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MUTUAL ASSISTANCE IN CRIMINAL MATTERS:

A COMMONWEALTH PERSPECTIVE

Memorandum by the Commonwealth Secretariat
and a paper by Dr. DAVID CHAIKIN, Director
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The annexed paper by Dr. D.A. Chaikin and the Commonwealth Fraud Officer addresses problems of concern to Commonwealth Law Ministers both at Winnipeg in 1977 and at Barbados in 1980.

2. The paper was prepared by Dr. Chaikin and the Commonwealth Fraud Officer as a discussion document. It analyses the law relating to jurisdiction in criminal matters and then examines the various procedures whereby one country may provide judicial and non-judicial assistance to another in the investigation and prosecution of crimes. Given the importance that Commonwealth Law Ministers attached to international economic crime at Barbados in 1980 the paper tends to concentrate on mutual judicial assistance in matters relating to commercial crime. However, the analysis of law and practice is relevant to other areas of ordinary criminal law offences. Finally, the paper explores the various approaches which may be taken within the Commonwealth to foster and improve mutual assistance in criminal matters.

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ANNEX to LMM(83)29

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Introduction

Commonwealth Law Ministers have always given attention at their meetings to matters involving mutual assistance in the administration of justice. However, except with regard to the Commonwealth Scheme for the Rendition of Fugitive Offenders and special areas such as international commercial crime and international child stealing, little attention has been given to the general subject of mutual assistance in criminal matters. Given the common legal traditions of most Commonwealth countries and the close bonds that bind the Commonwealth together, this is perhaps surprising.

2. The number of cases involving other jurisdictions in the detection, investigation, prosecution and enforcement of judicial orders must have increased dramatically as this century has progressed. Developments in communication, technology, transportation and the increased mobility of individuals, companies and capital have all contributed to a situation where the conception and commission of ordinary criminal law offences involve two or more different jurisdictions. Few jurisdictions, inside or outside the Commonwealth, have

profits of over $40 million in the Montreal urban community in 1976. The researchers were of the view that although a 1980 amendment to the Canadian Criminal Code, when proclaimed could be an effective tool in dealing with loansharking activities, there was still room for improvement in that area, and gave as an example the fact that tne the amending Bill did not deal with the taking over by loan sharks of legitimate business.

It was found that there was a tendency for the courts to treat gamblers leniently, partly because the gambling laws permit and even encourage certain types of gambling under certain circumstances, and also because gambling cases are not presented to the courts as one part of a possible multi-faceted criminal enterprise. Labour corruption was regarded as being less common in Canada, however this type of corruption could increase beyond its current level, since historically social and criminological phenomena often appeared in the United States several years before they were visible in Canada.

In examining the activities of motorcycle gangs, the report pointed to the profitability of the legal activities undertaken by gang members, and lamented the fact that the criminal law did not focus on the activities of the gang itself, but rather on the activities of the individuals who form part of that gang. It was found that "white-collar" crimes are very lucrative, so that if the estimated losses to business which was projected by United States law enforcement authorities (valued at three per cent of the gross National Product) were applied to Canada, this would amount to $6.3 billion annually. It was also felt that the incidence of this class of crime, namely: stock market frauds, fraudulent bankruptcies, frauds on Government and computer crimes was bound to increase, because of the increased opportunities provided by the growing complexity of the economic system and an increasing reliance on technology.

Finally under this head, the report examined various ways in which "laundering" of money obtained by crime takes place in order that it be made to appear that it was obtained legally, and its subsequent investment in legitimate business enterprises. As a secondary activity which flows from prior criminal activity, the researchers found that the criminal justice system is mainly directed towards the predicated criminal offences to the exclusion of these secondary activities, and warns that if left unchecked, these avenues could be used to monopolise complete sectors of the economy and to influence and corrupt politicians.

(b) Existing Criminal Law in Canada

The report states (not altogether surprisingly) that nothing in existing Canadian criminal law is expressly designed to provide for the types of remedies needed for the forfeiture of illicit profits on conviction. It points to a number of provisions in the Criminal Code which are designed only to remove from the hands of convicted persons, objects whose possession is unlawful, but all those mentioned are tangible objects. And even the general forfeiture provision contained in section 446 of the Criminal Code itself was seen to refer to a tangible and portable object. Intangibles, such as shares in a company, or an interest in a partnership or money in a bank account cannot be forfeited. Similarly things which are not portable, (i.e., capable of being brought before a Justice) such as real estate do not appear to fall within the terms of the section.

(i) Narcotic Control

Under the provisions of the Narcotic Control Act there is a limited power to forfeit the proceeds of illegal narcotic sales, for a police officer may seize any thing by means of or in respect of which he reasonably believes an offence under the Act has been committed, or any thing which may be evidence of the commission of such an offence. Since the primary purpose of such seizure is to gather evidence for the prosecution of the accused, it would seem that only things which are capable of being tendered in evidence may be seized. Moreover the Report points out that since the language of the Act appears to require proof that the actual bills seized were obtained from the purchaser of the narcotics; a money order, into which the cash had been converted could not be seized, with the result that large quantities of cash seized from persons who have been convicted of drug trafficking or importation, frequently had to be returned to the accused or his lawyer.

(c) Application of RICO to Canada

The researchers identified certain advantages, disadvantages and difficulties in implementing a statute similar to RICO in Canada. It was felt that it would be an advantage to be able to focus criminal proceedings on an organisation rather than on an individual as at present, and that this could be effectively used to combat the use or acquisition of legitimate business enterprises by persons involved in criminal activities. They also regarded the forfeiture provisions as helpful to the State, both as a means of removing the profit incentive from criminal activity and of depriving organised crime of its ill-gotten gains, and also in permitting the State to recover from criminal organisations at least part of the cost of investigations and prosecutions. The civil forfeiture provisions of RICO were also considered to be advantageous as they allowed action to be taken in cases where the evidence was insufficient for a criminal prosecution, they compensated the victim, worked as an economic punishment to the accused and most importantly they prevented the unjust enrichment of the individual.

The disadvantages were considered to be the cost in court time and money of prosecutions, and the constitutional difficulty which could be encountered because of the absence of jurisdiction in the Federal Government either, if civil forfeiture provisions were passed on their own, or if they were engrafted on to the criminal provisions as part of the penalty. The researchers perceived one area of particular difficulty in the high burden of proof placed on the Crown to prove the origin of funds involved in racketeering activity since the "tracing" of the money back to the criminal activity is well nigh impossible. In order to obviate this difficulty the Report recommended the introduction of a reverse-onus provision, which would place on the accused the burden of proving on the balance of probabilities that the money was not derived from racketeering activity once the Crown had demonstrated that the accused had participated in racketeering, and had accumulated assets of substantial value during that period.

(d) Recommendations of Evaluators

The Report found that the RICO statute had the potential to become an effective weapon in the fight against crime, because it provided the prosecution with a novel way of illustrating to the court and the public the economic underpinnings of organised crime, and recommended that Canada adopt similar legislation. The enactment of the RICO Statute as a separate piece of legislation did not find favour, it was recommended instead that the new legislation be incorporated into the Criminal Code. The Researchers did not favour the adoption of the Civil provisions, and warned that since the possibility of inappropriate or abusive prosecutions will always exist, consideration should be given to a requirement that the Attorney-General of a Province or his deputy must consent to any such prosecution. This last recommendation is one which requires careful consideration if the lack of investigatory support is not to detract the attention of the police away from the "leaders" to the "small men".

CHAPTER SIX: AUSTRALIAN EXPERIENCE

(a) Introduction

Recent amendments to the Customs Act of Australia, and in particular those effected by the Customs Amendment Act, 1979 (No.92) have greatly strengthened the hands of the law enforcement agencies in that country, by introducing stricter methods of investigation and proof, and tougher methods of seizure and confiscation for offences relating to narcotic drugs. The use of listening devices has been authorised, subject to certain safeguards which are designed to protect the right of the citizen; the forfeiture proceedings have been strengthened by shifting the burden of proof; and stringent provisions are made for confiscating the indirect proceeds from dealings in narcotic drugs by the recovery of pecuniary penalties.

The subjective territorial principle gave jurisdiction to the State where the actor was physically present at the time of the crime. The second extension, called the "objective territorial principle", established that a State has jurisdiction over crimes commenced outside the State but consummated within its territory. The "objective territorial principle" gave jurisdiction to the State where the "harmful effects" or the prohibited conduct were felt. Although it is recognised in the common law States, such as the United Kingdom[4] and the United States,[5] as well as in the civil law system, there is considerable disagreement as to its scope. Section 18 of the American Restatement of Foreign Relations Law (Restatement)[6] confines the objective territorial principle to effects that are direct, foreseeable and substantial. It is arguable that this formulation is too open-ended and allows the State to assume jurisdiction where economic or social ulterior effects occur within its territory. Professor R. Jennings[7] and other commentators contend that the objective territorial principle applies only where the effects are a "constituent element" or legally essential element of the offence. Any effect which is not a functional requirement of the crime must be "ex-hypothesis neutral and irrelevant". Unless the objective territorial principle is so restricted, it is submitted that the principle would lose its territorial character and will become an excuse for asserting universal or protective jurisdiction.

(ii) The Protective or Security Principle

17. The protective principle or the principle of security is a claim that a State has jurisdiction over crimes committed abroad which are directed against certain interests of the State. The jurisdiction for the protective principle lies in the inadequacy of a national law in punishing offences within its territory which are directed against the vital interests of other States. Offences within the ambit of this principle include attacks on the security, credit, political independence and territorial integrity of the State. The counterfeiting of a State's currency and seals and the falsifications of its official documents are, perhaps, the clearest example of the application of the protective principle.

18. Whilst the United States and the United Kingdom prefer the territorial and national basis of jurisdiction, other States have extensively relied upon the protective principle. The Harvard Research observed that there is a tendency to extend the application of penal law to punish political crimes committed by aliens abroad. This has led to a controversy over the propriety of the protective jurisdictional principle. It seems that the principle is open to abuse, and yet there is no generally recognised limitation on its application.

(iii) The Active Personality or Nationality Principle

19. It is universally accepted that a State has practically unlimited jurisdiction with respect to crimes committed outside its territory by a natural person or by a corporation which has the nationality of the State. The justification for basing jurisdiction on nationality is that a national owes allegiance to his State and that a State's treatment of its nationals is not a matter of concern to other States or to international law.

20. Although the nationality of an individual is conferred by the law of the State,[8] there must exist a genuine link between the State and the individual.[9] It has been suggested[10] that the nationality of a corporation is in a similar position as an individual. However, there are differing views as to the national character of a corporation. Article 27 of the Restatement provides that the corporation has the nationality of the State which creates it. This proposition reflects the Anglo-American view of nationality of a corporation. On the other hand, the Harvard Research shows that most other States consider the nationality of a corporation as determined by the location of its seat or chief officer whilst a few States ascribe the nationality to where the corporation's principal activity takes place. The process of ascribing nationality is further complicated because States adhere to different and sometimes conflicting theories of corporate personality. The United States legislature[11] and courts assert jurisdiction over a corporation which is created in a foreign country where either the corporation has substantial links with the United States and its citizens, or is subject to the control of nationals of the United States. Other States are much less willing to "pierce the corporate veil". For example, the British Government[12] has emphasised that the separate legal personality of the parent company and its subsidiary, and the corporation itself and its shareholders, should be respected when applying doctrines of jurisdiction.

21. Another problem is that a conflict may occur between the territorial principle and the nationality principle. The conflict may exist if the laws are different or even if the laws are the same. For example, where more than one State determines that a corporation is its national, there may be multiple jurisdictions. It has been argued that the territorial principle must always prevail and that extra-territorial jurisdiction concepts, such as the

nationality principle, cannot be exercised to "contradict the local law at the place where the alleged offence was committed." This position does not rely on any international law principle as such, but rather provides the only solution which is not destructive of justice and international intercourse.

(iv) The Passive Personality Principle

22. The passive personality principle endows jurisdiction on a State for crimes committed by any person outside the territory if the victim of the crime is one of its nationals. It has been doubted whether this principle exists as a separate basis of jurisdiction. It is difficult to justify the principle except in so far as it is subsumed under the protective principle. It is submitted that although a State has an interest in the treatment of its nationals in a foreign State an attack on such nationals should not per se justify a State's intervention unless the nationality of the victim is the reason for the criminal conduct and not where it is merely incidental to the crime.

23. English and American courts have regarded the passive personality principle as contrary to international law. In R. v Jameson[13] Lord Russell C.J. stated that international law requires a sovereign power to respect "the subject and the rights of all sovereign powers outside its own territory." Applying this view, the passive personality principle may be seen "at variance with the principle of the exclusive jurisdiction of a State over its own territory, but also with the well settled-principle that a person visiting a foreign country ... falls under the dominion of the local law".[14]

24. On the other hand, the penal codes of continental countries have provisions relying on the passive personality theory. In these States the passive personality theory is merely a subsidiary or auxiliary ground for assuming jurisdiction. Moreover, these States have restricted the passive personality principle to offences threatening the national's life, bodily well-being, health or liberty.

25. The principle of passive personality is not positively supported by international cases and authorities.[15] However, although the principle has not gained general acceptance this does not mean that it is contrary to internatinal law principles. It should be reiterated that the Lotus case indicated that States have a presumptive freedom of action unless there is an express prohibition founded on a rule of international law.

