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OCTOBER 2003

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The **NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL** is published eleven times per year by the National Association of Attorneys General, with the support of the Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, reporting recent developments in environmental enforcement. The **Journal** is funded, in part, by the Environmental Protection Agency under grant number X-825626, administered by the Office of Enforcement and Compliance Assurance. The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency nor of the National Association of Attorneys General nor does mention of trade names or commercial products constitute endorsement or recommendation for use. Unsolicited articles, inquiries on editorial content, and subscription requests should be addressed to:

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The annual subscription rate is \$195; government/nonprofit organization/academic library rate, \$95. For information on obtaining copies of other materials reported in the **Journal**, contact Sharon Lee at (202) 326-6045. For subscription and billing information, call the subscription clerk at (202) 326-6030. Articles appearing in this journal are indexed in *Environmental Periodicals Bibliography*.

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THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME: INTERNATIONAL CHALLENGES AND THE LEGAL TOOLS AVAILABLE TO ADDRESS THEM

By

Thomas G. Snow*

Introduction

Increasingly, white collar crimes targeting American victims are committed by persons located in the United States who then flee the country or hide their illicitly derived proceeds abroad,¹ or by persons located physically outside the United States who utilize the telephone, mail, Internet, and the international financial system to perpetrate their crimes and launder their profits.² Put another way, much contemporary white collar crime is also transnational crime.³ Consequently, a twenty-first century prosecutor responsible for the investigation and prosecution of such offenses must, by necessity, be a public international lawyer. He must understand and be capable of utilizing the various international legal tools available to address the challenges posed by criminals whose activities touch on more than one sovereign state.⁴ Specifically, he must know how to obtain, often in a form admissible in U.S. courts, information or evidence located outside the United States. And he must know how to secure the legal rendition of fugitives

wanted for prosecution in this country, but who carefully avoid crossing U.S. borders.

The primary international legal tools available for the rendition of international fugitives and the acquisition of overseas evidence are, respectively, extradition and mutual legal assistance treaties. Many such treaties are already in force,⁵ and the number is increasing.⁶ Although highly successful in providing U.S. prosecutors with international fugitives to prosecute⁷ and crucial extraterritorial evidence with which to convict them,⁸ such treaties are not always available. Either no treaty exists with the foreign country from which assistance is needed,⁹ or the treaty in force fails to provide for the specific assistance required.¹⁰ As a result, the contemporary white collar crime prosecutor must also be conscious of alternative, and sometimes internationally sensitive, legal means available to bring fleeing defendants into the jurisdiction of their courts or to gain access to evidence located beyond U.S. territory.¹¹

Finally, even when extradition and mutual legal assistance treaties are in force, and when their terms appear to provide for the foreign assistance needed in a particular case, their utilization can generate vexing legal, policy, and practical issues which at times frustrate, or at a minimum slow, the acquisition of the requested assistance.¹²

This article provides a brief overview of the international extradition and mutual legal assistance processes with which U.S. prosecutors,¹³ including those responsible for the investigation and prosecution of white collar crimes, must be familiar. It describes the key contents of international extradition and mutual legal assistance treaties and how those treaties are utilized in securing overseas fugitives and evidence. Next, it contains a brief section describing a few of the options open to prosecutors when such treaties are not available. These options, while sanctioned and acceptable as a matter of U.S. law, can implicate foreign sovereignty interests and thus are utilized with care. Last, the article provides a sam-

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pling of some of the challenging legal, policy, and practical issues which can arise when white collar crime prosecutors utilize extant and applicable extradition and mutual legal assistance treaties.

I. International Extradition

A. *Treaties and Their Contents*

When a U.S. prosecutor seeks the return of an international fugitive wanted for prosecution on fraud charges, for some other white collar crime such as money laundering, or for any other criminal offense, the primary legal tool for securing the rendition of such a fugitive is the international extradition treaty. Most countries, like the United States,¹⁴ cannot extradite fugitives absent such a treaty. Extradition treaties set out the crimes that are “extraditable”: those crimes for which the parties to the treaties have agreed to grant extradition.

Most older U.S. extradition treaties contain a list or schedule of extraditable offenses.¹⁵ More modern U.S. extradition treaties, including most of those negotiated in the past generation, contain a “dual criminality” provision. Instead of a list or schedule of crimes, such treaties define extraditable offenses as those which are punishable under the laws of both countries by deprivation of liberty, by some agreed upon minimum term, or by a more severe penalty.¹⁶ A few U.S. extradition treaties utilize both approaches, and contain a list of extraditable offenses combined with a dual criminality provision.¹⁷ The modern dual criminality approach is preferred not only by the United States but has also been embraced by the international community.¹⁸ This approach provides for growth and development in criminal law and obviates the need to re-negotiate an extradition treaty in order to capture new forms of criminality.¹⁹

A variety of “standard” provisions exist in modern U.S. extradition treaties. For example, in addition to defining the offenses for which extradition is available, extradition treaties set out the supporting docu-

ments which must be submitted by the “requesting state,” — the country seeking extradition. Among such documents are copies of the arrest warrant, the charging document, and information on the identity of the fugitive.²⁰ In addition to information establishing the charges for which the fugitive is being sought, extradition treaties also identify the requisite evidentiary standard the requesting state must meet.²¹

Extradition treaties contain articles which can limit the requested state’s obligation to extradite. For example, despite the strong U.S. policy interest in negotiating extradition treaties that obligate the parties to surrender their own nationals,²² some treaties make such surrender discretionary.²³ As a practical matter, many countries still do not extradite their nationals, often based upon a constitutional prohibition against doing so.²⁴

Extradition treaties often provide a basis to deny extradition when the crime is deemed a “political offense,”²⁵ the relevant statute of limitations has run,²⁶ or the person has already been prosecuted and either convicted or acquitted of the same offense for which extradition is being sought.²⁷

Extradition treaties even limit the requesting state’s actions with respect to a fugitive after his surrender. The “rule of specialty”²⁸ prohibits a country from prosecuting or punishing an extradited person for crimes other than those for which the requested state granted extradition.²⁹ However, specialty can be waived by the requested state, providing the possibility of prosecution for crimes in addition to those for which extradition was provided.³⁰ The rule of specialty in modern extradition treaties often limits the re-extradition of a person to a third state.³¹ Other exceptions exist for extradited persons who leave the requesting state and later return to it, or who remain in the requesting state after they are free to leave.³²

Finally, there are a variety of other fairly standard provisions in modern U.S. extradition treaties. They cover everything from the procedures for making ur-

gent requests for “provisional arrest,”³³ to the language of the documents submitted in support of extradition,³⁴ bases for the temporary or deferred surrender of a fugitive,³⁵ how to prioritize competing requests for extradition from several countries,³⁶ the “waiver” by a fugitive of formal extradition,³⁷ how to arrange for “transit” through the territory of one of the parties to the treaty of a person being extradited to the other treaty partner from a third state,³⁸ and how legal representation and the costs of extradition are handled.³⁹

B. The Extradition Process

Formal, fully documented requests for extradition are made through the diplomatic channel,⁴⁰ normally under cover of diplomatic note. Requests for provisional arrest made under urgent circumstances typically go through the diplomatic channel as well.⁴¹ Yet some modern extradition treaties permit provisional arrest requests to be made directly between the U.S. Justice Department and the comparable Ministry of our treaty partner. Interpol may be utilized for the transmission of such requests.⁴²

As a practical matter, a United States prosecutor who wishes to seek the extradition of an international fugitive must first contact the Justice Department’s Office of International Affairs (OIA) in Washington, D.C. Country experts in that office work with the prosecutor to obtain the information and supporting material necessary to initiate the provisional arrest and/or extradition process.⁴³ Once the requisite information and supporting materials are obtained, OIA then works directly with the U.S. State Department,⁴⁴ which in turn transmits the information to the relevant U.S. Embassy and directs the Embassy to submit the request to the government of the country in which the fugitive is located. Prior to the submission of a formal request for extradition to a foreign country, the supporting documents are translated, at the cost of the requesting prosecutor’s office, into the language of the other country.⁴⁵

What happens next depends on the other country’s substantive laws and procedural rules relating to international extradition. In many countries, as with the United States⁴⁶ both the judicial and executive branches of government have a role to play. Often, an extradition hearing in a foreign court is held to determine whether the requirements of the treaty have been complied with, and some form of judicial review of the initial finding of extraditability is provided.⁴⁷ The final decision to surrender the person found extraditable by the courts is ultimately made by a high ranking executive branch official of the foreign government.⁴⁸

Once the accused or previously convicted fugitive is ready for surrender to the United States, the United States Marshals Service normally sends escort officers to the other country to collect him. The Marshals take custody of the extraditee from foreign police officials at or near the time of departure from the airport.⁴⁹

II. Mutual Legal Assistance

A. Treaties and Their Contents

When a prosecutor in the United States needs evidence or other formal assistance from a foreign country for use in a white collar crime case,⁵⁰ or for the investigation or prosecution of any other type of criminal offense,⁵¹ the primary legal tool for obtaining such evidence is the mutual legal assistance treaty (MLAT).⁵² Such treaties provide for a wide range of evidential assistance. Consider, for example, a U.S. white collar crime prosecutor investigating a complex fraud and money laundering scheme. The prosecutor may determine that he needs the testimony of victim-witnesses in Hong Kong who are unwilling or unable to travel to the United States, copies of authenticated bank records from the Cayman Islands, the freezing of illegally derived assets secreted in Swiss banks, and the temporary transfer in custody to the United States of a cooperating defendant in Italy in order to

testify at the U.S. trial. Mutual legal assistance treaties provide for all of these forms of assistance and more.⁵³

In addition to the wide variety of assistance available to prosecutors pursuant to MLATs, there are other benefits to such treaties. For example, they create an international treaty obligation to provide the types of assistance set out in the agreement. When prosecutors seek such evidence using the traditional letters rogatory approach, the requested countries provide the assistance, if at all, simply as a matter of comity.⁵⁴ Under an MLAT, if the requested assistance is not forthcoming, the United States may cite the other country's obligation to execute the request, perhaps resulting in a more prompt response by the country to the U.S. prosecutors' request.

Many United States MLATs do not require dual criminality as a prerequisite for obtaining assistance.⁵⁵ This means that it is often not necessary that the crime being investigated or prosecuted in the United States, and for which mutual legal assistance is sought, would also be considered a criminal offense in the requested country. This differs dramatically from extradition treaties, which virtually always capture the dual criminality principle.⁵⁶ For example, the absence of a dual criminality requirement in MLATs may prove helpful to U.S. white collar crime prosecutors seeking evidence in support of their export control cases⁵⁷ even when the foreign countries from which they need evidence lack similar criminal laws restricting the export of controlled goods or technologies.

As with extradition treaties, MLATs contain provisions which limit the requested state's obligation to provide assistance. For example, many MLATs state that assistance may be denied if the request relates to a "political offense,"⁵⁸ or that assistance may be postponed if execution of the request would interfere with an ongoing criminal investigation or prosecution in the country from which assistance has been sought.⁵⁹ Although dual criminality is often not a prerequisite to the obligation to grant assistance, most MLATs per-

mit a country to refuse to execute a request if doing so would prejudice the security or similar essential interests of the requested state.⁶⁰ Many MLATs contain provisions that are somewhat analogous to the rule of specialty in extradition treaties,⁶¹ because they limit the use of the provided evidence to the particular investigation or prosecution set out in the request.⁶²

B. The Mutual Legal Assistance Process

MLAT requests are made directly between the "Central Authorities" as identified in the applicable treaty.⁶³ For the United States, the Central Authority is always the United States Attorney General or his designee. The Office of International Affairs in the Criminal Division of the U.S. Department of Justice serves as the designee of the United States Attorney General for purposes of making and receiving MLAT requests.⁶⁴ The Central Authority for the treaty partner is most often the Minister of Justice,⁶⁵ Attorney General,⁶⁶ Minister of Interior,⁶⁷ or other person responsible for international criminal assistance matters in that country, or a person designated by such an official.⁷⁰

The existence of law enforcement Central Authorities, which make and receive requests directly without the need to rely upon the slower, more cumbersome diplomatic channel, and provide for direct consultations on cases, issues, and problems,⁶⁸ constitutes one of the most important improvements of MLATs over the traditional letters rogatory process. As with extradition, when a state, local, or federal prosecutor needs overseas evidence, he first contacts one of the country experts in the Justice Department's Office of International Affairs (OIA). The OIA attorney will then work with the prosecutor throughout the process of drafting the mutual legal assistance request.⁶⁹ It is not unusual for the prosecutor and the OIA attorney to exchange several drafts by e-mail or fax before the MLAT request is put in final form. Such requests must state clearly what is being investigated in the United States, what specific assistance is needed from the other country, how that assistance relates to the

U.S. investigation or prosecution, and any procedures for obtaining or authenticating the foreign evidence that will assist in its admissibility in the United States.

Once any necessary translation of the request is obtained, OIA forwards the MLAT request directly to the other country's Central Authority. The requested country's response depends on its domestic laws and procedures for executing international requests for assistance. Many countries have detailed mutual legal assistance statutes, which set out how to execute foreign MLAT requests. Often the process is for prosecutors in the foreign countries to seek the assistance of their domestic courts to obtain the necessary subpoenas or other compulsory orders required to collect the evidence sought in the U.S. request. The United States proceeds in a similar fashion when foreign authorities make an MLAT request for evidence.⁷¹

Many relatively simple MLAT requests can be executed without further involvement by U.S. authorities including most requests for foreign business or official records. However, more complicated requests⁷² require continued involvement by the OIA attorney and the prosecutor to manage the legal and logistical issues necessary for the successful execution of the request.⁷³ Once the requested evidence is obtained by the foreign authorities, it is returned by the Central Authority of the requested country to the United States Central Authority — the Office of International Affairs. The Office of International Affairs then transmits the evidence directly to the United States prosecutor.

III. Alternatives to Formal Extradition and Mutual Legal Assistance

A. Securing the Rendition of International Fugitives

White collar crime prosecutors sometimes find themselves interested in effecting the return of an accused or convicted defendant who is outside the United States even when formal extradition is not available.

There may be no extradition treaty in force with the country of refuge, the extant treaty may not make the offense for which the defendant is wanted extraditable, or the defendant may be a citizen of the other country and that country may refuse to extradite its own nationals. In such circumstances, prosecutors sometimes explore legal alternatives to formal extradition.

Prosecutors may work with the Office of International Affairs, which in turn works with the U.S. State Department, to seek the deportation or expulsion of a fugitive from another country back to the United States. If the fugitive is a U.S. citizen, OIA relies upon the U.S. arrest warrant to have his passport cancelled.⁷⁴ At OIA's request, the State Department then sends a cable to the U.S. Embassy in the country in which the fugitive is located, explaining that the U.S. citizen is a fugitive without a valid travel document, and requests that the other country use its domestic immigration law or other available legal means to return him, perhaps in the custody of U.S. Marshals, to the United States. Whether and under what circumstances a foreign country is willing to execute such requests varies, and depends both on its domestic law, and its willingness to utilize immigration procedures to accomplish a purpose more often pursued via international extradition.⁷⁵

Sometimes white collar crime and other prosecutors will attempt to "lure" an international fugitive from a jurisdiction where his extradition cannot readily be obtained, whether directly to the United States or to a third country where extradition or deportation to the United States is possible. Lures usually involve some sort of subterfuge, trick, or other deception, often by undercover law enforcement agents or informants in communication with the fugitive, which convince the wanted person to voluntarily leave the country of refuge.⁷⁶

International fugitive lures are a legitimate, increasingly important law enforcement technique and do not violate U.S. Constitutional due process.⁷⁷ That said,

a foreign country may view any U.S. law enforcement activity necessary to effect the lure of a fugitive from its soil — even if that activity consists of nothing more than telephone calls or e-mails into the country — as an infringement upon its sovereignty unless specifically approved by that country.⁷⁸ In fact, lures can even be prohibited by foreign criminal law.⁷⁹ To ensure that broader law enforcement and other U.S. interests are fully considered prior to implementation of an international fugitive lure,⁸⁰ federal prosecutors interested in utilizing this technique must first consult with the Office of International Affairs.⁸¹

By relying upon the nationality principle, countries which refuse to extradite their own nationals⁸² usually can assert jurisdiction over crimes committed by their citizens no matter where in the world those crimes were committed.⁸³ Consequently, the U.S. white collar crime prosecutor should be aware that a country that refuses to surrender one of its nationals for prosecution in the U.S. may be willing to assert jurisdiction over that individual and prosecute him there.⁸⁴ However, this alternative may provide more of a theoretical than a practical solution depending on how much of, and in what form, the U.S. evidence of the crime must be produced in order to support such a foreign prosecution,⁸⁵ and whether the other country has the resources and political will to actually undertake such prosecutions.⁸⁶

B. Obtaining Financial Information From Abroad

Prosecutors may also resort to using unilateral legal measures to obtain extraterritorial evidence when cooperative measures such as formal MLATs or letters rogatory are not likely to secure needed bank records or other financial information from abroad.⁸⁷ For example, sometimes U.S. prosecutors need financial records from a foreign country with strict bank secrecy laws or blocking statutes.⁸⁸ If an MLAT exists with the other country, the records should be accessible. During the negotiation process, U.S. negotiators⁸⁹ routinely ensure that provisions in our MLATs obligating the parties to provide testimony,

documents, and other evidence will provide U.S. prosecutors with access to bank and other foreign business records regardless of the limiting provisions of foreign domestic law.⁹⁰ Without an MLAT or comparable executive agreement⁹¹ in force, however, no such obligation exists. A country may or may not be willing and able to provide copies of a customer's bank records sought by letters rogatory or a letter of request.⁹² Absent customer consent, a release of bank records may actually constitute a criminal violation under the law of the foreign country.⁹³ In such cases, U.S. prosecutors may consider serving a grand jury subpoena on a branch of the bank in the U.S., demanding records from the branch in the foreign bank-secrecy jurisdiction.

