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MUTUAL LEGAL ASSISTANCE TREATIES WITH BELIZE, INDIA, IRELAND, AND LIECHTENSTEIN

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

REPORT

[To accompany Treaty Docs. 107–13, 107–3, 107–9, and 107–16]

The Committee on Foreign Relations to which were referred the Treaty Between the Government of the United States of America and the Government of Belize on Mutual Legal Assistance in Criminal Matters, signed at Belize, on September 19, 2000, and a related exchange of notes (Treaty Doc. 107–13); the Treaty Between the Government of the United States of America and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters, signed at New Delhi on October 17, 2001 (Treaty Doc. 107–3); the Treaty Between the Government of the United States of America and the Government of Ireland on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 18, 2001 (Treaty Doc. 107–9); and the Treaty Between the Government of the United States of America and the Principality of Liechtenstein on Mutual Legal Assistance in Criminal Matters, and a related exchange of notes, signed at Vaduz on July 8, 2002 (Treaty Doc. 107–16) having considered the same, reports favorably thereon, each subject to an understanding and conditions indicated in the corresponding resolutions of advice and consent to ratification, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and said resolutions of advice and consent to ratification.

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I. PURPOSE

The treaties are designed to provide a formal basis for mutual cooperation between the respective parties on law enforcement matters.

II. BACKGROUND

The United States currently has mutual legal assistance treaties (MLATs) in force with over 50 countries. Along with extradition treaties, these treaties provide a formal means for facilitating and expanding cooperative law enforcement efforts with other nations.

All four of the treaties discussed in this report were submitted by President Bush during the 2d session of the 107th Congress. Two of the treaties were signed, however, during the Clinton Administration.

III. SUMMARY AND DISCUSSION OF THE TREATIES

A. GENERAL

Each of the treaties under consideration has distinct features, but they follow a common format. In general, they consist of twenty articles, more or less. They cover essentially the same matter, in same general order, often with only minor variations of style and language. The major articles usually address the following:

- the scope of assistance of the Treaty, in the form of a general statement of purpose and a general inventory of the kinds of assistance available;
- identification of the Central Authorities responsible for administration of the Treaty;
- the limitations on assistance available at the discretion of the Central Authority in particular types of cases;
- the form and contents required of any petition for assistance under the Treaty;
- how the costs associated with a particular request are to be allocated;
- the limitations of use or disclosure of any evidence or information obtained pursuant to a Treaty request;
- the procedure for hearings conducted at the behest of a foreign country to take testimony or evidence in the Requested State;
- the circumstances under which the parties are to have access to information found in the records of government agencies of other countries;

- the procedure for inviting witnesses to travel abroad and give testimony in the Requesting State;
- the provisions for the transfer of persons in custody (prisoners) from one country to the other to permit them to participate in foreign proceedings;
- the pledge of each party to devote best efforts in response to a request for the location or identification of a particular person or item;
- the service of documents related to a Treaty request;
- the agreement to execute a search and seizure upon request of a Treaty partner;
- provisions for the return of property transferred to another country; and
- assistance in forfeiture proceedings and in proceedings concerning restitution and criminal fines.

B. KEY PROVISIONS

1. Limitations on Assistance

All of the Treaties have an article that describes the circumstances under which assistance may or must be refused. The most common limitations permit the parties to decline a request for assistance (1) which involves a purely military offense not ordinarily treated as a criminal offense, (2) which is related to a political offense, (3) whose execution would prejudice a national security or similar essential interest, or (4) which does not comply with the procedural requirements of the particular Treaty.

2. Limitations on Use

The MLATs allow the Central Authorities of the country providing evidence or information under the Treaty to prohibit its use in other investigations or prosecutions without their consent or until after it has been publicly disclosed as a consequence of the use for which it was intended. The same article normally includes confidentiality limitations in addition to use limitations. They permit responding countries to insist that the evidence or information they provide be kept confidential and to condition their responses accordingly.

3. Testimony and Evidence in the Requested State

An original purpose of the MLAT program was to permit the United States to obtain evidence from foreign jurisdictions in a form admissible in American courts. That remains unchanged. American courts usually do not have authority to subpoena foreign nationals living abroad. Even in cases where foreign requirements can be overcome, U.S. law imposes specific requirements that must be met before depositions can be taken overseas and the testimony subsequently introduced in criminal proceedings in this country. MLATs are designed to overcome these obstacles, in addition to meeting the practical and diplomatic challenges of taking depositions in a foreign country. They obligate the parties to call witnesses, using compulsory process if necessary.

4. Records of Government Agencies

MLATs generally divide governmental information available under their provisions into two categories, namely, publicly available information (which must be provided upon request) and information available to judicial and law enforcement personnel but not to the general public (which may be provided upon request). The Treaties contemplate access to material held by any of the three branches of the U.S. government. The United States is unwilling to compromise drug trafficking intelligence produced and held by U.S. law enforcement agencies. Thus, in past MLATs, the Senate has insisted upon a proviso requiring the Executive Branch to deny any request that would give corrupt foreign officials information that might be used to frustrate U.S. efforts to combat drug trafficking.

5. Location and Identification of Persons or Items

The MLAT parties generally pledge their best efforts to ascertain the location or identity of "persons or items" within their territory upon request. Effective use of a MLAT often begins by finding an overseas fugitive or locating and identifying a witness or a custodian of bank records or other physical evidence resident in another country. The form and content articles of the Treaties instruct Requesting States to provide such information as to the location and identification of the persons or items as they can.

6. Search and Seizure

The search and seizure articles in the Treaties are similar. They require execution of any request accompanied by information sufficient to satisfy the legal requirements of the country in which execution is to occur. They generally feature an authentication procedure designed to satisfy U.S. legal requirements for admissibility of evidence. Finally, each Treaty has a provision authorizing conditions for the protection of third party interests in the property.

IV. Entry Into Force and Termination

The Treaties with Belize, India and Ireland enter into force upon the exchange of the instruments of ratification. The Treaty with Liechtenstein enters into force on the first day of the second month following the month of the exchange of the instruments of ratification.

The clauses on termination are identical in substance, providing that either party may terminate the Treaty by written notice to the other party, and that such termination takes effect six months after the date of the notification.

V. Committee Action

The Committee reviewed the Treaties at a public hearing on September 19, 2002, receiving testimony from representatives of the Departments of State and Justice (S. Hrg. 107–721). The Committee considered the Treaties on October 8, 2002, and ordered them favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the ratification of the

Treaties, each subject to an understanding and the conditions set forth in the resolutions of advice and consent to ratification.

VI. Committee Recommendation and Comments

The Committee recommends favorably the four Treaties. The Committee believes that these treaties are useful instruments for facilitating international law enforcement cooperation. The Committee urges that the Senate act promptly to give its advice and consent to ratification.

As in the case in consideration of mutual legal assistance treaties in the 105th and 106th Congresses, the Committee again recommends including in the resolutions of advice and consent an understanding related to the International Criminal Court. The understanding is designed to make plain that the United States will exercise its rights under the treaty provisions to limit the use of assistance provided to ensure that such assistance is not re-transferred to the International Criminal Court, unless the United States becomes a party to the Court or "unless the President has waived any applicable prohibition on provision of such assistance in accordance with applicable United States law." Earlier this year, Congress enacted legislation barring U.S. cooperation with the Court (Title II of the Supplemental Appropriations Act for Fiscal Year 2002, P.L. 107–206). The legislation, however, provides waiver authority for the President under certain conditions.

The conditions set forth in the resolutions of advice and consent have also been included in such resolutions in recent years. The first condition requires the United States to deny any request for assistance if it has specific information that a senior Government official of the requesting party who will have access to information to be provided "is engaged in a felony, including the facilitation of the production or distribution of illegal drugs." The Committee believes that this language should be construed broadly, and should apply to officials involved not only in direct involvement in illegal activity, but should also apply to indirect involvement or intentional acts of omission by senior officials in failing to pursue illegal activity.

VII. Explanation of the Treaties

What follows are technical analyses of the Treaties with Belize, India, and Ireland prepared by the Departments of State and Justice.