(v) The Universality Principle

26. Universal jurisdiction is a claim to jurisdiction over certain crimes against the international order. A State may assert jurisdiction over universal crimes if the criminal is found within its territory. The universal principle is of a residuary nature in that it is only relevant where the municipal criminal law of the State does not apply to the offence by virtue of the other principles of jurisdiction

27. It is well settled that it is a customary rule of the law of nations that there is universal jurisdiction to punish pirates. In Re Piracy Jure Gentium[16] the Privy Council held that jurisdiction over pirates extends to piracy on the high seas and on any ship because a person guilty of such piracy has placed himself beyond the protection of any State. There are also other crimes which are founded in treaties that are subject to the principle of universality. For example, the International Convention for the Suppression of Currency Counterfeiting of April 1929, the Convention for the Prevention and Punishment of Terrorism of November 1937 and the Convention for the Suppression of Unlawful Seizure of Aircraft of September 1970 may be regarded as creating universal crimes. However, an English court has no universal jurisdiction over such crimes until an English statute[17] is passed pursuant to the convention.

28. Finally, the universality principle by its very nature only applies to a limited number of crimes. It is of little importance in the field of economic crime, with the possible exception of counterfeiting. Nevertheless, it is submitted that there is a need for creating universal crimes particularly in the area of international maritime fraud.

C. The English Criminal Law and Jurisdiction

29. Given the pressure of time it has not been possible to examine the relevant law in other Commonwealth jurisdictions other than that of England. However, it is thought an analysis of the English law will be helpful given the influential role that it has played in the legal

systems of the majority of Commonwealth jurisdictions.

30. English criminal law has largely relied on the territorial principle in invoking criminal jurisdiction. The common law rule was that English courts enjoyed jurisdiction only in respect of conduct which took place within its territory. Professor G. Williams[18] in a seminal article on jurisdiction pointed out that this rule is historically linked with the venue doctrine which required that a jury decide cases on the basis of its own knowledge of the facts, and that the jury must come from the locality in which the criminal acts occurred. Although the venue doctrine has been abolished, it is submitted that English criminal law is saddled with many jurisdictional obstacles directly emanating from its tenacious adherence to the territorial principle.

31. Under the territorial doctrine the determination of the locus or place of the crime assumes a critical importance. By answering the question "where did the crime take place?", one should be able to automatically decide whether there is or is not jurisdiction. However, this proposition ignores the difficulty that the crime may be committed in more than one country. The classic illustration is where the defendant in country A fires a shot across the border and kills a person in country B. In international law both the State where the defendant is physically present and the State where the effects of the defendant's criminal conduct are felt would be entitled to assume jurisdiction. However, the common law viewed the elements of a crime as largely indivisible and could not really countenance the notion that a crime could be committed in two different places.[19] It is partly for this reason that the case law has not adequately provided any clear general principles to deal with the problem of offences that are committed in more than one State.

32. The common law attitude to jurisdiction has also been applied to the judicial interpretation of statutes creating new crimes. Although Parliament is supreme in its legislative competence and its powers are not limited by the doctrine of territorial jurisdiction, the courts have relied on a number of principles of statutory construction to circumscribe the extension of legislative power beyond its borders. There is the well established presumption[20] that Parliament does not intend to criminalise conduct in places outside the territorial jurisdiction of the English courts. This presumption applies unless there are clear and express statutory words to the contrary. There is also a presumption[21] that Parliament does not claim jurisdiction which exceeds the limits established by "the common consent of nations". This presumption is necessary for reasons of international comity. It is not commonly relied upon by English courts because England has limited its jurisdictional competence more than is required by international law. In contrast to these traditional guides to statutory interpretation, Lord Diplock[22] has expressed the unorthodox opinion that where a new statutory crime is created and the statutory language does not contain any geographical limitation, then the courts should not imply such a limitation except where it is required by international rules of comity. Although Lord Diplock's opinion that the presumption of territoriality should not be invoked willy-nilly is attractive, it has not gained any acceptance from other members of the English judiciary.

33. In England, statutory extensions to the territorial principle usually rely on the nationality or sometimes the residence of the party.[23] For example, the criminal law is applied to many offences committed by Crown servants abroad[24] or by military service personnel outside England.[25] The protective principle is also utilised for offences such as perjury[26] and electoral bribery,[27] and for offences relating to revenue and exchange control.[28] International crimes such as piracy are also within the English jurisdictional net.

(i) English Theories of Jurisdiction

34. The writers have adopted three theories as explaining where a crime is committed.[29] Firstly, the initiatory theory gives jurisdiction to the place where the physical acts of the offender take place. Secondly, the terminatory theory denotes jurisdiction to the country where the consequences of the crime, or the last constituent element of the offence takes place. Thirdly, the inclusionary theory confers jurisdiction on the State where any of the constituent elements of the offence are com-mitted.

35. The initiatory theory assumes that jurisdiction coincides with the place where the act was committed, and considers the State in which the physical acts of the offender occur has the greater interest in prosecuting the criminal offence. The terminatory theory focuses on the harms which the offender has caused, and considers the State in which the injurious effects are felt has the primary interest in accepting jurisdiction. The inclusionary theory postulates that any State in which an essential element of the offence occurs, whether this

consists of physical conduct or proscribed consequences, has an equal right to assert jurisdiction over the offence.

36. The principal argument in favour of the terminatory theory is that "the State where the last element of the crime occurs is presumably the sufferer from it, and therefore has the greatest interest in prosecuting it."[30] Such a State would be entitled to invoke jurisdiction so as to protect persons within its territory and to guard against unlawful acts emanating from abroad. Professor G. Williams[31] argues that States have a mutual interest in suppressing crime and there is "generally little reason to fear that the State where the offender physically acts will remain passive, even if the ill effects are not felt within its own borders." However, States have different laws governing criminal behaviour and it is not uncommon that a State where the physical offender is present is unable to prosecute the criminal. This is particularly so with economic crimes where many States have undeveloped and inadequate laws and where legal technicalities may result in an unmeritorious acquittal.

37. The most persuasive argument in favour of the initiatory theory is that a person should only be expected to know the law of a place where he is since it would be oppressive to punish him in any other State where his conduct produced illegal con-sequences. It is also likely that the witnesses would be in the State claiming ini-tiatory jurisdiction, and that in contrast to the terminatory theory, the initiatory theory avoids the necessity of extradition. Moreover, the initiatory theory is easier to apply since the principal elements of the offence are certain, and it does not entail the legal fiction inherent in the terminatory theory that a person is deemed to act at a place other than where he is. Finally, the initiatory theory accords with the legal presumption that the "criminal law regulates persons within its territory, not that it protects persons within the territory."[32] It is submitted that a presumption can hardly be conclusive because the function of the criminal law is also to protect those persons within the realm.

38. Since the inclusionary theory allows jurisdiction to be accepted if either the initiatory or terminatory theory is satisfied, it will have some of the advantages and disadvantages of both these theories. The unique advantage of the inclusionary theory is that it facilitates the prosecution of offenders whenever a constituent part of the offence is committed within the jurisdiction. The application of the inclusionary theory would bring many more offences involving a foreign element within the criminal jurisdiction of English courts. Whether an expansion of jurisdiction is desirable depends largely on whether one believes that the existing narrow territorial concept is appropriate. This issue will be discussed in due course. Finally, since there is no clear authority on whether the inclusionary theory would expose the accused to double jeopardy,[33] it is submitted that there is a need for a double criminality rule in relation to offences with a foreign element.

39. The writers have been divided as to which theory of jurisdiction the English courts have preferred. Professor G. Williams maintained in 1965 that the weight of authority seemed to adopt the terminatory theory. On the other hand Mr J. Lew considered that up to 1972 the English caselaw was equally divided between the initiatory and terminatory theories, but that the decision in Treacy v D.P.P.[34] and the more recent cases have embraced the inclusionary theory. Although many of the cases may be explained in terms of these theories, the judiciary[35] have only on a few occasions expressly relied on these doctrines. It is submitted that the English case law is rather confusing, largely because it has extended the territorial principle under the guise of legal fictions. It will be further argued that there is a modern tendency for the courts to expand the notion of territorial jurisdiction particularly in relation to the offence of conspiracy abroad to commit crimes in England.

(ii) Conduct and Result Crimes

40. Jurisdictional notions may be best understood by classifying offences as either "conduct crimes" or "result crimes".[36] Conduct crimes are offences in which the constituent elements of the actus reus include only the physical acts of the offender as well as, when relevant, the surrounding circumstances in which they take place. A conduct crime is completed once the physical conduct occurs. In a conduct crime jurisdiction lies where the conduct of the offender takes place. Once the crime is completed any consequential results are irrelevant, and jurisdiction cannot be invoked in the place where the results are affected. In contrast, a result crime is one where the essential constituent elements include not only the conduct of the offender but also the proscribed consequences of those physical acts. A court has jurisdiction over a result crime if any part of the proscribed result takes place within the territory.

41. A major difficulty is determining whether a specific crime is a conduct crime or is a result crime. Disagreement over this question in relation to the offence of blackmail resulted in a division of opinion in the House of Lords in Treacy v D.P.P.[37] In Treacy the defendant posted in the Isle of Wight a letter demanding money with menaces addressed to a Mrs X. in West Germany. In these circumstances the House of Lords had to decide whether the English court had jurisdiction to try the defendant for the charge of blackmail contrary to section 21 of the Theft Act 1968. Lord Hodgson, [38] with Lord Guest[39] in agreement, held that the writing and posting of a threatening letter in England constituted making a demand with menaces, and thus the English court had jurisdiction over the offence. In contrast, Lord Morris[40] and Lord Reid,[41] in dissent, considered that the demand was made in Germany when it was received by the victim, and therefore there was no jurisdiction. Finally, Lord Diplock[42] thought that even if the offence of blackmail was not completed until the victim received a threatening demand, nevertheless, this did not affect the right of the State to try the offence.

42. The decision in Secretary of State for Trade v Markus[43] provides a clear illustration of a result crime. An English company was established for the purpose of selling shares in an investment trust, the latter being managed by a Panamian company. Agents of the English company visited investors in West Germany, showed them misleading brochures, and then transmitted signed application forms to London. Applications were "processed" in London only after the investor's money was deposited in a Swiss bank. The managing director of the English and Panamian companies was charged with fraudulently inducing the investment of money, contrary to sections 13(1)(b) and 19 of the Prevention of Fraud (Investments) Act 1958.

43. The main bone of contention in Markus was whether the English court had jurisdiction with respect to the offence under s.13(1)(b). This provision contains two distinct and separate offences:

(a) inducing a person by misleading, false or deceptive statement to take part in any arrangement for the investment of money, in property other than securities; or

(b) inducing a person by such a statement to offer to take part in any such arrangement.

44. In Markus it was clear that the inducement, the offer to take shares and the payment all took place in Germany. It followed that the offence of "offering to take part in an arrangement" was completed in Germany and was not justiciable in England. However, the House of Lords held that this offence was not mutually exclusive from the "offence of taking part in an arrangement". The Law Lords agreed with the opinion of Lord Widgery C.J. in the Court of Appeal[44] that although an offer had been made by investors in Germany and the processing of the papers was conditional on such an offer being made, this did not preclude the prosecution from charging the offence of taking part in the arrangement. The court held that it had jurisdiction over the latter offence because the victims had not become parties to the arrangement until the application form had been processed in London.

45. Lord Diplock in the Markus[45] case explicitly adopted the conduct/result crime classification. He described both the offences in section 13(1)(b) as result crimes and concluded that jurisdiction would lie where any of the proscribed results (that is taking part or offering) took place. It is submitted that Lord Diplock's view repre-sents a correct analysis in that the offences are defined by reference to the behaviour of the victim as a consequence of the accused's acts.

46. The decision in Markus had been considered by Mr J. Lew[46] as an example of the court exercising "excessive jurisdiction." Mr Lew argued that since "the offender's action in England did not amount per se to a criminal offence in England,"[47] it is contrary to international law for an English court to apply its laws to acts committed in a foreign state. It is submitted that this view is misconceived because it assumes that a crime can ony be committed in the place where the offender is present and where his conduct takes place. It fails to give due weight to the important fact that the harmful consequences or proscribed results may be an essential element of the crime which is sufficient to ground jurisdiction.

47. There are special problems in determining where the proscribed results of a result crime have in fact occurred. In R. v Harden[48] the accused was charged with obtaining a valuable security by a false pretence. It was alleged that he had dispatched from England a letter

containing false pretence to a company in Jersey, which in response had sent a cheque to the fraudster in England. The Court of Criminal Appeal held that there was no offence in England because the "obtaining" occurred where the ownership of the property passed, in this case when the cheque was delivered to the post office in Jersey. The court expressly found that the defendant had agreed with the victim that the post office would act as its agent for the purpose of receipt.[49] The court assumed that its finding that the offence took place in Jersey necessarily deprived it of jurisdiction. It placed no significance on the fact that the defendant was physically present in England and the false pretences emanated from England. The argument that both Jersey and England shared jurisdiction with respect to the offence was never considered by the court.

48. Ten years later in the decision in R. v Tirado[50] the Court of Appeal refused to extend the Harden case and considerably limited its impact. In Tirado the accused had allegedly obtained money from persons in Morocco by falsely promising them employment in England. He had suggested to his victims that they send a banker's draft to him by using a Moroccan bank or by post. The court held that the offence of obtaining property by deception was justiciable in England. It refused to "take the law an inch beyond that which Harden had determined, namely that if a recipient of a valuable security wishes to show that he obtained it when it was posted to him, he has to be able to show an agreement, expressly or impliedly, whereby he had undertaken and accepted that posting should be equivalent to personal delivery so far as he was concerned."[51] This is strong judicial language which suggests that the type of evidence required to establish such an agreement would need to be substantial. It will not, for example, be sufficient to rely on the contract doctrine known as the "postal rule".[52] Thus, in Tirado the court held that since the fraudster had recommended alternative channels of communication and had been indifferent as to the method of delivery, it was open to the jury to decide that the post office was not his agent.

49. In determining the place of conduct in conduct crimes the courts are prepared to rely on legal fictions. Although a defendant may be physically present in country X, his conduct may be deemed to take place in country Y. Foreign conduct may also be considered as relevant to the commission of a conduct. For example, in Lawson v Fox[53] the hours driven by a lorry driver on the Continent were counted in ascertaining the existence of the offence of driving in excess of eleven hours in one day. The House of Lords said that it was irrelevant to the offence whether the conduct in France was lawful or not.