Such extraterritorial subpoenas⁹⁴ — often referred to as Bank of Nova Scotia subpoenas or “BNS” subpoenas after the Canadian banks involved in the seminal U.S. court cases upholding the government's authority to use them⁹⁵ — compel a foreign bank doing business in the United States to obtain records from its overseas branch or branches when needed in connection with a U.S. grand jury investigation, or the banks face contempt and fines for failure to do so. Given the conflicting U.S. and foreign legal obligations the subpoenas generate when served — for example, compliance with the U.S. grand jury subpoena may require a violation of foreign penal laws — courts have sometimes conducted a balancing test addressing several factors in order to determine whether to enforce such subpoenas. Among those factors are the “vital national interests” of the United States and the other sovereign state and the “extent and the nature of the hardship that inconsistent enforcement actions would impose upon the [bank].”⁹⁶ U.S. courts, in upholding the use of BNS subpoenas, have determined that the U.S. interest in investigating crime is greater than the foreign interest in bank secrecy and that banks must comply with the subpoenas regardless of the potential hardship they may suffer due to the conflict with foreign law.⁹⁷

However, BNS subpoenas can be viewed by foreign governments as an improper assertion of extraterritorial power by the United States which infringes upon state sovereignty, and use of the subpoenas has sometimes led to diplomatic criticism and complaints. Consequently, as with international-fugitive lures, federal prosecutors must obtain Office of International Affairs approval in Washington prior to issuing or enforcing such subpoenas.⁹⁸ As a practical matter, with the increasing number of MLATs that provide a less coercive and less controversial means to obtain foreign bank records, the need to resort to BNS subpoenas has diminished somewhat, and they are utilized less often today.⁹⁹

Prosecutors may also seek U.S. court ordered, compelled customer consent directives. Essentially, the prosecutor asks the court to order a person subject to its jurisdiction — often the target of a criminal investigation — to sign a consent directive authorizing banks to disclose records of any and all accounts over which the person has a right of withdrawal and turn those records over to the U.S. grand jury.¹⁰⁰ Presented with a signed directive demonstrating the customer's consent to the release of his account information, foreign banks will often produce records that would otherwise be protected by bank secrecy laws.¹⁰¹

Carefully worded compelled customer consent directives¹⁰² have been held not to violate the Fifth Amendment privilege against self-incrimination.¹⁰³ Specifically, while clearly compelled and potentially self-incriminating, the directives are not “testimonial” in nature.¹⁰⁴ However, their utility is only as good as a foreign country's willingness to honor them. Some foreign jurisdictions refuse to recognize such directives, viewing them as failing to represent free and voluntary consent to disclosure by the account holder.¹⁰⁵

Finally, a white collar crime or other prosecutor in the United States may rely upon the U.S. agents¹⁰⁶ with whom he is working to obtain foreign financial information or other useful evidence located abroad. In

other words, sometimes a U.S. prosecutor may forgo the use of formal MLAT or letters rogatory requests and simply rely upon U.S. law enforcement authorities, acting unilaterally or with the cooperation of foreign police authorities, to secure the extraterritorial evidence he needs.

Unilateral extraterritorial investigative action by U.S. law enforcement personnel without the knowledge, permission, or assistance of the host country's law enforcement authorities is not common. Principles of international law¹⁰⁷ and foreign law¹⁰⁸ may restrict it. In addition, as a general matter, U.S. law enforcement agencies seek to conduct investigative activities in foreign countries in a manner that will not undermine the future law enforcement cooperation of those countries.¹⁰⁹ However, it is quite common for U.S. law enforcement agencies to obtain informal, “police to police” assistance from their overseas counterparts. If evidence is obtained in such a manner, U.S. prosecutors must be cognizant of relevant Fourth Amendment jurisprudence that may affect their ability to use it.

A search and seizure of evidence abroad as part of a “joint venture” between U.S. and foreign law enforcement authorities may need to be “reasonable” under the Fourth Amendment¹¹⁰ in order to overcome an eventual motion to suppress the evidence by a U.S. citizen defendant.¹¹¹ To determine “reasonableness,” courts may look to see whether the evidence was obtained in a manner consistent with the law of the foreign country.¹¹² However, when the evidence is to be introduced in a trial in this country against a criminal defendant who is a nonresident alien without significant voluntary connection to the United States, he is not entitled to the protection of the Fourth Amendment at all.¹¹³ So long as the evidence was obtained from abroad in a manner that does not “shock the conscience” of the U.S. court,¹¹⁴ prosecutors may use it against defendants without concern over Fourth Amendment restrictions.

IV. Challenges Faced When Utilizing International Law Enforcement Treaties

A. Extradition Treaties

When an extradition treaty exists with a country through which a white collar crime fugitive is transiting or in which he has taken extended refuge, the U.S. prosecutor usually relies upon the treaty to obtain the arrest and extradition of the fugitive to the United States. Yet requests for extradition can generate a wide variety of interesting legal and political hurdles that may slow or frustrate the return of the person being sought for prosecution or punishment. While it is impossible to detail all such hurdles, a few of the more common may be usefully highlighted.

For one, even with a modern dual criminality treaty, a foreign country will only extradite if the acts leading to the crime or crimes for which the United States is seeking extradition would be deemed a criminal offense under the laws of the other country (had those acts taken place within the jurisdiction of that country).¹¹⁵ Yet acts that constitute some serious white collar crimes under U.S. law — such as export control violations¹¹⁶ — are not recognized as criminal offenses under the laws of every other country. In such circumstances, extradition may not be possible.

Alternatively, in a particular case there may exist no direct foreign counterpart to the U.S. white collar crime — computer fraud, for example¹¹⁷ — but the same acts that constitute the U.S. criminal violation would constitute some differently denominated offense under foreign law — perhaps a general fraud or obtaining property by deception statute — if committed within that country's jurisdiction. In such circumstances U.S. authorities argue¹¹⁸ that the dual criminality requirement is satisfied, and that, for purposes of extradition, it shouldn't matter whether the parties to the treaty place the crime within the same category of offenses or describe the offense by the same terminology.¹¹⁹

Similarly, sometimes the fact that the federal government enjoys only those powers that the U.S. Constitution expressly or impliedly grants to it, with the remaining powers reserved to the fifty states, can complicate the international extradition of a person wanted for prosecution on federal charges. For example, the use of mail or wire as elements of the federal mail or wire fraud statutes,¹²⁰ essential to the assertion of U.S. federal jurisdiction over fraud, have proven confusing to foreign extradition courts. Yet again, the usually prevailing U.S. position in such cases is that a purely jurisdictional element should not hinder the dual criminality analysis, and concomitantly, it should not undermine the extraditability of the offense.¹²¹

A white collar crime prosecutor seeking the extradition of a fugitive may encounter other challenges as well. For example, even when dual criminality otherwise exists, if the United States is asserting extraterritorial jurisdiction over the offense for which extradition is being sought,¹²² that alone may affect a country's ability to surrender the fugitive. In other words, if the fugitive is not only located in a foreign country, but the behavior for which he is criminally charged occurred partially or entirely outside the United States, that may make a difference as to whether his extradition can be obtained. Whether extradition can or will occur depends on the country of refuge and the language of the applicable U.S. extradition treaty. Many modern U.S. extradition treaties make clear that extradition shall be granted regardless of where the act or acts constituting the offense were committed.¹²³ Several older U.S. extradition treaties are silent on this point.¹²⁴ Others contain language indicating that extradition will be granted when the country from which extradition is requested would enjoy extraterritorial jurisdiction in similar circumstances.¹²⁵

As noted above,¹²⁶ many U.S. extradition treaties contain provisions prohibiting extradition when the person sought has been convicted or acquitted for the same offense in the country from which extradition is sought¹²⁷ or in a third country.¹²⁸ The increased in-

ternational mobility of many of today's white collar criminals, combined with the inherently transnational nature of much contemporary white collar crime, creates a growing need for the interpretation of such provisions.¹²⁹ Yet their texts do not make clear just how a foreign government or extradition court will determine whether the crime for which a person is wanted in the U.S. constitutes the "same offense" for which he has already been prosecuted in the requested state.¹³⁰ In modern extradition treaties the United States negotiators attempt to ensure that such clauses will be interpreted narrowly.¹³¹ As a practical matter, however, if there exists no clear, mutually accepted *travaux preparatoires* or negotiating history to the treaty which sheds light on this issue, the answer will likely turn upon the requested state's interpretation of the clause and its applicable domestic law.

A final example of a potential obstacle to extradition is the possible punishment that the fugitive may receive in the United States. While as a practical matter the issue does not arise in U.S. white collar crime cases,¹³² many modern extradition treaties contain separate articles dealing with capital punishment. These treaties often permit the requested state, when extradition is sought for a crime potentially punishable by death in the requesting state and not so punishable in the requested state, to demand promises or assurances from the requesting state that, if the fugitive is extradited, he will not be executed.¹³³ Absent the provision of such assurances, the requested state is under no obligation to surrender the fugitive. However, recently a very small number of countries, without a valid treaty basis for doing so,¹³⁴ have put the United States on notice that they will refuse to extradite fugitives to this country absent assurances that the extraditees will not be subjected to life imprisonment,¹³⁵ or even to an indeterminate sentence.¹³⁶ Thus, depending on the country in which the fugitive has taken refuge, it is at least possible that some of the most serious U.S. white collar crime cases could generate demands for such assurances.¹³⁷

B. Mutual Legal Assistance Treaties

While requests pursuant to mutual legal assistance treaties (MLATs) are now made regularly on behalf of white collar crime prosecutors in the United States who need evidence located abroad, and while increasingly such requests are executed fully and successfully, various hurdles can delay or frustrate acquisition of the requested assistance. Just as with international extradition cases, the hurdles which can arise in MLAT cases are too varied to always anticipate, much less identify specifically. However, a few representative examples are worth noting.

One unfortunate reality in the MLAT process is the time it takes for the execution of requests made to a foreign country: often weeks or months, and occasionally longer. While the Central Authorities named in MLATs provide for direct communication between the law enforcement authorities of the requesting and requested states,¹³⁸ once a request is made, it can still take a considerable amount of time for the foreign authorities to obtain any necessary compulsory process in the foreign court,¹³⁹ collect the requested evidence, and send it back to the United States. Of course, if the foreign resources devoted to handling incoming requests for assistance are limited or overtaxed, the execution of such requests will be further delayed.¹⁴⁰

This time delay can frustrate a U.S. prosecutor who needs to obtain and analyze the overseas evidence in order to determine which, if any, U.S. charges to bring, as well as a U.S. prosecutor who has already brought criminal charges against a defendant, but views the foreign evidence as a critical link in his chain of proof. Federal statutes exist that recognize the time-consuming nature of international evidence gathering and provide for the relaxation of traditional statutes of limitations¹⁴¹ and speedy trial rules¹⁴² in such cases. Yet white collar crime prosecutors who seek evidence located outside the United States, especially in cases

in which such evidence is located in several foreign jurisdictions, must be both careful planners and patient people.

When the requested foreign assistance includes computer related information or records, the time it takes to make and execute an MLAT request can prove even more problematic. As a commentator from the U.S. Department of Justice Criminal Division's Computer Crimes and Intellectual Property Section has put it:

One characteristic of electronic evidence is that it can be altered, transferred or destroyed almost instantaneously, and from remote locations, often with a single keystroke. These changes to evidence may result from a criminal trying to cover his tracks, or a system administrator routinely clearing old e-mails or other data from a company's servers. Whatever the case, criminal evidence can be lost — long before an international request for evidence is ever transmitted.¹⁴³

Efforts are being made to address the challenges to international mutual legal assistance posed by new technology. On a bilateral level, MLAT requests are often sent by facsimile or the Internet directly from the Office of International Affairs (the U.S. Central Authority) to the Central Authority in the requested state. In addition, many modern MLATs contain a provision indicating that while requests are to be made in writing, the Central Authority of the requested state may accept a request made otherwise — for example, by telephone — in urgent circumstances.¹⁴⁴ On the multilateral level, in recent years organizations such as the G-8, the Council of Europe, and the European Union have focused extensively on computer and high-tech crimes and have agreed upon everything from “action plans” to actual multilateral conventions designed in part to facilitate more effective international cooperation in such cases.¹⁴⁵

Today U.S. prosecutors handle cases involving not only the extradition of international white collar crime fugitives and the acquisition of overseas evidence needed to effectively prosecute them, but also cases in which they want to effect the freeze, forfeiture, and repatriation of the proceeds of crimes which have been laundered through or hidden in foreign banks. Most U.S. MLATs have articles providing for assistance in forfeiture matters.¹⁴⁶ For the most part, the wording of those articles does not obligate the requested parties to do any more than what their domestic laws permit. While the progressive domestic laws of some countries enable them in some circumstances to actually immobilize, confiscate, and even return all or a portion of the illegally derived proceeds to the United States, other countries are quite limited in what forfeiture related assistance they can provide. Thus, even with an MLAT in place containing an article on forfeiture assistance, U.S. prosecutors should be prepared for mixed results when actually seeking such assistance.¹⁴⁷

Last, while rarely utilized, most MLATs contain a provision that authorizes the requested state to deny assistance when execution would prejudice the security or similar essential interests of that state.¹⁴⁸ For example, if as part of a criminal investigation a United States MLAT request were to seek sensitive national security related information, the treaty partner could deny the request. United States treaty negotiators try to ensure that such “essential interests” provisions will be applied narrowly.¹⁴⁹ Interpreted too broadly, they could undermine the fundamental obligation to provide mutual assistance which is the cornerstone to effective MLAT practice. Yet to the extent it is the requested state's own view that controls whether a foreign request for assistance implicates such essential interests, U.S. prosecutors could face the denial of a request which would otherwise appear to fall within the proper scope of the treaty.¹⁵⁰

Conclusion

The contemporary white collar criminal routinely either ignores international borders and foreign state sovereignty or relies upon them to facilitate and hide his criminal behavior. National borders and state sovereignty continue to pose obstacles to prosecutors charged with investigating and prosecuting those same white collar criminals. Consequently, today's prosecutors must be not only criminal lawyers, but public international lawyers as well. Specifically, they must understand how to utilize extradition and mutual legal assistance treaties to effect the return of criminal defendants from foreign countries and how to investigate crimes across national boundaries. Such treaties, despite their limitations, constitute highly effective "tools of the trade" for the twenty-first century prosecutor. Yet in circumstances in which such treaties do not exist or simply will not work, U.S. prosecutors should also be cognizant of the legal alternatives to formal extradition and mutual legal assistance, and of the sensitive foreign sovereignty interests that can be implicated when relying upon such alternatives.

[Author's note: Please remember that the tools discussed in this article, namely extradition and mutual legal assistance treaties, are as available to state and local prosecutors as they are to federal prosecutors. Our more modern extradition treaties cover environmental crimes to the extent the acts leading to those crimes in the United States would constitute criminal offenses if committed within the jurisdiction of the foreign country in which the fugitive is located. Moreover, most U.S. mutual legal assistance treaties are available to assist state and local prosecutors in obtaining overseas evidence in environmental crimes cases regardless of whether the other country criminalizes the same activity. One note of caution, however; both extradition and mutual legal assistance can be time consuming and expensive processes. It may take many months or even years to extradite a fugitive and up to a year to obtain foreign bank records or other evidence. A pros-

ecutor must also be prepared to pay the cost of translation from English into the language of the applicable foreign country of those documents submitted in support of your extradition or mutual legal assistance requests. State and local prosecutors' offices must also bear the transportation costs associated with the physical return of the extradited fugitive, including the travel of the U.S. Marshals Service escorts. In many cases, these combined costs can run into the thousands of dollars.

If you are interested in learning more about international extradition and mutual assistance issues, keep your eyes open for the "Basic International Issues Course" offered periodically at the National Advocacy Center in Columbia, South Carolina. Several seats in that course are reserved for state and local prosecutors. If you need assistance in connection with an extradition or mutual legal assistance matter, call the Office of International Affairs of the U.S. Department of Justice and ask for the appropriate country expert. The number is (202) 514-0000.]

ENDNOTES

1. Most such cases are not widely publicized. Except for the victims of the fraud, those involved in the criminal justice process, and local residents if the case is covered by the regional press, few others ever become aware of the matter. The cases of Eddie Antar and Martin Frankel constitute two notable exceptions to this general rule and are offered here for demonstrative purposes.