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

On September 19, 2000, the United States signed the Treaty Between the Government of the United States of America and the Government of Belize on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with a number of countries as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases. The Treaty with Belize is a major advance for the United

States in its efforts to combat criminal activity including organized crime, terrorism, and international drug trafficking in the Caribbean and Central America.

This Treaty is accompanied by an exchange of diplomatic notes related to Articles 1 and 9, as was the mutual legal assistance treaty between the United States and Antigua and Barbuda, which entered into force on July 1, 1999. This exchange of notes reflects the Parties' understanding, and constitutes an integral part of the Treaty.

It is anticipated that, for the United States, the Treaty will be self-executing, and will be implemented pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. Belize will enact its own mutual legal assistance laws to implement the Treaty.

This technical analysis of the Treaty has been prepared by the United States delegation that conducted the negotiations.

ARTICLE 1—SCOPE OF ASSISTANCE

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

The term "investigations" includes grand jury proceedings in the United States and similar pre-charge proceedings in Belize, and other legal measures taken prior to the filing of formal charges in either State. The term "proceedings" is intended to cover the full range of proceedings in a criminal case, including such matters as bail and sentencing hearings. Since the phrase "proceedings related to criminal matters" is broader than the investigation, prosecution, or sentencing process itself, proceedings covered by the Treaty need not be strictly criminal in nature. For example, civil forfeiture proceedings are covered by the Treaty.

As confirmed in the accompanying exchange of notes, assistance under the Treaty includes assistance in criminal tax matters. In other words, it covers "pure" tax matters; however, it does not extend to civil and administrative enforcement of income tax laws unrelated to any criminal matter.

The second paragraph of this article sets forth a non-exhaustive list of major types of assistance that were specifically considered by the Treaty negotiators. The Government of Belize has stated that Belizean courts currently do not have the authority to enforce forfeiture, restitution, or collection orders of foreign courts, but that such authority may be legislated.

Extradition treaties sometimes condition the surrender of fugitives upon a showing of "dual criminality," i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense had they occurred in the Requested State. The third paragraph of this article was intended to make it clear that there is no general requirement of dual criminality for cooperation. Thus, assistance may be provided even when the criminal matter under investigation in the Requesting State would not be a crime in the Requested State "except as otherwise provided in this treaty," a phrase which refers to Article 3(1)(e), under which the Requested State may, in its discretion, require dual criminality

for a request under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters).

The fourth paragraph of the article contains a standard provision in United States mutual legal assistance treaties[1] which states that the Treaty is intended solely for government-to-government mutual legal assistance. The Treaty is not intended to provide to private persons a means of evidence gathering, nor is it intended to extend to non-criminal matters. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence thereunder.

ARTICLE 2—CENTRAL AUTHORITIES

Article 2 of the Treaty requires that each party establish a "Central Authority" for transmission, reception, and handling of all treaty requests.

The Central Authority for the Requesting Party is expected to exercise discretion as to the form and content of requests, and also as to the number and priority of requests. The Central Authority of the Requested Party is responsible for receiving each request, transmitting it to the appropriate federal or state agency, court, or other authority for execution, and insuring that a timely response is made.

The second paragraph of the article provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the duties of Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. § 0.64–1.[2] The Office of International Affairs, Criminal Division, Department of Justice, will make all requests on behalf of United States law enforcement, and receive and review all requests on behalf of Belize. The United States Attorneys' Offices and law enforcement agencies will execute requests on behalf of Belize.

Article 2(2) of the Treaty also states that the Attorney General of Belize or a person designated by the Attorney General will serve as the Central Authority for Belize. In practice, we understand that the Solicitor General of Belize will serve as the Central Authority for Belize, as well as the executing authority, along with Belizean police, for requests on behalf of the United States. The police will be involved in routine matters, such as those involving service of documents upon entities in Belize. The Solicitor General will be involved in more complex matters, such as those involving the gathering of business or bank records.

The third paragraph states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, INTERPOL channels, or any other means, at the option of the Central Authorities themselves.

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

[2] The Assistant Attorney General for the Criminal Division has in turn redelegated the authority to the Deputy Assistant Attorneys General and to the Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29, 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, Dec. 6, 1983. This authority is further delegated to Deputy Directors.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

Article 3 specifies the limited classes of cases in which assistance may be denied under the Treaty. Similar provisions appear in many other U.S. mutual legal assistance treaties.

One such basis for denial is that execution of the request would prejudice the security or other essential public interests of that State. "Security" includes cases where assistance might involve disclosure of information which is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States, will work closely with the Department of State and other Government agencies to determine whether to execute a request which might fall in this category.

The phrase "essential interests" was intended to limit the class of cases in which assistance may be denied. It would not be enough that the Requesting State's case is one which would be inconsistent with public policy had it been brought in the Requested State. Rather, the Requested State must be convinced that execution of the request would seriously conflict with significant public policy interests.

"Essential interests" could be invoked if the execution of a request would violate essential United States interests related to the fundamental purposes of the Treaty. For example, one fundamental purpose of the Treaty is to enhance law enforcement cooperation, and attaining that purpose would be hampered if sensitive law enforcement information available under the Treaty were to fall into the wrong hands. Therefore, the United States Central Authority would invoke Article 3(1)(b) to decline to provide sensitive or confidential drug related information pursuant to a request under this Treaty if it were to determine, after appropriate consultation with law enforcement, intelligence, and foreign policy agencies, that a senior foreign government official who will have access to the information is engaged in or facilitates the production or distribution of illegal drugs and is using the request to the prejudice of a U.S. investigation or prosecution.[3]

In general, the mere fact that the execution of a request would involve the disclosure of records protected by bank or business secrecy in the Requested State would not justify invocation of the "essential interests" provision. Indeed, a major objective of the Treaty is to provide a formal, agreed channel for making such information available for law enforcement purposes.

Article 3(1)(d) permits denial of a request if it relates to a political offense. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition treaties for determining what is a "political offense."

Article 3(1)(e) permits denial of a request if there is no "dual criminality" for a request made under Article 14 (involving searches and seizures) or Article 16 (involving asset forfeiture matters). However, the Belizean delegation indicated that the Govern-

[3] This is consistent with the statements of the Senate in giving its advice and consent to ratification of the mutual legal assistance treaties with Mexico, Canada, Belgium, Thailand, the Bahamas, and the United Kingdom Concerning the Cayman Islands. Cong Rec 13884, October 24, 1989.

ment of Belize intends not to object to such a request even in the absence of dual criminality.

Article 3(1)(f) permits denial of requests seeking the exercise of compulsory process if the request does not establish reasonable grounds for believing that the offense in question occurred. Such a showing is routinely required by the U.S. Department of Justice before it authorizes the issuance of subpoenas. However, this specific language was added to provide assurances to the Belizean Government that all requests for such measures would be justified by the facts reflected on the face of the request.

Article 3(2) obligates the Requested State to consider imposing appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a State might request information which could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a politically motivated prosecution (which would be subject to refusal under the Treaty's terms). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. The Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence subject to the conditions, it must honor the conditions.

Article 3(3) effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the basis for any denial of assistance. This should avoid misunderstandings, and enable the Requesting State to improve its requests in the future.

ARTICLE 4—FORM AND CONTENT OF REQUESTS

Article 4(1) requires that requests be in writing, except that the Central Authority of the Requested State may accept a request in another form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise.

Article 4(2) lists the four kinds of information deemed crucial to the efficient operation of the Treaty and which must be included in each request. Article 4(3) outlines kinds of information which are important but not always crucial, and should be provided "to the extent necessary and possible." In keeping with the intention of the Parties that requests be as simple and straightforward as possible, there is no requirement that a request be legalized or certified in any particular manner.

ARTICLE 5—EXECUTION OF REQUESTS

Article 5 requires each Central Authority promptly to execute a request or to transmit the request to the appropriate authority. The Parties contemplate that the Central Authority, upon receiving a request, will first review the request, then promptly notify the Central Authority of the Requesting State if the request does not appear to comply with the Treaty's terms.