50. Finally, there is no authority as to jurisdiction with respect to crimes of omission. It is, nevertheless, submitted that the locus of criminal omissions is the place where the performance of the act is required. For example, a failure by a company to keep accounting records contrary to section 12(10) of the Companies Act 1976 would clearly give the English courts jurisdiction over the offence. This would be considered a conduct crime.

(iii) Inchoate Offences and Jurisdiction

51. Although inchoate offences are essentially conduct crimes, jurisdiction does not necessarily lie where the conduct takes place. The general rule is that jurisdiction over an inchoate crime belongs to the State that would have had jurisdiction if the substantive offence had been consummated.[54] The justification for this exception to the territorial principle seems to be that an English court is not prepared to hear evidence on questions of foreign criminal law.

52. The general principle is illustrated by the decision in R. v Governor of Brixton Prison, ex parte Rush[55] in which an application for extradition to Canada was refused in circumstances where the defendant was charged with conspiracy to defraud the public of $100 million. The evidence showed that the defendant and others had sent circulars and letters from Canada to investors resident outside Canada. The latter were invited to become shareholders in two companies controlled by the applicant and to send cheques to post office boxes in Nassau or Panama. These cheques later were either transferred to Toronto or paid into a Nassau bank account. It was alleged that fraudulent attributes were given to the shares in these companies. The Divisional Court held that there was no offence of obtaining valuable securities by false pretences in Canada since these securities were obtained either when the cheques were put into the post, or at latest when received in Panama and Nassau. Since the indictable offence which they conspired to commit was completed when the cheques were obtained, no offence had been committed in Canada.

53. Similarly, a conspiracy to commit a crime abroad is not triable in England unless the contemplated crime is justiciable under English law. In Board of Trade v Owen [56] the

House of Lords held that a conspiracy formed in England to defraud a German export control department in Germany was not an offence in England. Lord Tucker observed that:

> "... a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here ... It necessarily follows that a conspiracy of the nature of that charged (that is to defraud) - which, in my view was a conspiracy to obtain a lawful object by unlawful means, rather than to commit a crime - is not triable in this country since the unlawful means and the ultimate object were both outside of jurisdiction."[57]

54. It is respectfully submitted this statement fails to take into account that a conspiracy to defraud, unlike other inchoate offences, may have an object that is not a substantive criminal offence.[58] It follows that jurisdiction over conspiracy to defraud should not be predicated on whether the object of the conspiracy is triable in England.

55. The general rule considered in Owen may be subject to certain exceptions. Lord Tucker in Owen[59] thought that a conspiracy in England to violate the laws of a foreign state might be indictable here if the performance of the conspiracy would produce a public mischief in England or injure a person in England by causing him damage abroad. The scope of this exception has not been tested. The exception is so widely worded that it may swallow up the rule. For example, it may be argued that a conspiracy to defraud English resident shareholders of a foreign company, which is not carrying on business in England, would fall within the rubric of the exception.

56. Another exception, supported by the decision in R. v Kohn[60] is that where a conspiracy formed in England contemplates the possibility that the crime may be committed within jurisdiction, then, even though the conspiracy is completely performed abroad it is justiciable in England. Thus, in Kohn, the court decided that a conspiracy formed in England to scuttle a Prussian ship with the object of defrauding Belgian insurance underwriters was indictable if the conspirators envisaged that the ship might be scuttled at an English port or within English territorial waters.[61]

57. The reverse situation is where a conspiracy is entered abroad to commit a crime in England. Professor G. Williams[62] considers that such a conspiracy is a logical corollary to the Owen principle and would be justiciable in England, whilst on the other hand it has been argued that this would constitute a claim for extraterritorial jurisdiction which would be lawful only if it is based on an express statutory enactment. Unfortunately, there is no direct authority on the point, and it is submitted that the relevant principles, if any, have been obscured by the judicial inclination to resort to convenient but unsatisfactory legal fictions.

58. In R. v Baxter[63] the defendant in Northern Ireland posted fraudulent football pool claims to promoters in Liverpool. On a charge of attempting to obtain property by deception, it was held that the English court had jurisdiction on two alternative grounds. Firstly, the attempt was "still in being" when the fraudulent letters were received in England. Secondly, when a person "dispatches a missile" and arranges for its transport and delivery (these constituting an essential part of the attempt), he commits part of the crime within jurisdiction. The first explanation relies on a legal fiction that conduct may "constructively" be deemed to occur in a place where the defendant is not physically present. The second reason implicitly introduces the notion of "effects-based" jurisdiction, but does not impose any coherent limits on its application. It is submitted that these alternative explanations are inconsistent with each other in that the first suggests that attempt is a conduct crime and the second insinuates that attempt is a result crime.

59. In D.P.P. v Stonehouse[64] the defendant fabricated his death by pretending to drown in Miami with the intention that his wife would be able to claim on an insurance policy in England. The defendant was convicted of attempting to obtain property by deception. The following question was certified by the Court of Appeal to the House of Lords: "Whether the offence of attempting ... to obtain property in England by deception, the final act allegedly to constitute the offence of attempt having occurred outside the jurisdiction of the English courts is triable in an English court, all the remaining acts necessary to constitute the completed offence being intended acts necessary to constitute the completed offence being intended to take place in England." Although the House of Lords unanimously answered the question in the affirmative, it is submitted with due respect that the judgments did not directly tackle the question certified on appeal. All the judges placed special emphasis on the fact that the news of Stonehouse's death in America had been communicated by the media in England. Lord Salmon said that Stonehouse had intended to use the media as his

"innocent and willing agents" to inform his wife and insurers, and that this imparting of information was an essential part of the attempt. Similarly, Viscount Dilhorne thought that the false representations communicated by the media were analogous to false representations by post, and since they were intended to be communicated there was jurisdiction. Lord Keith and Lord Diplock seemed to have adopted the wide view of "effects-based" jurisdiction. Lord Keith considered that an offence is justiciable if the effects of the act intentionally operate or exist in jurisdiction, and Lord Diplock[65] assumed that jurisdiction over the completed crime would exist if the consequences were intended to be caused by him in England, and that this would determine jurisdiction over the inchoate crime. It is apparent that if the court in Stonehouse had addressed itself to the question which State would have had jurisdiction over the consummated offence the answer would clearly have been England, and according to the "logical corollory" of Owen, jurisdiction would lie over the inchoate offence.

60. The complex problem pertaining to jurisdiction over conspiracy is well illustrated by the case of Tarling v Government of Singapore.[66] The Government of Singapore sought the extradition of Tarling on 17 charges related to dealing in shares of two Hong Kong companies, which were owned by Haw Par Brothers International Ltd. (HPBIL), a Singapore company, and Haw Par Brothers (Hong Kong) Limited. (HPBK), its Hong Kong subsidiary. It was alleged that Tarling and other directors of HPBIL had fraudulently appropriated shares by purchasing them at below market value and selling them at a huge profit at the expense of HPBIL and HPBK. The scheme for executing the share deal was highly complicated and was neither disclosed to the independent directors of HPBIL nor to its shareholders. The House of Lords had to decide whether the English court would have had jurisdiction over the offence by hypothetically substituting England for Singapore. In relation to the charge of conspiracy to steal the House of Lords unanimously held that there was no jurisdiction. Lord Wilberforce argued as follows :

> "It cannot be a crime triable (hypothetically) in England to conspire in Hong Kong to steal shares in a Hong Kong company (KD) the property of a Hong Kong Company (HPBHK). Equally clearly it cannot be a crime triable (hypothetically) in England to conspire in Hong Kong to steal shares in a Hong Kong company (KL) the property (allegedly although there was some doubt about this) of a company in England."[67]

61. If the principle that jurisdiction over conspiracy to steal is the same as the substantive offence of theft is applied, it is evident that the offence of theft is only justificiable if it is committed at the place where the thief commits the act of appropriation or the place where the property is actually situated.[68] It is clear that jurisdiction cannot depend on where the owner of the property is to be found. Since there was no evidence of an act of appropriation in Tarling and since the shares of a company are located in the place of a company's registration,[69] in this case Hong Kong, there was no jurisdiction.

62. The question whether there was jurisdiction over the crime of conspiracy to defraud raises difficult issues in determining where the defrauding or proposed defrauding took place. The charge of conspiracy in Tarling was framed so as to obviate the jurisdictional obstacles. The indictment in Tarling alleged that the conspiracy consisted of the dishonest concealment of the disposal of shares belonging to HPBIL for the personal benefit of the directors with the intention of preventing the shareholders from requiring the directors to account for the profits. The House of Lords were divided on whether the indictment contained a justiciable offence. Lord Salmon[70] held that this charge should fail on exactly the same jurisdiction grounds as the charge of conspiracy to steal. The other three Law Lords applied the principle in D.P.P. v Doot,[71] which had held that a conspiracy formed abroad to commit an offence in England is triable if acts in furtherance of the conspiracy were performed in England. Lord Wilberforce[72] and Lord Keith considered that as there was no evidence of overt acts in Singapore in furtherance of the conspiracy to bring the case within the principle in Doot, the offence was not justiciable. On the other hand, Viscount Dilhorne expressly and Lord Edmund-Davies impliedly found sufficient evidence of overt acts so as to make the crime justiciable. Viscount Dilhorne considered that the continuing omission to reveal to shareholders the true state of affairs and the false representations made in the annual report of HPBIL were evidence of overt acts. However, Viscount Dilhorne did not base his decision on the so-called "overt acts" approach because he regarded the alleged overt acts as irrelevant averments in the indictment. Viscount Dilhorne relied on the principle that "the conspiracies formed in Hong Kong were directed to the law of Singapore, to deprive a Singapore company of assets it held itself and held by a wholly-owned subsidiary." This statement implies that jurisdiction over the offence of conspiracy to defraud is determined by the geographical location of the victims of the fraud. It this is correct, it is submitted that jurisdiction over such a conspiracy is considerable since at the

time of the fraud the victims may be located in more than one country.

(iv) Law Reform

63. It is generally agreed that the law relating to jurisdiction over criminal offences in England is neither clear nor logical. The Law Commission Report on The Territorial and Extraterritorial Extent of the Criminal Law[73] represents one attempt to clarify the present law. This report adopts the inclusionary theory of jurisdiction, a theory of which Lord Diplock has been its greatest advocate. The Report recommends that :

> "Where any act or omission or any event constituting a prescribed element of an offence occurs in England or Wales, the offence should be deemed to have been committed there, even if other elements of the offence take place outside England and Wales."[74]

64. The report rejects the notion of adopting the general rule of jurisdiction based on harmful effects because such a claim for jurisdiction would invite similar claims by other countries,[75] some of which have different conceptions of public policy. It is submitted that this argument has no empirical support, and, indeed, ignores the fact that many countries already claim extended jurisdiction on the widest grounds. The report favours a pragmatic approach in determining whether jurisdiction based on "harmful consequences" should be asserted for a specific crime and argues that "much must depend on the policy underlying the particular offence." It is clear from the previous discussion of the case law that the courts have been reluctant to ascertain the policy behind criminal offences and have preferred instead to apply legal fictions. It is thus difficult to see why the courts would take a policy-orientated view of jurisdiction in the future.

65. The appropriateness of the territorial principle as a comprehensive doctrine of jurisdiction may be questioned. It has already been mentioned that the historial conditions surrounding the development of the territorial principle are markedly different from today. The territorial principle was developed at a time when criminal conduct was locally based and when corporations did not have a predominant role in international life. Furthermore, the territorial principle is becoming increasingly irrelevant for the following reasons. Firstly, international criminals have transnationalised their activities, thus necessitating the introdution of new extraterritorial offences. Secondly, the growth of evasive activity with international links has meant that there are large loopholes in national criminal laws. Thirdly, the movement of the loci of power to transnational corporations has created special problems in enforcing criminal laws. Fourthly, the internationalisation of the world's capital markets has permitted new opportunities for international frauds which have only slightly discernible territorial connections with any one country. It is submitted that greater reliance should be placed on other principles of criminal jurisdiction, such as the nationality principle and the protective principle. The nationality principle avoids the difficulty of a court sitting in judgment on nationals and officials of another country, whose activities may not be criminal in the latter country. It is also an effective way of solving the problem of jurisdiction in relation to criminal offences committed by English nationals or corporations registered in England. This solution would be in accordance with the practice of the civil law States which claim extraterritorial jurisdiction based on the nationality principle.

D. United States Anti-Fraud Laws

66. The attitude of the English courts to questions of jurisdiction is irrespective and this is reflected in the attitudes of the prosecutionary authorities and the police. The judicial and police authorities in most Commonwealth jurisdictions appear to take a similar view. However, the position in the United States of America may usefully be contrasted with this restrictive approach. There is some evidence that United States jurisprudence in this matter is gaining more respect in certain Commonwealth countries and, of course, many Commonwealth countries have to contend with the problems faced by the United States authorities taking such a robust attitude to matters of jurisdiction and in particular the extraterritorial application of their laws. In briefly examining the relevant United States law attention will be focussed on the law and practice relating to securities frauds as this constitutes a useful comparative model. There is a trend in many States to extend regulatory laws beyond the national frontiers. The extraterritorial application by American courts of the anti-fraud provisions in the Federal securities laws provides a valuable illustration as to the possible approaches to the question of jurisdiction. Instead of engaging in a complex analysis as to where a securities fraud has occurred, the American courts have tended to grant extraterritoriality where this would promote the policy of the

securities laws. Similarly, the Securities and Exchange Commission (SEC) has advocated an expansive view of jurisdiction in its administrative hearings and consent decrees. Consequently, jurisdiction over fraud offences has been accepted in many circumstances where an English court would decline jurisdiction.