In the 1980s, Eddie Antar and several family members built the "Crazy Eddie" discount electronics chain in the New York City area. The company was known to millions through its aggressive, multi-year advertising campaign trumpeting "in-s-a-a-ane" prices. The chain collapsed and sought Chapter 11 bankruptcy protection in 1989. Federal prosecutors then alleged that Eddie Antar had engaged in a massive fraud involving "Crazy Eddie" stock leading to losses in excess of \$74 million. Antar, after purportedly hiding millions of his illegally derived proceeds in banks in Switzerland, Liechtenstein, England, Canada, and Israel, became a fugitive from justice in 1990 and was eventually located and arrested in Tel Aviv in 1992 pursuant to a U.S. extradition request. He was surrendered to the United States from Israel later that year. After a jury trial in 1993, United States Attorney Michael Chertoff, who in 2001 became the Assistant Attorney General for the Criminal Division at the U.S. Department of Justice in Washington, D.C., obtained the conviction of Eddie Antar on charges of conspiracy to commit racketeering, 18 U.S.C. § 1962(d); making false and misleading state-

ments in filings before the Securities and Exchange Commission, 15 U.S.C. §§ 78m, 78ff(a); mail fraud, 18 U.S.C. § 1341; and securities fraud, 15 U.S.C. §§ 78j(b), 78ff(a); 17 C.F.R. § 240.10b-5. That conviction was eventually overturned on appeal based on a finding that the district court judge had made comments at the sentencing hearing creating an appearance that he was biased against Antar. *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995). However, in 1996 Antar pled guilty to a single count of racketeering conspiracy and was sentenced to eight years imprisonment and a \$250,000 fine. The "Crazy Eddie" case has received extensive national publicity. *See, e.g.*, Lisa W. Foderaro, *Call It Insane, but Crazy Eddie is Coming Back*, N.Y. TIMES, Jan 20, 1998, at B1; Bloomberg News, *Founder of Crazy Eddie Gets 8 Years in Prison and Big Fine*, N.Y. TIMES, Feb. 11, 1997, at B7; Barry Meier, *Founder of Crazy Eddie Chain Pleads Guilty in Stock Fraud*, N.Y. TIMES, May 9, 1996, at D8.

Former stock broker Martin Frankel allegedly defrauded several insurance companies of over \$200 million dollars during the 1990s and laundered some of the fraud proceeds through Swiss, offshore, and U.S. banks. Sometime in 1999, he fled the United States. He was eventually located and arrested for extradition in Hamburg, Germany, on September 4, 1999. Frankel was charged by federal indictment in Connecticut with wire fraud, money laundering, securities fraud, participation in a racketeering enterprise (RICO), and conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. §§ 1343, 1956(a)(2)(A); 15 U.S.C. § 78j(b); and 18 U.S.C. § 1962(c)-(d). *United States v. Frankel*, No. 3:99CR235 (D. Conn. filed Oct. 7, 1999); Jesse Angelo, *Fugitive Financier Hit with 36 Counts*, N.Y. POST, Oct. 8, 1999, at 4, 1999 WL 22652721. He was also charged with fraud related offenses by state authorities in Tennessee and Mississippi. *Tennessee v. Frankel*, No. I-1099-351 (Tenn. Ct. Gen. Sess. filed Sept. 10, 1999); *Mississippi v. Frankel*, No. 00-222CRH-00-232CRH (Miss. Cir. Ct. filed Apr. 10, 2000); *Tenn 'Gets Its Dibs' on Franklin Embezzling*, COM. APPEAL (Memphis, Tenn.), Sept. 16, 1999, at C2, 1999 WL 22125671; *Miss. Charges Rogue Financier*, COM. APPEAL (Memphis, Tenn.), Apr. 11, 2000, at B5, 2000 WL 18314057. Frankel was eventually extradited to the United States in March of 2001 on all except the federal money laundering charges but only after an unsuccessful attempt to escape by sawing through the bars of his German prison cell the week before he was surrendered to the United States. Tom Chill, *Fugitive Frankel Back in U.S.*, WASH. POST, Mar. 5, 2001, at A6, 2001 WL 2548714; Ellen Joan Pollack, *Financier Frankel Faces U.S. Court on Fraud Charges*, WALL ST. J., Mar. 5, 2001, at A4, 2001 WL-WSJ 2856050. In the summer of 2002, he pled guilty in the federal case in Connecticut to charges of wire fraud, securities fraud, RICO, RICO conspiracy, and a criminal forfeiture count. Getahn Ward, *Frankel Guilty in Insurance Scheme*, TENN.-NASHVILLE, May 16, 2002, at 1, 2002 WL 19905559. His sentencing has not been scheduled and will take place after the resolution of the state charges still pending against him. His case has received extensive national publicity. *See, e.g.*, ELLEN JOAN POLLACK, *THE PRETENDER: HOW MARTIN FRANKEL FOOLED THE FINANCIAL WORLD AND LED THE FEDS ON ONE OF THE MOST PUBLICIZED MANHUNTS IN HISTORY* (2002); Sandra Block, *Fugitive Goes from High Life to Prison Cell: Alleged Embezzler Frankel Jailed After Months on the Run*, USA TODAY, Sept. 7, 1999, at 3A, 1999 WL 6852729; *Ex-Financier Tried to Escape German Jail*, N.Y. TIMES, Mar. 1, 2001, at C2.

2. Among these is the now notorious "419" advance fee fraud scheme perpetuated by Nigerian Crime Enterprises (the numeri-

cal designation reflecting a provision in the Nigerian criminal code). Vast numbers of potential American victims receive unsolicited e-mails, faxes, or letters purportedly from an official or other prominent person in Nigeria. These communications seek assistance requiring minimal effort, often simply the utilization of the victim's own established bank account, for the transfer of large sums of money out of Nigeria. They cite one of a variety of legal, political, or business reasons to explain the need for the assistance of the victim and promise to pay him or her a percentage in exchange for the help. As two federal prosecutors familiar with such scams have written:

The vast majority of these letters and e-mails arriving in the United States are promptly deposited into actual or virtual wastebaskets. Hundreds more are forwarded to the United States Postal Service, the F.B.I., or the Secret Service. Sometimes, however, crooks get lucky. A victim responds with a tiny nibble and the hook is set.

Jim Buchanan & Alex J. Grant, *Investigating and Prosecuting Nigerian Fraud*, U.S. ATTYS' BULL., Nov. 2001, at 39, 40.

Eventually, those hooked are convinced to part with one or more "advance fees" to take care of some unanticipated problem described by the perpetrator of the fraud before the final large (and totally bogus) money transfer can take place. *Id.* at 40.

3. Fraud in its many manifestations (*e.g.*, telemarketing fraud, insurance fraud, pyramid scheme investment fraud, various forms of securities fraud, fraud involving on-line auctions, identity theft fraud, business opportunity fraud, credit card fraud, prime bank investment fraud, immigration document fraud), and many other forms of white collar crime (*e.g.*, intellectual property theft, computer hacking, currency counterfeiting, money laundering, the export of controlled goods and technology without a license), often involve people or interests in more than one sovereign state.

4. Among those legal tools are bilateral extradition treaties and mutual legal assistance treaties (MLATs). *See infra* notes 14-39, 50-62 and accompanying text. However, while not addressed in this article, an increasing number of multilateral law enforcement conventions contain articles designed to facilitate extradition and mutual legal assistance in cases involving the type of criminality covered by the conventions. *See, e.g.*, United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, arts. 16-18, 40 I.L.M. 335; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20., 1988, arts. 6-7, U.N. Doc. NO. E/CONF.82/15, 28 I.L.M. 493; Inter-American Convention Against Corruption, Mar. 29, 1996, arts. 13-14, 35 I.L.M. 724.

5. According to records maintained by the U.S. Justice Department's Office of International Affairs, as of July 11, 2002, there were bilateral United States extradition treaties in force with 126 foreign jurisdictions and bilateral U.S. mutual legal assistance treaties in force with forty-six foreign jurisdictions.

6. The United States Government, via the Departments of Justice and State, maintains an active program of negotiating, seeking Senate advice and consent to ratification, and bringing into force new international law enforcement treaties and agreements. On September 15, 1998, the Senate Foreign Relations Commit-

tee (SFRC) held hearings on eighteen new extradition treaties (Antigua and Barbuda, Argentina, Austria, Barbados, Cyprus, Dominica, France, Grenada, India, Luxembourg, Mexico, Poland, Spain, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Zimbabwe) and on nineteen new mutual legal assistance treaties (Antigua and Barbuda, Australia, Barbados, Brazil, Czech Republic, Dominica, Estonia, Grenada, Hong Kong, Israel, Latvia, Lithuania, Luxembourg, Poland, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Venezuela). *Extradition, Mutual Legal Assistance, and Prisoner Transfer Treaties: Hearing Before the Senate Comm. on Foreign Relations*, 105th Cong. 7–13 (1998) (statement of Mark M. Richard, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice). The full United States Senate provided advice and consent to ratification of those treaties on October 21, 1998. 144 CONG. REC. S12,972–73 (daily ed. Oct. 21, 1998). On September 12, 2000, the SFRC held hearings on four new extradition treaties (Belize, Paraguay, South Africa, Sri Lanka) and on nine new mutual legal assistance treaties (Cyprus, Egypt, France, Greece, Nigeria, Romania, Russia, South Africa, Ukraine). *Consideration of Pending Treaties: Hearing Before the Senate Comm. on Foreign Relations*, 106th Cong. 3–11 (2000) (statement of Bruce C. Swartz, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice). The full United States Senate provided advice and consent to ratification of those treaties, with the exception of the MLAT with Russia, on October 18, 2000. 146 CONG. REC. S10,662–64 (daily ed. Oct. 18, 2000). The MLAT with Russia was eventually approved on December 19, 2001. 147 CONG. REC. S13,771 (daily ed. Dec. 19, 2001).

On September 19, 2002, the SFRC held hearings on two new extradition treaties (Lithuania and Peru), on a new protocol to one extradition treaty (Canada), and on five new mutual legal assistance treaties (Belize, India, Ireland, Liechtenstein, and Sweden). *Law Enforcement Treaties: Hearing Before the Senate Comm. on Foreign Relations*, 107th Cong. 5–10 (2002) (statement of Bruce C. Swartz, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice). The full United States Senate provided advice and consent to ratification of those treaties, with the exception of the MLAT with Sweden, on November 14, 2002. 148 CONG. REC. S11,057–59 (daily ed. Nov. 14, 2002). Numerous other new extradition and mutual legal assistance treaties have since been completed and signed and are awaiting Senate action, or are in various stages of negotiation. In addition, each year representatives of the Justice and State Departments meet to set law enforcement treaty negotiation priorities for the upcoming year.

7. According to U.S. Justice Department statistics submitted to Congress, in the five year period from 1995 to 2000, over six hundred extradition requests were granted by foreign countries, and more than two hundred other requests resulted in the return of fugitives to the U.S. via deportation or expulsion. U.S. DEP’T OF STATE, REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO THE CONGRESS PURSUANT TO SECTION 211 OF THE ADMIRAL JAMES W. NANCE AND MEG DONOVAN FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 2000 AND 2001 [PUBLIC LAW 106-113], at 3 (2000) [hereinafter STATE DEP’T REPORT].

8. The U.S. Justice Department does not maintain publicly available records of the specific number of cases in which foreign evidence has actually been obtained in response to formal U.S. requests for international assistance. However, hundreds of such requests are made and executed each year.

9. While bilateral United States extradition and mutual legal assistance treaties are in force with a majority of the countries in Latin America, the Caribbean, and Europe, no such treaties yet exist with significant numbers of countries in the Middle East, Sub-Saharan Africa, and Asia.

10. For example, many modern criminal offenses are not included in older “list” extradition treaties, and thus are not extraditable, *see infra* note 15, and while many MLATs do not make dual criminality a prerequisite for obtaining evidentiary assistance, some do contain such a requirement. *See infra* note 55. Thus, depending on the crime being prosecuted or investigated by the U.S. prosecutor, there may be instances when an extradition or mutual legal assistance treaty exists with a foreign country, but in which the prosecutor may be unable to effectively utilize such treaties for securing the return of an international fugitive or obtaining overseas evidence.

11. For example, U.S. prosecutors may seek the expulsion or deportation of fugitives from foreign countries to the United States, or “lure” them from a country of refuge to the United States or to a place from which extradition or deportation to the U.S. is possible. *See infra* note 77. U.S. prosecutors may rely upon unilateral compulsory measures, such as subpoenas with extraterritorial application, compelled customer consents, or searches and seizures conducted abroad, in order to obtain foreign financial records needed for U.S. criminal investigations. *See infra* notes 87–109 and accompanying text.

12. *See infra* notes 115–50 and accompanying text.

13. As used in this article, the term “United States prosecutor” refers to federal, state, and local prosecutors. Although federal prosecutors continue to have the greatest need to obtain fugitives and evidence located outside the United States, the need for such assistance by state and local prosecutors is on the rise. Beginning in 2002, the Justice Department’s National Advocacy Center in Columbia, South Carolina, began offering a “Basic International Issues Seminar” for federal, state, and local prosecutors on extradition, mutual legal assistance, and other international criminal law issues. The course is usually offered twice a year, and is sponsored by the Office of Legal Education of the Executive Office for United States Attorneys and the National District Attorneys Association.

14. 18 U.S.C. § 3184 (2000) sets out the procedure for extradition of fugitives from the United States: “Whenever there is a treaty or convention for extradition between the United States and any foreign government . . .” *Id.*; *see also* *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) (“While a government may, if agreeable to its own constitution and laws, voluntarily exercise its power to surrender a fugitive from justice to the country from which he had fled . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.”). The few exceptions under United States law to the general rule that extraditions from the United States must take place pursuant to treaty are beyond the scope of this Article.

15. The U.S. extradition treaty with Egypt, for example, dates from the time of the Ottoman Empire and contains a short list of offenses that includes murder, rape, arson, piracy, mutiny, burglary, robbery, forgery, counterfeiting, and embezzlement. Con-

vention on Extradition, Aug. 11, 1874, U.S.-Ottoman Empire, art. 2, 19 Stat. 572.

16. Article 2(1) of the U.S. extradition treaty with India states: "An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty." Extradition Treaty, June 25, 1997, U.S.-India, art. 2(1), S. TREATY DOC. 105-30 (1997) [hereinafter Extradition Treaty with India]. The extradition treaty with India is cited several times in this article. It was chosen by the author because, in addition to his familiarity with the treaty given his position as the senior Justice Department representative on the U.S. negotiating delegation for that treaty, its provisions are similar to those found in most recently negotiated United States extradition treaties.

17. See Agreement for the Surrender of Fugitive Offenders, Dec. 20, 1996, U.S.-H.K., art. 2(1), S. TREATY DOC. 105-3 (1997).

18. See Model Treaty on Extradition, art. 2(1), G.A. Res. 116, U.N. GAOR, 45th Sess., Supp. No. 49A, at 211, U.N. Doc. A/RES/45/116 (1991), reprinted in 30 I.L.M. 1407, amended by G.A. Res. 88, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/88 (1998).

19. Thus, if only one party to such a treaty criminalizes money laundering, insider trading on the securities markets, or international parental kidnaping at the time the extradition treaty enters into force, those offenses will not be extraditable between the treaty partners. Once the other party also criminalizes such behavior those offenses will become extraditable under the terms of the existing treaty, and an obligation to surrender persons wanted for such offenses will be created.

20. See, e.g., Extradition Treaty with India, *supra* note 16, art. 9(2)-(3):

All requests for extradition shall be supported by . . . documents, statements or other types of information which describe the identity and probable location of the person sought A request for extradition of a person who is sought for prosecution shall also be supported by: (a) a copy of the warrant or order of arrest, issued by a judge or other competent authority; [and] (b) a copy of the charging document

21. The U.S. extradition treaty with India states that a request for extradition of a person who is sought for prosecution shall be supported by, among other things, "such information as would justify the committal for trial of the person if the offense had been committed in the Requested State". *Id.* art. 9(3)(c). Interestingly, because of our different standards on committal of a case for trial, as a practical matter this means that an Indian extradition request to the United States must contain information establishing only "probable cause" to believe that an extraditable offense was committed and that the fugitive committed it, while a U.S. extradition request to India must meet a higher, *prima facie* standard. See Office of Int'l Affairs, U.S. Dep't of Justice & Office of Legal Adviser, U.S. Dep't of State, *Technical Analysis of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India Signed June 25, 1997*, in S. EXEC. REP. No. 105-23, at 103, 109 (1998) [hereinafter *Technical Analysis, India*].

22. Senior U.S. Department of Justice officials routinely urge foreign officials to change the laws or policies which prevent them from extraditing their nationals. The Department of Justice position is that justice is usually best served when a case is prosecuted in the country whose citizens or interests were harmed and where the witnesses and other evidence are located. The assertion of extraterritorial jurisdiction and domestic prosecution by the country of the perpetrator's nationality, while occasionally successful as a last resort, has not been a viable, routine alternative to the extradition of nationals. See STATE DEP'T, REPORT, *supra* note 7, at 4 ("The United States makes no distinction between extraditing its own nationals and nationals of other countries. We advocate that all countries adopt the same policy.").

Most recently negotiated U.S. extradition treaties create an obligation on the parties to surrender their own nationals. See, e.g., Extradition Treaty with India, *supra* note 16, art. 3 ("Extradition shall not be refused on the ground that the person sought is a national of the Requested State").

23. See, e.g., Extradition Treaty, Apr. 23, 1996, U.S.-Fr., art. 3(1), S. TREATY DOC. No. 105-13 (1997) ("[T]here is no obligation upon the Requested State to grant the extradition of a person who is a national of the Requested State.").

