].

Note

The words in square brackets in sub-s. (1) were inserted by the Criminal Justice Act 1993, s. 21(1). Sub-s. (1A) was inserted by the Proceeds of Crime Act 1995, s. 14(3) with retrospective effect. Sub-s. (5) was substituted by the Criminal Justice Act 1993, s. 21(2). (3). In sub-s (6), the words in the first set of square brackets were substituted by the Drug Trafficking Act 1994, s. 65(1), Sched. 1, para. 25 and the words in the second set were substituted by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, s. 5, Sched. 4, para. 76.

Supplementary

Rules of court

10.—(1) Provision may be made by rules of court for any purpose for which it appears to the authority having power to make the rules that it is necessary or expedient that provision should be made in connection with any of the provisions of this Part of this Act.

(2) Rules made for the purposes of Schedule 1 to this Act may, in particular, make provision with respect to the persons entitled to appear or take part in the proceedings to which that Schedule applies and for excluding the public from any such proceedings.

(3) An Order in Council under section 9 above may authorise the making of rules of court for any purpose specified in the Order.

(4) Rules of court made under this section by the High Court in Scotland shall be made by Act of Adjournal.

(5) This section is without prejudice to the generality of any existing power to make rules.

Application to courts-martial etc

11.—(1) Section 2 above applies also to a summons requiring a person charged with a civil offence to appear before a service court (whether or not in the United Kingdom) or to attend before such a court for the purpose of giving evidence in proceedings for such an offence; and a warrant may be issued under section 6 above where—

- (a) such a summons has been issued in respect of a prisoner within the meaning of section: or

(b) it appears to the Secretary of State that it is desirable for such a prisoner to be identified in, or otherwise by his presence to assist, such proceedings or the investigation or such an offence.

(2) Section 5 above applies also to a person serving a sentence of detention imposed by a service court or detained in custody awaiting trial by such a court.

(3) In this section "a civil offence" has the same meaning as in the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 and "service court" means a court-martial constituted under any of those Acts or a Standing Civilian Court.

THE VIENNA CONVENTION

PART II

Substances useful for manufacture of controlled drugs

12.—(1) It is an offence for a person—

- (a) to manufacture a scheduled substance; or
- (b) to supply such a substance to another person, knowing or suspecting that the substance is to be used in or for the unlawful production of a controlled drug.

[(1A) A person does not commit an offence under subsection (1) above if he manufactures or, as the case may be, supplies the scheduled substance with the express consent of a stable.]

(2) A person guilty of an offence under subsection (1) above is liable—

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or a fine or both.

(3) In this section "a controlled drug" has the same meaning as in the Misuse of Drugs Act 1971 and "unlawful production of a controlled drug" means the production of such a drug which is unlawful by virtue of section 4(1)(a) of that Act.

(4) In this section and elsewhere in this Part of this Act "a scheduled substance" means a substance for the time being specified in Schedule 2 to this Act.

(5) Her Majesty may by Order in Council amend that Schedule (whether by addition, deletion or transfer from one Table to the other) but—

- (a) no such Order shall add any substance to the Schedule unless—
 - (i) it appears to Her Majesty to be frequently used in or for the unlawful production of a controlled drug; or
 - (ii) it has been added to the Annex to the Vienna Convention under Article 12 of that Convention; and
- (b) no such Order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

Note

Sub-s. (1A) was inserted by the Criminal Justice (International Co-operation) (Amendment) Act 1999, s.1.

13.—(1) The Secretary of State may by regulations make provision—

- (a) imposing requirements as to the documentation of transactions involving scheduled substances;
- (b) requiring the keeping of records and the furnishing of information with respect to such substances;
- (c) for the inspection of records kept pursuant to the regulations;
- (d) for the labelling of consignments of scheduled substances.

(2) Regulations made by virtue of subsection (1)(b) may, in particular, require—

- (a) the notification of the proposed exportation of substances specified in Table I in Schedule 2 to this Act to such countries as may be specified in the regulations; and
- (b) the production, in such circumstances as may be so specified, of evidence that the required notification has been given;

and for the purposes of section 68 of the Customs and Excise Management Act 1979 (offences relating to exportation of prohibited or restricted goods) any such substance shall be deemed to be exported contrary to a restriction for the time being in force with respect to it under this Act if it is exported without the requisite notification having been given.

(3) Regulations under this section may make different provision in relation to the substances specified in Table I and Table II in Schedule 2 to this Act respectively and in relation to different cases or circumstances.

(4) The power to make regulations under this section shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) Any person who fails to comply with any requirement imposed by the regulations or, in purported compliance with any such requirement, furnishes information which he knows to be false in a material particular or recklessly furnishes information which is false in a material particular is guilty of an offence and liable—

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

(6) No information obtained pursuant to the regulations shall be disclosed except for the purposes of criminal proceedings or of proceedings under the provisions of the [Drug Trafficking Act 1994] or the Criminal Justice (Scotland) Act 1987 relating to the confiscation of the proceeds of drug trafficking or corresponding provisions in force in Northern Ireland.

Note

In sub-s. (6) the words in square brackets were substituted by the Drug Trafficking Act 1994, s.65, Sched. 1, para.26.

14.-17, (Ss 14, 16 were repealed (s.14 as to England and Wales only) by the Drug Trafficking Act 1994, ss67, 68, Sched.3; s.14 was repealed as to Northern Ireland by S.I. 1996 No. 1299 (N.I. 9), s.15 was repealed by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, s.6, Sched.5; s.17 was repealed by the Criminal Justice (Scotland) Act 1995, s.117, Sched.6, Pt II, Sched.7, Pt II.)

Offences at sea

Offences on British Ships

18.—Anything which would constitute a drug trafficking offence if done on land in any part of the United Kingdom shall constitute that offence if done on a British ship.

Ships used for illicit traffic

19.—(1) This section applies to a British ship, a ship registered in a state other than the United Kingdom which is a party to the Vienna Convention (a "Convention state") and a ship not registered in any country or territory.

(2) A person is guilty of an offence if on a ship to which this section applies, wherever it may be, he—

- (a) has a controlled drug in his possession; or
- (b) is in any way knowingly concerned in the carrying or concealing of a controlled drug on the ship.

knowing or having reasonable grounds to suspect that the drug is intended to be in or on a state other than the United Kingdom.

(3) A certificate purporting to be issued by or on behalf of the government of a state shall be sufficient evidence, if the effect that the importation or export of a controlled drug is prohibited by the laws of that state shall be evidence, and in Scotland sufficient evidence, of the

(4) A person guilty of an offence under this section is liable—

- (a) in a case where the controlled drug is a Class A drug—
- (i) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both;
 - (ii) on conviction on indictment, to imprisonment for life or a fine or both;
- (b) in a case where the controlled drug is a Class B drug—
- (i) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both;
 - (ii) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or a fine or both;
- (c) in a case where the controlled drug is a Class C drug—
- (i) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum or both;
 - (ii) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.

(5) In this section "a controlled drug" and the references to controlled drugs of a specified class have the same meaning as in the said Act of 1971; and an offence under this section shall be included in the offences to which section 28 of that Act (defences) applies.

Enforcement powers

20.—(1) The powers conferred on an enforcement officer by Schedule 3 to this Act shall be exercisable in relation to any ship to which section 18 or 19 above applies for the purpose of detecting and the taking of appropriate action in respect of the offences mentioned in those sections.

(2) Those powers shall not be exercised outside the landward limits of the territorial sea of the United Kingdom in relation to a ship registered in a Convention state except with the authority of the [Commissioners of Customs and Excise], and [they] shall not give [their] authority unless that state has in relation to that ship—

- (a) requested the assistance of the United Kingdom for the purpose mentioned in subsection (1) above; or
- (b) authorised the United Kingdom to act for that purpose.

Note

The words in square brackets in sub-ss. (2)-(4), (6) were substituted by the Criminal Justice Act 1993, s.23(2).

Jurisdiction and prosecutions

21.—(1) Proceedings under this Part of this Act or Schedule 3 in respect of an offence on a ship may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the United Kingdom.

(2) No such proceedings shall be instituted—

- (a) in England or Wales except by or with the consent of the Director of Public Prosecutions or the Commissioners of Customs and Excise;
- (b) in Northern Ireland except by or with the consent of the Director of Public Prosecutions for Northern Ireland or those Commissioners.