Where the United States is the Requested Party, it is anticipated that the Central Authority will transmit most executable requests to federal investigators, prosecutors, or judicial officials for execution.

The second sentence of the first paragraph authorizes and requires the authority selected by the Central Authority, possibly including federal, state, and local agencies in the United States, to do everything within its power to execute the request. However, this provision is neither intended nor understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Belize. Rather, it is anticipated that when a request from Belize requires compulsory process, the Department of Justice would ask a federal court to issue the necessary process under Title 28, United States Code, Section 1782, and the provisions of this Treaty.[4]

The third sentence in Article 5(1) reflects an understanding that the Parties intend to provide each other with every available form of assistance. The Belizean delegation noted that the Government of Belize has no power to compel the production of otherwise private information outside of Belizean court proceedings pursuant to foreign requests. However, the Belizean delegation indicated that it could attempt to begin its own investigation upon receiving evidence of wrongdoing from the United States, compel production of records, and then attempt to share those records with the United States. The success of this method is unknown. The Government of Belize is taking steps to amend its laws to enable gathering of evidence on the basis of foreign requests. Public records always may be produced.

Article 5(2) relates to costs of representing the Requesting State in any proceedings in the Requested State. It is also understood that should the Requesting State choose to hire private counsel for a particular request, it is free to do so. It is also anticipated that the United States will be willing to negotiate, to the extent permissible under U.S. law, regarding extraordinary costs which might be incurred by Belize.

Paragraph 3 is inspired by Article 5(5) of the U.S.-Jamaican Treaty. It provides that the method of executing a request for assistance under the Treaty must be in accordance with the Requested State's internal laws absent specific, contrary requirements in the Treaty itself.

The same paragraph requires that procedures specified in the request shall be followed in the execution of the request except to the extent that those procedures cannot lawfully be followed in the Requested State. This provision is necessary for two reasons.

First, significant differences may arise between the procedures which United States and Belizean authorities must follow in collecting evidence in order to assure the admissibility of that evidence at trial.

Second, the value of forensic examinations could be significantly lessened—and the Requesting State's investigation could be impacted—if the Requested State were to insist unnecessarily on han-

[4] This paragraph of the Treaty specifically authorizes United States courts to use all of their powers to issue subpoenas and other process to satisfy a request under the Treaty.

dling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Article 5(4) states that execution of a request for assistance may be postponed where the Central Authority of the Requested State determines that execution would interfere with an ongoing investigation, prosecution or legal proceeding in the Requested State. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence. The paragraph also allows the Requested State to provide the information on conditions needed to avoid interference with the Requested State's proceedings.

It is anticipated that some United States requests for assistance may contain information which under our law must be kept confidential. For example, it may be necessary to set out information which is ordinarily protected by Rule 6(e) of the Federal Rules of Criminal Procedure. Article 5(5) of the Treaty enables the Requesting Party to call upon the Requested Party to keep the information in the request, including the existence of the request, confidential. If the Requested Party cannot execute the request without disclosing the information in question (as might be the case if execution requires a public judicial proceeding in the Requested Party), or if for some other reason this confidentiality cannot be assured, the Treaty obligates the Requested Party to so indicate, thereby giving the Requesting Party an opportunity to withdraw the request rather than risk jeopardizing an investigation or proceeding by public disclosure of the information. The Belizean delegation indicated that the Belizean Central Authority will be able to keep the information contained in a request confidential until the matter is brought into court; the United States Central Authority can request that the Belizean Central Authority seek a confidentiality order from the court in Belize.

Article 5(6) is intended to encourage open communication between the two Central Authorities in monitoring the status of specific requests.

ARTICLE 6—COSTS

Article 6 of the Treaty reflects the increasingly accepted international rule that each State shall bear the expenses incurred within its territory in executing a legal assistance treaty request. This is consistent with similar provisions in other United States mutual legal assistance treaties. Article 6 does oblige the Requesting State to pay fees of expert witnesses, translation and transcription costs, and allowances and expenses related to travel of persons pursuant to Articles 10 and 11. It is also anticipated that the United States will be willing to negotiate, to the extent permissible under U.S. law, regarding extraordinary costs which might be incurred by Belize.

Article 4(2)(d) states that the Requesting State must specify the purpose for which the information or evidence sought under the Treaty is needed, and the first paragraph of Article 7 states that information provided under the Treaty may not be used for any purpose other than purposes related to the criminal offenses stated in the request without the prior consent of the Requested State.

Article 7(2) states that the Requested State may request that the information it provides to the Requesting State be kept confidential or subject to other conditions. Under most United States mutual legal assistance treaties, conditions of confidentiality are imposed only when necessary, and are tailored to fit the circumstances of each particular case. The Belizean delegation indicated that the United States could request that an order of confidentiality be sought in the courts of Belize. Article 7(2) requires that if conditions are imposed, the Requesting State must make "best efforts" to comply with them. This "best efforts" language was used because the purpose of the Treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could routinely permit the Requesting State to see valuable evidence but impose confidentiality restrictions which prevent the Requesting State from using it.

If the United States Government were to receive evidence under the Treaty in one case which proved to be exculpatory evidence to the defendant in another case, the United States might be constitutionally obliged to share the evidence with the defendant in the second case. *See Brady* v. *Maryland,* 373 U.S. 83 (1963). Therefore, Article 7(3) states that nothing in Article 7 shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the Requesting Party in a criminal prosecution. Any such proposed disclosure shall be noticed by the Requesting Party to the Requested Party in advance.

Article 7(4) states that once evidence obtained under the Treaty has been revealed to the public in accordance with Article 7(1) or 7(2) of the Treaty, the Requesting State is free to use the evidence for any purpose. Once evidence obtained under the Treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain, and is likely to become a matter of common knowledge, perhaps even described in the press. Once this has occurred, it is practically impossible for the Central Authority of the Requesting Party to block the use of that information by third parties.

It should be noted that under Article 1(4) of the Treaty, the restrictions outlined in Article 7 give rise to no rights on the part of anyone other than the Parties to the Treaty (the United States and Belize) and, thus, the invocation and enforcement of these provisions are left entirely to the Parties. If any individual alleges that an authority in Belize is seeking to use information or evidence obtained from the United States in a manner inconsistent with this article, the recourse would be for that individual to inform the Central Authority of the United States of the allegations for consideration as a matter between the governments.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

The first paragraph of Article 8 states that a person in the Requested State shall be compelled, if necessary, to appear and testify or produce documents, records, or articles of evidence. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of the Requested State. The compulsory process obligation is limited by the Requested State's laws. Under current Belizean law, documentary and testi-

monial evidence may be compelled only in the context of a Belizean court proceeding. Belize is taking steps to amend its laws in this regard.

The third paragraph provides that persons specified in the request shall be permitted by the Requested State to be present and pose questions during the taking of testimony under this article. Such persons may include the defendant and his or her counsel in criminal cases.

Article 8(4) requires that if a witness attempts to assert a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the Requested State will take the desired evidence and turn it over to the Requesting State along with notice that it was obtained over such a claim. The applicability of the claim can then be determined in the Requesting State, where the scope of the immunity or privilege and the underlying legislative and policy reasons are best understood.

Despite Article 8(4), Article 5(3) insures that no person would be compelled to furnish information if he has a right not to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a request from Belize is guaranteed the right to invoke any testimonial privileges (attorney-client privilege, inter-spousal privilege, etc.) available in the United States, as well as the constitutional privilege against self-incrimination, to the extent that it might apply in the context of evidence being taken for foreign proceedings.[5] A witness testifying in Belize may raise any privileges available under Belizean law, including the privilege against self-incrimination which exists under that law.

Article 8(5) establishes a procedure for authenticating records in a manner essentially similar to Title 18, United States Code, Section 3505. The second sentence of the paragraph provides for the admissibility of authenticated documents as evidence without additional foundation or authentication. With respect to the United States, this paragraph is self-executing and does not need implementing legislation. However, admissibility will be finally determined by the judicial authority presiding over the trial. Evidentiary tests other than authentication (such as relevance, materiality, etc.) will still have to be satisfied in each case.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

The first paragraph of the article obliges each Party to furnish the other with copies of publicly available records possessed by a governmental department or agency in the Requested State. The term "government departments and agencies" includes all executive, judicial, and legislative units of the federal, state, and local level in either country.