67. The United States has comprehensive Federal securities legislation which seeks to regulate improper securities transactions executed on a national securities exchange or through the facilities of inter-state communications. The most important Federal anti-fraud securities provision is Section 10(b) of the Securities Exchange Act 1934 and Rule 10(b)-5[76] made thereunder. The scope of Rule 10(b)-5 is uncertain and has been applied to factual circumstances far beyond the contemplation of its draftsmen.[77] Although a deliberate and wilful violation of Rule 10(b)-5 may constitute a criminal offence, criminal prosecutions are rare. The enforcement of the anti-fraud provision depends largely on the SEC instigating administrative or enforcement proceedings and, of course, private civil litigants assisted by lawyers operating under contingency fee arrangements.

(i) Legislative Jurisdiction under the Securities Exchange Act

68. There are two distinct issues involved in the exercise of US legislative jurisdiction over a securities transaction, which allegedly is in violation of the Securities Exchange Act 1934.[78] The first is the extraterritorial application of the 1934 Act under American constitutional law and also under international law. The second is the jurisdictional requirement under the particular provision it is sought to apply extraterritorially. The first issue is concerned with whether Congress has the power, or indeed has exercised this power, to make rules seeking to regulate such a transaction. The second issue involves the question whether the jurisdictional means that are an essential element of the particular violation can be proven - thus in a case under Rule 10(b)-5 - has the defendant utilised instrumentalities of inter-state commerce or the facilities of a national securities exchange? Although these issues are conceptually distinct, it will be shown that the SEC has asserted a view of jurisdiction which would practically eliminate the basis of the distinction.

69. A very important principle in American constitutional law is that the courts are duty bound to follow a Congressional directive on a statute, even if this would be contrary to "international law".[79] The major exception to this principle is that the American courts will not enforce a statute if it violates the "due process" clause of the Constitution.[80] Since the securities laws are silent as to their extraterritoriality,[81] this constitutional restraint is not important and need not be discussed here. This is not to say that international law is irrelevant in the process of statutory interpretation. In construing legislation the courts naturally attempt to arrive at a result that would not be contrary to international law.[82] The logical approach of the courts is to make a decision as to the existence of jurisdiction under international law as a guide to their interpretation of the statute. Indeed, the American courts have referred extensively to principles of international law, particularly to the subjective territorial principle, the objective territorial principle and the nationality principle as expressed in sections 17, 18 and 27 of the Restatement of Foreign Relations Law.[83] Whilst not adopting the Restatement as the final word on extraterritoriality of the 1934 Act, the courts have employed its principles as a framework for the analysis of jurisdiction.

70. The most aggressive advocate of an expansive view of jurisdiction has been the SEC. The SEC has argued that an incidental use of inter-State commerce in connection with the alleged fraudulent conduct is sufficient to ground jurisdiction, albeit the transaction is organised and executed wholly outside the United States.[84] The policy justification of the SEC view is that extraterritoriality is necessary for the proper enforcement of the securities laws and the protection of American investors and corporate issuers, and that it also benefits other countries by extending protection to their citizens . The SEC view has a number of significant implications. Firstly, since a breach of Rule 10(b)-5 requires some use of inter-State commerce, jurisdiction exists over any transactions anywhere in the world which in fact violated that rule. Thus, a plaintiff who could establish the substantive merits of his Rule 10(b)-5 claim would ipso facto be entitled to a remedy in the American courts. Secondly, the width of the SEC's approach is accentuated by the view of the courts that the use of inter-State commercial facilities in furtherance of a fraud need not be an essential element in the scheme, premeditated or even effective. Therefore, a foreign party who merely used American inter-State commercial facilities to make an appointment with the victim or to confirm the transaction would be within the scope of jurisdiction. In practice the SEC view has had a considerable impact in its process of administrative regulation and in its consent decrees.[85] It has also recently been accepted in some of the courts.[86]

(ii) The Subjective Territorial Principle

71. The American courts have considered that the subjective territorial principle is applicable not only where part of the crime is committed in the United States, but also where no constituent element of the offence has in fact taken place within the territory. This broad view of jurisdiction is illustrated by the decision in Leasco Data Processing Equipment Corporation v Maxwell.[87]

72 In Leasco an American corporation complained that the defendants, who were mainly British citizens and companies, had conspired to cause it to buy Pergamon stock at an unfair price in violation, inter alia, of section 10(b) of the 1934 Act. The stock of Pergamon, a British company, was neither traded on any US market nor listed on any national securities exchange. It was alleged that false and misleading financial information was given to Leasco's officials in London and New York. After signing an agreement in New York, Leasco through a foreign subsidiary, which the court described as its alter ego, acquired 38 per cent of the outstanding stock of Pergamon on the London Stock Exchange. The Court of Appeals held that jurisdiction existed because the misrepresentations which were made in New York were an "essential link" in the fraudulent scheme.[88] Such conduct was sufficient for jurisdiction, even though, the critical misrepresentations that directly triggered the share purchases were made in London. The decision in Leasco would suggest that any conduct connected with the United States may ground jurisdiction provided that it has direct or indirect causal relationship with the fraudulent scheme.[89]

73. In Bersch v Drexel Firestone Inc.[90] the Court of Appeals formulated authoritative guidelines on the issue of jurisdiction. In the Bersch case an American citizen brought a class action on behalf of thousands of investors who had subscribed to a public offering of shares in Investors Overseas Service, a Canadian corporation. Although the offering was aimed solely at foreigners, some three hundred and eighty Americans, including the plaintiff, participated in the subscription. The complaint alleged that the prospectus, which had been mailed from foreign post offices, was false and violated Rule 10(b)-5. The only relevant conduct within the United States was a partial drafting of the prospectus, and a series of meetings in New York between the issuer's officials, accountants and underwriters in order to "initiate, organise and structure" the offering. The defendants, with some justification, argued that this was merely preliminary to the work carried out abroad. The Court of Appeals, nevertheless, held that there was jurisdiction over the claim brought by the American plaintiffs but not with respect to the suit of the foreign plaintiffs.

74. An important innovation in Bersch was the creation of an analytical framework where the question of jurisdiction was separately answered in respect of the different classes of plaintiff. The court of Appeals made important distinctions between plaintiffs who were American residents, American citizens residing abroad and foreign nationals. In respect of the last category the court stated:

> "The fraud, if there was one, was committed by placing the alleged false and misleading prospectus in the purchaser's hands. Here the final prospectus emanated from a foreign source... not only do we not have the case where all misrepresentations were communicated in the nation whose law is sought to be applied... but we do not even have the oft-cited case of the shooting of the bullet across a state line, where the state of the shooting as well as the state of the hitting may have an interest in imposing its law. At most the acts in the United States have helped to make the gun whence the bullet was fired from places abroad...."

75. The Court of Appeals concluded that there was no jurisdiction over the claims of foreign plaintiffs where the acts within the United States "are merely preparatory, or take the form of culpable misfeasance, and are relatively small in comparison to those abroad." It has been convincingly argued that the jurisdictional conduct necessary to sustain a foreign plaintiff suit encompasses only acts that are constituent of a Rule 10(b)-5 claim.

76. A different standard of jurisdictional conduct was adopted for plaintiffs who were non-resident American citizens. The Court of Appeals declared:

> "While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident." [91]

77 It should be noted that "preparatory activities" were also described as "acts of material importance" in the fraudulent scheme, and it is arguable that this requirement is not inconsistent with the measure of conduct that had been considered necessary in previous decisions such as Leasco. Finally, the Court of Appeals viewed the claim of the American resident plaintiffs as involving an application of the "effects-based" jurisdiction, which will be discussed in due course.

78. The guidelines established in Bersch are very important, and apply to transactions in both domestic and foreign securities, whether or not they are registered with the SEC or traded on a national securities exchange. Whether the Bersch guidelines provide formal rules or merely contain elements of public policy is not clear. Another problem is that the application of the Bersch standards may constitute an exorbitant exercise of jurisdiction because the jurisdictional standard is weaker in the case of American victims of fraud than injured foreign investors. Nevertheless, these guidelines have been followed in several major cases. In ITT v Vencap[92] the Court of Appeals held that jurisdiction would exist over claims by a foreign plaintiff if it could be established that the American territory had been used for the "perpetration of fraudulent acts themselves", as opposed to merely preparatory conduct which would be sufficient for an American plaintiff. Similarly, in Securities and Exchange Commission v Kasser [93] the SEC was granted an injunction in circumstances where it was alleged that the United States had been used as an operating base for the export of fraudulent securities by a Canadian company to foreign plaintiffs. The court of Appeals found jurisdiction even though the fraud had no substantial impact on the United States.

(iii) The Objective Territorial Principle

79 The American courts have interpreted the objective territorial principle as applying to conduct which occurs outside the territory but causes an effect within the State. The first leading securities case to apply this principle was Schoenbaum v Firstbrook.[94] In Schoenbaum the Court of Appeals for the Second Circuit stated:

> "We believe that Congress intended the Securities Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges, and to protect the domestic securities market from the effect of improper foreign transactions in American securities. In our view neither the usual presumption against extraterritoriality nor the specific language of s.30(b) show Congressional intent to preclude application of the Securities Exchange Act to transactions regarding stock traded in the United States, which are affected outside the United States, when extraterritorial application is necessary to protect investors."[95]

80. This statement has two far-reaching implications. Firstly, it accepts the idea that jurisdiction may be asserted over foreign conduct that has violated the 1934 Act if there are harmful effects on an American interest. Secondly, it expresses the belief that the 1934 Act should be applied extraterritorially whenever this will further the perceived policy behind the statute.

81. "Effects-based" jurisdiction has been applied in other cases. In Travis v Anthes Imperial Ltd.[96] the court held that there was jurisdiction where American investors suffered losses, even though the foreign stock was neither listed nor traded on an American national securities exchange. Similarly, in Bersch v Drexel Firestone Inc. [97] the Court of Appeals held that an American resident who had relied on a false prospectus emanating from abroad was entitled to sue under Rule 10(b)-5. According to the court, the American resident did not have to establish that the defendant's material conduct occurred within the United States. The Bersch case is thus clear authority for the view that in the case of American residents jurisdiction may be based on domestic effects per se

82. Finally, "effects-based" jurisdiction is to some extent circumscribed by section 18 of the Restatement which requires that the effects within the US be substantial, direct and foreseeable'. Although these criteria have not been fully defined, the cases suggest some important characteristics. In the Bersch case the Court of Appeals held that it was insufficient for the purposes of jurisdiction to assert that the fraud has had an effect on the American economy or American investors generally. It was not enough to claim that domestic or foreign investors' confidence in the American securities market had been undermined. The court said that there must be a direct connection between the fraud and

the American securities market. This means that the impairment of the security's value must result from the fraud itself and not merely from the other party's reaction to having been injured.[98]

(iv) The Federal Securities Code and Reform

83. The American Law Institute's proposed Federal Securities Code has dealt with the question of extraterritorial application of the Federal securities laws.[99] The Code advocates very broad powers of extraterritoriality, but permits the SEC to create exemptions from the Code because of policy reasons. Section 1604 of the Code provides that within the limits of international law the Code applies to the following transactions:

(a) sales, offers... of securities, proxy solicitations, tender offers... that occur within the United States although initiated outside the United States;

(b) activities of non-residents of the United States who are registered issuers or registered persons under the Code, directors, officers, and stock holders of registered issuers;

(c) an attempt, solicitation, or conspiracy outside the United States to commit a violation of the Code within its territory to the extent that the Code's criminal provisions apply to the relevant conduct;

(d) any other prohibited, required or actionable conduct whose constituent elements occur to a substantial, but not necessarily predominant extent within the United States, or some or all of whose constituent elements occur outside the United States but cause a substantial effect within it, of a type that the Code is designed to prevent, as a direct and foreseeable result of the conduct;

(e) an act initiated within the United States although it occurs outside the United States.

84. This provision has embraced the territorial principle simpliciter in (b), the subjective territorial principle in (e), the objective territorial principle in (a) and (d) and also probably the protective principle in (c). It is evident that the Code has advocated a very broad notion of extraterritoriality. The Commentary to the Code noted that the phrase "constituent elements" in (d) is not limited to acts essential to the establishment of the "prohibited, required, or actionable conduct".

E. Conflicts of Jurisdiction

85. There are at least three types of situations where conflicts of jurisdiction might arise between States. Firstly, where transactions involve persons and assets in several countries, each country may be in a position to claim jurisdiction. The existence of concurrent jurisdiction may result in problems of double jeopardy. Secondly, where there is a conflict between domestic law and international law, it is submitted that the generally accepted norms of international law should be applied. However, most States do not regard international law as controlling domestic law. Thirdly, a conflict may arise where the exercise of jurisdiction involves conflicting requirements of conduct as imposed by two or more States. The conflict of enforcement jurisdiction may seriously affect the relations between States, and requires greater elaboration.

86. It is clear that if two States exercise jurisdiction in a case so that a person is subject to inconsistent requirements of conduct, then, a dispute between the States and hardship to that person will arise. American courts have on occasions issued an injunction or subpoena to produce documents which have required action or inaction abroad by a party, who is thereby exposed to civil or criminal sanctions under the applicable foreign law.[100] American discovery orders requiring production of documents in violation of foreign bank secrecy laws are particularly troublesome. The American courts have been reluctant to defer to foreign laws, interests or courts. For example, in SEC v American Institute Counsellors, Inc.[101] a district court judge ordered the Swiss Credit Bank to transfer certain assets from Switzerland to the United States, even though such a transfer would violate Swiss banking and customs law. The judge refused to defer to Swiss law because of Swiss Credit Bank's participation in a securities violation and because control of assets was necessary for the protection of investors. As in many cases involving conflicts of enforcement jurisdiction, the judge's order had the effect of precipitating a consent agreement between the party and the SEC.

87. Where there is a potential conflict of enforcement jurisdiction it is desirable for a State to take into account all relevant interests including the interests of other States.