(3) Without prejudice to subsection (2) above no proceedings for an offence under section 19 above alleged to have been committed outside the landward limits of the territorial sea of the United Kingdom on a ship registered in a Convention state shall be instituted except in pursuance of the exercise with the authority of the Commissioners of Customs and Excise of the powers conferred by Schedule 3 to this Act; and section 3 of the Territorial Waters Jurisdiction Act 1878 (consent of Secretary of State for certain prosecutions) shall not apply to those proceedings.

Note

The words in square brackets in sub-s. (3) were substituted by the Criminal Justice Act 1993, s. 23(2)(1A).

Supplementary

Extradition

22.—(1) The offences to which an Order in Council under section 2 of the Extradition Act 1870 can apply shall include drug trafficking offences.

(2) In paragraph 1.5 of Schedule 1 to the Extradition Act 1989 extradition offences treated as with jurisdiction of foreign states) after paragraph (i) there shall be inserted—

- "(j) a drug trafficking offence within the meaning of the Drug Trafficking Offences Act 1986; or
- (k) an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates".
- (3) At the end of subsection (2) of section 22 of the said Act of 1989 (extradition offences under Conventions) there shall be inserted—

"(h) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which was signed in Vienna on 20th December 1988 ("the Vienna Convention");".

and at the end of subsection (4) of that section there shall be inserted "and

- (h) in relation to the Vienna Convention—
- (i) any drug trafficking offence within the meaning of the Drug Trafficking Offences Act 1986; and
 - (ii) an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates".

Application of ancillary provisions of Misuse of Drugs Act 1971

23.—(1) The Misuse of Drugs Act 1971 shall be amended as follows.

(2) In section 12(1) (prohibition direction on practitioner etc. in consequence of conviction) after paragraph (b) there shall be inserted—

"(c) of an offence under section 12 or 13 of the Criminal Justice (International Co-operation) Act 1990;".

(3) In section 21 (offences by bodies corporate) after the words "an offence under this Act" there shall be inserted the words "or Part II of the Criminal Justice (International Co-operation) Act 1990".

(4) In section 23 (power to search and obtain evidence) after subsection (3) there shall be inserted—

"(3A) The powers conferred by subsection (1) above shall be exercisable also for the purposes of the execution of Part II of the Criminal Justice (International Co-operation) Act 1990 and subsection (3) above (excluding paragraph (a)) shall apply also to offences under section 12 or 13 of that Act, taking references in those provisions to controlled drugs as references to scheduled substances within the meaning of that Part."

23A. (This section, which was inserted by the Criminal Justice Act 1993, s.77, Sched. 4, was repealed as to England and Wales by the Drug Trafficking Act 1994, ss 67, 68, Sched.3 and as to Northern Ireland by S.I. 1996 No. 1299 (N.I.9).)

Interpretation of Part II

24.—(1) In this Part of this Act—

- "British ship" means a ship registered in the United Kingdom or a colony;
- "Convention state" has the meaning given in section 19(1) above;
- "scheduled substance" has the meaning given in section 12(4) above;
- "ship" includes any vessel used in navigation;
- "the territorial sea of the United Kingdom" includes the territorial sea adjacent to any of the Channel Islands, the Isle of Man or any colony;
- "the Vienna Convention" means the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which was signed in Vienna

(2) Any expression used in this Part of this Act which is also used in the [Drug Trafficking Act 1994] has the same meaning as in that Act [and, in section 22(1), "drug trafficking offences" includes drug trafficking offences within the meaning of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990].

(3) In relation to Scotland, any expression used in this Part of this Act which is also used in the Criminal Justice (Scotland) Act 1987 has the same meaning as in that Act and "drug trafficking offence" means an offence to which section of that Act relates.

(4) If in any proceedings under this Part of this Act any question arises whether any country or territory is a state or is a party to the Vienna Convention, a certificate issued by or under the authority of the Secretary of State shall be conclusive evidence on that question.

Note

In sub-s.(2), the words in the first set of square brackets were substituted by the Drug Trafficking Act 1994, s.65, Sched. 1, para. 28 and the words in the second set were added by the Criminal Justice (Confiscation) (Northern Ireland) Order 1990, S.I. 1990 No. 2588, art. 38, Sched. 2.

25--29. *Repealed by the Drug Trafficking Act 1994, s. 67, Sched. 3.*

PART IV
GENERAL

Expenses and receipts

30.—(1) Any expenses incurred by the Secretary of State under this Act shall be defrayed out of money provided by Parliament.
(2), [(3)] ...

Notes

Sub-s.(3), which was added by the Criminal Justice Act 1993, s.25 was repealed, together with sub-s.(2), by the Drug Trafficking Act 1994, s.67, Sched. 3.

Consequential and other amendments, repeals and revocation

31.—(1) The enactments and instruments mentioned in Schedule 4 to this Act shall have effect with the amendments there specified, being amendments consequential on or otherwise relating to the provisions of this Act.
(2) ...

(3) The enactments mentioned in Schedule 5 to this Act are hereby repealed to the extent specified in the third column of that Schedule.
(4) Article 9 of the Criminal Justice (Evidence, Etc) (Northern Ireland) Order 1988 is hereby revoked.

Note

Sub-s.(2) was repealed by the Drug Trafficking Act 1994, s.67, Sched. 3.

Short title, commencement and extent

32.—(1) This Act may be cited as the Criminal Justice (International Co-operation) Act 1990.

(2) This Act shall come into force on such day as may be appointed by the Secretary of State by an order made by statutory instrument and different days may be appointed for different provisions and different purposes and for different parts of the United Kingdom.
(3) This Act extends to Northern Ireland.

(4) Her Majesty may by Order in Council direct that the provisions of this Act [and those provisions of the Drug Trafficking Act 1994 which re-enact provisions of this Act] shall extend, with such exceptions and modifications as appear to Her Majesty to be appropriate, to any of the Channel Islands, the Isle of Man or any colony.

Note

The words in square brackets in sub-s.(4) were inserted by the Drug Trafficking Act 1994 s.65

SCHEDULES

SCHEDULE 1

Section 4(6)

UNITED KINGDOM EVIDENCE FOR USE OVERSEAS: PROCEEDINGS OF NOMINATED COURT

Securing attendance of witnesses

1. The court shall have the like powers for securing the attendance of a witness for the purpose of the proceedings as it has for the purpose of other proceedings before the court.

2. In Scotland the court shall have power to issue a warrant to officers of law to cite witnesses for the purpose of the proceedings and [section 156 of the Criminal Procedure (Scotland) Act 1995] shall apply in relation to such a witness.

Power to administer oaths

3. The court may in the proceedings take evidence on oath.

Privilege of witnesses

4.—(1) A person shall not be compelled to give in the proceedings any evidence which he could not be compelled to give—

- (a) in criminal proceedings in the part of the United Kingdom in which the nominated court exercises jurisdiction; or
- (b) subject to sub-paragraph (2) below, in criminal proceedings in the country or territory from which the request for the evidence has come.

(2) Sub-paragraph (1)(b) above shall not apply unless the claim of the person questioned to be exempt from giving the evidence is conceded by the court, tribunal or authority which made the request.

(3) Where such a claim made by any person is not conceded as aforesaid he may (subject to the other provisions of this paragraph) be required to give the evidence to which the claim relates but the evidence shall not be transmitted to the court, tribunal or authority which requested it if a court in the country or territory in question, on the matter being referred to it, upholds the claim.

(4) Without prejudice to sub-paragraph (1) above a person shall not be compelled under this Schedule to give any evidence if his doing so would be prejudicial to the security of the United Kingdom, and a certificate signed by or on behalf of the Secretary of State or, where the court is in Scotland, by or on behalf of the Lord Advocate to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact.

(5) Without prejudice to sub-paragraph (1) above a person shall not be compelled under this Schedule to give any evidence in his capacity as an officer or servant of the Crown.

(6) In this paragraph references to giving evidence include references to answering any question and to producing any document or other article and the reference in sub-paragraph (3) above to the transmission of evidence given by a person shall be construed accordingly.