Article 9(2), regarding sharing nonpublic information, is discretionary, and requests for such information may be denied in whole or in part. Moreover, the Requested State may only exercise its discretion to turn over such information "to the same extent and under the same conditions" as it would to its own law enforcement or judicial authorities. It is intended that the Central Authority of

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

the Requested State will determine that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information that would be available to investigative authorities in that State, but that justifiably would be deemed inappropriate to release to a foreign government. For example, assistance might be deemed inappropriate where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information that was given to the Requested State in return for a promise that it not be divulged. Of course, a request could be denied under this clause if the Requested State's law bars disclosure of the information.

The U.S. delegation discussed whether this article could serve as a basis for exchange of information in tax matters. It was the intention of the U.S. delegation that the United States be able to provide assistance under the Treaty in criminal tax matters, and such assistance could include tax return information when appropriate. The Belizean delegation indicated that such tax information could be obtained from the Belizean Ministry of Finance. Accordingly, the U.S. delegation is satisfied that this Treaty is a "convention or bilateral agreement relating to the exchange of tax information" for purposes of Title 26, United States Code, Section 6103(k)(4), and the United States would have the discretion to provide tax return information to Belize under this article in appropriate cases.[6] The accompanying exchange of notes indicates that both Parties recognize the need, in many cases, to restrict access to information collected by revenue authorities.

Article 9(3) establishes a procedure for authenticating official foreign records by certification that is consistent with Rule 902(3) of the Federal Rules of Evidence and Rule 44 of the Federal Rules of Civil Procedure.

This provision, like Article 8(5), states that documents authenticated under this paragraph shall be "admissible." It will, of course, be up to the judicial authority presiding over the trial to determine whether the evidence should in fact be admitted. Evidentiary tests other than authentication (such as relevance or materiality) must be established in each case.

ARTICLE 10—TESTIMONY IN THE REQUESTING STATE

Article 10 provides that, upon request, the Requested State shall invite persons to travel to the Requesting State to appear, for example to testify. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the invited person. The Requesting State would be expected to pay the expenses of such an appearance pursuant to Article 6 of the Treaty, and Article 10(1) provides that the witness shall be informed of the extent of expenses which the Requesting State will pay in a particular case. It is assumed that such expenses would normally include the costs of transportation, room, and board. When a witness

[6] Thus, this Treaty, like all of the other U.S. bilateral mutual legal assistance treaties, is understood to authorize the provision of tax return information in appropriate circumstances.

is to appear in the United States, a nominal witness fee would also be provided.

Article 10(2) provides that the Central Authority of the Requesting State shall inform the Central Authority of the Requested State whether any decision has been made as to whether a person shall not be subject to service of process or detention for earlier acts or convictions. It should be noted that safe conduct is limited to acts or convictions which preceded the witness's departure from the Requested State. This provision does not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

The third paragraph states that the safe conduct provided for by this article expires seven days after the Central Authority of the Requesting State has notified the Central Authority of the Requested State that the person's presence is no longer required, or when the person leaves the territory of the Requesting Party and thereafter voluntarily returns to it. However, the competent authorities of the Requesting State may extend the safe conduct up to fifteen days if it determines that there is good cause to do so. For the United States, the "competent authority" for these purposes would be the Central Authority; for Belize, the Solicitor General would be the appropriate competent authority.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

In some criminal cases, a need arises for the testimony in the United States of a witness in the custody of another country. In some instances, the other country is willing and able to "lend" the witness to the United States Government, provided that the witness would be carefully guarded while in the United States and returned to the Requested State at the conclusion of the testimony. On occasion, the Department of Justice has been able to arrange for consenting federal inmates in the United States to be transported to foreign countries to assist in criminal proceedings. Article 11(1) provides an express legal basis for cooperation in such instances.

There have also been recent situations in which a person in custody on a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with a case. Article 11(2) addresses this situation.

The article's third paragraph provides the obligation and express authority for the receiving State to maintain such a person in custody throughout his stay there, unless the sending State specifically authorizes release. The paragraph also authorizes the receiving State to return the person in custody to the sending State. The initial transfer of a prisoner under this article requires the consent of the person involved and of both Central Authorities, but the provision does not require that the prisoner consent to be returned to the sending State.

Once the receiving State has agreed to assist the sending State's investigation or proceeding pursuant to this article, it would be inappropriate for the receiving State to hold the person transferred and require extradition proceedings before allowing him to return to the sending State as agreed. Therefore, Article 11(3)(c) provides that extradition proceedings will not be required before the status

quo is restored by the return of the person transferred. Finally, Article 11(3)(d) states that the prisoner will receive credit for time served while in the custody of the receiving State. This is consistent with United States practice in these matters.

The article does not provide for any specific "safe conduct" for prisoners transferred under this article because it is anticipated that the authorities of the two countries will deal with such situations on a case-by-case basis. If the person in custody is unwilling to transfer without safe conduct assurances, and the requesting State is unable or unwilling to provide satisfactory assurances in this regard, the person is free to decline to travel.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

Article 12 requires that the Requested State make "best efforts" to locate or identify persons (such as witnesses, potential defendants, or experts) or items sought by the Requesting State. The Requesting State would be expected to supply all available information about the last known location of any person or item sought.

ARTICLE 13—SERVICE OF DOCUMENTS

This article creates an obligation on the part of the Requested State to use its best efforts to effect the service of documents such as summonses, complaints, subpoenas, or other legal papers relating in whole or in part to a Treaty request.

It is expected that when the United States is the Requested State, in the absence of any request by Belize to follow a specified procedure for service, service under the Treaty will be made by registered mail, or by the United States Marshal's Service in instances where personal service is requested.

ARTICLE 14—SEARCH AND SEIZURE

It is sometimes in the interests of justice for one State to ask another to search for, secure, and deliver articles or objects needed in the former State as evidence or for other purposes. This article creates a formal framework for handling such a request. Belize will require implementing legislation to effectuate this article.

The article requires that the search and seizure request include "information justifying such action under the laws of the Requested State." This means that normally a request to the United States from Belize will have to be supported by probable cause for the search. A United States request to Belize would have to satisfy the corresponding evidentiary standard there, which was described by the Belizean delegation to be one of "reasonable suspicion." [7]

The second paragraph of the article is designed to insure that a record is kept of articles seized and of articles delivered up under the Treaty. This provision effectively requires that the Requested State keep detailed and reliable information regarding the condition of the article at the time of seizure, and the chain of custody between seizure and delivery to the Requesting State.

[7] Note that while involuntary confessions are not admissible in evidence under Belizean law, physical evidence that is illegally obtained is admissible. The party whose rights were violated may seek only civil relief against the Belizean Government for such action. Also, Belizean authorities may conduct warrantless searches for firearms offenses.

The article also provides that the certificates describing continuity of custody will be admissible without additional authentication at trial in the Requesting State, thus relieving the Requested State of the burden, expense, and inconvenience of having to send its law enforcement officers to the Requesting State to provide authentication and chain of custody testimony each time the Requesting State uses evidence produced pursuant to this article. Nevertheless, the trier of fact is free to bar use of the evidence itself, notwithstanding the certificate, if there is some other reason to do so aside from authenticity or chain of custody.

ARTICLE 15—RETURN OF ITEMS

This article provides that the Requested State may require the return of any documents or items of evidence. It is anticipated that unless original records or articles of significant intrinsic value are involved, the Requested State will routinely not request return.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

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

Article 16 authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure. The term "proceeds or instrumentalities" is intended to include things such as money, vessels, or other valuables which either are being used in the crime or were purchased or obtained as a result of the crime. Upon receipt of notice under this article, the Central Authority of the State in which the proceeds or instrumentalities are located may take whatever action is appropriate under its law.