88. Section 40 of the Restatement outlines a number of factors that may be considered in minimising such conflicts. Section 40 provides that where two States enjoy jurisdiction to prescribe and enforce rules of law imposing inconsistent conduct upon a person, each State "is required by international law" [102] to consider in good faith moderating the exercise of its enforcement jurisdiction in the light of the following factors:

(a) the vital national interests of each of the States; [103]

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; [104]

(c) the extent to which the required conduct is to take place in the territory of the other State;

(d) the nationality of the person; [105] and

(e) the extent to which enforcement by action of either State can reasonably be expected to achieve compliance with the rule prescribed by that State.

89. Section 40 essentially advocates a government interest analysis or conflict of laws approach. The aim is to find the "proper law", by balancing the interests of the parties and involved States, and thereby "do justice". American courts have sometimes relied upon section 40 in resolving conflicts of jurisdictions. In SEC v Banca Della Svizzera Italiana [106] a Swiss bank, operating in New York through a subsidiary corporation, acted for an undisclosed principal in the purchase and sale of shares on the New York Stock Exchange. The American SEC alleged that there was a "strong probability" that the purchasers of the shares were engaged in insider dealing. A court order directing the Swiss bank to disclose the identity of its principals and to answer interrogatories was upheld by the Southern District Court of New York. Milton Pollack D.J. considered that since the Swiss bank had acted in bad faith, in that it made deliberate use of Swiss non-disclosure laws to evade the American securities laws of insider trading, disclosure should be ordered with severe contempt sanctions if that order was not complied with. The judge noted that the American Government had a vital national interest in the enforcement of its securities laws, whereas the Swiss Government had not expressed any opposition to the disclosure order. At the same time the judge also considered that the remaining section 40 elements were tipped in favour of the SEC - the Swiss bank had profited from the transaction; the Swiss bank had a transnational character; and the answering of interrogatories would take place in the United States. It is, of course, debatable whether the court in the Banco Della case did give adequate consideration to the policy interests at issue, as well as to the sensitive matters of international relations and economic policy. [107] Even if it did, it seems that section 40 does not necessarily eliminate conflicts of jurisdiction because it does not assure that the courts of two States will reach the same result in applying the provision. For example, a Swiss court may have considered that the secrecy of commercial transactions is fundamental to the integrity and success of Swiss financial institutions and that this factor overrides any American interest. It is thus submitted that although section 40 provides a more flexible position, the problem of conflicts of jurisdiction can be best solved by relying on international negotiations and agreements, which precisely set limits on the exercise of overlapping jurisdictions.

International Judicial Assistance

90. In most states the relevant authorities, whether executive, judicial or legislative, do not have authority beyond their territorial jurisdiction. This limitation on jurisdiction is evident at both the legislative and enforcement levels. In general, national laws have no application to conduct that takes place entirely outside the territory of the national State. Similarly, the power to conduct investigations, to collect evidence, to "arrest" criminals and to seize the "fruits" of their crimes beyond the national territory is extremely limited. Another restriction is that the performance of official acts by external regulatory agencies in another State will be considered an infringement of national sovereignty, [108] even if the external State's laws explicitly allow such action.

91. The most important method of removing such restrictions is international judicial assistance. The phrase "international judicial assistance" describes a series of devices by

which States co-operate in the enforcement of law. It is a general term which includes but is wider than international legal assistance. International legal assistance means that a requested State supports the enforcement of laws of an external State by carrying out enquiries or taking procedural steps on its own territory and passing on the results for a specific proceeding. International judicial assistance is distinct from international legal assistance because it also entails extra-legal co-operative links between States. The collection and dissemination of intelligence, the targeting of criminals and informal investigations are examples of international judicial assistance, where legal procedures are not involved. International judicial assistance is therefore wider and less constrained by legal process. International judicial assistance can take place merely as a result of administrative fiat by the executive arm of government.

92. International judicial assistance is usually granted to external authorities on the basis of comity, declarations of reciprocity, bilateral treaties or multilateral conventions. Co-operation is based on mutual trust and common interest. Diplomatic and political considerations are crucial. Where a State has considerable economic or military influence in another State the latter may be obliged to give the requisite assistance. It is not unknown for States to unilaterally take the jurisdiction of another country. [109] Some States, noticeably the United States, [110] will provide international judicial assistance to external courts and agencies despite the lack of a reciprocal action by the external authority. All these factors suggest that international judicial assistance should be viewed not only in its legal context but also in its political and social dimensions.

93. Having regard to the history and legal traditions of Commonwealth countries it may again be helpful to focus attention on the position in England. In the United Kingdom little attention has been given to international judicial assistance. This may be explained by a number of considerations. When the United Kingdom had an Empire judicial assistance between the "mother" country and its colonies and dependent States was largely unnecessary. The United Kingdom had authority to pass legislation with respect to its colonies and overseas possessions which were not sovereign States. Its Imperial jurisdiction embraced a wide range of matters including extradition. For example, the Fugitive Offenders Act 1871 dealt with, inter alia, persons accused of crimes and escaping from the colonies to the United Kingdom. Also, section 5 of the Extradition Act 1873, which provided for the interrogation of witnesses on behalf of foreign territories, was applicable in almost all territories which were subject to British rule. In certain crimes the United Kingdom passed legislation extending the jurisdiction of its colonial courts. For example, the Slave Trade (East African Courts) Act 1874 conferred jurisdiction on East African courts in regard to slave vessels, slaves, goods and effects. Furthermore, with essentially the same civil service, informal methods of co-operation including the transmission of intelligence were easily attained.

94. With the development of the Commonwealth of Nations and the creation of independent sovereign States,it was no longer possible or appropriate to enact imperial legislation or unduly rely upon the former methods of co-operation. [111]

95. Different considerations inhibited the British Government from granting judicial assistance in criminal matters to Civil Law jurisdictions. These States had a fundamentally different system of criminal justice, which was treated with distrust and suspicion. There was also the problem of determining on what legal basis the authorities in the United Kingdom could be obliged to afford assistance when the individual concerned had committed no offence against the law of England. These concerns were to some extent set aside when the United Kingdom entered into extradition treaties with foreign States and enacted the Extradition Act 1870. However, outside the ambit of extradition law and practice, the United Kingdom has failed to provide any comprehensive measure of international judicial assistance.

96. A number of recent developments have brought into question the traditional British approach. As has already been pointed out, the nature of international crime has dramatically altered in the past fifty years. [112] The ease of communication and relative freedom of movement had led to a growth of crimes in which elements may be committed in more than one State. The tendency for criminals to use international boundaries as a means of escaping justice has exacerbated the difficulties of law enforcement. This has been compounded by the revolution in information and communications technology.

A Investigations

(i) Informal Investigations

97. Informal co-operation between law enforcement authorities and in particular individual officers is a crucial element in combatting international crime. The extent of informal co-operation is impossible to assess, although there can be no doubt that it does occur at all levels and is probably the most important practical consideration in the fight against international crime. A few Commonwealth countries station police officers overseas as liaison officers attached to their diplomatic missions deliberately to foster this form of co-operation. A good example of this are the 61 liaison officers of the Royal Canadian Mounted Police stationed in 31 different countries. Of course, countries in close geographic proximity invariably develop close informal working relationships at an operational police level. Obvious examples of this in the Commonwealth would be Singapore and Malaysia and certain African countries. In a limited number of cases these informal relationships are given official or legislative backing.

98. The promotion of informal co-operation between judicial and police authorities was recognised as an important factor by the Commonwealth Law Ministers at their last meeting in Barbados in May 1980. In the context of international commercial crime, Commonwealth Law Ministers endorsed the proposal that a Commonwealth Fraud Liaison Scheme be established to inter alia facilitate and foster such co-operation. This is recognised in the terms of reference of the Commonwealth Fraud Officer who was appointed in November 1981 by the Commonwealth Secretary-General as a result of the Ministers' initiative.

99. To a certain extent the existence of such organisations as ICPO-Interpol and the Customs Co-operation Council tended to institutionalise the informal network which existed before their creation. Although this process is probably inevitable and has many advantages, the importance of informal co-operation, invariably developed on the basis of a personal relationship, should not be underestimated. Direct informal contact between officers can and often does result in the taking of action which would be impossible if the formal and institutionalised procedures had been followed. Of course, in many cases these more formal procedures may later be gone through to cover the earlier informal contact.

100. In so far as informal co-operation must in the vast majority of cases involve either a common interest between the relevant officers or a personal relationship it is naturally limited in its scope. Police officers are wisely reluctant to disclose sensitive information to persons they do not know and trust. Cases have occurred where information has been passed on to officers who have either abused it or mishandled it. It must also be admitted that some police agencies are by nature unduly secretive and suspicious of other authorities, both domestic and foreign. Furthermore, as in all walks of life some law enforcement officers are just unco-operative and narrow minded.

101. Certainly the more that can be done to broaden police officers' perspectives and allow them to develop contacts at the international level the better for everyone. The temporary secondment of officers to the General Secretariat of ICPO-Interpol provides a useful mechanism, but one that is not taken full advantage of by most Commonwealth countries.[113] The development of regional contact groups and the convening of regional meetings obviously facilitates this sort of contact and must be commended on this basis. An interesting development in this regard is the institution of annual meetings of Caribbean Police Chiefs.

102. To a very real extent the reluctance of police agencies to provide effective co-operation, on any lawful basis, to officials from another jurisdiction results in a vicious circle. Apart from creating mistrust and fostering a generally unco-operative attitude, it prevents its own officers gaining an international perspective and establishing effective working contacts in that other jurisdiction. It is unfortunate that many senior officers do not take a longer term view and see the provision of assistance in such cases as an economic investment of their admittedly limited and stretched resources. The law enforcement authorities of certain developing countries cannot properly be criticised for lack of zeal in responding to requests from ICPO-Interpol and other agencies when they themselves are treated with suspicion and even derision. The attitude unfortunately taken by some police officers, particularly in the more developed jurisdictions, is that requests from and to these countries are merely an excuse for trying to persuade their own government of the need for a foreign trip.

103. Many countries will not co-operate with a foreign authority unless the alleged offence

satisfies the principles of double criminality and/or reciprocity. [114] Double criminality requires that the offence is punishable in both the requesting and the requested States. Reciprocity means that assistance is only given if the requesting country would grant the same or similar assistance if the positions were reversed. Some States also insist on a minimum standard of seriousness of the offence. A report prepared by the General Secretariat of ICPO-Interpol [115] has concluded that many countries will not provide assistance to a foreign investigation in relation to certain economic crimes, such as securities and commodities manipulation, tax evasion and exchange control offences. It is thus crucial for a law enforcement agency to find out the relevant foreign law early in the investigation, so that attempts at forging co-operation are neither futile nor unnecessarily costly.

104. The constitutional propriety of conducting informal investigations on behalf of external authorities must also be kept in mind. The essential objects of a police investigation are the prevention of crime and the detection of and punishment of criminals. These objects necessarily define the ambit of the police's functions, but the police enjoy considerable discretion in fulfilling their duties. There are, however, limits. In Attorney-General for Hong Kong v Ocean Timber Transportation Ltd. [116] it was held that the privilege of investigating a company pursuant to a search warrant would be abused if the police disclosed the content of corporate documents to an external agency, without the consent of the company. It is submitted that if the corporate information was collected without resorting to any legal process the result may have been different. There is a lack of English authority as to the propriety or otherwise of transmitting intelligence or information collected by the police. Moreover, with the exception of involuntary statements,[117] all evidence whether it is obtained by illegal or unfair means is admissible in court subject to the judge's discretion. For example, there have been a number of cases in which the courts have admitted evidence obtained by surreptitious surveillance. [118]

(ii) Formal Investigations

105. Formal investigations involving international elements present special problems. For example in the United Kingdom although a Department of Trade inspector appointed under section 165 of the Companies Act 1948 enjoys significant investigatory powers, these do not extend beyond the territorial jurisdiction of the United Kingdom. He has no legal means of administering oaths to the directors of United Kingdom registered companies who are in foreign States, or to collect evidence overseas. A number of Department of Trade inspectors' reports [119] have highlighted the difficulties in conducting effective investigations in circumstances where the principal participants flee the jurisdiction, taking documents and other evidence with them. These obstacles to the investigatory process are aggravated when foreign law enforcement agencies or self-regulatory authorities [120] provide no or meagre assistance or co-operation.

106. It is virtually unknown for a law enforcement agency or authority to be given powers of inspection other than those under the legislation of its State.However, a number of recent developments have suggested the possibility that one State may empower the officials of another State to conduct investigations on its behalf. In 1980 it was suggested to the Commonwealth Law Ministers' Meeting [121] that in appropriate circumstances the same inspectors may be appointed under the relevant provisions in the Companies Acts of other Commonwealth jurisdictions. This would, in effect, enable inspectors to conduct an international investigation. Similarly, in 1982 the New Zealand Government appointed the Australian Government's Royal Commission on Drug Trafficking as a Commission of Inquiry in New Zealand. [122] This almost unprecedented action empowered the Australian authority to hear evidence in New Zealand, and to compel New Zealand residents, believed to have knowledge of certain drug syndicates, to appear as witnesses before the Royal Commission. Naturally, the Commission would be required to comply "in every respect" with New Zealand's statute and case law.

107. The Report submitted to the 1980 Commonwealth Law Ministers' Meeting on the development of co-operation in commercial crime enforcement also drew attention to the practical advantages in different countries with interests in a particular matter pooling their investigatory resources and sharing the information obtained. This has already occurred to a limited extent in the Commonwealth in a few cases involving illicit trafficking in narcotics and in two cases involving the collapse of businesses with activities in a number of countries.