Transmission of evidence

5.—(1) The evidence received by the court shall be furnished to the Secretary of State [and the Lord Advocate for transmission to the court tribunal or authority that made the request] in Scotland, the Lord Advocate for transmission to the court tribunal or authority that made the request

(2) If in order to comply with the request it is necessary for the evidence to be accompanied by any certificate, affidavit or other verifying document, the court shall also furnish for transmission such document of that nature as may be specified in the notice nominating the court.

(3) Where the evidence consists of a document the original or a copy shall be transmitted, and where it consists of any other article the article itself or a description, photograph or other representation of it shall be transmitted, as may be necessary in order to comply with the request.

Supplementary

6. For the avoidance of doubt it is hereby declared that the Bankers Books Evidence Act 1879 applies to the proceedings as it applies to other proceedings before the court.

7. No order for costs shall be made in the proceedings.

Note

In para. 2, the words in square brackets were substituted by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, s.5, Sched. 4, para. 76.

Sections 12 and 13

SCHEDULE 2

SUBSTANCES USEFUL FOR MANUFACTURING CONTROLLED DRUGS

TABLE I

Ephedrine
Ergometrine
Ergonamine
Lysergic acid
1-Phenyl-2-propanone
Pseudoephedrine

The salts of the substances listed in this Table whenever the existence of such salts is possible.

TABLE II

Acetic anhydride
Acetone
Anthranilic acid
Ethyl ether
Phenylacetic acid
Piperidine

The salts of the substances listed in this Table whenever the existence of such salts is possible.

SCHEDULE 3

Section 20

ENFORCEMENT POWERS IN RESPECT OF SHIPS

Preliminary

1.—(1) In this Schedule “an enforcement officer” means—
(a) a constable;

(b) an officer commissioned by the Commissioners of Customs and Excise under section 6(3) of the Customs and Excise Management Act 1979; and
(c) any other person of a description specified in an order made for the purposes of this Schedule by the Secretary of State.

(2) The power to make an order under sub-paragraph (1)(c) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(3) In this Schedule “the ship” means the ship in relation to which the powers conferred by this Schedule are exercised.

Power to stop, board, divert and detain

2.—(1) An enforcement officer may stop the ship, board it and, if he thinks it necessary for the exercise of his functions, require it to be taken to a port in the United Kingdom and detain it there.

(2) Where an enforcement officer is exercising his powers with the authority of the [Commissioners of Customs and Excise] given under section 20(2) of this Act the officer may require the ship to be taken to a port in the Convention state in question or, if that state has so requested, in any other country or territory.

Powers in respect of suspected offence

4. If an enforcement officer has reasonable grounds to suspect that an offence mentioned in section 18 or 19 of this Act has willing to receive it.

(3) For any of those purposes he may require the master or any member of the crew to take such action as may be necessary.

(4) If an enforcement officer detains a vessel he shall serve on the master a notice in writing stating that it is to be detained until the notice is withdrawn by the service on him of a further notice in writing signed by an enforcement officer.

Power to search and obtain information

3.—(1) An enforcement officer may search the ship, anyone on it and anything on it including its cargo.

(2) An enforcement officer may require any person on the ship to give information concerning himself or anything on the ship.

(3) Without prejudice to the generality of those powers an enforcement officer may—

- (a) open any containers;
- (b) make tests and take samples of anything on the ship;
- (c) require the production of documents, books or records relating to the ship or anything on it;
- (d) make photographs or copies of anything whose production he has power to require.

Powers in respect of suspected offence

4. If an enforcement officer has reasonable grounds to suspect that an offence mentioned in section 18 or 19 of this Act has been committed on a ship to which that section applies he may—

- (a) arrest without warrant anyone whom he has reasonable grounds for suspecting to be guilty of the offence; and
- (b) seize and detain anything found on the ship which appears to him to be evidence of the offence.

Assistants

- 5.—(1) An enforcement officer may take with him, to assist him in exercising his powers—
 (a) any other persons; and
 (b) any equipment or materials.
 (2) A person whom an enforcement officer takes with him to assist him may perform any of the officer's functions but only under the officer's supervision.

Use of reasonable force

6. An enforcement officer may use reasonable force, if necessary, in the performance of his functions.

Evidence of authority

7. An enforcement officer shall, if required, produce evidence of his authority.

Protection of officers

8. An enforcement officer shall not be liable in any civil or criminal proceedings for anything done in the purported performance of his functions under this Schedule if the court is satisfied that the act was done in good faith and that there were reasonable grounds for doing it.

Offences

- 9.—(1) A person is guilty of an offence if he—
 (a) intentionally obstructs an enforcement officer in the performance of any of his functions under this Schedule;
 (b) fails without reasonable excuse to comply with a requirement made by an enforcement officer in the performance of those functions; or
 (c) in purporting to give information required by an officer for the performance of those functions—
 (i) makes a statement which he knows to be false in a material particular or recklessly makes a statement which is false in a material particular; or
 (ii) intentionally fails to disclose any material particular.
 (2) A person guilty of an offence under this paragraph is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Note

In para 2(2) the words in square brackets were substituted by the Criminal Justice Act 1993, s. 23(2).

SCHEDULE 4

Section 31(1)

CONSEQUENTIAL AND OTHER AMENDMENTS

The Misuse of Drugs Act 1971

1. In section 27(1) of the Misuse of Drugs Act 1971 after "1986" there shall be inserted the words "or an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates".

The Magistrates' Courts Act 1980

2. After section 97(2) of the Magistrates' Courts Act 1980 there shall be inserted—
 "(2A) A summons may also be issued under subsection (1) above if the justice is satisfied that the person in question is outside the British Islands but no warrant shall be issued under subsection (2) above unless the justice is satisfied by evidence on oath that the person in question is in England or Wales."

The Criminal Justice Act 1982

3. At the end of Part II of Schedule 1 to the Criminal Justice Act 1982 there shall be inserted—
 "Criminal Justice (International Co-operation) Act 1990 (c. 5) Section 14 (concealing or transferring proceeds of drug trafficking)."
 4., 5. . . .

The Criminal Justice Act 1988

6.—(1) The Criminal Justice Act 1988 shall be amended as follows.
 (2) In sections 24(4) and 26 for the words "section 29 below" there shall be substituted the words "section 3 of the Criminal Justice (International Co-operation) Act 1990".
 (3) In paragraph 6(1) of Schedule 13 for the words "In section 29 above 'criminal proceedings' does not include proceedings before a Service court" there shall be substituted the words "No application shall be made under section 3 of the Criminal Justice (International Co-operation) Act 1990 in relation to any offence which is or is to be the subject of proceedings before a Service court".

The Magistrates' Courts (Northern Ireland) Order 1981

7. In Article 118(2) of the Magistrates' Courts (Northern Ireland) Order 1981 after the words "a person" there shall be inserted the words "in Northern Ireland".

The Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988

8. In Articles 4(4) and 6 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 for the words "Article 9" there shall be substituted the words "section 3 of the Criminal Justice (International Co-operation) Act 1990".

Notes

Para. 4 was repealed by the Drug Trafficking Act 1994, s.67(1), Sched.3, Para.5 was repealed by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, s.6(1), Sched.5.

Section 31(3)

SCHEDULE 5

REPEALS

Chapter	Short title	Extent of repeal
36 & 37	The Extradition Act 1873	Section 5.
1975 c. 34	The Evidence (Proceedings in Other Jurisdictions) Act 1975	Section 5
1978 c. 26	The Suppression of Terrorism Act 1978	In section 1, subsection (3)(d) together with the word "and" immediately preceding it, in subsection (4) the words from "and" that subsection (3) (d)(ii) onwards and subsection (5)(b) together with the word "and" immediately preceding it.

5. Notwithstanding paragraph 1, procedural documents may be forwarded via the judicial authorities of the requested Contracting Party where the addressee's address is unknown or where the requesting Contracting Party requires a formal service.

Article 53

1. Requests for assistance may be made directly between judicial authorities and returned via the same channels.
2. Paragraph 1 shall not prejudice the possibility of requests being sent and returned between Ministers of Justice or through national central offices of the International Criminal Police Organization.
3. Requests for the temporary transfer or transit of persons under temporary arrest or being detained or who are serving a custodial sentence, and the periodic or occasional exchange of information from the judicial records must be effected through the Ministers of Justice.
4. Within the meaning of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, where the Federal Republic of Germany is concerned, Ministry of Justice shall mean the Federal Minister of Justice and the Justice Ministers or Senators in the Federal States.
5. Reports made with a view to proceedings against infringement of the legislation on driving and rest time, in accordance with Article 21 of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters or Article 42 of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, as amended by the Protocol of 11 May 1974, may be sent by the judicial authorities of the requesting Contracting Party directly to the judicial authorities of the requested Contracting Party.