The second paragraph of Article 16 states that the Parties shall assist one another to the extent permitted by their laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses, to restitution to crime victims, and to the collection of fines imposed as sentences in criminal prosecutions. It specifically recognizes that the authorities in either state may take immediate action to immobilize the assets pending further proceedings. Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or to enforce a judgment of forfeiture levied in the Requesting State, the Treaty encourages the Requested State to do so. However, the language of the article is carefully selected so as not to require either State to take any action that would exceed its internal legal authority. It does not mandate institution of forfeiture proceedings or initiation of temporary immobilization in either country against property identified by the other if the relevant prosecuting authorities do not deem it proper to do so.[8] Note that the Government of Belize

[8] The Government of Belize can freeze assets in narcotics-related cases; however, the person whose assets are frozen must be charged with an offense and convicted, and appeals must be

Continued

has indicated that Belizean courts do not have the authority to enforce forfeiture orders of foreign courts. Belizean courts may order the forfeiture of assets in narcotics money laundering and trafficking cases within the jurisdiction of Belize.

United States law permits the Government to transfer a share of certain forfeited property to other countries that participate directly or indirectly in the seizure or forfeiture of the property. The amount transferred will generally reflect the contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The law requires that the transfer be authorized by an international agreement between the United States and the foreign country, and be approved by the Secretary of State.[9] Article 16(3) is consistent with this framework, and will enable either Party to transfer forfeited assets, or the proceeds of the sale of such assets, to the other Party to the extent permitted by their respective laws.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

Because of this article, the Treaty leaves the provisions of United States and Belizean law on letters rogatory completely undisturbed, and does not alter any pre-existing agreements concerning investigative assistance.

ARTICLE 18—CONSULTATION

Experience has shown that as the parties to a treaty of this kind work together over the years, they become aware of various practical ways to make the Treaty more effective and their own efforts more efficient. This article calls upon the States to share those ideas with one another, and encourages them to agree on the implementation of such measures. Practical measures of this kind might include methods of keeping each other informed of the progress of investigations and cases in which Treaty assistance was utilized, or the use of the Treaty to obtain evidence which might otherwise be sought under other methods which might be less acceptable in the Requested State. This article also provides for the possibility of training and technical assistance, as agreed to by the Parties' Central Authorities.

It is anticipated that the Central Authorities will conduct annual consultations pursuant to this article.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

This article contains provisions, common among law enforcement treaties, for ratification, entry into force, effectiveness regarding earlier acts, and termination.

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exhausted, before assets will be forfeited. For Belize to be able to freeze or forfeit assets in other types of offenses, implementing legislation would be needed.

[9] Title 18, United States Code, Section 981(i)(1).

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

On October 17, 2001, the United States signed a Treaty Between the Government of the United States and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with many other countries, all as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases. It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. India will enact the Treaty pursuant to its own domestic laws.

The Office of International Affairs, Criminal Division, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, prepared the following technical analysis of the new Treaty based on their participation in its negotiation.

As negotiated, the text of the Mutual Legal Assistance Treaty (MLAT) between the United States and India is substantially similar to other recent modern MLAT texts negotiated by the United States. Any significant variations or interpretative understandings reached during the negotiations are noted below.

PREAMBLE

Usually, the preambles to U.S. MLATs contain a general statement of the desire of the Parties to cooperate, without referencing any specific categories of criminal offenses. However, the Indian delegation to the treaty negotiations wanted to highlight the applicability of this MLAT to terrorism and other serious criminal matters-an idea readily accepted by the U.S. delegation. Consequently, the preamble references specifically the Parties' desire to cooperate and provide mutual legal assistance in criminal matters, "including those relating to terrorism, narcotics trafficking, economic crimes, and organized crime."

ARTICLE 1—SCOPE OF ASSISTANCE

Paragraph 1 contains standard language making clear that the Parties shall provide the widest measure of mutual assistance in connection with the investigation, prosecution, prevention, and suppression of offenses, and in proceedings related to criminal matters. During the negotiations the Indian delegation confirmed the U.S. view that the MLAT will be available for making requests for investigations when a criminal referral is possible, but when it is unknown at the time of the request whether the case will ultimately be pursued criminally (e.g., as is sometimes the case in SEC, CFTC, or Tax Division investigations). Moreover, the Indian delegation confirmed that even if a matter for which assistance has been sought ends up being pursued civilly or administratively, so long as it is in essence the same matter for which the request was made and for which the criminal route was a possibility at the time

of the request, the requesting U.S. entities can then use the evidence India has provided under the MLAT in those civil or administrative proceedings. India will interpret "proceedings related to criminal matters" as encompassing such civil or administrative proceedings, and no further request or permission is required. Finally, it is worth noting that, consistent with other MLATs, the negotiators agreed that this Treaty is a "convention" under Title 26, United States Code, Section 6103(k)(4), pursuant to which the United States may exchange tax information with treaty partners.

ARTICLE 2—CENTRAL AUTHORITIES

The U.S. delegation agreed to accept the "Ministry of Home Affairs, or a person designated by the Ministry of Home Affairs" as the Indian Central Authority under the treaty. However, the Indian delegation assured the U.S. delegation that India will designate a particular office within the Ministry to make and receive requests, and to serve as the primary point of contact for the U.S. Justice Department's Office of International Affairs.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

The Indian delegation proposed dropping the entire reference to "political offenses" as a discretionary grounds for the denial of assistance. India wanted to ensure that assistance in a terrorism matter would never be denied on "political offense" grounds. The U.S. shared India's interest in ensuring that assistance in terrorism cases would never be denied on such a basis, and agreed to address the issue by making it clear in the treaty that crimes covered by a multilateral convention to which both India and the United States are party shall not be considered political offenses. Paragraph 2 of this article lists those multilateral conventions to which both India and the United States are party, and makes clear that crimes covered by those and future such conventions shall not be deemed political offenses for purposes of denying assistance. This language is almost identical to that contained in the recently approved and now in force extradition treaty with India.

ARTICLE 5—EXECUTION OF REQUESTS

Paragraph 3 of this article, which contains language standard to many U.S. MLATs, was the basis for extensive discussion between the U.S. and Indian delegations. That paragraph reads, "Requests shall be executed in accordance with the laws of the Requested State, except to the extent that this Treaty provides otherwise. The method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested State."

The first sentence of that paragraph is important to the United States, to ensure that, in the event of a conflict between existing law and the treaty, the treaty will prevail. That language also prevents India from unilaterally revising the scope of its obligations under the treaty by simply enacting conflicting legislation at some later date. However, India did not want to agree to undertake obligations not currently provided for by its domestic laws. After considerable discussion during the negotiations, and an exchange of

written correspondence after the face to face talks, India agreed to the U.S. formulation.

Paragraph 4 of this Article is unusual in a U.S. Mutual Legal Assistance Treaty. It states, "The Requested State shall not decline execution of a request on the ground of bank secrecy". Bank secrecy is not a ground for denial of a request in any bilateral U.S. MLAT. However, normally MLATs state all the bases for denial, and because bank secrecy is never listed as such a basis, it is clear without further reference that a request shall not be denied on the grounds of bank secrecy. Yet the Indian delegation stated that affirmatively stating this point in the text of the treaty would help ensure that U.S. requests for assistance would never be denied based on the grounds of bank secrecy in India. Consequently, the United States agreed to the inclusion of this provision.

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

Paragraph 3 states that the Requested State shall permit the presence of specified persons during the execution of a request, and shall allow such persons to "pose questions to be asked of the person giving the testimony or evidence." Despite the U.S. preference for doing so, the Indian delegation indicated that given current Indian law, U.S. authorities will likely not be permitted to directly question witnesses in India. However, they agreed that, pursuant to this provision of the Treaty, questions "posed" by U.S. authorities will be asked by Indian law enforcement or judicial authorities.

ARTICLE 10—APPEARANCE OUTSIDE THE REQUESTED STATE

Paragraph 2 contains a "safe conduct" provision for persons who appear in the Requesting State pursuant to this Article. Although it is the preference of the United States to make the granting of safe conduct a matter of Requesting State discretion, the Indian delegation indicated that it was extremely important for India that such safe conduct be mandatory. Consequently, the United States agreed, as it has in several of our other MLATs in which our treaty partners have insisted upon mandatory language, to the wording contained in this paragraph. It reads, "A person appearing in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any acts or convictions which preceded that person's departure from the Requested State."