24. See, e.g., CONSTITUÇÃO FEDERAL [Constitution] art. 5(LI) (Braz. 1988) ("[N]o Brazilian shall be extradited, except the naturalized ones"); GRUNDGESETZ [Constitution] art. 16(2) (F.R.G. 1949) (amended 1993, 2000) ("No German may be extradited to a foreign country.").

25. Extradition treaties do not define what constitutes a political offense. Consequently, how that term is interpreted will depend on the law of the requested state. Yet some modern U.S. extradition treaties exclude various agreed upon crimes from the definition of a political offense — such as those covered by certain multilateral conventions to which both extradition treaty partners are also parties. See, e.g., Extradition Treaty with India, *supra* note 16, art. 4:

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.
2. For the purposes of this Treaty, the following offenses shall not be considered to be political offenses:
 - (a) a murder or other willful crime against the person of a Head of State or Head of Government of one of the Contracting States, or of a member of the Head of State's or Head of Government's family;
 - (b) aircraft hijacking offenses, as described in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on December 16, 1970;
 - (c) acts of aviation sabotage, as described in the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on September 23, 1971;
 - (d) crimes against internationally protected persons, including diplomats, as described in the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, done at New York on December 14, 1973;

(e) hostage taking, as described in the International Convention against the Taking of Hostages, done at New York on December 17, 1979;

(f) offenses related to illegal drugs, as described in the Single Convention on Narcotic Drugs, 1961, done at New York on March 30, 1961, the Protocol Amending the Single Convention on Narcotic Drugs, 1961, done at Geneva on March 25, 1972, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on December 20, 1988;

(g) any other offense for which both Contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; and

(h) a conspiracy or attempt to commit any of the foregoing offenses, or aiding and abetting a person who commits or attempts to commit such offenses.

Other modern U.S. extradition treaties go even further in limiting the scope of the political offense exception to extradition, excluding virtually every crime of violence. *See, e.g.*, Supplementary Extradition Treaty, Oct. 21, 1986, U.S.-F.R.G., art. 2, S. TREATY DOC. NO. 100-6 (1987) (amending Extradition Treaty, June 20, 1978, U.S.-F.R.G., art. 4(3), 32 U.S.T. 1485):

For the purpose of this Treaty the following offenses shall not be deemed to be [political] offenses . . . :

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, manslaughter, maliciously wounding, or inflicting grievous bodily harm;

(c) kidnapping, abduction, or any form of unlawful detention, including taking a hostage;

(d) placing or using an explosive, incendiary or destructive device capable of endangering life, or of causing grievous bodily harm, or causing substantial property damage;

(e) an attempt or conspiracy to commit, or participation in, any of the foregoing offenses.

Recent multilateral conventions in the terrorism area go further yet. For example, the International Convention for the Suppression of Terrorist Bombings, Jan. 10, 2000, S. TREATY DOC. 106-49 (2000), 39 I.L.M. 270 (entered into force Apr. 10, 2002), actually eliminates the political offense defense for crimes covered by the convention. Article 11 of that convention reads:

None of the offences set forth in article 2 shall be regarded, for purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Id. art. 11.

26. *See, e.g.*, Extradition Treaty with India, *supra* note 16, art. 7 (“Extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws of the Requesting State.”). Some modern extradition treaties contain no “lapse of time” provision at all. Some older extradition treaties make the lapse of time provisions in both the requesting and the requested states relevant to the extradition determination.

27. For an example of a “prior prosecution,” or *non bis in idem* provision, *see id.* art. 6(1) (“Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.”) Of course, if personal jurisdiction can be obtained over a fugitive previously prosecuted in a foreign country (a separate sovereign) without relying upon extradition, his subsequent prosecution and punishment in the United States would not be prohibited by the Fifth Amendment prohibition against double jeopardy. *See United States v. Rashed*, 234 F.3d 1280 (D.C. Cir. 2000); *Chan Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984); *United States v. McRary*, 616 F.2d 181 (5th Cir. 1980).

28. Also referred to as the “rule of speciality.”

29. *See, e.g.*, Extradition Treaty with India, *supra* note 16, art. 17(1):

A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for:

(a) the offense for which extradition has been granted or a differently denominated offense based on the same facts on which extradition was granted, provided such offense is extraditable or is a lesser included offense;

(b) an offense committed after the extradition of the person; or

(c) an offense for which the executive authority of the Requested State consents to the person’s detention, trial, or punishment

The rule of speciality provides the requested state with confidence that the person it surrenders will not be subjected to prosecution and punishment for (already committed) crimes on which it would not have granted extradition — crimes not extraditable under the terms of the treaty.

30. *See, e.g., id.* art. 17(1)(c); *see also United States v. Tse*, 135 F.3d 200 (1st Cir. 1998), *United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991).

31. *See, e.g.*, Extradition Treaty with India, *supra* note 16, art. 17(2) (“A person extradited under this Treaty may not be extradited to a third State for an offense committed prior to his surrender unless the surrendering State consents.”).

32. *See, e.g., id.* art. 17(3):

Paragraphs 1 and 2 of this Article shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of that person to a third state, if:

(a) that person leaves the territory of the Requesting State after extradition and voluntarily returns to it; or

(b) that person does not leave the territory of the Requesting State within 15 days of the day on which that person is free to leave.

33. *See, e.g., id.* art. 12(1) (“In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition.”). A request for provisional arrest contains streamlined information about the identity and location of the fugitive, and the crime or crimes for which he is wanted. The “urgent” circumstances referred to under such treaty provisions include situations in which a fugitive is “on the run,” and may move to another country or drop out of sight altogether by the time a fully documented request for extradition can be prepared, translated, and submitted.

34. Extradition requests made to the United States usually require English, and likewise, extradition requests made to a treaty partner likely require use of the partner’s language. Despite its twenty-four languages spoken by a million or more people, with Hindi being the most widely used, English remains India’s most important language for national, political, and commercial communication. CENT. INTELLIGENCE AGENCY, WORLD FACT BOOK 2002, at <http://www.cia.gov/cia/publications/factbook/geos/in.html> (last updated Dec. 9, 2002). Thus, the U.S. extradition treaty with India requires that “[a]ll documents submitted by the Requesting State shall be in English.” Extradition Treaty with India, *supra* note 16, art. 11.

35. *See, e.g.,* Extradition Treaty with India, *supra* note 16, art. 14:

1. If the extradition request is granted in the case of a person being prosecuted or is serving a sentence in the Requested State, the Requested State, subject to its laws, may temporarily surrender the person sought to the Requesting State for the purpose of prosecution. The person so surrendered shall be kept in custody in the Requesting State and shall be returned to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by agreement of the Contracting States.
2. The Requested State may postpone the extradition proceedings against a person who is being prosecuted or who is serving a sentence in that State. The postponement may continue until the prosecution of the person sought has been concluded or until such person has served any sentence imposed.

36. *See, e.g., id.* art. 15:

If the Requested State receives requests from the other Contracting State and from any other State or States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State it will surrender the person. In making its decision, the Requested State shall consider all relevant factors, including but not limited to:

- (a) whether the requests were made pursuant to treaty;
- (b) the place where each offense was committed;

(c) the respective interests of the Requesting States;

(d) the gravity of the offenses;

(e) the nationality of the victim;

(f) the possibility of further extradition between the Requesting States; and

(g) the chronological order in which the requests were received from the Requesting States.

37. *See, e.g., id.* art. 18 (“If the person sought consents to surrender to the Requesting State, the Requested State may, subject to its laws, surrender the person as expeditiously as possible without further proceedings.”).

38. *See, e.g., id.* art. 19:

1. Either Contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State. A request for transit shall be made through the diplomatic channel. The facilities of Interpol may be used to transmit such a request. It shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit may be detained in custody during the period of transit.

2. No authorization is required where air transportation is used and no landing is scheduled on the territory of the Contracting State. If an unscheduled landing occurs on the territory of the other Contracting State, the other Contracting State may require the request for transit as provided in paragraph 1. That Contracting State shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

39. *See, e.g., id.* art. 20:

1. The Requested State shall advise, assist, appear in court on behalf of the Requesting State, and represent the interests of the Requesting State, in any proceeding arising out of a request for extradition.

2. The Requesting State shall bear the expenses related to the translation of documents and the transportation of the person surrendered. The Requested State shall pay all other expenses incurred in that State by reason of the extradition proceedings.

3. Neither State shall make any pecuniary claim against the other State arising out of the arrest, detention, examination, or surrender of persons sought under this Treaty.

40. *See, e.g., id.* art. 9(1) (“All requests for extradition shall be submitted through the diplomatic channel.”).

41. *See, e.g., id.* art. 12. As indicated, an immediate provisional arrest can be helpful when a fugitive will be in a foreign country for only a few hours or a few days and there is insufficient time to prepare the full set of extradition documents. It may also be considered when concern over public safety exists. Once a fugitive is provisionally arrested, the applicable treaty sets out a

period of time, often forty-five or sixty days, by which a fully documented request for extradition must be submitted. *See, e.g., id.* art. 12(4):

A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required by Article 9.

42. *See, e.g., id.* art. 12(1):

In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organization (Interpol) may be used to transmit such a request.

43. The form and content of what is required to support a request for provisional arrest and/or extradition varies significantly from country to country. OIA country experts are knowledgeable in what is required under the treaties and foreign domestic laws of the countries for which they are responsible.

44. The Law Enforcement and Intelligence Section (L/LEI), Office of the Legal Adviser, United States Department of State.

45. *See supra* note 34. In the United States, the cost of translation is borne by the requesting prosecutor's office. Currently, federal funds are not available to pay for or reimburse state or local prosecutors' offices for such costs. Unfortunately, this expense can sometimes deter small, low-budget state and local prosecutors' offices from seeking the international extradition of fugitives from their jurisdictions.

46. *See* 18 U.S.C. §§ 3181–3190 (2002).

47. This is usually accomplished by direct appeal to a superior court or by petition for writ of habeas corpus, depending the foreign country's law.

48. For example, in the United Kingdom the decision to surrender the person found extraditable is made by the Secretary of State. U.K. HOME OFFICE, EXTRADITION PROCEDURES IN THE UNITED KINGDOM (2002), at <http://www.homeoffice.gov.uk/oicd/jcu/extranote.htm>.

49. *See* Act of Aug. 2, 1977, Pub. L. No. 95-86, 91 Stat. 419, 425; *see also* 18 U.S.C. §§ 3192, 3193 (2000); Exec. Order No. 11,517, 35 Fed. Reg. 4937 (Mar. 19, 1970). At times, the U.S. Marshals agree to be accompanied by a representative from another federal law enforcement agency, or from a state or local police department. On occasion, when it is imperative that a fugitive be returned to the United States before U.S. Marshals have time to travel to the foreign country, and when there are already U.S. law enforcement agents in the foreign country (such as FBI, DEA or Diplomatic Security Agents resident at the U.S. Embassy), the Marshals agree to have those agents serve as escort agents for the return of the fugitive.

While the return of a fugitive to the United States is usually uneventful, such is not always the case. In 1986, Alex W. Herbage was extradited from the United Kingdom. Mr. Herbage was charged in the Middle District of Florida in connection with an investment fraud scheme. At the conclusion of the extradition proceedings in the U.K., the U.S. Marshals flew over to collect Mr. Herbage and return to Florida. Initially, the commercial airline prohibited them from boarding the plane. During his months in prison fighting extradition, Mr. Herbage's weight had escalated in excess of several hundred pounds. Airline officials were concerned that he would not have access to the lavatory, a real problem given the length of the transatlantic flight. Special arrangements were made, including the use of a portable lavatory and a privacy drape. Mr. Herbage ultimately returned to the U.S. without incident, and later pled guilty to three counts of mail fraud. *United States v. Herbage*, 850 F.2d 1463 (11th Cir. 1988).

50. Usually, the United States must make formal requests when (1) the information, evidence, or other required assistance can only be obtained via compulsory process in the other country, such as a foreign search warrant or subpoena; (2) the foreign country, based upon its domestic laws or principles of sovereignty, demands a formal request before it will provide the information, evidence, or assistance; or (3) the foreign evidence must be obtained in a particular form or following a particular procedure in order to better ensure its admissibility in U.S. courts. As a practical matter, much evidence, information, and criminal intelligence can and should be obtained without the need for formal requests, without relying upon MLATs, letters of request, or letters rogatory. Rather, what is desired from a foreign country may be more quickly and efficiently obtained through police or regulatory channels — for example, through the International Criminal Police Organization (Interpol); through law enforcement liaison agents stationed at U.S. Embassies abroad; through Financial Intelligence Units (FIUs) such as the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN); or through Memoranda of Understanding (MOUs) such as those utilized by the U.S. Securities and Exchange Commission and the U.S. Customs Service with their overseas counterparts.

51. *See, e.g.,* Treaty on Mutual Legal Assistance in Criminal Matters, June 13, 1997, U.S.-Lat., art. 1(1), S. TREATY DOC. NO. 105-34 (1998) [hereinafter MLAT with Latvia] (“The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters.”) The U.S. negotiators of this and all MLATs ensure there exists a meeting of the minds between treaty partners that the term “investigations” includes all stages of a criminal investigation, including U.S. grand jury proceedings. The MLAT with Latvia is cited several times in this article. It was chosen by the author because, in addition to his familiarity with the treaty given his position as the senior Justice Department representative on the U.S. negotiating delegation for that treaty, its provisions are similar to those found in most recently negotiated United States mutual legal assistance treaties.

52. In the absence of a bilateral MLAT or an applicable multilateral convention with a mutual legal assistance article, prosecutors utilize letters of request or letters rogatory when seeking formal international assistance. *See* 18 U.S.C. § 1781 (2000); FED. R. CIV. P. 28(b); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 474 cmt. h (1987).

53. *See, e.g.*, MLAT with Latvia, *supra* note 51, art. 1(2):

Assistance shall include:

- (a) taking the testimony of statements of persons;
- (b) providing documents, records, and other items;
- (c) locating or identifying persons or items;
- (d) serving documents;
- (e) transferring persons in custody for testimony or other purposes;
- (f) executing searches and seizures;
- (g) assisting in proceedings related to immobilization and forfeiture of assets; restitution; collection of fines; and
- (h) any other form of assistance not prohibited by the laws of the Requested State.

54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 cmt. e.

55. *See, e.g.*, MLAT with Latvia, *supra* note 51, art. 1(3) (“Assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offense under the laws of the Requested State.”). In the absence of dual criminality, not every U.S. MLAT makes assistance mandatory. *See, e.g.*, Treaty on Mutual Legal Assistance in Criminal Matters, June 17, 1999, U.S.-Rus., art. 1(3), S. TREATY DOC. NO. 106-22 (2000) (making the provision of assistance discretionary in the absence of dual criminality); *see also* Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 23, 1993, U.S.-S. Korea, art. 3(2) & annex, S. TREATY DOC. NO. 104-1 (1995) (establishing an obligation to provide assistance in the absence of dual criminality if the requested assistance relates to a crime falling within certain agreed-upon categories of offenses set out in the treaty annex).

56. Older “list” treaties usually delineate extraditable offenses as only those acts deemed criminal by both contracting states at the time the treaties were negotiated. More modern “dual criminality” treaties define extraditable offenses as those acts deemed criminal by both contracting states, and punishable in both states by an agreed upon minimum penalty. *See supra* notes 15–19 and accompanying text.

57. *E.g.*, Arms Export Control Act, 22 U.S.C. § 2778 (2000); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (1994); Export Administration Act, 50 app. U.S.C. §§ 2401–2420 (1994).

58. *See* MLAT with Latvia, *supra* note 51, art. 3(1)(b) (“The Central Authority of the Requested State may deny assistance if . . . the request relates to a political offense . . .”).

59. *See, e.g., id.* art. 5(4):

If the Central Authority of the Requested State determines that execution of a request would interfere with an ongoing criminal investigation, prosecution, or proceeding in that State, it may postpone execution, or make execution subject to conditions determined to be necessary after consultation with the Central Authority of the Requesting State. If the Requesting State accepts the assis-

tance subject to the conditions, it shall comply with the conditions.

60. *See, e.g., id.* art. 3(1)(c) (“The Central Authority of the Requested State may deny assistance if . . . the execution of the request would prejudice the security or similar essential interests of the Requested State . . .”).

61. *See supra* notes 28–32 and accompanying text.

62. Some MLATs only create limitations on use when specifically imposed by the requested state. *See, e.g.*, MLAT with Latvia, *supra* note 51, art. 7:

1. The Central Authority of the Requested State may require that the Requesting State not use any evidence or information obtained under this Treaty in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested State. In such situations, the Requesting State shall comply with the requirement.
2. The Central Authority of the Requested State may request that evidence or information furnished under this Treaty be kept confidential or be used only subject to terms and conditions that it may specify. If the Requesting State accepts the evidence or information subject to such conditions, the Requesting State shall use its best efforts to comply with the conditions.
3. Nothing in this Article shall preclude the use or disclosure of evidence or information to the extent that there is an obligation to do so under the Constitution of the Requesting State in a criminal prosecution. The Requesting State shall notify the Requested State in advance of any such proposed use or disclosure.