附件七

APPENDIX K SEEKING ASSISTANCE IN CRIMINAL MATTERS FROM THE UNITED KINGDOM

Guidelines for Judicial and Prosecuting Authorities

(Second Edition, October 1999)

CONTENTS

Chapter 1: Introduction	
Chapter 2: Range of assistance and channels of communication	
Chapter 3: Form and content of requests to the UK	
Chapter 4: Execution of requests in the UK	
Chapter 5: Home Office Code of Practice	
Annex A: Conducting enquiries in, or seeking assistance from, the UK: <i>The competencies of the Home Office (UK Central Authority) and the National Criminal Intelligence Service (UK National Central Bureau of Interpol)</i>	
Annex B: The Home Office Code of Practice	
Annex C: Contract details for the Home Office (UK Central Authority) and other relevant UK authorities	
Annex D: Contract details for authorities in the Channel Islands, the Isle of Man and the UK Overseas Territories	

CHAPTER 1: INTRODUCTION

The United Kingdom Government attaches great importance to assisting judicial and prosecuting authorities in other countries in combating national and international crime.

The UK is able to provide a full range of legal assistance in criminal matters to judicial and prosecuting authorities in other countries under Part I of the Criminal Justice (International Co-operation) Act 1990, the UK's principal mutual legal assistance legislation

These guidelines:

- give details of the assistance that can be provided under the Act and the procedures to follow when requesting assistance;
- explain the important role of the Judicial Co-operation Unit of the Home Office, in the execution of requests for legal assistance in criminal matters; and
- describe how the Home Office, as the UK Central Authority, works in close co-operation with the UK National Central Bureau of Interpol, which is part of the UK's National Criminal Intelligence Service (NCIS).

The Home Office staff working exclusively on requests for legal assistance and are fully conversant with mutual legal assistance law and practice. The Home Office works to very high professional standards. These are reflected in its published Code of Practice, included in these guidelines.

Extradition matters and international co-operation between, for example, Customs services, tax administrations and regulatory authorities in the financial services industry are not included in these guidelines. Separate guidelines on these matters can be obtained from the relevant contact shown in Annex C.

These guidelines are available in English, French, German, Italian and Spanish. Further copies may be obtained from the Judicial Co-operation Unit at the Home Office. The Home Office is not responsible for judicial co-operation with the Channel Islands, the Isle of Man or the UK Overseas Territories. Contact points for the competent authorities of the Islands and Territories are listed in Annex D.

CHAPTER 2: RANGE OF ASSISTANCE AND CHANNELS OF COMMUNICATION

Range of available assistance: What is possible?

The United Kingdom is able to provide a full range of legal assistance to judicial and prosecuting authorities in other countries and territories for the purposes of criminal investigations and criminal proceedings. The legal assistance that can be provided includes:

- service of summonses, judgments and other procedural documents;
- obtaining witness statements on oath and authenticated documents, including banking evidence;
- use of the investigation powers of the Serious Fraud Office in London and the Crown Office in Edinburgh in cases of serious or complex fraud;
- exercise of search and seizure powers;
- restraint and confiscation of proceeds of crime, and
- temporary transfer of prisoners, with their consent, to assist with criminal investigations and proceedings.

Which countries can the United Kingdom assist?

The UK can assist any country (or territory) in the world, whether or not that country is able to assist the UK.

Are international agreements required?

The UK can provide most forms of legal assistance without bilateral or international agreements – but assistance in the restraint and confiscation of proceeds of crime is dependent upon a bilateral agreement or other international agreement.

The UK has ratified:

- 1959 European Convention on Mutual Assistance in Criminal Matters and its Additional Protocol;
- the 1990 European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and
- the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention).

The UK has also adopted the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters.

Does the UK require reciprocity?

No, but the UK would expect assistance from countries which are parties to relevant bilateral or international agreements with the UK.

Is dual criminality required?

No usually. The criminal conduct described in any request need not constitute an offence under UK law, had it occurred in the UK, *except* in cases involving the exercise of search and seizure

powers or use of the special investigation powers of the Serious Fraud Office (in Scotland, the Crown Office) in cases of serious or complex fraud.

Does the UK assist with requests involving Mutual witnesses?

In general, yes. But if the request is for evidence on oath, for certified documentary evidence, for search and seizure of evidence or would involved use of the investigation powers of the Serious Fraud Office (in Scotland, the Crown Office), then *one or more* of the following conditions must be satisfied:

- criminal proceedings must have been instituted in the requesting country (meaning that a court has issued a summons or an arrest warrant; the defendant has been charged or indicted; or the facts alleged by the prosecutor have been put to the defendant and will be put before a trial court);
- the request must come from a competent authority in a Commonwealth country or be made under an international agreement; or
- the conduct would constitute an offence of the same or similar nature under UK law had it occurred in the UK.

Which authorities can make requests to the UK? What information should be included in requests?

Details of the authorities which may submit requests for legal assistance to the UK and what information should be included in letters of request (commissions rogatoires) are given in Chapter 3.

Where should requests to the UK be sent?

Requests for legal assistance in criminal matters must be sent to the Home Office.

What does the Home Office do?

The functions of the Home Office as UK Central Authority are described in Chapter 4.

Is it possible to submit requests to the Home Office through diplomatic channels?

Yes. Diplomatic channels, such as Embassies or High Commissions in London, may be used where required by the law and practice of the requesting country. But direct communication with the Home Office is preferred as this can help speed up the execution of requests.

At what stage of investigations or proceedings should requests be sent to the Home Office?

At any stage. In general, requests should be made as soon as the need for legal assistance is known and giving the UK authorities as much time as possible to execute the request. Delay in sending requests to the Home Office can result in an increase in the number of urgent cases, and delay the processing of other requests.

Requests for restraint (freezing) and confiscation of the proceeds of crime may only be considered where proceedings have been instituted or where it is certified when proceedings are to be instituted.

Will the Home Office take account of any requirements or procedures which are specified in requests?

Yes. Testimony may be received or recorded and oaths or cautions administered in any specified form to the extent possible under UK law.

May witnesses in the UK be approached directly without informing the Home Office?

Yes. Contact may be made directly by letter, fax or telephone. If the witness is willing to assist the enquiry voluntarily, an approach may be made through Interpol to record his or her statement or to the Home Office if testimony on oath is required.

How long does it take to execute a request?

This will depend on the circumstances of the request. Requesting authorities are kept informed of progress by the Home Office, in accordance with its Code of Practice, and provided with

details of the officer(s) responsible for executing the request. These arrangements help ensure that timely assistance is provided.

Any reasons for urgency such as statutory time limits, pre-trial court appearances or trial dates should be clearly stated in all requests.

May requests be sent to the Home Office via Interpol?

Yes, but direct communication with the Home Office is preferred as this helps speed up execution of requests. If requests for legal assistance intended for the Home Office are sent through Interpol channels, they must be marked clearly for the attention of the Home Office.

What assistance does the Home Office, as UK Central Authority, provide which the NCIS, as UK National Central Bureau of Interpol, does not?

The respective competencies of the Home Office and the NCIS are set out in Annex A.

What requests may be sent to the UK National Central Bureau of Interpol at the NCIS?

Examples of requests that may be submitted directly to the UK National Central Bureau of Interpol without involving the Home Office include requests for:

- interviewing witnesses or suspects in criminal investigations where the person to be interviewed is willing to co-operate without appearing or needing to appear before a judicial authority in the UK;
- sharing of information and intelligence concerning investigations into offences which have been committed in the UK (provided that the information or intelligence is not being requested for use in proceedings);
- asset tracing enquiries;
- providing details of previous convictions;
- providing, for investigative purposes, details of UK telephone subscribers;
- providing details of keepers of motor vehicles registered in the UK and of driving licences issued in the UK;
- obtaining medical or dental statements or records where the patient has given written consent.