FORMS

The Indian delegation indicated that while the forms included in the treaty are acceptable for requests to India from the United States, it is likely that in requests from India to the United States, India will specify different procedures, consistent with Indian rules of evidence and procedure, for authenticating records and demonstrating chain of custody.

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

On January 18, 2001, the United States signed a Treaty Between the Government of the United States of America and the Government of Ireland on Mutual Legal Assistance in Criminal Matters ("the Treaty"). In recent years, the United States has signed similar treaties with many other countries, all as part of a highly successful effort to modernize the legal tools available to law enforcement authorities in need of foreign evidence for use in criminal cases. The Treaty with Ireland is an advance for the United States in its attempts to win the cooperation of all countries in combating organized crime, transnational terrorism, international drug trafficking, and other crimes. It is anticipated that the Treaty will be implemented in the United States pursuant to the procedural framework provided by Title 28, United States Code, Section 1782. Ireland will enact the Treaty pursuant to its own domestic laws.

The Office of International Affairs, Criminal Division, United States Department of Justice, and the Office of the Legal Adviser, United States Department of State, prepared the following technical analysis of the new Treaty based on their participation in its negotiation.

ARTICLE 1—SCOPE OF ASSISTANCE

The first Article of the Treaty is a standard provision in United States mutual legal assistance treaties (MLATs) and provides for assistance in all matters involving the investigation, prosecution, and prevention of offenses, and in proceedings relating to criminal matters. In paragraph 2, the Article sets forth a non-exhaustive list of major types of assistance specifically considered by the Treaty negotiators. This list varies from the standard language in some MLATs in that it does not include a reference to the Parties providing assistance in proceedings related to restitution and the collection of fines. This variance was made because the Irish delegation explained, that although their government can provide assistance in determining the existence or location of assets involving the collection of fines or the enforcement of restitution orders, they cannot collect fines or restitution on behalf of another country. This limitation is not uncommon and references to providing assistance in proceedings related to restitution and the collection of fines is not included in many MLATs, for example, those with the United Kingdom and Antigua.

The concluding subparagraph of this list reflects the standard language in most United States MLATs except that the negative connotation implied by the use of the word "not" as used in the phrase "Assistance shall include . . . any other form of assistance not prohibited by the laws of the Requested Party," was deleted and language similar to that used in the corresponding Article in the MLAT with the United Kingdom was used—"Assistance shall include . . . such other assistance as may be agreed between Central Authorities."

The third paragraph of this Article is intended to make it clear that there is no general requirement of dual criminality, i.e., proof

that the facts underlying the offense charged under the laws in the Requesting Party would also constitute an offense had they occurred in the territory of the Requested Party. Thus, the Requested Party may provide assistance to the Requesting Party even when the criminal matter under investigation would not be a crime under the laws of the Requested Party. Although the Irish delegation stated that dual criminality would not be a requirement under the Treaty, the language "except when required by the law of the Requested Party" was included to recognize that Irish law requires a different procedure to execute a request from the United States on the rare occasions when dual criminality does not exist.

Paragraph four of this Article contains a standard provision of U.S. MLATs, which states that the Treaty is intended solely for government-to-government mutual legal assistance. Similarly, the paragraph provides that the Treaty is not intended to create any right in a private person to suppress or exclude evidence, or to impede the execution of a request.

ARTICLE 2—CENTRAL AUTHORITIES

Article 2 of the Treaty is a standard provision in United States MLATs and requires that each Party establish a "Central Authority." The Central Authority is responsible for the transmission, reception, handling of treaty requests, and insuring that a timely response is made.

The second paragraph of the Article provides that the Attorney General or a person designated by the Attorney General will be the Central Authority for the United States. The Attorney General has delegated the duties of the Central Authority under mutual legal assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. § 0.64–1. [1] The Office of International Affairs, Criminal Division, Department of Justice, will make all requests on behalf of the United States, and review all requests on behalf of Ireland. The United States Attorneys' Offices and law enforcement agencies will execute requests on behalf of Ireland.

Article 2(2) of the Treaty also states that the Minister for Justice, Equality and Law Reform of Ireland or the person designated by him or her will serve as the Central Authority for Ireland.

The third paragraph states that the Central Authorities shall communicate directly with one another for the purposes of the Treaty. It is anticipated that such communication will be accomplished by telephone, telefax, law enforcement channels, or any other means, at the option of the Central Authorities.

ARTICLE 3—LIMITATIONS ON ASSISTANCE

Article 3 specifies the limited classes of cases in which assistance may be denied under the Treaty.

Article 3(1)(a) permits the Requested Party to deny the request if execution of the request would prejudice the sovereignty, the se-

[1] The Assistant Attorney General for the Criminal Division has in turn redelegated the authority to the Deputy Assistant Attorneys General and to the Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29, 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, Dec. 6, 1983. This authority is further delegated to Deputy Directors.

curity or other essential interests, or would be contrary to important public policy of the State. The term "important public policy" in Article 3(1)(a) would include a Requested Party's policy of opposing the exercise of jurisdiction which in its view is extraterritorial and objectionable. In this regard, the Irish delegation made it clear that, like the Government of the United Kingdom, the Government of Ireland may object to certain extraterritorial exercises of United States jurisdiction, and retains the right to deny, pursuant to Article 3(1)(a) of the Treaty, a United States request for assistance made in connection with an exercise of extraterritorial jurisdiction. For example, in what are known as "re-export cases," (that is, where companies attempt to avoid export restrictions to a country by first exporting the goods to a country to which those restrictions do not apply) the Irish delegation advised that these cases would be closely scrutinized and it was possible that assistance could be denied under the "important public policy" clause of 3(1)(a).

Article 3(1)(b) bars assistance under the Treaty if the target of the investigation or the defendant in the case had previously been tried and convicted or acquitted on the same facts outlined in the request. This approach is similar to the concept of non bis in idem in international extradition treaties. This Article shall not affect the availability of assistance in respect of other participants in the offense for which assistance is requested who would not be entitled to be discharged on the grounds of a previous acquittal or conviction. A similar provision is found in the MLATs with the United Kingdom and the Bahamas.

Article 3(1)(c)(i), a standard provision in United States MLATs, permits the Requested Party to deny the request if it relates to a political offense. Article (3)(1)(c)(ii), also a standard provision, permits denial if the offense is a military offense. These restrictions are similar to those found in other MLATs. It is anticipated that the Central Authorities will employ jurisprudence similar to that used in the extradition context for the application of these provisions.

Article 3(2) obligates the Requested Party to consider imposing appropriate conditions on providing assistance in lieu of denying a request outright pursuant to the first paragraph of the Article. For example, a Party might request information that could be used either in a routine criminal case (which would be within the scope of the Treaty) or in a case that would be subject to refusal under the Treaty's terms. This paragraph would permit the Requested Party to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested Party would notify the Requesting Party of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting Party an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting Party does accept the evidence subject to the conditions, it must honor the conditions.

ARTICLE 4—FORM AND CONTENTS OF REQUESTS

Article 4(1) is a standard provision in United States MLATs and requires that requests be made in writing, except that the Central Authority of the Requested Party may accept a request in another

form in "emergency situations." A request in another form must be confirmed in writing within ten days unless the Central Authority of the Requested Party agrees otherwise. Article 4(1) also requires that requests shall be submitted in "an official language" rather than in the "the official language" as stated in most MLATs. This is because Ireland has two official languages. It was agreed that all requests made to the United States will be made in English and that all requests made to Ireland will be made in English or Irish, but in any event, the United States cannot be required to make requests to Ireland in Irish.

Article 4(2) and (3) are standard provisions in United States MLATs. Article 4(2) lists the four kinds of information that are deemed crucial to the efficient operation of the Treaty and must be included in each request. Article 4(3) outlines the kind of information that is important, but not always crucial, and should be provided "to the extent necessary and possible."