Other MLATs have provisions that automatically restrict further use of requested evidence absent the consent of the requested state. *See, e.g.*, Treaty on Mutual Legal Assistance in Criminal Matters, Jan. 6, 1994, U.S.-U.K., art. 7(2), S. TREATY DOC. NO. 104-2 (1995) (“The Requesting Party shall not use or disclose any information or evidence obtained under this Treaty for any purposes other than for the proceedings stated in the request without the prior consent of the Requested Party.”).

63. *See, e.g.*, MLAT with Latvia, *supra* note 51, art. 2:

1. Each Party shall have a Central Authority to make and receive requests pursuant to this Treaty.
2. For the United State of America, the Central Authority shall be the Attorney General or a person designated by the Attorney General. For Latvia, the Central Authority shall be the Prosecutor General or a person designated by the Prosecutor General.
3. The Central Authorities shall communicate directly with one another for the purposes of this Treaty.

64. 28 C.F.R. § 0.64-1 (2001) (delegating the Attorney General’s authority to the Assistant Attorney General for the Criminal Division). The Assistant Attorney General for the Criminal

Division has in turn delegated this authority to the Deputy Assistant Attorney's General and the Director of the Office of International Affairs. Directive No. 81, 45 Fed. Reg. 79,758 (Dep't Justice Dec. 2, 1980) (as corrected at 48 Fed. Reg. 54,595 (Dep't Justice Dec. 6, 1983)). That delegation was subsequently extended to the Deputy Directors of the Office of International Affairs. Directive No. 81A, 59 Fed. Reg. 42,160 (Dep't Justice Aug. 17, 1994).

65. *See, e.g.*, Treaty on Mutual Assistance in Criminal Matters, Feb. 23, 1995, U.S.-Aus., art. 2(1), S. TREATY DOC. NO. 104-21 (1995) ("For the Republic of Austria the Central Authority shall be the Federal Minister of Justice or such persons as the Federal Minister of Justice designates.").

66. *See, e.g.*, Treaty on Mutual Legal Assistance in Criminal Matters, June 12–Aug. 18, 1987, U.S.-Bah., art. 4(3), S. TREATY DOC. NO. 100-17 (1988) ("For the Bahamas, the Central Authority shall be the Attorney General or person designated by him.").

67. *See, e.g.*, Treaty on Mutual Assistance in Criminal Matters, Mar. 19, 1986, U.S.-Thail., art. 3(3), S. TREATY DOC. NO. 100-18 (1988) ("For the Kingdom of Thailand, the Central Authority shall be the Minister of Interior or a person designated by him.").

68. *See, e.g.*, MLAT with Latvia, *supra* note 51, art. 19 ("The Central Authorities shall consult, at times mutually agreed to by them, to promote the most effective use of this Treaty. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Treaty."). In fact, OIA attorneys schedule annual or biannual consultations with the foreign Central Authorities of many MLAT partners in order to discuss pending cases, issues, and problems.

69. This is true whether the request will be made pursuant to an extant MLAT, or via letters rogatory or a letter of request. However, the focus of this article is on MLATs and the process for seeking and obtaining assistance through that mechanism.

70. *See, e.g.*, MLAT with Latvia, *supra* note 51, art. 4(2)–(3):

2. The request shall include the following:

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

(b) a description of the nature and subject matter of the investigation, prosecution, or proceeding, including a statement of the factual basis and applicable provisions of law for each offense;

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

(d) a statement of the purpose for which the evidence, information, or other assistance is sought.

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

(g) a description of any particular procedure to be followed in executing the request

71. 28 U.S.C. § 1782 (2000).

72. For example, a FED. R. CRIM. P. 15 deposition in the foreign country at which the U.S. desires the presence of the defendant and full direct and cross examination by the prosecutor and de-

fense counsel. Such depositions are sometimes used in a criminal case to obtain the testimony of a witness unable or unwilling to travel to the United States.

73. *See, e.g.*, United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (demonstrating the complexities of a Rule 15 deposition); *see also* Michael J. Burke, Note, *United States v. Salim: A Harbinger for Federal Prosecutions Using Depositions Taken Abroad*, 39 CATH. U. L. REV. 895 (1990) (discussing *Salim*'s effect on MLAT requests).

74. 22 C.F.R. §§ 51.70–72 (2002).

75. *See, e.g.*, United States v. Usama Bin Laden, 156 F. Supp. 2d 359 (S.D.N.Y. 2001) (discussing a South African Supreme Court decision that analyzed the distinction between extradition and deportation, and found that the delivery of Khalfan Mohamed to U.S. authorities for his alleged role in the 1998 U.S. Embassy bombings in Africa constituted a deportation in violation of South African immigration law).

76. For example, a prosecutor might try to lure a fugitive out of safety to collect a prize, attend a social event, or further a criminal act. Lures are often conducted by law enforcement agents located in the United States via telephone or e-mail contacts with criminal subjects abroad. For example, in 2000, unknown persons believed to be in Kazakhstan were attempting to extort Michael Bloomberg, founder and owner of Bloomberg L.P. The subjects demanded via the Internet that Bloomberg pay them money in exchange for information on how they had managed to infiltrate Bloomberg L.P.'s computer system. FBI undercover agents, with the assistance of Mr. Bloomberg, engaged in e-mail communications with the subjects while they were in Kazakhstan — an area where extradition was not possible — and convinced them to travel to London for a meeting. On August 10, 2000, they were identified as the authors of the communications to Bloomberg and arrested for extradition to the U.S. by the London Metropolitan Police and New Scotland Yard. Nick Fielding, *Hackers Caught in Bloomberg e-Sting*, SUNDAY TIMES (London), Aug. 20, 2000, at 10.

77. United States v. Wilson, 732 F.2d 404, 410–11 (5th Cir. 1984) (relying in part on the *Ker-Frisbie* doctrine); *see also* Frisbie v. Collins, 342 U.S. 519, 522 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

78. *See, e.g.*, SCHWEIZERISCHES STRAFGESETZBUCH, CODE PÉNAL SUISSE, CODICE PENALE SVIZZERO [StGB, Cp, Cp] [SWISS PENAL CODE] art. 271(1) (Switz.) (translation):

Whoever, on behalf of a foreign State, without authorization, undertakes to conduct on Swiss territory acts which relate to the public powers, who-soever proceeds to conduct such acts for a foreign party or another foreign organization, who-soever encourages such acts, will be punished by imprisonment and, in serious cases, by reclusion.

79. *See, e.g., id.* art. 271(2) ("Who-soever, using violence, *ruse* or threat, *lures* a person abroad in order to deliver him to an authority, a party or another organization abroad, or to put his life or physical integrity in danger, will be punished by reclusion.") (emphasis added).

80. For example, a lure operation, although perfectly legal as a matter of U.S. law, may not be advisable if the country from which the fugitive is lured will object and take measures seriously adverse to other important U.S. law enforcement or foreign policy interests with that country.

81. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-15.630 (1997) [hereinafter U.S. ATTORNEYS' MANUAL].

82. See *supra* notes 23–24 and accompanying text.

83. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987).

84. See United Nations Convention Against Transnational Organized Crime, *supra* note 4, art. 16(10):

A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution

85. For example, Mexico can usually rely exclusively on documentary information and evidence to prosecute an offense committed by one of its nationals while in the United States. France and Israel, on the other hand, require U.S. witnesses to travel to those countries and testify at the criminal trials of Israeli and French nationals who have been charged with committing crimes in the United States.

86. See *supra* notes 23–24 and accompanying text.

87. For example, with countries with which the U.S. does not have an MLAT or in which a foreign letters rogatory request will not pierce domestic bank secrecy laws.

88. See ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 356–75 (1993); see also Thomas G. Snow, *Competing National and Ethical Interests in the Fight Against Transnational Crime: A U.S. Practitioner's Perspective*, in CRIME AND LAW ENFORCEMENT IN THE GLOBAL VILLAGE 173, 173–74 (William F. McDonald ed., 1997).

89. Extradition and mutual legal assistance treaties are negotiated for the United States by attorneys from the Justice Department's Office of International Affairs (OIA) and the State Department's Office of the Legal Adviser.

90. James P. Springer, *Obtaining Foreign Evidence and Other Types of Assistance for Criminal Tax Cases*, U.S. ATT'YS BULL., July 2001, at 43, 45 (2001) (“MLATs are designed to override local laws in the requested states pertaining to bank secrecy . . .”).

91. For example, mutual legal assistance in criminal matters between the United States and the People's Republic of China and between the United States and Taiwan is conducted pursuant to executive agreement rather than treaty. Agreement on Mutual Legal Assistance in Criminal Matters, June 19, 2000,

U.S.-P.R.C., STATE DEP'T DOC. No. 01-44 (2001); Agreement on Mutual Legal Assistance in Criminal Matters, Mar. 26, 2002, Am. Inst. in Taiwan-Taipei Econ. & Cultural Representative Office in the U.S., available at <http://law.moj.gov.tw>; see also *Taiwan, U.S. Sign Joint Crime-Busting Accord*, AGENCE FR.-PRESSE, Mar. 28, 2002, 2002 WL 2372688.

92. Unlike MLATs, these mechanisms are based upon comity and do not obligate the requested state to provide the requested assistance. See text accompanying *supra* note 54.

93. See, e.g., StGB, Cp, Cp art. 273 (Switz.) (providing criminal penalties for disclosure of confidential business information to foreigners); Federal Law on Banks and Savings Banks (Switz. 1934) (providing criminal penalties for disclosure of confidential financial information).

94. Such subpoenas are “extraterritorial” in the sense that, while served on a bank with a domestic U.S. presence, they seek records located outside the United States.

95. *In re Grand Jury Proceedings Bank of Nova Scotia (Bank of Nova Scotia II)*, 740 F.2d 817 (11th Cir. 1984); *In re Grand Jury Proceedings (Bank of Nova Scotia I)*, 691 F.2d 1384 (11th Cir. 1982).

96. RESTATEMENT (SECOND) ON FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965), quoted in *Bank of Nova Scotia II*, 740 F.2d at 827, *Bank of Nova Scotia I*, 691 F.2d at 1389 n.7; see also RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES §442 (1987).

97. See *Bank of Nova Scotia II*, 740 F.2d at 825–29; *Bank of Nova Scotia I*, 691 F.2d at 1389–91. But see *In re Sealed Case*, 825 F.2d 494, 498–99 (D.C. Cir. 1987) (overturning trial court's civil contempt order against non-compliant bank where disclosure of subpoenaed information would clearly violate foreign law).

98. U.S. ATTORNEYS' MANUAL, *supra* note 81, § 9-13.525; U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 279(B) (1997).

99. However, if important evidence can not be obtained through more cooperative means, unilateral measures will still be considered, and in some cases authorized. In addition to the established “BNS subpoena” mechanism, Congress recently passed a new statute permitting U.S. prosecutors to seek foreign bank records. Section 319(b) of the USA PATRIOT Act permits subpoenas to be issued to foreign banks that maintain correspondent accounts in the United States. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 319(b), 115 Stat. 272, 311 (codified at 31 U.S.C. § 5318(k) (Supp. 2002)). It is anticipated that federal prosecutors' ability to utilize this statute will be governed by the same or similar U.S. ATTORNEYS' MANUAL rules that govern the issuance and enforcement of BNS Subpoenas.

100. Such consent directives are often referred to as “Ghidoni waivers,” after the seminal case in which a consent directive was unsuccessfully challenged on Fifth Amendment grounds. *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984).

101. See Springer, *supra* note 90, at 50 (“Prosecutors have enjoyed widespread success in using *compelled* disclosure directives to obtain financial records from most countries”) (citing *Tournier v. Nat’l Provincial & Union Bank*, 1 K.B. 461 (Eng. C.A. 1924)).
102. For example, the consent directive should not identify or acknowledge the existence of any specific accounts.
103. *Doe v. United States*, 487 U.S. 201 (1988).
104. *Id.* at 206–14.
105. See Springer, *supra* note 90, at 50 (“A court of the Cayman Islands, a dependency of the United Kingdom, has held that such directives do not constitute voluntary and freely given consent for disclosure as required under the secrecy laws of that jurisdiction.”) (citing *In re ABC Ltd.*, [1984] C.I.L.R. 130, 134–35 (Cayman Is. Grand Ct. 1984)).
106. For example, in a federal white collar crime investigation, a prosecutor may work with agents from a variety of agencies, including the Federal Bureau of Investigation, the U.S. Customs Service, the U.S. Secret Service, the Postal Inspectors Office, the Drug Enforcement Administration, or one of the several Inspector Generals’ Offices.
107. RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987) (“A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”).
108. See *supra* note 78.
109. This is *not* to say U.S. law enforcement authorities *never* find it necessary to conduct unilateral investigative activity on foreign soil.
110. *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968). Absent sufficient U.S. involvement in the extraterritorial search and seizure, the Fourth Amendment does not apply to foreign officials and evidence obtained in violation of that amendment by such officials, pursuant to the “silver platter” doctrine. *United States v. Marzano*, 537 F.2d 257, 281 (7th Cir. 1976) (citing *Lustig v. United States*, 338 U.S. 74 (1949); *Gambino v. United States*, 275 U.S. 310 (1927); *Byars v. United States*, 273 U.S. 28 (1927)).
111. *United States v. Barona*, 56 F.3d 1087, 1091–93 (9th Cir. 1995).
112. *Id.* at 1094.
113. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
114. *Barona*, 56 F.3d at 1091 (quoting *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978)).
115. See *supra* note 16 and accompanying text. An analysis of whether this fundamental principle of extradition law should be abolished and whether countries should agree to surrender persons wanted for criminal offenses in the requesting state even when the underlying acts or omissions would not violate the criminal law of the requested state is beyond the scope of this paper.
116. See *supra* note 57.
117. 18 U.S.C. § 1030 (Supp. 2002).
118. Usually successfully. See, e.g., *Levy v. Attorney General*, [1987] H.K.L.R. 777 (C.A.) (upholding extradition to the U.S. from Hong Kong on Continuing Criminal Enterprise (CCE) charges despite the lack of an equivalent offense under Hong Kong law).
119. See *id.* In fact, we address this point directly in the texts of our most modern extradition treaties. See, e.g., Extradition Treaty with India, *supra* note 16, art 2(3)(a) (“For the purposes of this Article, an offense shall be an extraditable offense . . . whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology . . .”).
120. 18 U.S.C. §§ 1341, 1343 (Supp. 2002).
121. See, e.g., Extradition Treaty with India, *supra* note 16, art. 2(3)(b):
- For the Purposes of this Article, an offense shall be an extraditable offense . . . whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court . . .
122. See, e.g., 18 U.S.C. § 470 (Supp. 2002) (criminalizing acts of counterfeiting which take place outside of the United States).
123. Extradition Treaty with India, *supra* note 16, art. 2(4) (“Extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed.”).
124. See, e.g., Agreement on Extradition: Continued Application of the U.S.-U.K. Treaty of 1931, May 14–Aug. 19, 1965, U.S.-Kenya, 16 U.S.T. 1866; Extradition Treaty, Dec. 22, 1931, U.S.-U.K., T.S. No. 849; see also *id.* art. 16 (extending application of the treaty to the Kenyan Protectorate).
125. See, e.g., Extradition Treaty, Nov. 13, 1994, U.S.-Phil., art. 2(4), S. TREATY DOC. NO. 104-16 (1995):
- If the offense was committed outside of the territory of the Requesting State, extradition shall be granted in accordance with the provisions of this Treaty: (a) if the laws in the Requested State provide for punishment of an offense committed outside of its territory in similar circumstances; or (b) if the executive authority of the Requested State, in its discretion, decides to submit the case to its courts for the purpose of extradition.
126. See *supra* note 27 and accompanying text.

127. Extradition Treaty with India, *supra* note 16, art. 6(1) (“Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested.”).

128. Extradition Treaty, June 8, 1972, U.S.-U.K., art. 5(1)(a), 28 U.S.T. 227:

Extradition shall not be granted if . . . the person sought would, if proceeded against in the territory of the requested Party for the offense for which his extradition is requested, be entitled to be discharged on the grounds of a previous acquittal or conviction in the territory of the requesting or requested Party or of a third State

129. These are often referred to by practitioners as prior prosecution, double jeopardy, or *non bis in idem* provisions.

130. As indicated above, U.S. constitutional double jeopardy principles do not prohibit the United States from prosecuting a person for the same offense for which he has been tried, convicted, and even punished in a foreign country, assuming personal jurisdiction can be obtained, through extradition or some alternative means. *See supra* note 27.

131. *See, e.g., Technical Analysis, India, supra* note 21, at 108 (footnote omitted):

[Article 6(1)], which prohibits extradition if the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested, is similar to the language present in many U.S. extradition treaties. This provision applies only when the person sought has been convicted or acquitted in the Requested State of exactly the same crime that is charged in the Requesting State. It is not enough that the same facts were involved. This article will not preclude extradition in situations in which the fugitive is charged with different offenses in both countries arising out of the same basic transaction. Thus, if the person sought is accused by one Contracting State of illegally smuggling narcotics into that country, and is charged by the other Contracting State with conspiring to illegally export the same shipment of drugs, an acquittal or conviction in one Contracting State does not insulate that person from extradition because different crimes are involved.