Such requests need not be sent to the Home Office unless it is a requirement of the judicial authority making the request. Requests for both legal assistance and for investigative assistance may be sent both to the Home Office and the UK National Central Bureau of Interpol. They will jointly co-ordinate the execution of the request. Any such requests should be clearly marked to show the request had been submitted to both authorities.

May requests for legal assistance be sent direct to courts or prosecuting authorities in the UK?

No. The courts in the UK have no investigative function and the prosecuting authorities do not, in general, have responsibilities for initiating enquiries on behalf of competent authorities abroad. The Home Office handles thousands of requests every year, and is best placed to ensure that requests for legal assistance are dealt with speedily, efficiently and in accordance with the requirements of the requesting authorities.

Requests should always be sent to the Home Office or to the UK National Central Bureau of Interpol at the NCIS.

May evidence be taken away by visiting judicial or investigating officers?

Under law in the UK, all evidence received by a court or seized by a UK investigator must be sent to the Home Office for transmission to the requesting authorities abroad. Once received by the Home Office the evidence may be handed to visiting officials directly or sent to the requesting central or judicial authority.

Are requests kept confidential?

In line with established international practice, the Home Office does not disclose the existence or content of letters of request outside government departments or agencies or the courts or

enforcement agencies in the UK. Requests are not disclosed more than is necessary to obtain the co-operation of the witness or other person concerned.

In general, requests are not shown or copied to any witness or other person, nor is any witness informed of the identity of any other witness. In the event that confidentiality requirements make execution of a request difficult or impossible, the Home Office consults the requesting authorities.

Where public statements are made by authorities about the assistance they are requesting from the UK, the Home Office should be notified so that it may respond appropriately to any media or public enquiries.

Where should requests for Scotland and Northern Ireland be sent?

The UK comprises three separate jurisdictions: England and Wales; Scotland; and Northern Ireland. All requests to the UK for assistance in criminal matters should be sent to the Home Office or the UK National Central Bureau of Interpol at NCIS, irrespective of from where in the UK the assistance is required. But preliminary, informal enquiries about how to make requests intended for execution in Scotland may be made direct to the Crown Office in Edinburgh.

Where should requests for the Crown Dependencies and the UK Overseas Territories be sent?

The Crown Dependencies, namely the Channel Islands (Guernsey and Jersey) and the Isle of Man, and the UK Overseas Territories¹ are not part of the United Kingdom. The Crown Dependencies and the Overseas Territories are themselves wholly responsible for executing requests within their own jurisdictions (although Interpol London is the Interpol office for the Crown Dependencies and certain of the Overseas Territories²). Requests should usually be sent to the Attorney General of the Crown Dependency or Overseas Territory from where the assistance is required.

Are requests ever declined? Is there anything the Home Office cannot do?

Experience so far has shown that requests to the Home Office for legal assistance are rarely declined. However, the UK may decline requests the execution of which may prejudice UK investigations, proceedings, national security or other essential interests. No request will be declined without stating the reason or reasons why the request cannot be executed or without consulting the requesting authority and, where appropriate, inviting it to modify the request so that assistance may be provided.

The UK will decline to execute requests where a trial in the requesting country would involve double jeopardy (*non bis in idem*). If the subject of a request has been convicted or acquitted in the UK or a third country of an offence arising from the conduct described in the request, the UK will not assist the gathering of evidence for another trial of the same person for the same conduct.

The Home Office cannot facilitate requests for interception of communications for evidential purposes. This is because UK law, section 9 of the Interception of Communications Act 1985, does not permit intercept material lawfully obtained by warrant to be added in evidence. Interception is an important intelligence development tool and requests for assistance with intelligence development can be considered by NCIS.

CHAPTER 3: FORM AND CONTENT OF REQUESTS TO THE UK

Which authorities may make requests to the UK?

Requests for legal assistance in criminal matters may be made by any competent court or tribunal, judicial or prosecuting authority. Requests may also be made by any other competent authority that the Home Office considers has the function of making requests for the purposes of criminal proceedings or criminal investigations. Such authorities include Attorneys General, investigating judges, examining magistrates, public prosecutors and Ministers or Departments of Justice having responsibilities for criminal matters.

¹ Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falklands, Gibraltar, Montserrat, St Helena and the Turks and Caicos Islands
² Falklands and St Helena; the other Overseas Territories host Interpol Sub-bureaux.

Should requests be made or confirmed in writing?

Yes, requests should always be made in writing, addressed to the Home Office or to the UK National Central Bureau of Interpol, depending on the nature of the assistance requested (see Annex A). They may be sent in advance by fax or e-mail but an undertaking should be given to send the original request by airmail or courier or other method of rapid delivery within a reasonable time, normally 7 days.

What language may requests to the Home Office be made in?

Requests must be made in writing in English or be submitted with an English translation. If no translation is provided the Home Office will ask for one.

What information should be included in requests?

All relevant information must be included. This will vary according to the nature of the assistance required. Omission of any relevant information may delay execution of the request.

Wherever possible all requests should include:

- Any information which is likely to help the Home Office arrange for execution of the request in accordance with the requirements of the requesting authority.

Letters of request *must* include the following details:

- Details and the address of the judicial or prosecuting authority conducting the investigation or proceedings to which the request relates, and the name, telephone and fax details of the responsible official(s) there.
- Full name(s) of the subject(s) of the investigation or proceedings.
- A summary of the facts of the offence(s) and details of the offence(s) committed or alleged. Where evidence is required, the request should make clear that there are reasonable grounds for suspecting that the offence has been committed and that proceedings have been instituted in relation to the offence or, if proceedings have not been instituted, that the offence is being investigated.
- A description of the evidence or material or other assistance required, clearly stating whether original evidence or certified copies are required.
- The purpose for which the evidence or material or other assistance is required and the relevance of the assistance to the investigation or proceedings.

Requests should also state, to the extent necessary and possible:

- The date of the trial or hearing and any other dates relevant for the purposes of executing the request; and any reasons why the request is urgent, for example because the accused person or suspect is in detention.
- The full name, date of birth and location of any person from whom evidence is required making clear whether there are a witness or an actual or potential accused.
- Available information on the identity and whereabouts of any person to be located.
- Details, including the telephone number, of any British law enforcement officer who is familiar with the investigation.
- The request should also say whether *and why* the presence of officers or officials of the requesting authorities is required during the execution of the request. The names of such persons should be provided (in general, such officers or officials may observe, but may not participate in, the execution of requests).

Requests for service of summonses, judgements and other procedural documents should include:

- The original document(s) with a translation or, if the original documents cannot be provided, a translation certified as a true copy of the original.
- The identity, date of birth and location of any person on whom a summons or

judgment is to be served; details of that person's connection with the proceedings; and details of any particular way in which the summons or judgment should be served.

- Details of any allowances and expenses to which a person asked to appear in proceedings abroad is entitled; the address of the court where the proceedings are to take place; and the name and telephone number of an official of the court from whom the person asked to appear can seek further information if necessary.

Requests for witness evidence (testimony), should include

- Where evidence is required to be taken *on oath* before a court in the UK this should be expressly stated in the request. Expressions such as "to hear" or "to examine" witnesses or suspects should be avoided as they have no precise meaning in UK law. For the avoidance of doubt the requesting authority should set out as clearly as possible the conditions under which any interview or examination should be conducted.

A list of questions to be asked.

- Details of the procedure to be followed in taking the evidence, including any rules on privilege which a witness or suspect may be entitled to claim.

- Any caution or formal notification of rights which should be given to the witness or suspect under the law of the requesting State.

- If banking evidence is required, the request must provide the name or number of the account and the address or number ("Sort Code") of the branch of the bank where the account is held. This detail is required because there is no central record of bank accounts held in the UK.

Requests for search and seizure of evidence should include

- The full address or a precise description of any place to be searched; full details of the specific material or type of material to be seized and a full description of the criminal conduct concerned. (Requests for search and seizure cannot be executed unless the criminal conduct would be a serious offence under UK law if it had occurred in the UK.)