B. Evidence

108. The collection of evidence for either civil or criminal proceedings presents special legal and practical problems in cases where such evidence is located in a foreign jurisdiction. Firstly, there is the problem whether the foreign State will permit evidence to be taken in its territory by the method proposed by the parties or authorities. Secondly, there may be limits imposed by the law of a State on the nature and extent of evidence that may be requested. Thirdly, there is the difficulty of compelling an overseas witness to give evidence in aid of domestic proceedings. Fourthly, the courts of a requesting State may be reluctant to admit evidence obtained in a foreign jurisdiction, particularly in criminal cases. Fifthly, the costs involved in searching, collecting and translating foreign evidence may deter a law enforcement agency or a civil litigant from pursuing the matter.

(i) Voluntary Procedures

109. Obtaining evidence located in a foreign jurisdiction creates acute problems which are not found in wholly domestic cases. Many States, primarily those within the civil law tradition, view the taking of even voluntary testimony by persons other than their own officials as an infringement of their territorial sovereignty. The civil law system's view is best understood by reference to its dependence on its judicial officers, and not the parties themselves, to carry out all procedural acts including the taking of depositions. Of course, where there is a foreign prohibition on the taking of testimony, arrangements can be made to secure the attendance at the trial of parties and witnesses resident in a foreign country. The high cost, the difficulties of organisation and personal inconvenience rules out this as a practical alternative except in the most important cases. Moreover, there is no means of forcing an unwilling witness who is out of jurisdiction to attend the trial. It is clear from Stuart v Bakis Co. [123] that the attendance of witnesses cannot be enforced except by the writ of subpeona, and such writ cannot extend beyond territorial jurisdiction.

110. In the case of the United Kingdom, if the foreign law allows, and the witness is co-operative, testimony may be given either by an out-of-court deposition or by commission. In R.v Upton S.T. Leonard Inhabitants [124] it was pointed out that English courts are extremely reluctant to admit evidence taken out of court in criminal cases because the reliability and credibility of a witness's testimony cannot be directly challenged by cross-examination. In particular, the demeanour of the witness, which may be vital to the issue of guilt, would not be scrutinised by a jury. Thus, as a general rule the English courts, unlike those of Scotland and of most other countries, will not admit evidence in criminal trials which is not given by a witness attending the trial in the presence of the accused. In exceptional cases, such as when witnesses are dangerously ill, the courts will sometimes admit out-of-court depositions. Furthermore, under section 2 of the Criminal Justice Act 1967, as amended [125] written statements taken outside the United Kingdom may now in certain circumstances be tendered as evidence in criminal proceedings. However, under this provision it is open to any other party to object to the statement being tendered and to insist that the maker of the evidence be called to give oral evidence, which is often impracticable when the witness is abroad.

111. The early authority of R. v Budgel [126] stated that at common law the taking of evidence before a judge by way of commission was never permitted in criminal cases. Under section 4 of the Evidence by Commission Act 1831 (repealed) the courts had a limited power to issue commissions for the examination of witnesses, but this did not apply to indictments [127] or felonies. [128] Moreover, section 3 of the Evidence by Commission Act 1885, gave an English court the power to request a judge or court in India or the colonies to take depositions, and such depositions were admissible in proceedings in England to the same extent as if they had been taken before an English judge. The 1885 Act provided an effective means of securing evidence abroad in criminal cases, but it was repealed by the Evidence (Proceedings in Other Jurisdictions) Act 1975. There is now no method of taking the evidence of a witness on commission overseas in criminal cases. A Director of Public Prosecutions Working Party Report [129] has suggested that this provision in the 1885 Act should be reintroduced and extended to foreign as well as Commonwealth courts. Alternatively, it is submitted that section 32 of the Criminal Justice (Scotland) Act 1980 should be applied to England. Section 32 of the 1980 Act provides for the taking of evidence on commission, where the court is satisfied that the evidence is necessary for the proper adjudication of the trial, and there would be no unfairness to the accused in such a case. In the absence of a statutory provision authorising the taking and receipt of evidence by commission, relevant and probative evidence may not be available in a criminal trial.

112. In contrast to criminal proceedings, the court's power to take and admit foreign evidence in civil cases is wider. Formerly, evidence was taken by ordering a writ of commission to issue in the Queen's name, [130] but this practice has been superseded by

other and more convenient methods. Under the Rules of the Supreme Court [131] an order for the examination of witnesses both in and out of jurisdiction may be issued, where it appears necessary for the purposes of justice. [132] The order may take one of three different forms. [133] Firstly, the High Court is empowered to appoint a special examiner to take evidence in a foreign jurisdiction, provided that this is allowed by the foreign government.[134] Secondly, a British consular official may be appointed to act as a special examiner in a foreign State where there is a Civil Procedure Convention between the United Kingdom and that State, [135] or if there is no such convention with the consent of the Secretary of State.[136] Thirdly, letters of request [137] may be issued to the judicial authorities of a country in which evidence is required.

113. The appointment of an examiner is in the "highest degree" a matter of discretion for the court. [138] Before issuing an order for the examination of a witness abroad, the court must be satisfied that the witness can give relevant and material evidence, [139] that the witness cannot conveniently be brought to England, [140] and that the request is bona fide [141]. Furthermore, it is well established by the decisions in Berden v Greenwood [142] and Re Boyse, Crofton v Crofton [143] that an order will not be made where it is essential that the witness should be cross-examined at the trial. The court may also refuse to grant an order where the costs of executing the application are prohibitive. [144]

114 The appointment of an examiner is not available in all countries. For example, in Switzerland a special examiner who exercies his functions could be charged with economic espionage. [145] In such cases it is necessary to rely on the letters of request procedure. This is a compulsory method of obtaining evidence, and will be discussed in the next section. Finally, although the use of examiners provides an appropriate method of taking evidence abroad in accordance with English procedure, [146] its main disadvantage is that, except in a few countries, the witness cannot be compelled to attend an examination.

115. The voluntary obtaining of evidence in the United Kingdom for use abroad is governed by the Consular Relations Act 1968. [147] Section 10(1)(a) of the 1968 Act provides that:

> "A diplomatic agent or consular official of any state may, if authorised to do so under the laws of that state, administer oaths, take affidavits and do notarial acts required by a person for use in that state or under the laws thereof."

116 This provision imposes minimum judicial obstacles in obtaining evidence located in the United Kingdom. It is principally used in civil cases, but it is not known how extensively since in such matters the foreign mission acts without reference to the United Kingdom authorities. There is, however, no power to compel a witness to attend before a consul.

(ii) Compulsory Procedures

117 In cases where a witness out of jurisdiction refuses to volunteer information or where the relevant foreign law prohibits or limits the use of the deposition or commission procedures, it is necessary to enlist the assistance of the foreign legal authorities in order to obtain and secure the required evidence. The customary method of obtaining the assistance of foreign authorities is by means of a letter of request (letters rogatory). Letters rogatory are a formal request from one country to another requesting that the latter country perform some judicial act. This procedure is available in civil and sometimes in criminal cases, and is used by both governments and private parties.

118 A country may honour a request for judicial assistance on the basis of comity or pursuant to a treaty obligation. The common law and civil law systems have markedly different views on comity and the procedures for observing letters of request. In Common Law States the letters rogatory procedure is primarily intended to assist parties who have difficulties in obtaining relevant evidence. In Civil Law States this procedure is used for investigations into cases which have not yet come into court.

119. Yet again we may perhaps be forgiven for concentrating on the relevant law and practice in the United Kingdom and more particularly in England, given the special Civil Law considerations in Scotland. A number of Commonwealth jurisdictions have in their laws provisions similar to that of section 13 of the Evidence Act of Seychelles. This section states "except where it is otherwise provided by special laws now in force in Seychelles or hereafter enacted, the English Laws of evidence for the time being shall prevail."[148]

120. In the United Kingdom letters of request are executed either through administrative

assistance given by the police, or by virtue of the relevant statutory provisions now in force. The first statutory provision is section 5 of the Extradition Act 1873 which in practice governs the formal taking of evidence in England and Wales for the purpose of criminal proceedings in a foreign country. The second provision is section 5 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 which allows the taking of evidence for foreign and Commonwealth criminal proceedings, and section 2 of the 1975 Act which applies to evidence requested in foreign civil cases.

121. Under section 124 of the Extradition Act 1870 a foreign diplomat or consul could apply directly to a judge of the High Court, who was empowered to order the taking of evidence for the purposes of a foreign criminal proceedings. This procedure was cumbersome [149] and expensive, and was replaced by a simpler, summary procedure in section 5 of the Extradition Act 1873. Section 5 of the 1873 Act provides that the Secretary of State may issue an order requiring a magistrate or a justice of the peace to take evidence [150] for the purpose of "any criminal matter" pending in any court or tribunal of a foreign State. There is no case law on section 5 of the 1873 Act. In practice the scope of section 5 is given a broad interpretation by the British Government. [151] It is considered that the section 5 procedure extends to any foreign State,including those countries in which there is no extradition arrangement under section 2 of the Extradition Act 1870. The procedure thus falls outside the extradition machinery per se. It does not, however, apply to Commonwealth countries. Furthermore, it is available in respect of "any criminal matter", which is interpreted as not limited to extradition crimes within the meaning of the Extradition Acts. Nor is it necessary for the matter to be criminal in the United Kingdom it is sufficient for it to be criminal in the law of the requesting State.

122. An important limitation on section 5 is that it cannot be used in respect of a criminal matter of a "political character". This means that the procedure cannot be used for preliminary enquiries. It is necessary that there be a precisely established offence, a clearly defined and named suspect, and specific evidence implicating that suspect so that he has a case to answer. [152] The section 5 procedure is therefore not helpful in gathering intelligence concerning the associates of suspected criminals or criminal activities in general. On the other hand, by virtue of section 1(3)(d) of the Supression of Terrorism Act 1978, the "political crime" exception is not available under section 5 of the 1873 Act in cases which originate in a State which is a party to the European Convention on the Suppression of Terrorism and in offences covered by the 1978 Act.

123. Section 5 is most frequently used in serious cases particularly where evidence is requested from an accused person. In these circumstances it is considered that a judicial proceeding is necessary to safeguard the interests of the accused. However, an accused person cannot be obliged to give evidence in a court even under a section 5 order and a witness cannot be required to answer a question where the answer would incriminate him. Therefore, section 5 is a compulsory proceeding of a limited nature because it does not derogate from the common law privileges.

124. That section 5 is not intended to provide an easy and quick means of transmitting information to foreign authorities is indicated by the current practice in processing foreign requests. Almost all requests by foreign courts in relation to criminal matters are passed through diplomatic channels to the Home Office [153] where action under section 5 is considered. The approach taken by the Home Office is flexible. Where the case concerned is not serious, or the evidence requested not of unusual significance and the requesting court does not specify that evidence on oath is needed, it may be decided not to issue a section 5 order for the evidence to be taken formally before a magistrate. Instead, the police will be asked to take the evidence by way of written statement. This is not a compulsory proceeding because no one is obliged to answer police questions. It is, however, the more usual method of executing foreign requests. For example, in 1980, 135 cases were dealt with in this way, whereas only 25 orders were issued under section 5.

125. The taking of evidence in civil and commercial matters for use in foreign courts was previously governed by the Foreign Tribunals Evidence Act 1856. The 1856 Act enabled the United Kingdom to comply with its obligations under the numerous bilateral civil law conventions [154] which it had concluded with foreign States. The 1856 Act was repealed and replaced by the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970. [155]

126. The 1975 Act [156] does not simply apply to the Hague Convention, but introduces new enabling provisions for taking evidence which is required in foreign proceedings. Unlike the

Hague Convention, the 1975 Act applies to countries which have not ratified the Convention, and applies not only to civil proceedings, which are either pending or in contemplation, [157] but also to criminal proceedings which have been instituted. [158] Under sections 1(a) and 5(1)(a) of the 1975 Act, requests for assistance may emanate only by or on behalf of a foreign court or tribunal. The 1975 Act applies to foreign courts of law and administrative tribunals or agencies, such as the American Securities Exchange Commission and the Commodity Future Trading Commission. However, in stark contrast to the United States, [159] the House of Lords has decided in Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [160] that the 1975 Act cannot be used, directly or indirectly, for the purposes of criminal investigatory proceedings. It is submitted that the requirement that criminal proceedings be instituted means that requests for judicial assistance by grand juries in the United States, or by investigatory magistrates on the Continent, or foreign Commissions of Inquiry would be refused by English courts. Thus the 1975 procedure will not provide judicial assistance in the early stages of a criminal investigation.

127. In dealing with a request for evidence from a foreign court, the courts in the United Kingdom are guided by a number of principles. The court must first decide whether it has jurisdiction to make an order and, secondly, whether it ought to exercise its discretion in making or refusing an order. Under section 1 of the 1975 Act the court has jurisdiction in civil cases where the requesting court exercises jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom. Under Section 5 of the 1975 Act the court has jurisdiction in a criminal case where the requesting court is exercising jurisdiction in a country or territory outside the United Kingdom.[161] An important question is whether a court in the United Kingdom has jurisdiction when a foreign requesting court has improperly assumed jurisdiction over the subject matter or over an individual or corporation. For example, if an American court exercised jurisdiction in a transnational securities fraud in violation of the accepted principles of jurisdiction in international law, must the request for information be refused by the United Kingdom court? Under section 4 of the Protection of Trading Interests Act 1980 a court in the United Kingdom is prohibited from making an order under section 2 of the 1975 Act for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction or is otherwise prejudicial to the sovereignty of the United Kingdom. It is also provided by section 4 that a certificate issued by the Secretary of State to the effect that a foreign request infringes the jurisdiction or is prejudicial to the sovereignty of the United Kingdom shall be conclusive evidence of that fact. It may be argued that section 4 of the 1980 Act applies only when the request for assistance infringes jurisdiction and not when the foreign court has improperly assumed jurisdiction over the subject matter or the person. Mr. D. L. Jones [162] has contended that in the absence of a certificate from the executive, it is difficult to see how a request under the 1975 Act can infringe the jurisdiction of the United Kingdom if it complies with the terms of the Act. On the other hand, section 4 of the 1980 Act is so vaguely worded that a court in the United Kingdom may be entitled to refuse to accede to a foreign request if it considered that it related to a matter which was properly within its jurisdiction and not properly within the jurisdiction of the requesting court. If, however, the courts in the United Kingdom adopted a narrow view of the jurisdictional competence of foreign courts, this would amount to a repudiation of article 12(b) of the Hague Convention, which provides that the execution of letters rogatory should not be refused solely on the ground that the requested State claims exclusive jurisdiction over the subject matter of the action.