132. Although white collar crimes are not punishable by death in the United States, such is not the case in every country in the world. Thus, while U.S. white collar crime prosecutors may never need to decide whether to forgo capital punishment in order to secure the return of an international fugitive, it is possible the United States Government could find itself in a position where it must decide whether to demand “death penalty assurances” from a requesting extradition treaty partner in a white collar crime case. For example, if the United States ever enters into an extradition treaty with the People’s Republic of China, that country may seek the extradition of a fugitive wanted for taking bribes. *See* Charles Hutzler, *China Executes Official for Bribery*, *PLAIN DEALER* (Cleveland, Ohio), Mar. 9, 2000, at A3, 2000 WL 5137366.

133. Extradition Treaty with India, *supra* note 21, art. 8:

1. When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless:

(a) the offense constitutes murder under the laws in the Requested State; or

(b) the Requesting State provides assurances that the death penalty, if imposed, will not be carried out.

2. In instances in which a Requesting State provides an assurance in accordance with paragraph 1(b) of this Article, the death penalty, if imposed by the courts of the Requesting State, shall not be carried out.

134. Unlike death penalty assurances clauses, which are common in modern extradition treaties, practically no United States extradition treaties contain a life imprisonment or term of years assurance clause. An exception is the U.S. Extradition Treaty with Venezuela, which permits the requested state to demand assurances that the person surrendered will not face life imprisonment:

In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted.

Extradition Treaty, Jan. 19–21, 1922, U.S.-Venez., art. 4, 43 Stat. 1698.

135. On October 2, 2001, the Mexican Supreme Court ruled that a sentence of life imprisonment constitutes inhumane punishment under the Mexican constitution, which permits only a sentence of finite years. *Jurisprudencia de 2 de octubre de 2001*, 14 SEMANARIO JUDICIAL DE LA FEDERACION [S.J.F.] 13 (Mex. 9a época 2001); *Mexico Makes Extraditions to U.S. Harder*, *SAN DIEGO UNION-TRIB.*, Oct. 4, 2001, at A19, 2001 WL 27292686. Subsequently, lower courts in Mexico began demanding assurances from the United States that fugitives extradited to this country will not be imprisoned for life. *See* Tim Stellar, *Mexican Court Slows Extraditions in Slayings*, *ARIZ. DAILY STAR*, May 3, 2002, at A1, 2002 WL 12820004. The Mexican Supreme Court decision, and the subsequent demand for life imprisonment assurances by the Mexican Government and lower courts, has created a host of challenging legal, policy, and practical problems with which the U.S. Justice Department officials and prosecutors throughout the United States are still wrestling. While an analysis of these issues is beyond the scope of this article, it is clear that the flow of fugitive offenders from Mexico to the United States has decreased since the Mexican Supreme Court decision, and that the decision constitutes a significant irritant to the U.S.–Mexico bilateral law enforcement relationship. U.S. law en-

forcement officials can only hope that this is not a harbinger of things to come in the decisions of courts in other foreign countries.

136. See PORT. CONST. (Constitutional Law No. 1/97, 1997) art. 33(5) (emphasis added):

Extradition in respect of offences punishable, under the law of the requesting State, by deprivation of liberty or detention order for life or an indeterminate term, shall only be permitted on condition of reciprocity based on an international agreement and provided that the requesting State gives an assurance that such sentence or detention order will not be imposed or enforced.

137. The question of what the United States should do when faced with non-treaty based requests for life imprisonment or term-of-years assurances, as a matter of policy or international treaty law, is beyond the scope of this Article.

138. See *supra* note 63 and accompanying text. As a practical matter, the role of foreign Central Authorities in ensuring the prompt, complete execution of incoming requests for assistance varies from country to country. Some foreign Central Authorities are more robust and responsive than others.

139. For example, the subpoena of a witness for testimony or a bank for account records.

140. United States prosecutors are not the only ones frustrated with the amount of time it takes to obtain evidence from foreign nations. MLAT requests made to the United States are usually farmed out by the Office of International Affairs to the United States Attorney's Offices in the federal districts where the requested evidence is located and can take several weeks or months to execute. OIA is currently engaged in an effort to reduce the time it takes for the execution of incoming requests by urging foreign authorities to utilize the formal MLAT channel only when the case is significant and the evidence they need cannot be obtained through alternative, less formal means, such as the police-to-police channel.

141. 18 U.S.C. § 3292 (2000).

142. *Id.* at § 3161(h)(9) (2000).

143. Michael A. Sussmann, *The Critical Challenges From International High-Tech and Computer-Related Crime at the Millennium*, 9 DUKE J. COMP. & INT'L L. 451, 469-70 (1999).

144. See, e.g., MLAT with Latvia, *supra* note 51, art. 4(1):

A request for assistance shall be in writing except that the Central Authority of the Requested State may accept a request in another form in urgent situations. If the request is not in writing, it shall be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. The request shall be in the language of the Requested State unless otherwise agreed.

145. See, e.g., Convention on Cybercrime, Nov. 23, 2001, art. 25, Europ. T.S. 185, 41 I.L.M. 282; see also Sussman, *supra*

note 143, at 476-84 (discussing multilateral organizations' efforts to combat high-tech crime).

146. See, e.g., MLAT with Latvia, *supra* note 51, art. 17:

1. If the Central Authority of one Party becomes aware of proceeds or instrumentalities of offenses that are located in the other Party and may be forfeitable or otherwise subject to seizure under the laws of that Party, it may so inform the Central Authority of the other Party. If the Party receiving such information has jurisdiction in this regard, it may present this information to its authorities for a determination whether any action is appropriate. These authorities shall issue their decision in accordance with the laws of their country. The Central Authority of the Party that received the information shall inform the Central Authority of the Party that provided the information of the action taken.
2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings.
3. The Party that has custody over proceeds or instrumentalities of offenses shall dispose of them in accordance with its laws. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent permitted by the transferring Party's laws and upon such terms as it deems appropriate.

147. While a thorough description is beyond the scope of this article, the United States enjoys statutes that provide authority for a wide range of forfeiture-related assistance to foreign authorities, including the restraint and confiscation of illegally derived assets, and even the enforcement of foreign confiscation judgments. See, e.g., 18 U.S.C. § 981(a)(1)(B)-(C) (2000); 18 U.S.C. § 1956(c)(7) (2000); 28 U.S.C. § 2467 (2000).

148. See text accompanying *supra* note 60.

149. See, e.g., Office of Int'l Affairs, U.S. Dep't of Justice & Office of the Legal Adviser, U.S. Dep't of State, *Technical Analysis of the Treaty Between the United States of America and the Republic of Latvia on Mutual Legal Assistance in Criminal Matters*, in S. EXEC. REP. NO. 105-22, at 216, 219 (1998):

[Article 3(1)(c)] permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the security or similar essential interests of that State. All United States mutual legal assistance treaties contain provisions allowing the Requested State to decline to execute a request if execution would prejudice its essential interests.

.....

The delegations agreed that the phrase "essential interests" is intended to limit narrowly the class of cases in which assistance may be denied. It is not enough that the Requesting State's case is one that

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. An example is a request involving prosecution by the Requesting State of conduct that occurred in the Requested State that is constitutionally protected in the Requested State.

150. For example, even though many MLATs do not require dual criminality as a prerequisite for the obligation to provide assistance (*see supra* note 55 and accompanying text) a requested state could potentially refuse to grant assistance to the U.S. in a case without dual criminality where that state felt granting assistance would conflict with its fundamental public policy.

DECISIONS

CERCLA

Third Circuit Announces Factors for Determining Arranger Liability: *Morton International, Inc., et al. v. A.E. Staley Manufacturing Company et al.*, No. 01-4259 (3d Cir. Sept. 16, 2003)

Background

This lawsuit involves the cleanup of a New Jersey site where a mercury processing plant was located from 1929 to 1974. The plant was the largest producer of intermediate inorganic mercury compounds. Morton International is the successor-in-interest to the various owners of the plant. It has been funding the cleanup of the site under various judicial orders. Morton and other plaintiffs brought this action against various potentially responsible parties (PRPs), including Tenneco Gas Pipeline Company, for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act. (CERCLA). The plaintiffs argued that the agreements under which the plant processed customers' prime virgin mercury (PVM) into red and yellow oxides of mercury (ROM and YOM) rendered the defendants "arrangers" under section 107(a)(3), 42 U.S.C. § 9607(a)(3) of CERCLA.

An initial motion for summary judgment filed by the defendants was denied. Tenneco subsequently filed a motion for summary judgment on its own behalf which the court granted. Of the plaintiffs, only Morton appealed. The district court requested that the appellate court "definitely address" the standard for arranger liability. There is little agreement among the circuits regarding arranger liability, including whether intent to dispose must be shown and whether ownership or control over the material being processed is a critical factor.

Holding

Among the categories of PRPs in CERCLA is "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party . . . at any facility." 42 U.S.C. § 9607(a)(3). The court noted that CERCLA does not define the term "arranged for." The court concluded that the use of the term "otherwise" expressed Congress' intention to expand the list of those who could be liable under this section and, thus, the language should be broadly construed.

The court reviewed the standards adopted by other circuit courts in determining arranger liability. It concluded that the courts were virtually unanimous on two points: (1) the determination of who is liable under this section of CERCLA is fact-sensitive, requiring a multi-factor analysis, and (2) the court must look beyond the defendant's characterization of the transaction to determine whether the transaction falls within the class of those who are liable under the statute. Beyond agreement on those two points, there is little consensus as to which factors should be considered and what priority each factor should receive in conducting the analysis.

After reviewing the various opinions and the text of the statute, the court concluded that the most important factors in determining arranger liability are ownership or possession and either knowledge or control. Ownership or possession of the hazardous substance is a prerequisite for finding liability but is not, by itself

enough to impose liability. There must also be a showing of either control over the process or knowledge that a release will occur during the process. According to the court, proof of actual general knowledge or of presumed knowledge will be sufficient to satisfy this requirement. Proof that the defendant had control over the process could also create an inference that the defendant had knowledge that the process resulted in the release of hazardous wastes.

Applying those factors to this case, the court reviewed the district court's conclusions. The court concluded that the trial court had inappropriately drawn inferences concerning ownership in favor of the defendant rather than in favor of Morton, the party opposing the motion. It determined that the evidence was sufficient to withstand the motion for summary judgment. The appellate court also found it fair to infer from Tenneco's involvement with mercury oxides that it had some knowledge about the environmental hazards of mercury processing. Thus, it found the "knowledge" evidence also sufficient to withstand the motion for summary judgment. Since there are disputed material facts with respect to Morton's claim against Tenneco, the court vacated the district court's grant of summary judgment and remanded the claim.

City's CSO Is a CERCLA Facility: *United States v. Union Corporation et al.*, No. 80-1589 (E.D. Pa. June 20, 2003)

Background

This lawsuit was commenced in 1980 by the federal government seeking reimbursement for past and future response costs to investigate and cleanup the Cottman Avenue Superfund site in Philadelphia, Pennsylvania. The property is bordered by Cottman Avenue on the west — at the foot of which is a mudflat that is submerged at high tide; Milnor Street on the north; an appliance recycling company and metal salvage yard on the east; and the Delaware River on the south and southwestern edge. The case was stayed pending attempted remediation of the site but was

restored to the court's active trial docket in 1998. The City of Philadelphia is a third-party defendant in the action.

The city owns a combined sewer overflow (CSO) that empties into the northeastern corner of the mudflats during periods of heavy rainfall. The defendants alleged that the city has discharged waste containing hazardous materials into the mudflat area.

After extensive discovery, the trial was divided into three phases. Phase I was to determine whether defendants were liable and whether response costs were incurred by the government. In January 2003, the court issued its opinion on the Phase I issues. See *United States v. Union Corporation*, 259 F. Supp. 2d 356 (E.D. Pa. 2003). The city filed a motion for summary judgment.

Holding

The city argued, *inter alia*, that the CSO is not a CERCLA facility. The court noted that only one circuit court has addressed the issue of a municipality's liability for hazardous substances from a public sewer system. In *Westfarm Associates Limited Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995), the court concluded that publicly owned treatment works were not excluded from the definition of "facilities" under CERCLA. In CERCLA, the term "facility" means "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." 42 U.S.C. § 9601(9)(A-B).

The Fourth Circuit reasoned that CERCLA had expressly abrogated state sovereign immunity under CERCLA. The statute does contain a narrow exclusion to the definition of "owner or operator" where state or local governments have acquired ownership of a facility involuntarily. If Congress had intended to

otherwise exempt state or local governments it would have done so. In the context of the entire statute, the language “including any pipe into a sewer or publicly owned treatment works” does not exclude localities from liability because of discharges from its sewers. Instead, it emphasizes that pipes leading into sewers are the responsibility of the owner or operator of the pipes, not the owner of the sewer or publicly owned treatment works.

The city asserted that holding the city liable under CERCLA would open the door to liability whenever anyone releases a listed substance into a municipal sewer. However, a municipality also has the benefit of an “innocent owner” defense. That defense may be asserted in a later phase of the trial.

[Editor’s note: In *Carson Harbor Village v. Unocal Corporation et al.*, No. CV 96-328 MMM (C.D. Cal. Aug. 8, 2003), the court held that cities, which were being sued under CERCLA on allegations that lead contained in runoff from storm drain systems polluted the plaintiff’s property, were not liable as either as arrangers or operators. It held that, under the Court’s holding in *United States v. Bestfoods*, 524 U.S. 51 (1998), holding, an operator must “manage, direct or conduct operations specifically related to pollution” to be liable as an operator under CERCLA. *Id.* at 66. The court did not discuss the issue of owner liability. The *Unocal Corporation* court did not discuss operator liability separately from owner liability.]

Insurance

CERCLA Clean-up and Remediation Costs Constitute “Damages” Under CGL Policies: *Johnson Controls, Inc. v. Employers Insurance of Wausau et al.*, No. 01-1193 (Wis. July 11, 2003)

Background

This lawsuit was brought in 1989 by Johnson Controls, Inc., which sought a declaratory judgment against various insurance companies for coverage relating to environmental cleanup at twenty-one property sites located in sixteen different states where the company faced liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Most of the sites are lead smelting sites; some are contaminated landfills to which Johnson sent spent lead acid batteries. For eight sites, Johnson Controls is seeking coverage for costs it incurred in

complying with a pre-suit demand from either a governmental agency or a third party. For eleven sites, Johnson Controls was either sued or settled prior to suit for a portion of the costs of cleanup. At two of the sites, Johnson Controls ultimately incurred no costs or liability.

In the court’s own words, “[t]he case has a long history . . . and has been buffeted . . . by a succession of contentious, inconsistent appellate decisions.” Slip op. at 20. One case, *City of Edgerton v. General Casualty Company of Wisconsin*, 517 N.W.2d 463 (1994), held that clean-up and remediation costs under CERCLA did not constitute “sums that the insured may become legally obligated to pay as damages” under the standard indemnification provision of CGL policies. It also held that issuance of letters by a state or federal agency under CERCLA, directing or requesting an insured to participate in the cleanup of contaminated property, did not trigger an insurer’s duty to defend. Another pertinent decision was issued in *General Casualty Company of Wisconsin v. Hills*, 561 N.W.2d 718 (1997), in which the court held that a CGL policy covered compensatory, monetary relief sought by third parties for losses incurred from the insured’s alleged past contamination of the property, so long as there was no request or directive by the government to the insured.

After *Hills* was decided, the Wisconsin Court of Appeals addressed Johnson Control’s appeal of the trial court’s grant of summary judgment to the insurers. To apply the holdings of both *Edgerton* and *Hills*, the court devised four categories of sites to determine whether coverage was available. The first category, under which coverage was not available, involved those situations, as in *Edgerton*, where the insured is responsible for cleaning up pursuant to a government directive under CERCLA and the insured performs the cleanup. The second category, encompassing the situation in *Hills*, was when the insured is not contacted by the government, the government has directed others to clean up the site and they, in turn, sue the insured. The appellate court created two more categories of cases that it deemed to be logical outgrowths of the *Edgerton* and *Hills* decisions. On

remand, the circuit court determined that all twenty-one sites fell into categories where the government's involvement would mean that costs incurred were not "legal damages" entitled to insurance coverage under CGL policies. Johnson petitioned the Wisconsin Supreme Court for review.

Holding

The court reviewed its decision in *Edgerton*, asking first if CERCLA response costs are damages. The *Edgerton* decision rested on the court's analysis that CERCLA response costs are equitable in nature. According to the court, in reaching that holding, it had relied on earlier case law that the court now stated was "overly restrictive" in its definition of damages. Furthermore, in *Edgerton*, the earlier court "did not appreciate the nature of liability for environmental cleanup costs under CERCLA or how that liability would be understood by a reasonable insured." Slip op. at 33. The court commented that the nature of relief in CERCLA would be "confused" if one tried to fit the liability scheme into a classic equitable/legal damages categorization. That cost recovery actions are available under section 107 of CERCLA demonstrates that an insured's liability is compensable as damages. An injunction is available as an alternative to monetary damages; thus, it is easily distinguishable from a traditional injunction.

The court also noted that the *Edgerton* court's conclusion that response costs are equitable in nature is disputed by other courts. For instance, the two federal court decisions cited in the *Edgerton* decision have since been rejected by the states whose law those courts were attempting to apply. See *Farmland Industries, Inc. v. Republic Insurance Company*, 941 S.W.2d 505 (Mo. 1997); *Bausch & Lomb Inc. v. Utica Mutual Insurance Company*, 625 A.2d 1021 (Md. 1993). The court concluded that the *Edgerton* decision was incorrect in holding that CERCLA response costs were not damages within the terms of a standard CGL policy.