- An explanation why the material requested is considered both relevant and important evidence to the investigation or proceedings why the evidence is thought to be on the particular premises or in the possession of the particular person concerned and why the material would not be produced to a UK court if the natural or legal person holding the material were ordered to do so. (This is to help ensure that applications to the UK courts for search warrants are successful and less likely to fail or be subject to subsequent legal challenge.)
- Appropriate undertakings for the safekeeping and return of any seized evidence

Requests for the restraint (freezing) of property should include:

- The name, address, nationality, date and place of birth and present location of the defendant(s) or person(s) whose criminal conduct has given rise to civil confiscation proceedings.
- Details of the offence with which the defendant has been, or is about to be, charged (or the civil action brought or about to be brought).
- Details of the law applicable to the charges and the evidence against the defendant.
- Particulars of the property which it is intended to restrain in the United Kingdom, the persons holding it and details of the link between the defendant and the property (this is important if the property to be restrained is held in the name of a third party such as a company or another person).
- State clearly whether prior assistance in the case (including asset tracing assistance) has been provided and, if so, give particulars of the UK enforcement or other authority involved and details of the assistance already received.
- Where applicable, details of any court orders already made in the requesting State against the defendant in respect of his or her property. If any court order has been made a *daily authenticated copy* should be included with the request – that is a true copy of that order certified by a person in his or her capacity as a judge, magistrate

or officer of the relevant court of the requesting State, or by an official of the Central Authority in the requesting State.

- Brief details of all known property held by the defendant *outside* the United Kingdom.
- A *certificate* issued by or on behalf of the requesting State's Central Authority stating:
 - that proceedings have been instituted in that country and have not been concluded, or that proceedings are to be instituted in the requesting State and, if so, when;
 - that the confiscation order which it is expected the court of the requesting State will make will have the purpose of recovering property, or the value of property, received in connection with drug trafficking or other serious crime (or, in the case of a forfeiture order, has the purpose of ordering the forfeiture of instrumentalities of crime).

Requests for confiscation of property in the UK should include:

- Information as in requests for restraint.
- An original confiscation order or a *duly authenticated copy* of the confiscation order.
- A *certificate* issued by or on behalf of the requesting State's Central Authority stating:
 - that the confiscation order is in force and that neither the order nor any conviction to which it may relate is subject to appeal;
 - that all or a certain amount of the sum payable under the order remains unpaid in the territory of the requesting State or that other property recoverable under the order remains unrecovered there;
 - that the confiscation order has the purpose of recovering property, or the value of property obtained in connection with drug trafficking or other serious crime (or in the case of a forfeiture order has the purpose of ordering the forfeiture of instrumentalities of crime);
 - and, where the person against whom the confiscation order was made did not appear in the proceedings, that he or she was notified of the proceedings in accordance with the requesting State's law in time to defend them.

Where the request is for the temporary transfer of a UK prisoner to give evidence or otherwise assist in criminal investigations or proceedings outside the UK, it should include:

- Dates on which the presence abroad of the prisoner is required, including the dates on which the court or other proceedings for which the prisoner is required will commence and are likely to be concluded;
- Information for the purpose of obtaining the prisoner's consent to the transfer and satisfying the UK authorities that arrangements will be made to keep the prisoner in secure custody such as:
 - whether the prisoner will have immunity from prosecution for previous offences;
 - details of proposed arrangements for collecting the prisoner from and returning the prisoner to the United Kingdom;
 - details of the type of secure accommodation in which the prisoner will be held in the requesting State;
 - details of the type of escort available abroad to and from the secure accommodation.

The above list is not exhaustive. The Home Office can provide further advice if necessary.

If the assistance requested ceases to be required, the Home Office or the UK National Central Bureau of Interpol should be informed immediately so that enquiries are not made unnecessarily.

CHAPTER 4: EXECUTION OF REQUESTS IN THE UK

What is the role of the Home Office?

The Home Office's responsibilities include:

- Ensuring that requests for legal assistance conform with the requirements of law in the UK and the UK's international obligations (for example, requests for legal assistance must come from a competent authority and be for the purposes of criminal investigations or proceedings).
- Ensuring that execution of requests is not inappropriate on public policy grounds (for example, requests involving double jeopardy will not be executed).
- Deciding how requests might most appropriately be executed (for example, some requests asking for search and seizure of evidence may be executed effectively by a witness producing the evidence to a court).
- Maintaining confidentiality of requests where necessary.
- Ensuring, so far as possible, that assistance is provided within an appropriate time scale (for example, taking account of trial dates).
- Drawing to the attention of the courts, the police and other UK authorities and agencies requests that evidence be obtained in the presence of foreign police or customs officers or prosecutors or defence lawyers.
- Seeking requesting authorities' agreement to meet extra-ordinary costs of executing requests and for services such as interpreters or stenographers or for duplication of documents. (Ordinarily, costs will be met by the UK authorities, in accordance with established international practice).
- Passing evidence received to the requesting authorities (and checking whether any part of the request remains outstanding).

How are requests executed?

The information below explains the ways requests in which are executed in England and Wales. (Requests seeking assistance from Scotland or Northern Ireland are sent by the Home Office to the Crown Office or the Northern Ireland Office for execution, although the laws and practices in those parts of the UK are similar to those in England and Wales.)

How are requests for service of summonses and judgments executed?

Summonses and judgments received by the Home Office from competent authorities abroad are normally served on the persons to whom they are addressed by recorded delivery post. Where personal service is requested, the Home Office arranges for the document to be served by the police.

Under law in the UK, any person to whom a summons or judgement is addressed must be given a notice explaining, as appropriate, that:

- the document does not impose any obligation under law in the UK to comply with it;
- the person might wish to seek legal advice on the possible consequences under the law of the requesting country of failure to comply; and
- the person may not, as a witness, be accorded the same rights and privileges in the requesting country as they would in criminal proceedings in the UK.

The person on whom a summons or judgement is served is asked to sign a receipt and return it to the Home Office to send to the requesting authority. The Home Office will advise the requesting authority whether the document has been delivered and a receipt has not been received or whether it was not possible to serve the document.

How are requests for evidence on oath executed?

Where a request is made for evidence to be received by a court in the UK or the execution of the request requires judicial authority under UK law, the Home Office may nominate a court to receive such of the evidence as may appear to the court to be appropriate. The court has powers to secure the attendance of the witnesses and suspects named in the request.

Witnesses and suspects may claim privilege against self-incrimination and refuse to answer questions or produce documents. In particular, a person cannot be compelled to give evidence before the nominated court if he or she could not be compelled to give the evidence in criminal proceedings in the UK or in criminal proceedings in the requesting country.

Where a witness or suspect claims privilege under the law of the requesting country, evidence will not be taken if the requesting authority concedes the claim. Where the claim is not conceded, the evidence may be taken but will not be sent to the requesting authority if a court in the requesting State rules that the claim to privilege is justified.

With the agreement of the UK court, attorneys, law enforcement officers and other interested parties from abroad named in the request (or a supplementary request) may observe the proceedings. Such agreement is almost always given.

Under UK law the evidence received by the court must be furnished to the Home Office to transmit to the requesting authority. It is possible for the evidence to be received directly from the Home Office by hand or, in urgent cases, for a Home Office official to be present at the court to receive the evidence and pass it directly to the representative of the requesting authority.

If the evidence required does not need to be taken on oath, the request may be sent to the UK National Central Bureau of Interpol which may then arrange for the evidence to be obtained directly by the police and the evidence would normally be returned to the requested authorities through Interpol channels or handed to visiting officers.

How are requests for authenticated documentary evidence, including certified banking evidence, executed?

The Home Office may nominate a court to receive such of the documentary evidence as may appear to the court to be appropriate. Normally, the custodian of the documents is required by the court to make a statement on oath. This may, for example, indicate whether the documents were created in the ordinary course of business or came into the custodian's possession from a third party and whether the documents are originals or genuine copies of the originals. Such a statement is for "chain of evidence" purposes. If banking evidence is required, the statement is normally provided by an official of the bank concerned.

The bank is under no obligation to inform the account holder that it has been ordered to disclose the information. In most cases, the nominated court will obtain the banking information without itself informing the account holder. This might not be appropriate if the account holder is a third party not complicit in the offence or if the account is administered by, for example, a firm of solicitors (professional legal advisers) or accountants. The court is notified by the account holder of the proceedings is entirely a matter for the court.

Before an account holder is notified, the Home Office consults with the requesting authority to ensure that execution of the request would not breach the requesting authority confidentiality requirements.

Under UK law, the evidence received by the court must be sent to the Home Office for transmission to the requesting authority.