128. Another jurisdictional requirement is that the courts in the United Kingdom must be satisfied that the evidence is required for the specific purpose of civil or criminal proceedings, but not both. The courts in the United Kingdom will ordinarily accept the foreign court's statement of the purpose of the letters of request. However, the House of Lords in Westinghouse questioned the American judge's characterisation of the letters of request. The Law Lords refused permission for Westinghouse to take evidence from Rio Tinto Zinc officials in England because the letters rogatory were not issued for the sole purpose of civil proceedings and, indeed, were issued for the collateral purpose of anti-trust criminal proceedings. Lord Diplock [163] said that it was an abuse of process to give effect to letters rogatory which were manifestly used by the Department of Justice for a grand jury investigation. It is submitted that this ruling will create difficulties in executing letters of request in the United Kingdom on behalf of an American court in circumstances where parallel civil and criminal proceedings have been instituted and where the purpose for which evidence is required is not clearly ascertainable.

129. The court's discretion to accede to a foreign request for evidence is influenced by the following considerations. In the Court of Appeal in Westinghouse [164] Lord Denning M.R. said that it was the duty of the court to do all it could to assist a foreign court "just as

the English court would expect the foreign court to help it in like circumstances." [165] The principle of reciprocity underlies all requests for assistance by foreign courts. In Seyfang v G.D. Searle and Co. [166] Cook J. thought that the court should apply the same principles as those which the courts apply in the calling and examination of witnesses in proceedings initiated in domestic cases. A fundamental principle in English law is that the court will not exercise its discretion if an application is frivolous, vexatious or an abuse of process. [167] Thus, in Seyfang, the court, in its discretion, refused to order medical experts to give evidence against their wishes, particularly where they had no involvement with the facts of history of the matter in issue, and where their evidence could not be given without a breach of confidence and without considerable personal inconvenience and expense.

130. In executing letters rogatory the courts enjoy wide powers. Whilst in criminal cases[168] the power to make orders is limited to the examination of witnesses, either orally or in writing, and the production of documents, in civil cases [169] the court has more extensive powers, including the power to make orders for the inspection, photography, preservation, custody or detention of any property. The more restricted powers available in criminal proceedings reflect the domestic doctrine that interrogatories and "discovery" are never allowed in criminal proceedings. Of course, no one can be compelled to give or produce any documents which he could not be compelled to yield in criminal proceedings in the United Kingdom or in the courts of the country making the request. [170] The letters rogatory procedure may also be used against companies. For example, in Penn-Texas Corporation v Murat Anstalt [171] it was held that a company cannot be ordered to attend an examination on oath, whilst in Penn-Texas Corporation v Murat Anstalt (No.2) [172] the Court of Appeal held that the company may be ordered to attend and produce specified documents by its proper officers. These powers may be supported by a subpoena. By virtue of section 4 of the 1975 Act the High Court [173] may issue a subpoena enforceable throughout the United Kingdom for the attendance of a witness before an examiner or commissioner appointed to take evidence outside the jurisdiction of the court.

131. Lord Keith in Westinghouse [174] claimed that the 1975 Act had allowed greater scope for collaboration among different jurisdictions in the United Kingdom and between those jurisdictions and the jurisdictions of other countries. Although letters rogatory are still valuable, it is submitted that they are inadequate, especially in criminal cases. The letters rogatory process was created in the 19th century when communications between governments travelled by ship and persons stayed in gaol indefinitely awaiting trial. Today, letters of request still travel slowly,[175] generally through diplomatic channels, taking six or seven months to be completely transferred, and are responded to in an equally slow fashion. Letters rogatory are expensive, involve numerous formalities and technical legal issues. They are also subject to three important limitations, which are discussed in the next section.

(iii) Limits

(a) Fishing Expeditions

132. The United Kingdom and all the Continental countries which were signatories to the Hague Convention specifically reserved [176] the right not to execute letters of request which were issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government's reservation was intended to incorporate the procedural rule that forbids discovery in the nature of "fishing expeditions", or pre-trial discovery which is part of the American practice. Under the United States Federal Rules of Civil Procedure a party may request discovery of anything which "appears reasonably calculated to lead to the discovery of admissible evidence." [177] The scope of discovery in the United States is thus broader than the English limit of admissible and material evidence. Requests for discovery in the United States are often vague, apply to persons who are not parties to the action, [178] and can be for depositions as well as documents.

133. In England a court will never allow pre-trial discovery. There are a large number of authorities [179] which show that English courts are hostile to any "fishing expedition". In Radio Corporation of American v Rauland Corporation [180] Devlin J. held that a party was not required under English law to answer questions or produce documents which were not admissible and relevant to the evidence to be adduced at the trial. He formulated a classic distinction between evidence which is admissible and relevant to the issues at the trial, and evidence which is in the nature of pre-trial discovery which may "lead to a trial of inquiry which may of itself lead to direct, relevant evidence for trial." Lord Goddard in the same case considered that any "endeavour to get in evidence by examining a person who may be able to put the parties in the way of getting evidence" is a "fishing expedition" which is

never permitted in English courts. In American Express Warehousing v Doe [181] a request of an American court for evidence to be taken from English insurance brokers was acceded to on the ground that the evidence was in fact required for the trial. The court relied upon the statement of the American judge that such evidence would be examined at the trial and that its admissibility would be determined at that time. Similarly, the Court of Appeal in Re Westinghouse Electric Corporation [182] accepted a United States District Court judge's statement that the evidence would be "not merely for pre-trial procedures" but for "actual use at the trial", as refuting the suggestion that the American plaintiff was engaged in a "fishing expedition". However, on appeal to the House of Lords in Rio Tinto Zinc Corporation v Westinghouse Electric Corp.[183] it was held that the observations of the foreign judge were not conclusive and than an objective examination of the testimony sought indicated that there was a "fishing expedition".

134. The attitude of the English courts to pre-trial discovery has not changed since the enactment of the Evidence (Proceedings in Other Jurisdictions) Act 1975. [184] Two provisions in the 1975 Act implicitly reject American notions of pre-trial discovery. Firstly, section 2(4) of the 1975 Act provides that a person shall not be required to state what documents are in his possession, custody or power, nor to produce documents appearing to the requesting court to be, or likely to be in his possession, custody or power. This provision prohibits a general order for the discovery of documents. Thus, in Westinghouse, the House of Lords refused to honour a request by an American judge for "any memoranda, correspondence, or other documents relevant" to an American antitrust civil suit because the request did not specify particular documents. An important consequence of this fishing limit is that the broad investigatory civil demands of agencies such as the Securities Exchange Commission, the Commodities Futures Trading Commission and the Federal Trade Commission cannot be applied extraterritorially by way of the letters rogatory process against United Kingdom individuals or companies. Secondly, section 2(3) prohibits an English court from making an order requesting any particular steps to be taken, unless they are steps which are to be required by way of obtaining evidence for the purpose of civil proceedings. It is submitted that this provision gives effect to the classic distinction formulated by Devlin J. in Radio Corporation.

135. Other rules that are relevant in this context include Order 39 of the Supreme Court Rules, which provides that evidence cannot be obtained from non-parties before the trial except in extreme circumstances, for example, where a person is ill, abroad, or cannot give evidence effectively. Furthermore, a plaintiff may obtain discovery of the identity of a wrongdoer and access to bank accounts and related documents from non-parties pursuant to the principles formulated in Norwich Pharmacal Co. v. Customs and Excise Commissioners[185] and Bankers Trust Co. v Shapira.[186]

136. Finally, it is interesting to note that civil law countries may have wider right to discovery in English courts than do common law countries. This is because civil law countries do not recognise the distinction between pre-trial and trial proceedings. All material which is sought by a civil law court will be relevant to the final trial and thus cannot be characterised as evidence for the purpose of fishing. This view is supported by an obiter dictum of Lord Diplock in Westinghouse,[187] where he indicated that whether evidence under the 1975 Act is evidence for the purpose of the trial or evidence for the purpose of pre-trial discovery is determined by the procedural system of the requesting court. It is submitted that if this view is correct it is anomalous and undermines the English court's negative view of "fishing expeditions".

(b) Privilege and Confidentiality

137. The execution of letters rogatory on behalf of foreign courts may be precluded by considerations of privilege or confidentiality. [188] Under section 3(1) of the Evidence (Proceedings in Other Jurisdictions) Act 1975 a witness may claim any privilege provided either under the law of England or under the law of the requesting States. The privilege extends to giving answers to any questions and to producing any document. In the case of civil and criminal proceedings in England, section 14(1) of the Civil Evidence Act 1975 [189] states that a person has the right to refuse to answer any question or produce any document or thing that might expose that person or his spouse to a criminal prosecution or fine under English law.

138. In Westinghouse the House of Lords held that the English companies were entitled to withhold documents, that otherwise had to be produced, by claiming privilege under section 3. In this case the production might have exposed the defendants to penalties for intentionally or negligently acting in breach of Article 85 of the Treaty of Rome, which has the force of law in England.

139. This contrasts with the United States which allows an individual, but not a company, to claim a privilege against self-incrimination, pursuant to the Fifth Amendment of the United States Constitution.

140. Generally, a privilege against self-incrimination would be lost if the relevant foreign prosecuting authority stipulated that it will grant immunity against prosecution. However, the British Government's Aide Memoire to the American Government in relation to the Westinghouse litigation contended that the Department of Justice's grant of immunity to the Rio Tinto executives undermined the Hague Convention. The House of Lords speaking with "the same voice as the executive" in Westinghouse refused to recognise the American grant of immunity because this was contrary to public policy. [190]

141. Another ground for refusing to disclose information in England is legal professional privilege. The general principle stated in Garfield v Fay [191] is that all communications between a party and his legal advisers, including foreign legal advisers, are privileged from disclosure if they are confidential and made by or to the adviser in his professional capacity for the purposes of getting legal advice. Calcraft v Guest [192] is authority for the proposition that in England this privilege belongs to the client and may be waived by him, but not by the legal adviser. Lord Halsbury in Bullivant v Attorney-General for Victoria [193] pointed out that the legal professional privilege does not apply where the communication or documents came into existence as a step in a criminal or illegal act. Re Whitworth [194] shows that a prima facie case of fraud or illegality must be made out before the privilege is lost.

142. Though not strictly a matter of letters rogatory procedure, mention may also be made of the decision in A.M. and S. Europe Ltd. v The Commission. [195] In this case the European Court of Justice held that correspondence between a company and its legal advisers, but not its in-house lawyers, is protected by legal privilege in an antitrust investigation by the Commission's inspectors. The European Court also considered that it, and not the courts of Member States, would decide whether a particular document enjoyed such protection.

143. Another matter which may also be referred to is the provision in the 1981 English Companies Act [196] amending the lawyer/client privilege in respect of a Department of Trade inspection. This provision protects barristers and solicitors from disclosing any privileged communication made to them in that capacity and enables a client to claim privilege in respect of the correspondence and discussions with his lawyer.

144. In addition to the various statutory prohibitions on the disclosure of certain kinds of information, such as commercial information obtained by the government under section 41 of the Fair Trading Act 1973, there is the doctrine of public interest privilege, formerly known as Crown privilege. This is a wide and vague doctrine which enables a party or the appropriate Minister to refuse to disclose documents for the purposes of a judicial hearing.

145. In Conway v Rimmer [197] the House of Lords indicated what it considered the correct approach to the clash of interests which arise whenever there is a question of public interest immunity. Lord Reid said that the essence of the matter is a weighing, on balance, of the two public interests, that of the nation or the public service in non-disclosure and that of justice in the production of documents. He further considered that there is a distinction between disclosing the "contents" and the "classes" of documents. Although a minister's certificate to the effect that disclosure of the contents of a document would harm the national or public interest is not conclusive, nevertheless, the court will be slow to question his opinion or even to go as far itself as to inspect the document. On the other hand, in class cases the minister's certificate is more likely to be open to challenge, but there are certain classes of documents which ought not to be disclosed.

146. In Lonrho Ltd. v Shell Petroleum Co. Ltd. [198] the plaintiff sought to obtain transcripts of evidence given by oil-giants Shell and BP to the Bingham inquiry into "oil sanctions busting" in South Africa. The Attorney-General objected and issued a certificate stating that the disclosure of this information would be contrary to the public interest. The

House of Lords, after considering the balance of public interest, held that even without the minister's certificate the evidence should not be disclosed because it had been obtained on the understanding that it would be treated confidentially. The House of Lords said that witnesses would be far less forthcoming at the inquiry if the express undertaking of confidentiality was ignored. The Law Lords applied the principle in D. v National Society for the Prevention of Cruelty to Children [199] that "where there is a pledge to keep (information) confidential, the courts should respect that confidence and should in no way compel a breach of it, save where the public interest clearly demands it, and then only to the extent that the public interest requires."

147. In Burmah Oil Co. Ltd. v Bank of England [200] the House of Lords refused to order disclosure of certain documents which were likely to be vital in establishing that the sale of the company's stake in British Petroleum to the Bank of England was unconscionable. The Law Lords inspected a number of documents but held that they were not of sufficient relevance to override the public interest objection to their production.