The court then addressed the second part of the *Edgerton* decision — that PRP letters do not trigger

the insurer's duty to defend. It noted that the duty to defend is generally broader than an insurer's duty to pay and that CGL policies require that notice be given once a claim is made. The court concluded that a reasonable insured is likely to conclude, when faced with a PRP letter, that, once an insurance company is notified of the letter, the duty to defend has arisen. The court also noted that many courts have concluded that a PRP letter constitutes the functional equivalent of a suit. See, e.g., *Quaker State Minit, Lube, Inc. v. Fireman's Fund Insurance Company*, 868 F. Supp. 1278 (D. Utah 1994).

The court then discussed whether there is a "compelling justification" for overruling the decision in *Edgerton*. The decision in *Hills* attempted to retain the holding in *Edgerton* but the distinctions in the two cases are arbitrary and illogical. Ultimately, the court was compelled to admit that *Hills* undermined the doctrinal underpinnings of *Edgerton*. Furthermore the *Edgerton* opinion failed to provide suitable direction and consistency in this area of the law. There has been no uniformity in the interpretation and application of these two decisions.

Generally, a court is disinclined to reverse prior interpretations of the language in insurance policies. However, most of the CGL policies that are entered into today will not be governed by this opinion since, beginning in 1985, insurance companies revised their standardized CGL policies to specifically exclude pollution from coverage. Therefore, the insurers cannot credibly argue that they have depended upon the holding in *Edgerton* in issuing policies.

The court concluded that there were compelling reasons to overrule *Edgerton* and, therefore, concluded that the errors in that decision must be corrected. Therefore, it reversed the decision of the court of appeals and remanded the case to the circuit court for further proceedings.

Water

Economic Considerations Not Pertinent in Determining Contents of NPDES Permit: *City of Burbank v. State Water Resources Control Board et al.*, No. B150912 (Cal. Ct. App. 2d Dist. Aug. 14, 2003)

Background

Burbank and Los Angeles own and operate publicly owned treatment works (POTWs). Some of the wastewater, after treatment, is eventually discharged into the Los Angeles River, a water of the United States. The California Regional Water Quality Control Board issued permits to both plants that were appealed to the State Board. The State Board declined review. Both cities then filed a writ of mandate challenging certain of their permit provisions. The superior court granted the petitions and entered judgments setting aside the permits, directing the Regional Board to issue new permits in accordance with the court's decision.

The superior court directed that the Regional Board must consider the economic cost of compliance and that these costs must be reasonable in light of the environmental benefit.

Holding

33 U.S.C. § 1311(b)(1)(B) of the Clean Water Act (CWA) includes publicly owned treatment works (POTWs) among those facilities subject to effluent limitations based on secondary treatment. It required POTWs to comply with effluent limitations that comply with water quality standards under state or federal law not later than July 1, 1977. 33 U.S.C. § 1342(a)(1) and (3) mandate that the permit issued by either the state or federal government must ensure compliance with section 1311 and other CWA provisions. None of these provisions states that a permitting authority may consider the economic cost of permit compliance when establishing effluent limitations in a permit. Nor do U.S. EPA's regulations authorize a permitting authority to impose less stringent effluent

limitations if those limitations (to meet water quality standards) would cause an economic burden on the discharger.

Furthermore, the state Water Code does not give authority to a regional board to consider the economic cost of permit compliance when issuing a permit.

Under section 13241 of the California Water Code, economic costs and benefits and other factors must be considered by regional boards when establishing water quality standards. Once those standards are established, however, the permits issued must implement and require compliance with those standards.

The court concluded that the Regional Board, when issuing a permit, may not consider anew the factors that must be considered when establishing water quality standards. To relieve a discharger from compliance with the water quality standards would conflict with the state's obligation under the CWA to enforce water quality standards. 33 U.S.C. §§ 1311(b)(1)(C); 1342(a).

Thus, the court reversed that portion of the trial court's judgment and remanded.

Some Aspects of Phase II Stormwater Rule Remanded: *Environmental Defense Center, Inc. v. U.S. EPA*, No. 00-70014 (9th Cir. Sept. 15, 2003)

Background

This lawsuit involves various challenges to U.S. EPA's Phase II Rule, 40 C.F.R. §§ 122.26(a)(9)(i)(A)–(B), promulgated to control pollutants entering waterways through storm sewers. Promulgated under section 402(p) of the Clean Water Act (CWA), the Phase II Rule requires that discharges from small municipal separate storm sewer systems (MS4s) and from construction sites between one and five acres in size be subject to the National Pollutant Discharge Elimination System (NPDES). In its regulations, EPA also reserved the authority to regulate other stormwater discharges in the future.

Under the Phase II Rule, in those cases where there is an applicable general permit, MS4s may submit a Notice of Intent (NOI) wherein the MS4 agrees to comply with the terms of the general permit and specifies its plans for implementing six Minimum Measures. These measures are designed to protect water quality and include: (1) conducting public education and outreach on stormwater impacts; (2) engaging public participation in the development of stormwater management programs; (3) detecting and eliminating illicit discharges; (4) reducing pollution to the MS4 from construction activities disturbing one acre or more; (5) minimizing water quality impacts from development and redevelopment activities disturbing one acre or more; and (6) preventing or reducing pollutant runoff from municipal activities. 40 C.F.R. § 122.34(b)(1)–(6). Alternatively, the small MS4 may apply for an individual permit that would also require compliance with the Minimum Measures. Third, the MS4 may apply for an individualized permit under the permitting program established by the Phase I Rule.

Challenges by Municipal Petitioners

Among their challenges to the rule, the municipal petitioners argued that it unconstitutionally compels small MS4 operators to regulate third parties and violates the First Amendment by requiring them to deliver EPA's "political" message.

Under the Tenth Amendment, the federal government may not compel states to implement federal regulatory programs or force states (and, by extension, municipalities) to regulate third parties in furtherance of federal programs. *Printz v. United States*, 21 U.S. 898 (1997); *Reno v. Condon*, 528 U.S. 141 (2000). The Tenth Amendment, however, does not keep the federal government from *encouraging* states and municipalities to implement federal programs by, for example, making federal funds available if the programs are implemented. So long as the residents of the state or municipality retain the right *not* to comply with a federal regulatory program, there is no constitutional impediment. In this case, there are alternative methods by which small MS4s may receive permits. So long as "the alternative to implementing a

federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation." *City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003).

In this case, although the Alternative Permit option requires the MS4 to propose management programs similar to those addressed by the Minimum Measures in its application, there is nothing that *requires* an operator to implement a federal regulatory program in order to receive a permit.

The First Amendment challenge to the Public Education and Illicit Discharge Minimum Measures involves the Phase II Rules' direction to distribute educational materials to the community. The materials involve a discussion of the impacts of stormwater discharges and how the public can help minimize them and informs the public of hazards associated with illegal discharges and improper disposal of waste. The Municipal Petitioners argued that the First Amendment prohibits EPA from requiring small MS4s to communicate such messages. The court concluded that the challenged requirements do not offend the First Amendment because the educational and public information activities required do not compel ideological speech. The requirement is akin to the generic advertising assessment approved by the Court in *Glickman v. Wildeman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), in which the Court said:

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469–70. The regulation attacked in this case is similar except that the public information requirement may compel a regulated party to engage in some speech at some time. However, that speech is not specified by the regulation. Thus, it does not offend the First Amendment. The court also found that the regulation is consistent with the regulatory program of the CWA and the responsibilities of point source dischargers.

Challenges by Environmental Petitioners

The environmental petitioners argued that the Phase II Rule allows small MS4s to design their pollution control programs without adequate regulatory and public oversight and the rule contravenes the CWA because it does not require EPA to review the MS4s NOI and does not contain express requirements for public participation.

The NOI embodies each discharger's agreement to abide by the terms of the general permit. EPA does not require review of the NOI prior to allowing discharge. The court noted that the Phase II general permitting scheme differs from the traditional model because the NOI under the Rule also contains the discharger's plans for reducing "the discharge of pollutants to the maximum extent practicable." 40 U.S.C. § 1342(p)(3)(B). The court held that, with the NOI containing this information, it "crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime." Slip op. at 27.

The CWA unambiguously expresses congressional intent that EPA issue no permits to discharge from municipal storm sewers unless those permits "require controls to reduce the discharge of pollutants to the maximum extent practicable." The Phase II general permits will likely contain numerous substantive requirements, but they will not "require controls to reduce the discharge of pollutants to the maximum extent practicable." Under the Phase II Rule, implementing Minimum Measures will meet the statutory requirement of reducing the discharge of pollutants to the maximum extent practicable. However, there is

nothing in the regulations to ensure that the measures a small MS4 decides to undertake will *in fact* reduce discharges to the maximum extent practicable. Therefore, under the current rule, permits could be issued that would not *require* controls to reduce the discharge of pollutants in compliance with the statutory mandate. The court held that this aspect of the rule is contrary to the clear intent of Congress and therefore remanded it to EPA.

The environmental petitioners also argued that the Phase II Rule does not provide for public participation as required by the CWA because the public doesn't receive notice or an opportunity for hearing regarding an NOI. EPA responded that the NOI are not permits so no public participation is necessary and that the public involvement minimum measure coupled with the availability of the federal Freedom of Information Act (FOIA) and the state equivalents would fulfill any requirements even if the NOIs were considered permits.

The CWA clearly requires that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public." 33 U.S.C. § 1342(j). It also requires that the public have an opportunity for a hearing before a permit is issued. 33 U.S.C. § 1342(a)(1). Under the Phase II Rule, it is the NOIs, not the general permit, that describe how a small MS4 plans to reduce its discharges. Since the Phase II Rule provides no public notification of these NOIs and provides no public hearings, it clearly contravenes the congressional intent expressed in the CWA. The court also concluded that EPA's argument concerning public availability through other means was unconvincing. The FOIA only applies to documents in EPA's hand, not in the hand of state or tribal permitting authorities. The rule does not require that these NOIs be sent to EPA. Therefore, the NOIs would only be available through the "vagaries of state and local freedom of information acts." Slip op. at 37. Therefore, the court also rejected that portion of the rule and remanded it to EPA.

The environmental petitioners also argued that EPA arbitrarily failed to regulate forest roads under the Phase II Rule despite the agency's finding that the roads are a major source of erosion and contribute ninety percent of the total sediment from forestry operations. EPA contended the challenge was time-barred, but the court disagreed. The agency did not "seriously" address the merits of the petitioners' objection. The court, thus, remanded this issue to EPA.

Challenges by Industry Petitioners

The industry petitioners claimed that EPA failed to consult adequately with the states concerning its promulgation of the Phase II Rule, but the court concluded that the overall record showed that the agency had met its duty of consultation. They, along with the municipal petitioners, also argued that EPA violated procedural constraints implied by the CWA in promulgating the rule. In particular, the municipal petitioners complained that the record did not demonstrate a rational basis for EPA to use the Census Bureau's designation of urbanized areas to determine that all these areas should be included in the Phase II Rule. The court disagreed. It stated that the CWA does not require EPA to establish with "pinpoint precision" a threshold population number that would justify regulation under the Phase II Rule.

A similar challenge was made to the designation of one acre construction sites. The petitioners argued that it was not possible to provide a quantitative link between small construction sites and an adverse effect on water quality. EPA argued that it was justified in extrapolating data about small sites from studies of larger ones. The court found that EPA had satisfied the "substantial evidence standard" in making its determination.

The Industry petitioners also argued that EPA had improperly retained authority to designate future sources of stormwater pollution for Phase II regulation. EPA pointed to section 402(p)(6), which specifically authorizes the Phase II program, as allowing the residual designation authority because the language

does not expressly preclude it and because the authority is consistent with that section's requirement that EPA establish a comprehensive program to protect water quality from adverse stormwater discharges.

Reviewing with deference EPA's decision, the court concluded that the agency had reasonably interpreted section 402(p)(6) as authorizing a third category of dischargers subject to Phase II regulation. Furthermore, the petitioners' concern that EPA may, in the future, designate a source without adequately establishing its eligibility is not yet ripe for judicial review.

Wetlands

Corps Has Jurisdiction Over Wetlands Adjacent to Tributaries of Navigable Waters: *Treacy and United States v. Newdunn Associates, LLP et al.*, No. 02-1480 (4th Cir. Sept. 10, 2003)

Background

Newdunn Associates owns forty-three acres of land in Newport News, Virginia, thirty-eight of which indisputably fall within the definition, from a scientific viewpoint, of "wetlands" as defined by 33 C.F.R. § 328.3(b). Prior to the construction of Interstate 64, the property had a natural hydrologic connection to Stony Run, a navigable-in-fact waterway. Now, surface waters from the property intermittently flow through approximately 2.4 miles of natural streams and manmade ditches into Stony Run.

After the Supreme Court's decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States*, 531 U.S. 159, Newdunn informed the Corps that it believed there was no federal jurisdiction over its property and began filling the wetlands without a permit. The Corps disagreed and commenced an enforcement action in federal district court. The Virginia State Water Control Board issued an Emergency Special Order (ESO) to Newdunn, ordering that he cease filling activities on its property. Newdunn also ignored the ESO and the Board filed a

civil enforcement action. Newdunn removed the Board's action to federal court.

The federal district court held that the Corps' wetlands regulations were invalid because they exceeded Congress' grant of authority under the Clean Water Act (CWA) and that the state's jurisdictional authority was coextensive with the federal government's. Both the federal and state governments appealed.

Holding

The first issue discussed by the court was whether it had jurisdiction over the Board's enforcement action. Unless a necessary element of the state's claim is a substantial, disputed question of federal law, then there is no federal question jurisdiction. The district court noted that the state statute defined wetlands in the same language as does the federal regulation. The appellate court stated that the district court, in its determination that the state statute was coextensive with the CWA, confused the definition of "scientific wetlands" and "jurisdictional wetlands."

There is no question that the property in question fits the federal definition of wetlands. Therefore, there is no question in this case as to the interpretation of the federal regulation and, thus, no federal question jurisdiction. The question that is raised is whether the wetlands are within the jurisdiction of the State Water Control Board. That question is resolved by examining the Virginia Wetlands Resources Act of 2000. That act was designed to implement a "comprehensive state program [that] would remove the uncertainty created by changing federal policies and case law decisions." Letter from L. Preston Bryant, Jr., Delegate to James s. Gilmore, III, Governor (Dec. 3, 1999) (quoted in slip op. at 9). That act defines "state waters" broadly to include "all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands." Va. Code Ann. § 62.1-44.3. State law prohibits any activity that may significantly alter or

degrade a wetland without a permit issued by the Board. Va. Code Ann. § 62.1-44.5.

Newdunn argued that the Board's jurisdiction depends on federal law because the state law provides that a Virginia Water Protection Permit shall constitute the certification required under section 401 of the CWA. The court disagreed. The issue of whether the Board has authority to regulate the wetlands remains a question of Virginia, not federal, law. The Virginia statute, by its plain language, exercises jurisdiction beyond that of the CWA. Therefore, there is no federal issue that must be resolved to determine the state law issue. This portion of the case was, thus, remanded to the Virginia court from which it was removed.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985), the Court upheld the Corps of Engineers' jurisdiction over wetlands adjacent to other waters. Although the *SWANCC* Court struck down the Migratory Bird Rule to extend federal jurisdiction to isolated ponds, the Court also quoted language from *Riverside Bayview Homes* that congressional concern on the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." *Id.* at 167.

Recently, this circuit concluded that the Corps intended to assert jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water." *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003). In that case, the court dismissed a Commerce Clause challenge to the Corps' regulations, finding that the definition was within the Corps' delegated responsibility was well within Congress's traditional power over navigable waters. *Id.* at 707. The interpretation that includes wetlands adjacent to tributaries of navigable waters is permissible because pollutants from these wetlands will eventually come to the waters Congress sought to protect. The *Deaton*

court also recognized that the Corps' definition included roadside ditches. That a ditch may be manmade is of no consequence.

In this case, the surface water from the Newdunn property passes through various natural and manmade waterways into a navigable waterway. Since there is a sufficient nexus between the property and navigable-in-fact waters, the Corps' jurisdiction is supported by the CWA and the implementing regulations.

The court reversed the ruling of the district court.

State Has Jurisdiction Over Some Isolated Ponds and Wetlands: *Indiana Department of Environmental Management v. Twin Eagle LLC*, No. 49800-0204-CV-237 (Ind. Sept. 23, 2003)

Background

Twin Eagle owns approximately 460 acres of land in Fort Wayne, Indiana, on which it plans to construct residences. A little over twenty-one acres are ponds and wetlands. Of those, over fourteen acres are wetlands and private ponds that are not subject to the Clean Water Act (CWA) under the ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). Twin Eagles' development plans involve filling in much of that acreage. If the state regulatory scheme applies to these fourteen acres then Twin Eagles must receive a permit for the filling activities.

In July 2001, the developer sought a declaratory judgment to prevent the Indiana Department of Environmental Management (IDEM) from enforcing state environmental laws against the project. The trial court held that the state laws did not give IDEM regulatory authority over private ponds or isolated wetlands or over any waters that were not "waters of the United States." In reaching that conclusion, the court also held that IDEM's interim regulatory process, under which it had issued a series of memoranda after the Court's *SWANCC* decision indicating its intention to regulate waters of the state no longer subject to CWA jurisdiction, was invalid. IDEM appealed.