How can requests for evidence in serious or complex fraud cases be executed?

The Home Office can refer requests for assistance in serious or complex fraud, or any part of such a request, to the Director of the Serious Fraud Office to obtain such of the evidence as may appear to the Director to be appropriate. Under law in the UK, the Director must be satisfied on reasonable grounds that the criminal conduct in the requesting country involves "serious or complex fraud". Frauds involving sums less than £1 million would not normally be regarded as "serious".

Before referring a request to the Director, the Home Office will seek a written assurance from the requesting authority that any statement which might be made by a person in response to a requirement imposed by virtue of the Director's investigation powers will not be used in evidence against that person, without the consent of the Home Office. This assurance is required because witnesses do not in general have a right to refuse to answer questions where use is made of the Serious Fraud Office's investigation powers. The assurance is therefore an important safeguard for the witness in the event of self-incrimination. The statement may, of course, be used against the accused person(s) named in the request if that is considered appropriate in the requesting country.

Under UK law, the evidence obtained by the Serious Fraud Office must be sent by the Director to the Home Office for transmission to the requesting authority.

Further information on what constitutes "serious or complex fraud" and what should be included in a request for legal assistance in cases involving serious or complex fraud may be obtained from the Serious Fraud Office (in Scotland, the Crown Office).

How can requests for search and seizure (search warrants and production orders) be executed?

The Home Office may direct police or Customs to apply to a court for a search warrant or a production order. (A production order is an order of the court requiring the person(s) on whom the order is served to produce the evidence specified in the order). Where further information is required about the offence or the material to be seized, depending on the particular circumstances, the Home Office will inform the requesting authorities without delay.

Where an application is made for a production order, interested parties must by law be notified (by the UK authorities) and be given an opportunity to be represented in the court that is hearing the application. In such cases, the Home Office consults the requesting authorities to ensure that execution of the request would not breach any explicit confidentiality requirement of the requesting authority. Notification of interested parties is not required where an application is made for a search warrant.

There is no authority under UK law to search for and seize, or to compel production of, any items which are subject to "legal privilege". Legal privilege applies to legal advice communicated between lawyers and their clients, but does not apply to communications intended to further a criminal purpose.

Under UK law, the evidence obtained must be sent by the police or Customs to the Home Office for transmission to the requesting authorities abroad.

How are requests for restraint (freezing) of assets executed?

In the United Kingdom, a court order to freeze (restrain) assets may be obtained on behalf of a designated foreign jurisdiction when court proceedings which may lead to a confiscation order have been or are about to be instituted there, or if a confiscation order has already been made. It is vital therefore that any request for the restraint of assets in the United Kingdom should make clear whether a confiscation order has been made; and, if not, whether proceedings which may lead to confiscation have been instituted in the requesting state or, if not, when they expect to begin.

UK law enables a restraint or freezing order to be obtained on behalf of another country in our High Court only where that country has been designated by subsidiary legislation. Normally, a country will be designated for assistance in relation to drug assets when it ratifies the 1988 UN (Vienna) Drugs Convention; or for assistance in relation to the proceeds of all crimes when it ratifies the 1990 Council of Europe (Strasbourg) Confiscation or when a bilateral confiscation agreement with the UK is in place.

The Home Office will authorise a relevant prosecuting authority to represent the requesting Government in the High Court proceedings. Applications to the High Court in international restraint and confiscation cases are dealt with in England and Wales by two prosecuting authorities. They are the Central Confiscation Branch of the Crown Prosecution Service and the Asset Forfeiture Unit of HM Customs and Excise. As a general rule, the Central Confiscation Branch of the Crown Prosecution Service will deal with any restraint or confiscation request where a police officer has carried out the preliminary asset tracing enquiries in this country. The Home Office can advise which office might be appropriate in a particular case.

UK law requires that certain UK court orders, including restraint orders, should be served personally on the defendant and/or interested parties. Where the High Court grants a restraint order on behalf of a foreign Government, the order will normally need to be channelled through the Home Office, for service on the appropriate person(s) abroad.

Where a restraint order is granted on behalf of another government, the Home Office will confirm this fact in writing, and request that such service be effected as specified in the order. The requesting country will be asked to complete and return to the Home Office a memorandum of service. It is important that the Home Office receives the completed memorandum quickly since delays could affect the High Court's willingness to continue the order. It is the fulfilment of the uncompleted memorandum is received within two weeks of its despatch and that in the event of unavoidable delay, an advance copy is sent to the Home Office by fax.

How are requests for temporary transfer abroad of UK prisoners executed?

UK law allows for the temporary transfer abroad of UK prisoners, including remand prisoners, who consent to assist with criminal investigations and proceedings. Prisoners cannot be transferred from the UK without their consent. Requests for temporary transfer of prisoners must be sent to the Home Office.

The Home Office must be satisfied before agreeing to the transfer that the presence of the prisoner is not already required in the UK for the purposes of investigations or proceedings and that the transfer would not prolong the prisoner's period of detention.

Where the transfer is agreed with the requesting authority, the Home Office arranges for:

- the taking of the prisoner in custody to a departure point in the UK and the delivery of the prisoner into the custody of a person representing the requesting authority;
- the escorting of the prisoner back to the UK by the requesting authority; and
- the subsequent transfer of the prisoner in custody from the arrival point in the UK to his or her place of detention.

The costs of escorting and accommodating prisoners from their point of departure from the UK to their point of return to the UK are borne by the requesting authority.

CHAPTER 5: HOME OFFICE CODE OF PRACTICE

The Home Office aims to ensure that requests for legal assistance are executed promptly, taking account of urgency, and that requesting authorities are kept informed of progress.

All requests received by the Home Office are acknowledged and the requesting authorities are given the name and contact details of the person in the Home Office responsible for coordinating its execution. As soon as possible, the Home Office will inform the requesting authority how the request is to be executed. In the relatively few instances where a request cannot be executed in whole or in part, the Home Office will provide an explanation and consult with the requesting authority about whether the assistance can be provided in a different way.

Where possible, the Home Office will give requesting authorities the contact details of the police or Customs officer or court official or other person to whom the request, or part of the request, has been referred for the purposes of executing the request. That person may then be contacted directly by the requesting authorities.

Any enquiries about requests that have been sent to the Home Office are also acknowledged and dealt with as quickly as possible. When making enquiries, the Home Office's reference number for the request should be quoted as this speeds up retrieval of information on the status of the request.

The sooner the Home Office is told about any difficulties which the requesting authorities may be having with any requests, the sooner the Home Office is able to reassure the requesting authorities that the matter is being dealt with.

The Home Office has published a Code of Practice. This is a set of standards that the Home Office applies in dealing with requests for legal assistance. The standards are closely monitored. The Code is set out at Annex B.

ANNEX A: CONDUCTING ENQUIRIES IN OR SEEKING ASSISTANCE FROM THE UNITED KINGDOM

THE COMPETENCIES OF THE HOME OFFICE (UK CENTRAL AUTHORITY) AND NCIS (UK NATIONAL CENTRAL BUREAU OF INTERPOL)

The examples below are intended to indicate whether the Home Office, as UK Central Authority for mutual assistance in criminal matters, or the UK National Central Bureau of Interpol (Interpol London) at the UK National Criminal Intelligence Service, is more appropriate for conducting enquiries in or seeking assistance from the UK.