Article 4(4) adds the provision that the Requested Party may ask the Requesting Party to provide any information that appears to the Requested Party to be necessary to execute the request. This language also appears in the MLAT with the United Kingdom.

ARTICLE 5—EXECUTION OF REQUESTS

The first paragraph of Article 5 is a standard provision in United States MLATs and provides that the Central Authorities shall execute promptly requests from the Requesting Party and that the courts of the Requested Party use their authority to execute those requests. The first paragraph also provides that "The Courts of the Requested Party shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request." The Irish delegation sought to clarify that the language of this paragraph does not purport to bestow powers on Irish courts that they would not otherwise possess. The U.S. delegation agreed that it did not.

Articles 5(2) and (3) are standard provisions in United States MLATs. They provide that the Central Authority of the Requested Party shall represent in the territory of the Requested Party the Requesting Party in any proceedings arising out of a request for assistance. In addition, the request will be executed in the manner specified in the request unless that manner is incompatible with the laws and practices of the Requested Party.

Article 5(4) is a standard provision in United States MLATs and provides that the Requested Party may postpone execution or make execution of a request subject to conditions if the execution of the request would interfere with an ongoing criminal investigation or proceeding in the Requested State. The delegations added language that would also allow the Requested State to postpone the execution of a request, or make the execution of a request subject to conditions, if to not do so would prejudice the safety of any person.

Article 5(5) provides that the presence of persons named in a request shall be facilitated by the Requested Party in accordance with its law and practice. Similar language appears in the MLAT with the United Kingdom and is designed to promote the presence of prosecutors and law enforcement authorities in the Requested

State in cases where their presence would assist the Requested Party in executing the request.

Articles 5(6), (7) and (8) are standard provisions in United States MLATs. They state that the Requested Party must, upon request, keep a request made under the Treaty confidential, must respond to reasonable inquiries from the Requesting Party and may ask the Requesting Party to provide information in such form as may be necessary to execute the request.

Articles 5(9), (10) and (11) are also standard provisions in United States MLATs. Article 5(9) states that the Requesting Party shall promptly inform the Requested Party of any circumstances that may make it inappropriate to proceed with the execution of the request. Article 5(10) states that the Requested Party shall promptly inform the Central Authority of the Requesting Party of any circumstances that may cause a significant delay in executing the request. Article 5(11) states that the Requested Party shall promptly inform the Requesting Party of the outcome of the execution of the request, and if the request is denied, the reasons for the denial.

ARTICLE 6—COSTS

Article 6 is consistent with similar provisions in other United States MLATs and reflects the rule that each Party shall bear the ordinary expenses of executing legal assistance requests. It also states that the Parties should consult as to the terms under which a request should be executed if extraordinary expenses will be incurred.

ARTICLE 7—LIMITATIONS ON USE

Article 7(1) is a standard provision in United States MLATs and states that the Requesting Party must specify the purpose for which the information sought under the Treaty is needed, and that the Requesting Party may not use the information for any other purpose without the consent of the Requested Party. The language stating that the Requested Party may impose a limitation that the Requesting Party may not use the information for any other purpose other than that specified in the request has been used in some of the newer MLATs.

This language was adopted by the delegations because, under Irish law, the Irish Central Authority cannot provide information to a foreign government unless the Treaty provides that the information will not be used for any purpose other than the one for which it was requested. The Irish delegation assured the United States delegation that Irish law will not limit subsequent use of information it provides to the United States pursuant to the Treaty because the Central Authority may give permission for subsequent use, and would do so in all but the most unusual of cases.

Article 7(2) is a standard provision in United States MLATs and permits a Requesting Party to disclose information obtained pursuant to the Treaty if there is a requirement to do so by the constitution of the Requesting Party in a criminal prosecution. This provision is designed to permit the United States to provide exculpatory

evidence to a defendant in a criminal prosecution. *See, Brady* v. *Maryland,* 373 U.S.83 (1963).

ARTICLE 8—TESTIMONY OR EVIDENCE IN THE REQUESTED PARTY

Article 8 is a standard provision in United States MLATs and states that a person in the Requested State shall be compelled, if necessary, to appear and testify or produce evidence. The standard MLAT language that states that a person shall be compelled has been modified in this Treaty to state that a person may be compelled. This modification was made because the Irish delegation explained that the word shall could be interpreted to give specific instructions to the Irish Courts. The Irish delegation explained that this change is necessary even though they have the ability to compel testimony on behalf of the United States and will use this power, if necessary.

Article 8(2) is a standard procedural provision in United States MLATs providing that, upon request, the Requested State shall furnish information in advance about the date and place of the taking of testimony or evidence.

Article 8(3) is also a standard provision in United States MLATs and permits the presence of persons specified in the request during the execution of the request, and shall allow such persons to ask questions directly of the witness or indirectly through a legal representative qualified to appear before the courts of the Requested Party. The latter clause was added because in certain situations questions to a witness must be asked by a member of the Irish bar. The introductory language "In accordance with its laws and practices" was added at the request of the Irish delegation so that the Treaty cannot be interpreted to infer rights upon United States representatives who are present at the execution of a request that would not normally be inferred upon Irish prosecutors and investigators.

Article 8(4) states that if a witness asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the Requested State will take the desired evidence and turn it over to the Requesting State along with notice that it was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting State, where the scope of the privilege and the legislative and policy reasons underlying the privilege are best understood.

Article 8(5) is a standard provision in United States MLATs and states that evidence produced pursuant to this Treaty may be authenticated by an attestation, and references forms appended to the Treaty that may be used for this purpose.

ARTICLE 9—RECORDS OF GOVERNMENT AGENCIES

Article 9 is a standard provision in United States MLATs and states that the Requested Party shall provide the Requesting Party with copies of publicly available documents and may share with its Treaty partner copies of nonpublic information in government files to the same extent it would with its own law enforcement or judicial authorities. Article 9 also states that this information may be

authenticated by an attestation, and references the forms appended to the Treaty that may be used for this purpose.

ARTICLE 10—TESTIMONY IN THE TERRITORY OF THE REQUESTING PARTY

Article 10 is a standard provision in United States MLATs and provides for witnesses who are located in the territory of the Requested Party and who are needed to testify in the territory of the Requesting Party to travel voluntarily to the territory of the Requesting Party for that purpose and to be granted safe passage by the Requesting Party.

ARTICLE 11—TRANSFER OF PERSONS IN CUSTODY

Article 11 is a standard procedural provision in United States MLATs that provides for the transfer of persons in custody in the territory of the Requested Party to the territory of the Requesting Party to provide assistance under the Treaty.

ARTICLE 12—LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

Article 12 is a standard provision in United States MLATs and states that the Requested Party shall use its best efforts to locate or identify persons or items specified in a request from the Requesting Party.

ARTICLE 13—SERVICE OF DOCUMENTS

Article 13 is a standard provision in United States MLATs and sets out procedures whereby the Requested Party shall use its best efforts to effect service of documents pursuant to requests made under the Treaty.

ARTICLE 14—SEARCH AND SEIZURE

Article 14 is a standard provision in United States MLATs and obligates the Parties to search for, secure, and deliver items needed by the other Party as evidence or for other purposes. This Article requires that a search and seizure request include "information justifying such action under the laws of the Requested Party." Thus, a request from Ireland to the United States will have to be supported by probable cause to conduct the search. A request from the United States will have to satisfy the corresponding Irish evidentiary standard.

The Irish delegation requested that language that states that searches and seizures be "carried out in accordance with the law of that [Requested] Party," be added to reiterate this important requirement, as outlined in Article 5.

The remainder of the Article states that a certificate describing the continuity of custody will be admissible without further authentication at trial in the court of the Requested Party.

The final paragraph of the Article states that the Requested Party may require that the Requesting Party agree to terms and conditions necessary to protect the interests of third parties.

ARTICLE 15—RETURN OF ITEMS

This procedural Article provides that any documents or items of evidence furnished under the Treaty must be returned to the Requested Party as soon as possible. The standard MLAT language states that this requirement applies only if the Central Authority of the Requested Party specifically requests it at the time that the items are delivered to the Requesting Party. However, because Irish law makes the return of items mandatory unless the Central Authority provides a waiver, the language of this Article states that the return of the documents or items is mandatory unless the requirement is waived by the Requested Party. The Irish delegation explained that they will not usually request the return of bank documents and the Irish Central Authority will include a standard waiver when they transmit bank records to the United States.