Holding

The court noted that there are three issues involved in determining whether IDEM has the authority to apply the state's National Pollutant Discharge Elimination System (NPDES) program to waters that were previously regulated under section 404 of the CWA. First, does IDEM have the statutory authority to regulate waters that are not waters of the United States? Second, does Indiana law give IDEM regulatory powers over private ponds or isolated wetlands or both? Third, if so, may IDEM employ the NPDES permitting procedure to regulate these bodies of water?

Federal law does not prevent a state from having a broader or more stringent regulatory program than the one imposed by the CWA. The state environmental laws give IDEM the authority to regulate discharges into "waters of the state." IND. CODE § 13-18-4-3. There is nothing in the statute that would limit the reach of IDEM's regulatory authority to those bodies of water covered by the CWA. In fact, long before the enactment of federal legislation, IDEM and its predecessor agencies had jurisdiction over all the waters of the state except those specifically statutorily excluded. Twin Eagles cited Indiana Code section 13-18-3-2(a) as limiting IDEM's jurisdiction to waters covered by the CWA. That section authorizes the agency to adopt rules "necessary" to the implementation of the CWA. However, other statutory sections authorize IDEM to issue regulations without regard to the CWA or other federal law. The court concluded that the section cited by Twin Eagles was intended to clarify that IDEM had the power to proceed under federal law but did not, in any, curtail its previous authority.

Among IDEM's rules is the requirement that "any discharge of pollutants into waters of the state" requires an NPDES permit unless it is specifically excluded. 327 IND. ADMIN. CODE 5-2-2. The *SWANCC* decision did nothing to curtail Indiana's scope of authority and, thus, did not affect the necessity for Twin Eagles to get state water approval through the water certification process.

The question remains, however, whether the state legislature has given IDEM authority to regulate the waters at issue in this case. Section 13-11-2-265 of the Indiana Code defines “water” as:

(1) [T]he accumulations of water, surface and underground, natural, public, and private; or

(2) [A] part of the accumulations of water, that are wholly or partially within, flow through, or border upon Indiana.

However, “the term ‘waters’ does not include a private pond . . . unless the discharge from the pond . . . causes or threatens to cause water pollution.” *Id.* Indiana jurisprudence has defined a private pond as a “body of water wholly upon the land of a single owner or group of owners and not connected with any public waters of the state.” Slip op. at 8, *citing Trowbridge v. Torabi*, 693 N.E.2d 622, 627 (Ind. Ct. App. 1998). Whether any of the ponds within Twin Eagles’ property conform to that definition is, in the first instance, an administrative determination.

There is no statutory definition of “wetlands.” One regulation defines wetlands as:

[T]hose areas that are inundated or saturated by surface water or ground water at a frequency and duration to support and that, under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include the following: (1) Swamps[,] (2) Marshes[,] (3) Bogs[,] (4) Similar areas.

327 IND. ADMIN. CODE 6.1-2-62 (dealing with industrial waste). The court acknowledged that the boundaries of wetlands can change, but difficulty in determining what constitutes a wetland does not automatically remove it from IDEM’s jurisdiction. Furthermore, since the definition of “waters” includes “the

accumulations of water . . . or . . . a part of the accumulations,” at least some wetlands can be “waters of the state.”

After the ruling in *SWANCC*, the Indiana General Assembly enacted Public Law 183, which prohibits a state agency from adopting or amending “an administrative rule . . . that concerns the definition of ‘wetlands’ or ‘isolated wetlands’” 2002 Ind. Acts. 183, sec. 2. Therefore, IDEM must make a case-by-case determination whether a particular site’s wetlands constitute “waters of the state” within IDEM’s regulatory jurisdiction.

The court noted that Twin Eagles has the option of applying for an NPDES permit and then challenging IDEM’s determination if it believes it is wrong or it may proceed without a permit and risk an enforcement action by IDEM. Since the legislature has prohibited rulemaking, there is no alternative to individualized determinations of IDEM’s jurisdiction.

Finally, the court addressed the validity of IDEM’s interim regulatory process. If the series of memoranda constituted a new rule, then the proper rulemaking procedures would have had to have been followed. IDEM contends, however, that its memoranda did not constitute a new rule. The court agreed. Indiana’s administrative code requires an NPDES permit to be issued for “any discharge of pollutants into waters of the state” with certain named exceptions. One of those exceptions was to discharges regulated under section 404 of the CWA. Once the decision in *SWANCC* removed certain waters from the regulatory reach of the CWA, these waters no longer were automatically exempted from the state’s NPDES permit requirement.

The court remanded the case to the trial court.

CIVIL PROCEEDINGS

New Filing

Water

***New Hampshire v. Amerada Hess Corporation et al.*, No. 03-C-550 (Super. Ct. Merrimack County Oct. 7, 2003)**

New Hampshire has filed a lawsuit against twenty-two oil companies alleging that methyl tertiary-butyl ether (MTBE) added to gasoline to cut smog emissions has caused widespread contamination of the state's drinking water supply. The lawsuit asks that the court order the companies to pay for the cleanup of water supplies contaminated by the additive. The complaint estimates that MTBE is presently in 40,000 private drinking water wells in the state and fifteen percent of public water supplies.

[For further information, contact New Hampshire AAG Maureen Smith at (603) 271-3679. To see a copy of the press release and written questions and answers about the lawsuit, go to <www.state.nh.us/nhdoj>.]

Settlements

Air

***Iowa v. Lehigh Cement Company*, No. LACV-058687 (Dist. Ct. Cerro Gordo County Sept. 8, 2003)**

The state has reached an agreement with Lehigh Cement Company of Allentown, Pennsylvania, resolving a lawsuit alleging that Lehigh failed to comply with the Prevention of Significant Deterioration requirements of the Clean Air Act. Under the consent order, Lehigh will construct and install a wet scrubber at its Mason City plant to cut emissions of sulfur dioxide and apply selective non-catalytic reduction to reduce nitrogen oxide (NOx) emissions at a cost of approximately \$33 million. In addition, Lehigh will pay a civil penalty of \$150,000.

[For further information, contact Iowa AAG Dave Sheridan at (515) 283-6714.]

***Massachusetts v. Trigen-Boston Energy Corporation*, No. 03-04251B (Super. Ct. Suffolk County Sept. 8, 2003)**

To settle allegations that it violated Massachusetts' nitrogen oxide (NOx) budget program, a Boston power plant, Trigen-Boston Energy Corporation, has agreed to pay a civil penalty of \$210,000. According to the complaint, Trigen-Boston, which operates a fossil fuel fired steam generating plant in Boston, violated testing requirements under the program.

Seventy thousand dollars of the penalty will be suspended if the company complies with other provisions of the agreement, including the hiring of an independent consultant and submission of a report to the state environmental agency recommending how it can avoid future violations.

[For further information, contact Massachusetts AAG Nora Chorover at (617) 727-2200, ext. 3357.]

CERCLA

***In re Kaiser Aluminum Corporation*, No. 02-10429 (Bankr. D. Del. Aug. 22, 2003)**

Under the terms of a proposed consent decree filed in a Chapter 11 proceeding, Kaiser Aluminum Corporation would pay a total of \$24 million to settle claims filed against it by the federal government, California, Rhode Island, Washington, and the Puyallup Tribe regarding sixty-six hazardous waste sites in twenty-five states. Some of the claims relate to third-party disposal or treatment sites.

[For further information, contact California AAG Kevin James at (510) 622-2201.]

Water***Michigan v. RVP Development, Inc.*, No. 99-9399-CE (Cir. Ct. Manistee County Aug. 21, 2003)**

The Michigan Attorney General's office has reached an agreement with the developer of a golf course to settle a lawsuit alleging violation of state and federal environmental laws. The complaint stated that the developer hastened the erosion of soil into Lake Michigan by engaging in activities such as cutting down a woodlot along a bluff overlooking the lake. The state claimed that, in 1998 alone, more than 7,000 tons of soil washed into lake Michigan from the property.

[For further information, contact Michigan AAG Alan Hoffman at (577) 373-7510.]

Wetlands***United States v. IMC Phosphates Co.*, No. 8:03-CV-1814-T-17 (M.D. Fla. Aug. 27, 2003)**

IMC Phosphates Company, a phosphate mining company, has agreed to pay \$350,000 in restoration costs and a civil penalty of \$50,000 for discharging fill beyond the boundaries of its wetlands permits. The permits were issued for four separate phosphate mines in Florida. The unauthorized fill affected 11.3 acres of wetlands and 24.6 acres of open water.

[For further information, contact AUSA Daniel Eckhart at (407) 648-7500.]

CRIMINAL PROSECUTIONS**Indictments****Hazardous Waste*****Michigan v. William Ort et al.*, Nos. 03-4492 et al. (Dist. Ct. Lenawee County Aug. 27, 2003)**

William Ort of Melvindale, Michigan, Michael Rowley of Hudson, Michigan, and Lamoin Caskey of Fayette, Ohio, have been charged with violating Michigan state law involving the illegal transportation and disposal of hazardous wastes. The complaint alleges that Ort hired Rowley to dispose of sixteen drums of hazardous liquid waste from a welding and machining shop in River Rouge. Rowley, in turn, hired Caskey to assist him in loading the waste in a trailer and then hauling the trailer behind Caskey's truck. The trailer broke loose while being towed and crashed in Raisin Charter Township, Michigan. Caskey and Rowley allegedly removed the license plate from the trailer and fled.

[For further information, contact Michigan AAG Thomas Piotrowski at (734) 432-1259.]

RCRA***United States v. Gazi George and Donald Roeser*, No. 03-90025 (E.D. Mich. Aug. 21, 2003)**

Two former executives of City Environmental, a Detroit, Michigan, hazardous waste treatment facility, have been indicted for allegedly violating the Clean Water Act and the Resource Conservation and Recovery Act. According to the indictment, Gazi George and Donald Roeser had hazardous waste brought to the company and then landfilled without proper processing. The two are also charged with conspiring to violate the Clean Water Act by discharging liquid wastes that were either untreated or improperly treated into the Detroit sewer system.

George was vice-president of the company that owned City Environmental when the violations allegedly occurred; Roeser was the operations manager.

[For further information, contact AUSA Kris Dighe at (313) 226-9100.]

Water

United States v. Kerrville Painting Company et al., No. 4:03-CR-00-226-0WRW (E.D. Ark. Sept. 4, 2003)

Kerrville Painting Company, Inc., its owner Nick Mosakis, a former supervisor, Cecil Zimmerman, and Kevin Foster, a former Arkansas State Highway and Transportation Department inspector, were recently charged in a forty-seven-count indictment that alleged they violated various federal laws while performing highway bridge contracts over the Black River in north-east Arkansas.

Kerrville Painting of Kerrville, Texas, is a contractor specializing in sandblasting and painting steel bridges and is authorized to work on federal contracts in Arkansas, Okalahoma, and Texas. The indictment alleges a variety of felony counts including the intermittent discharge of pollutants into waters of the United States, conspiracy, the unpermitted disposal and transportation of hazardous waste, theft, false statements and witness tampering.

[For further information, contact AUSA Bill Adair at (501) 340-2600.]

Wildlife

United States v. Arnold M. Bengis et al., No. 03Crim308 (S.D.N.Y. Aug. 6, 2003)

Five men, including Arnold Bengis, the chairman and managing director of Hout Bay Fishing Industries, Ltd., have been charged with conspiring to illegally harvest large amount of seafood, including rock lobsters and Patagonian toothfish, in South Africa and importing it to the United States. The indictment alleges that the men underreported catches to the South African au-

thorities, falsified documents, unloaded vessels at night to avoid inspections, and bribed South African fishery control officers. After South African authorities seized a container of illegally harvested fish that was to be exported to the United States, the indictment alleges that the defendants “engaged in a series of elaborate deceptions, designed to avoid detection and perpetuate the scheme.” As an example, the indictment charges that Hout Bay employees were ordered to destroy records that showed the amounts of seafood harvested.

Federal prosecutors are seeking at least \$11.5 million in the conspiracy which is alleged to date back to 1987.

[For further information, contact AUSA Marcus A. Asner at (212) 637-2483 .]

Pleas/Verdicts

Asbestos

United States v. Andre Parker, No. 01-CR-2483 (N.D.N.Y. Oct. 2, 2003)

Andre Parker and Parker Environmental Management Group, Inc., have been convicted of twenty-two felonies related to the widespread falsification of laboratory analysis from asbestos abatement projects and illegal asbestos removal and dumping. Parker owns and operates Parker Environmental Management Group, a laboratory licensed to perform analysis on samples taken from asbestos abatement projects. From at least 1998, Parker and his employees falsified thousands of laboratory analysis results throughout New York City and central and upstate New York. Parker also directed his employees to take samples in locations in buildings, such as closets or areas far removed from abatement activities, to assure that results would pass. In 2001, Parker directed his employees to perform illegal asbestos abatement in Plattsburgh, New York, within thirty-three public housing buildings. Hundreds of bags of asbestos were then illegally dumped throughout the City of Plattsburgh at numerous locations by Parker’s employees.

[For further information, contact AUSA Craig Benedict at (315) 448-0672.]

Water

***United States v. David Van Dyke*, No. 3:03CR33RM (N.D. Ind. Aug. 25, 2003)**

David Van Dyke, the operator of the Warsaw, Indiana Wastewater Treatment Plant, recently pled guilty to three counts of violating the Clean Water Act (CWA). He altered and falsified a lab report that was submitted to the Indiana Department of Environmental Management. Van Dyke also admitted that the sewage plant's weekly limit for carbonaceous biological oxygen demand was violated and that he ordered employees to use diesel fuel at the plant to reduce foaming without reporting its use to state authorities. The plant discharges into Walnut Creek, a tributary of the Tippecanoe River, listed as the eighth most pristine waterway in the United States. Thousands of fish were killed in the creek and the river was severely damaged. Approximately 22,000 cubic yards of sewage sludge remain in the creek as a result of the improper operation of the facility.

[For further information, contact AUSA David Schmid at (574) 236-8287.]

Sentences

Asbestos

***United States v. Joseph P. Thorn*, No. 00-CR-88 (N.D.N.Y. Sept. 2, 2003)**

Nine months after the U.S. Court of Appeals for the Second Circuit vacated the sentence imposed on an asbestos contractor, the district court sentenced him to fourteen years in the federal penitentiary. The appellate court vacated the sentence because it did not take into account the severity of Thorn's actions, the likelihood that one or more of his former employees would ultimately suffer severe health effects, or adequately explain the sentence of just over four years on money laundering and Clean Air Act provisions that were to run concurrently.

Thorn has now been sentenced to fourteen years in federal prison for exposing workers to hazardous material and falsifying reports. Thorn was the owner of the A+ Environmental Services, Inc., that ran "rip and skip" operations, quickly stripping asbestos off pipes without any containment system.

[For further information, contact AUSA Craig Benedict at (315) 448-0672.]

Water

***People [California] v. Timothy Bradley*, No. CF 30244 (Super. Ct. Lake County Aug. 22, 2003)**

Timothy Bradley, general manager of the Clear Lake Oaks County Water district in California was recently sentenced to four months' incarceration and a \$54,000 fine on four misdemeanor counts of violating California state water pollution laws.

On February 12, 1999, Bradley's employees told him that the water treatment plant was discharging untreated sewage into Clear Lake and recommended he shut down the plant's pumps and bring in pumper trucks. Bradley decided not to take action and, instead, waited until February 16 to conduct a dye test and then take action to correct the problem. Testimony at the trial indicated that at least one-half million gallons of raw sewage entered the lake.

[For further information, contact DDA Paul Hagan, Lake County District Attorney's office, at (707) 445-7411.]

***State [New Jersey] v. Donald Kelly, Inc., John Kocis, and Shawn Kelly*, Nos. 1730, 1731, & 1732-05-3 (Super. Ct. Camden County July 11, 2003)**

Donald B. Kelly, Inc., John Kocis, and Shawn Kelly have been sentenced on their guilty pleas to charges that they violated New Jersey water pollution laws. Kelly and Kocis are the co-owners of Donald B. Kelly, Inc., a drum reconitioner in Camden; they admitted their responsibility for the discharge of wastewater contaminated toxic pollutants from their company into the Camden, New Jersey, sewer system during June 1999 to January 2003.

The company and Shawn Kelly pled guilty to two counts of third degree water pollution. Kelly was sentenced to a three-year probationary term and a fine of \$75,000. The company was sentenced to pay a \$25,000 fine. Kocis was sentenced to one-year probation conditioned upon serving 364 days in the Camden County jail.

[For further information, contact New Jersey DAG Bruce Kmosko at (609) 984-4470.]

United States v. Houston Marine Services, No. 03108 (S.D. Tex. Aug. 22, 2003)

Houston Marine Services, Inc. has been fined \$10,000 on its plea to a misdemeanor violation of the Clean Water Act. A discharge of 25,000 gallons of diesel oil occurred in the Houston ship channel when an employee mistakenly attempted to pump more than 100,000 gallons of fuel oil into a nearly full cargo tank aboard one of the company's barges. The company immediately notified the U.S. Coast Guard of the spill and spent \$200,000 to remediate.

[For further information, contact AUSA Eric Reed at (713) 567-9000.]