COMPETENCIES OF THE HOME OFFICE INCLUDE:	COMPETENCIES OF THE UK NATIONAL CENTRAL BUREAU OF INTERPOL INCLUDE:
Serving a summons or other judicial document requiring a person to appear before a judicial authority in the requesting country as a witness or defendant in criminal proceedings.	Interviewing witnesses and suspects in criminal investigations where the person to be interviewed is willing to co-operate without appearing before a judicial authority in the UK and where any statement made would be unsworn.
Obtaining sworn evidence or other authenticated or certified evidence, including banking documentation, for use in criminal proceedings or investigations.	Tracing assets in investigations preliminary to prosecution, particularly where the offence involves money laundering.
Authenticating or certifying evidence for use in the requesting country where that evidence has already been obtained by the UK police for their own purposes.	Sharing with the requesting country information concerning investigations into offences which have been committed in the UK.
Exercise of search and seizure powers where evidence is required for use in criminal proceedings or investigations.	Obtaining medical or dental statements or records where the patient has given written consent.
Temporarily transferring prisoners, with their consent, to the requesting country to appear as witnesses in criminal proceedings or to assist in criminal investigations.	Providing details of previous convictions: • for the purposes of police investigations, verifying applicants for employment in law enforcement or for work with access to children or suitability for owning firearms and holding gambling licences – when provided with a copy of the person's fingerprints. • for police intelligence purposes only – without fingerprints.
	Providing telephone subscriber details (UK telephone companies can provide only the family name and the initial of the subscriber and the address where the telephone is located).
	Seizing and securing in the UK property stolen abroad. Police in the UK can seize and retain property where the person in possession of it in the UK is suspected of knowing that the property is stolen.
	Providing passport details (all details held by the UK Passport Agency can be provided including any photographs held).
	Providing medical samples (body orifice swabs and samples of blood, saliva, semen, hair, urine and other tissue fluids can be obtained with the consent of the person from whom the sample is required).
	Providing details of keepers of motor vehicles registered in the UK and of driving licences issued in the UK.

22

ANNEX B: HOME OFFICE: CODE OF PRACTICE

Requests to the United Kingdom for evidence

The Home Office, being the central authority for the United Kingdom in mutual legal assistance in criminal matters, will:

- acknowledge all requests for evidence upon receipt, giving the name of the Home Office officer handling the request, his or her telephone and fax numbers and a reference number for any queries;
- respond to all enquiries about the execution of requests for assistance within 10 working days of receipt;
- upon receipt of the request where the request is marked "urgent", or no later than 20 working days after receipt in other cases, either: provide the requesting authority with the assistance sought; or inform the requesting authority of the action being taken to obtain the assistance and provide, where possible, the name(s) and other contact details of the person(s) with responsibilities for executing the request; or provide the requesting authority with a full explanation why the request cannot be executed in its entirety or in part and where possible indicate how the assistance might otherwise be obtained;
- if the requesting authority notifies the United Kingdom that it is necessary, provide with 20 working days of receipt of the notification a report on the progress of the request and, where possible, indicate by when the request will be executed and update that report on a similar time scale;
- endeavour to meet all reasonable time scales for the execution of requests, including urgent requests.

Requests to the United Kingdom for service of process (summons and other procedural documents)

The Home Office will:

- arrange for the execution of all requests for service of summonses within 10 working days of receipt;
- execute all requests for service of process in the manner requested insofar as that is compatible with UK law, and where that is not possible provide the requesting authorities with a full explanation;
- acknowledge simultaneously the receipt and the execution of requests for service of summonses (unless the Home Office has not received signed proof of service at least 10 working days before the hearing date, in which case the acknowledgement will confirm the arrangements made to execute the request);
- acknowledge simultaneously the receipt and the execution of requests for service of judgements and other procedural documents at the same time (unless the Home Office has not received signed proof of service after 30 working days, in which case the acknowledgement will confirm the arrangements made to execute the request);
- when acknowledging requests for service of procedural documents, provide the requesting authorities with the name and other contact details of the officer in the Home Office who has handled the request, including telephone and fax numbers and a reference number for any queries.

ANNEX C: CONTACT DETAILS FOR THE HOME OFFICE AND OTHER RELEVANT UK AUTHORITIES

Requests for legal assistance

Mutual Legal Assistance Section Judicial Co-operation Unit Home Office 50 Queen Anne's Gate London SW1H 9AT

Tel: +44 207 273 2437
Fax: +44 207 273 4400/4584

The Judicial Co-operation Unit at the Home Office has a round-the-clock answer phone facility and may be contacted out-of-hours by dialling: +44 1523 523523 (an operator will take the call who should be given pager number 657782 and a message which will be relayed to the legal assistance duty officer).

Requests for investigative assistance

UK National Central Bureau of Interpol (Interpol London) National Criminal Intelligence Service PO Box 8000 London SE11 5EN

Contact with Interpol London should be made through the National Central Bureau of Interpol in the requesting country.

Tel (24 hours): + 44 207 238 8115
Fax: +44 207 238 8112
Telex: 918734
Encrypted e-Mail: Via X400

Requests in cases of serious or complex fraud

Preliminary, informal enquiries may be sent to: Serious Fraud Office Elm House 10-16 Elm Street London WC1X 0BJ

Tel: +44 207 239 7272
Fax: +44 207 833 5430

Requests for execution in Scotland

Preliminary, informal enquiries may be sent to:

Fraud and Specialist Services Unit Crown Office 25 Chambers Street Edinburgh EH1 1LA
Tel: +44 131 226 2626
Fax: +44 131 226 6861

Advice on UK criminal law and procedure

Casework Directorate Crown Prosecution Service 50 Ludgate Hill London EC4M 7EX

Tel: +44 207 273 1382
Fax: +44 207 329 8171

Requests for administrative assistance in Customs matters

HM Customs & Excise International Criminal Division Solicitor's Office New King's Beam House 22 Upper Ground London SE1 9PJ

Tel: +44 207 865 5167
Fax: +44 207 865 5654

Advice on making requests for restraint and confiscation of assets

Central Confiscation Branch Crown Prosecution Service 50 Ludgate Hill London EC4M 7EX

Tel: +44 207 796 8283
Fax: +44 207 796 8270

Asset Forfeiture Unit Solicitor's Office HM Customs and Excise New King's Beam House 22 Upper Ground London SE1 9PJ

Tel: +44 207 865 5187
Fax: +44 207 865 5902

Requests for extradition of fugitives

Extradition Section Judicial Co-operation Unit Home Office 50 Queen Anne's Gate London SW1H 9AT

Tel: +44 207 273 3991
Fax: +44 207 273 2496

Requests for administrative assistance in revenue tax matters

Inland Revenue Solicitor's Office Somerset House London WC2R 1LB
Tel: +44 207 438 7091
Fax: +44 207 438 6246

Requests for regulatory assistance in companies matters

Department of Trade & Industry Investigations & Enforcement Directorate 10 Victoria Street
London SW1 ONN
Tel: +44 207 215 3021
Fax: +44 207 215 3115

ANNEX D: CONTACT DETAILS FOR AUTHORITIES IN THE CHANNEL ISLANDS, THE ISLE OF
MAN AND THE UK OVERSEAS TERRITORIES

Requests for execution in the Channel Islands and the Isle of Man

Guernsey

HM Attorney General Attorney General's Chambers St James Chambers St Peter Port
Guernsey GY1 2PA
Tel: +44 1481 723355
Fax: +44 1481 723439

Isle of Man

Attorney General's Chambers 2nd Floor New Wing Victory House Douglas ISLE OF MAN
IM1 3PP
Tel: +44 1624 685452
Fax: +44 1624 629162

Jersey

HM Attorney General Attorney General's Chambers Morier House St Helier Jersey JE1
1DD
Tel: +44 1534 502280
Fax: +44 1534 502299

Requests for execution in the UK Overseas Territories (details of authorities not listed are
obtainable from the Home Office)

Anguilla

The Attorney-General The Attorney-General's Chambers The Secretariat The Valley Angu-
illa
Tel: +1 264 497 3044
Fax: +1 264 497 3126

Bermuda

The Attorney-General's Chambers Global House 43 Church Street Hamilton HM12 Ber-
muda
Tel: +1 441 292 2463
Fax: +1 441 292 3608

British Virgin Islands

The Attorney-General The Attorney-General's Chambers Government of the British Virgin
Islands PO Box 242 Road Town Tortola
Tel: +1 284 494 3701
Fax: +1 284 494 6760

Cayman Islands

The Attorney-General The Attorney-General's Chambers Government Administration Building
George Town, Grand Cayman Cayman Islands

Tel: +1 345 949 7900
Fax: +1 345 949 6079

Gibraltar

Attorney-General

Attorney-General's Department 17 Town Range Gibraltar
Tel: + 350 70723
Fax: + 350 79891

Montserrat

The Attorney-General The Attorney-General's Chambers PO Box 129 Olveston Montserrat
Tel: +1 664 491 4686
Fax: +1 664 491 4687

Turks and Caicos Islands

The Governor's Government House Grand Turk Turks and Caicos Islands
Tel: +1 649 946 2308
Fax: +1 649 946 2903