ARTICLE 16—ASSISTANCE IN FORFEITURE PROCEEDINGS

Article 16 has become a standard provision in United States MLATs. The first paragraph authorizes the Central Authority of one Party to notify the Central Authority of the other Party of the existence in the latter's territory of proceeds or instrumentalities of offenses that may be forfeitable or otherwise subject to seizure.

The second paragraph of this Article states that the Parties shall assist one another to the extent permitted by their law in proceedings related to forfeiture. The standard MLAT language also requires the Parties to assist one another in proceedings related to restitution to crime victims or the collection of fines imposed as sentences in criminal convictions. Because Irish law does not permit Irish authorities to freeze assets to facilitate the recovery of assets for the satisfaction of fines or restitution orders, this language was not included.

The third paragraph of Article 16 has also become a standard provision in United States MLATs. It enables the transfer of forfeited assets, or the proceeds of the sale of such assets, to the other Party, to the extent permitted by the respective laws of the Parties.

ARTICLE 17—COMPATIBILITY WITH OTHER ARRANGEMENTS

This Article is a standard provision in United States MLATs and states that assistance and procedures provided for by this Treaty do not prevent the Parties from providing assistance to each other by other means.

ARTICLE 18—CONSULTATION

Article 18 is a standard provision in United States MLATs and states that the Parties shall consult with each other to make the Treaty effective. It is anticipated that consultations will be held annually.

ARTICLE 19—RATIFICATION, ENTRY INTO FORCE, AND TERMINATION

Article 19 is a standard provision in United States MLATs that outlines the procedures for ratification, entry into force, and termination of the Treaty.

VIII. Text of Resolutions of Advice and Consent to Ratification

Treaty with Belize

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. ADVICE AND CONSENT TO RATIFICATION OF THE TREATY WITH BELIZE ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, SUBJECT TO AN UNDERSTANDING AND CONDITIONS.

The Senate advises and consents to the ratification of the Treaty Between the Government of the United States of America and the Government of Belize on Mutual Legal Assistance in Criminal Matters, signed at Belize, on September 19, 2000, and a related exchange of notes (Treaty Doc. 107–13; in this resolution referred to as the "Treaty"), subject to the understanding in section 2 and the conditions in section 3.

SEC. 2. UNDERSTANDING.

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

> Prohibition on Assistance to the International Criminal Court.—The United States shall exercise its rights to limit the use of assistance that it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court unless the treaty establishing the Court has entered into force for the United States by and with the advice of the Senate in accordance with Article II, Section 2 of the United States Constitution, or unless the President has waived any applicable prohibition on provision of such assistance in accordance with applicable United States law.

SEC. 3. CONDITIONS.

The advice and consent of the Senate under section 1 is subject to the following conditions:

> (1) Limitation on Assistance.—Pursuant to the right of the United States under the Treaty to deny legal assistance that would prejudice the essential public policy or interests of the United States, the United States shall deny any request for such assistance if the Central Authority of the United States (as designated in Article 2(2) of the Treaty), after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior Government official of the requesting party who will have access to information to be provided as part of such assistance is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.
>
> (2) Supremacy of the Constitution.—Nothing in the Treaty requires or authorizes legislation or other action by the United States that is prohibited by the Constitution of the United States as interpreted by the United States.

Treaty with India

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. ADVICE AND CONSENT TO RATIFICATION OF THE TREATY WITH INDIA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, SUBJECT TO AN UNDERSTANDING AND CONDITIONS.

The Senate advises and consents to the ratification of the Treaty Between the Government of the United States of America and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters, signed at New Delhi on October 17, 2001 (Treaty Doc. 107–3; in this resolution referred to as the "Treaty"), subject to the understanding in section 2 and the conditions in section 3.

SEC. 2. UNDERSTANDING.

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance that it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court unless the treaty establishing the Court has entered into force for the United States by and with the advice of the Senate in accordance with Article II, Section 2 of the United States Constitution, or unless the President has waived any applicable prohibition on provision of such assistance in accordance with applicable United States law.

SEC. 3. CONDITIONS.

The advice and consent of the Senate under section 1 is subject to the following conditions:

(1) LIMITATION ON ASSISTANCE.—Pursuant to the right of the United States under the Treaty to deny legal assistance that would prejudice the essential public policy or interests of the United States, the United States shall deny any request for such assistance if the Central Authority of the United States (as designated in Article 2(2) of the Treaty), after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior Government official of the requesting party who will have access to information to be provided as part of such assistance is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

(2) SUPREMACY OF THE CONSTITUTION.—Nothing in the Treaty requires or authorizes legislation or other action by the United States that is prohibited by the Constitution of the United States as interpreted by the United States.

Treaty with Ireland

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. ADVICE AND CONSENT TO RATIFICATION OF THE TREATY WITH IRELAND ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, SUBJECT TO AN UNDERSTANDING AND CONDITIONS.

The Senate advises and consents to the ratification of the Treaty Between the Government of the United States of America and the Government of Ireland on Mutual Legal Assistance in Criminal Matters, signed at Washington on January 18, 2001 (Treaty Doc. 107–9; in this resolution referred to as the "Treaty"), subject to the understanding in section 2 and the conditions in section 3.

SEC. 2. UNDERSTANDING.

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance that it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court unless the treaty establishing the Court has entered into force for the United States by and with the advice of the Senate in accordance with Article II, Section 2 of the United States Constitution, or unless the President has waived any applicable prohibition on provision of such assistance in accordance with applicable United States law.

SEC. 3. CONDITIONS.

The advice and consent of the Senate under section 1 is subject to the following conditions:

(1) LIMITATION ON ASSISTANCE.—Pursuant to the right of the United States under the Treaty to deny legal assistance that would prejudice the essential public policy or interests of the United States, the United States shall deny any request for such assistance if the Central Authority of the United States (as designated in Article 2(2) of the Treaty), after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior Government official of the requesting party who will have access to information to be provided as part of such assistance is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

(2) SUPREMACY OF THE CONSTITUTION.—Nothing in the Treaty requires or authorizes legislation or other action by the United States that is prohibited by the Constitution of the United States as interpreted by the United States.

Treaty with Liechtenstein

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. ADVICE AND CONSENT TO RATIFICATION OF THE TREATY WITH LIECHTENSTEIN ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, SUBJECT TO AN UNDERSTANDING AND CONDITIONS.

The Senate advises and consents to the ratification of the Treaty Between the Government of the United States of America and the Principality of Liechtenstein on Mutual Legal Assistance in Criminal Matters, and a related exchange of notes, signed at Vaduz on July 8, 2002 (Treaty Doc. 107–16; in this resolution referred to as the "Treaty"), subject to the understanding in section 2 and the conditions in section 3.

SEC. 2. UNDERSTANDING.

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

PROHIBITION ON ASSISTANCE TO THE INTERNATIONAL CRIMINAL COURT.—The United States shall exercise its rights to limit the use of assistance that it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court unless the treaty establishing the Court has entered into force for the United States by and with the advice of the Senate in accordance with Article II, Section 2 of the United States Constitution, or unless the President has waived any applicable prohibition on provision of such assistance in accordance with applicable United States law.

SEC. 3. CONDITIONS.

The advice and consent of the Senate under section 1 is subject to the following conditions:

(1) LIMITATION ON ASSISTANCE.—Pursuant to the right of the United States under the Treaty to deny legal assistance that would prejudice the essential public policy or interests of the United States, the United States shall deny any request for such assistance if the Central Authority of the United States (as designated in Article 2(2) of the Treaty), after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior Government official of the requesting party who will have access to information to be provided as part of such assistance is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

(2) SUPREMACY OF THE CONSTITUTION.—Nothing in the Treaty requires or authorizes legislation or other action by the United States that is prohibited by the Constitution of the United States as interpreted by the United States.

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