148. The decisions in Lonrho and Burmah indicated that the presence or absence of a governmental interest is not conclusive, but is a compelling factor which may alter the balance of public interest in favour of the governmental body claiming public interest privilege. However, a completely different approach to the question of public interest immunity was taken in Air Canada v British Airport Authorities. [201] In this case Bingham J. decided to privately inspect ministerial documents with a view to ordering their production in a civil action by Air Canada against the British Airport Authorities and the Secretary of State for Trade. The judge clearly recognised the uniqueness of the claim for production:

> "Documents as close to the inner processes of government have never previously been ordered to be produced in any litigation... in none have its working papers been the subject of production."

149. The judge, however, considered that such documents were likely to be crucial, if not determinative, of the outcome of the substantive action. The decision in Air Canada in favour of production represents a considerable departure from the previous authorities which have assumed that disclosure of documents at the highest level of government will not be ordered. The authoritativeness of Air Canada is thus questionable.

150. A clear case when production will not be ordered is if it would embarrass the government in its relation with foreign States. For example, in Buttes Gas Oil Co. v Hammer (No.3) [202] the Court of Appeal refused to order disclosure of documents to a private defendant to support a contention that Buttes and the ruler of Sharjah had engaged in a fraudulent conspiracy, which would have been a defence to the alleged slander of the plaintiffs. Brightman and Donaldson L.JJ. held that disclosure was contrary to the public interest where documents were addressed to and emanated from the rulers of Sharjah and Umm al Qaywayn and which related to a territorial dispute between these sovereign States and two oil companies which had oil concessions in these States. Lord Denning M.R. emphasised that the court should not allow the discretionary process of discovery to offend the comity of nations. It is submitted that the case of Buttes illlustrates the difficulty of obtaining the assistance of courts where a sovereign State has allegedly engaged in an economic crime.

151 The public immunity doctrine also encompasses situations where disclosure would amount to a contempt of court or a breach of confidence. In Schering Chemicals Ltd. v Falkman Ltd. [203] the Court of Appeal upheld an injunction restraining Thames Television Ltd. from showing a documentary film on the drug Primodos because the film was based on confidential information given to the film's producer. Shaws L.J. considered that the communication in a commercial context of confidential information imposed a fiduciary duty on the recipient to maintain that confidence unless the giver consented to disclosure. He pointed out that the public interest in non-disclosure may be overborne where the subject matter was inimical to the public, for example, in cases of crime, fraud or other misconduct which threatened individual safety. On the other hand, in British Steel Corpn. v Granada Television Ltd., [204] the House of Lords held that journalists have no public interest immunity protecting them from the obligation to disclose their sources of information, where that information was unlawfully obtained by a third party and where discovery was necessary in order to do justice. Lord Wilberforce said that a claim of immunity based on the argument that if disclosure was ordered the sources of information would "dry up" had been rejected by previous authorities, [205] and that journalists should be in no better position than priests - confessors, doctors, bankers and other recipients of confidential information. Lord

Salmon, dissenting, relying on the New Zealand case of Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd.,[206] considered that the "newspaper rule" that the press was immune from disclosing its sources of information on discovery was not confined to cases of libel, but was of general application, save in exceptional circumstances where, for example, the security of the State required disclosure. He pointed out that there was a legitimate public interest in knowing about the affairs of nationalised industries such as British Steel, especially since the public did not have the same power to call relevant documents and discover faults as did ordinary shareholders.

(c) Legislation and Public Policy Limits

152. Courts and regulatory agencies have often asserted an authority to obtain information and documents from individual corporations which have little, if any, contact with the State. United States courts have claimed personal jurisdiction over foreigners on the basis of "a transitory presence or sporadic business transaction", which according to International Shoe Co. v State of Washington [207] may provide sufficient "minimum contacts" with the State, or on the open-ended "effects-doctrine" as exposed in Leasco Data Processing Equipment Corp. v Maxwell.[208] There is a long line of authorities such as U.S. v Imperial Chemical Industries[209] where American courts have found jurisdiction over foreign parent companies based on the activities of a subsidiary in the United States, in complete disregard of the separate legal personality of the parent and subsidiary companies. The United States also claims jurisdiction over companies that are at least 25 per cent controlled by American interests, even though the company has no active business in the United States. [210] The assertion of extraterritorial discovery orders is not confined to the United States. Belgium, the Netherlands, Norway, Germany and the European Economic Commission have claimed personal jurisdiction over foreign-based firms. Many States consider that such extensions of investigatory jurisdiction conflict with their national interests, [211] and have passed "blocking" or "protective" statutes. For example, Canada,[212] Australia [213] and New Zealand [214] have passed laws to protect business records of companies operating in their territory. In addition, a number of countries such as Switzerland have strict laws protecting domestic manufacturing or trade secrets.

153. The United Kingdom has enacted the most comprehensive legislation defending its commercial interests, namely the Protection of Trading Interests Act 1980. The 1980 Act replaces the former Shipping Contracts and Commercial Documents Act 1964. Although the 1980 Act was introduced primarily as a reaction to United States attempts to impose unilaterally and extraterritorially its own domestic and economic policies in the antitrust area, [215] it applies equally to overseas countries and to American agencies regulating fraud such as the Securities and Exchange Commission and the Department of Justice.

154. Under section 1 of the 1980 Act the Secretary of State is given three distinct powers to counter actual or proposed foreign measures in relation to international trade. The most important is the power to give directions to a person carrying on business in the United Kingdom prohibiting compliance with foreign measures. [216] The section is limited to foreign measures which apply to things done outside the territorial jurisdiction of the country which enacted such measures and to things done by persons carrying on business in the United Kingdom. The Secretary of State has discretion to make such directions to the extent that the foreign measures "are damaging or threaten to damage the interests of the United Kingdom." [217] Section 2 specifically deals with the regulation of documents or information demanded by foreign courts or authorities. This section provides that the Secretary of State may give directions prohibiting compliance with a requirement that a person in the United Kingdom shall provide to any court, tribunal or authority of an overseas country any commercial document or commercial information not within its territorial jurisdiction. It is apparent that section 2 is wider in scope than section 1 in that it could apply to a person(s) who may merely have a fleeting presence in the United Kingdom. A direction may be given in the following circumstances:

(i) where the foreign request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom- or
(ii) if compliance with the foreign requirement would be prejudicial to the security of the United Kingdom or the relations of the Government of the United Kingdom with the Government of any other country;
(iii) where the request is not for the purposes of civil or criminal proceedings already instituted in the foreign country; or
(iv) where the request is for general discovery of documents. [218]

155 The Secretary of State's power is very wide. His power is not limited to United Kingdom companies or to United Kingdom territory and may be applied extraterritorially.

For example, it could be invoked against a foreign company doing some business in the United Kingdom which has been requested to produce a document located in a third country, other than the United Kingdom or the requesting State. It is arguable that the Act contradicts the very principle that the law was designed to guard against, namely the extraterritorial application of laws. On the other hand, enforcement jurisdiction is limited by the principle of nationality. Section 3(3) of the 1980 Act stipulates that penalties for non-compliance with a direction do not apply to non-United Kingdom citizens or companies incorporated outside the United Kingdom. Moreover, the United Kingdom has emphasised in a diplomatic note [219] to the United States that the Secretary's discretion will take into account all the aspects of any case including the extent of British and other interests and considerations of international comity. This will not obviate the difficulty that British orders forbidding the release of non-British documents requested for American discovery purposes may be in conflict with the laws of another State and may hinder law enforcement.

156. Unlike the 1964 Act, which only prohibited the obtaining of documents directly from an individual, the 1980 Act applies to depositions and letters rogatory.[220] Section 4 of the 1980 Act limits the application of the Evidence (Proceedings in other Jurisdictions) Act 1975. It provides that U.K. courts shall not give judicial assistance to a foreign court or tribunal if the requesting body infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom. A certificate of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

157. The 1980 Act is unique in that it gives the Secretary of State authority to decide on the scope of traditional judicial matters, such as the limits of discovery. The result is that the Secretary has virtually unlimited power to determine the amount of assistance to be accorded to foreign courts and tribunals subject to a statutory veto by Parliament. Furthermore, the Act ensures that foreign trading matters affecting the national interest may be determined by the government rather than by the judiciary. For example, the British Government has recently prohibited British companies from complying with a United States embargo on the provision of equipment and technology for the £4 billion gas pipe-line between Siberia and Western Europe.

158. An interesting question is whether the 1980 Act provides a defence of sovereign compulsion for corporations which have refused to produce documents under American discovery orders. It is arguable that in relation to prohibition under the 1980 Act an English company has a complete defence to American discovery orders, if it can establish that its actions or non-actions were required by English law and that accordingly any other conduct would have involved an English criminal offence. However, it seems that the notion of foreign illegality excuse is not part of American law. In Societe Internationale Pour Participatione Industriel et Commercial S.A. v Rogers [221] the United States Supreme Court formulated two principles. Firstly, liability under a foreign non-disclosure law is not generally a defence to a valid discovery order. Secondly, the imposition of sanctions should take into account a party's inability despite good efforts to comply with the discovery order. Subsequent cases have suggested that there is a very substantial requirement of good faith. For example, in In re Ampicillin Antitrust Litigation the District Court of Columbia [222] held that Beecham, a United Kingdom company, had not made sufficient bona fides efforts to secure waiver of an order by the British Government, pursuant to the Shipping Contracts and Commercial Documents Act 1964, not to produce numerous requested documents. The court considered that a mere protest by the British company to the United Kingdom authorities was not sufficient: it was necessary that the company make strenuous efforts to seek reconsideration, modification or review of the government's order, or enter into direct negotiations with the British Government.

159. On the other hand, another line of American authorities in the 2nd Circuit Court of Appeals [223] have suggested that the courts should not order production of documents where it would be illegal under the foreign law of the situs of the documents. For example, in Ings v Ferguson, [224] it was held that production of documents will not be ordered contrary to a Canadian statute prohibiting disclosure where the defendant was only a witness and where material evidence could have been secured by letters rogatory. These 2nd Circuit cases dealt with a non-party witness and it is arguable that this factor might distinguish these cases from Societe. Nevertheless, there are a number of recent American decisions which indicate that the courts are more willing to allow foreign courts to decide the scope of discovery in situations where their legitimate interests are at stake. Although it is preferable that governments seek extra-judicial assistance from foreign authorities, rather than impose unilateral discovery orders, this does not resolve the underlying jurisdictional conflicts. There is common consensus that international negotiations and agreements are the

most effective methods of dealing with such conflicts.

C. Intelligence

160. Potentially the most vital element in international judicial assistance is the communication of timely and accurate intelligence which may facilitate the detection and prevention of crimes. Where an international element is involved in criminal matters, intelligence may assume an enhanced role because not only does it stimulate investigations across frontiers, but also may provide information which will effectively guide and link investigations between different States. Intelligence may also be more easily transmitted than evidentiary documents between law enforcement agencies in different jurisdictions. This is illustrated by the case of Attorney-General for Hong Kong v Ocean Timber Transportation Limited.[225] On 12 June 1978 the Royal Fiji Police supplied the Commercial Crimes Bureau of Hong Kong (CCB) with certain information. As a direct consequence, the CCB suspected that the directors of Ocean Timber Ltd. had committed a number of criminal offences, including conspiracy to defraud and theft. The directors were charged with these crimes, and a search warrant was issued under section 50(7) of the Police Force Ordinance by the Central Magistry on the information supplied by an inspector from the CCB. On two occasions the inspector, acting under the warrant, seized a number of private and confidential documents belonging to Ocean Timber Ltd.. The Royal Fiji Police asked to be supplied with copies of these documents so as to assist in its investigation of suspected crimes of dishonesty under the laws of Fiji. The CCB refused to assent to this request but agreed to allow inspection of the originals. Ocean Timber Ltd. sought two declarations from the Hong Kong court. Firstly, that the documents or copies should be not allowed to be removed from Hong Kong without the express consent of the corporation. Secondly, that the documents should not be permitted to be examined or delivered to any person other than a person directly concerned with the investigation of the crime set out in the information on which the search warrant had been issued.

161. At the court of first instance it was accepted by all parties that the Crown was entitled to obtain the documents pending the completion of the investigation of offences alleged to have been committed within Hong Kong. The Attorney-General made two propositions. He first argued that the police could disclose documents either directly or by way of copies to any person they thought fit. Alternatively, he argued that the Hong Kong police could disclose documents to the police forces of a friendly State within the Commonwealth for the purpose of assisting criminal investigation of a matter properly within the jurisdiction of that State. Both these propositions were rejected by the judge of first instance and the Court of Appeal.

162. The judge considered that the proposition that the police could disclose documents to anyone they considered fit was too wide. He said that the power to enter, search and take possession of documents is given to police to assist them in their investigation. The judge thought that the propriety of disclosing seized documents is limited to showing them to witnesses, experts or others who will assist the police in investigation of crimes committed in the jurisdiction of Hong Kong. He also rejected the proposition that international co-operation provided a basis for permitting the disclosure of documents. Jurisdiction in criminal matters was generally territorial and a search power could not apply to transactions within Hong Kong. It did not matter that a foreign police force could be trusted not to abuse any confidence reposed in it by the Hong Kong police.[226] For these reasons, the judge considered that the balance of competing public interest must, as a matter of principle, be decided in favour of upholding the possessory rights of the company. Since those rights were threatened outside Hong Kong the judge granted the declarations.

163. The Court of Appeal unanimously affirmed this decision. Huggins J.A. made the following telling comment:

> "Where a statute authorises an official to do an act which necessarily interferes with the general rights of one of the Queen's subjects such interference must not exceed what is reasonably necessary to attain the object of the act authorised. The present statutory provision allowing the issue and enforcement of search warrants was to enable the police to obtain evidence which may assist in the conviction of a person for an offence with which he is charged or of which he is reasonably suspected to be guilty. This must, however, be an offence triable in Hong Kong. It is untenable to contend that the police of Hong Kong have the power to apprehend persons for offences committed abroad - no warrant could have been issued to search for documents which would merely throw light on the character or activities of a person liable to apprehension in Fiji but not in Hong Kong."

164. It is submitted that a court in the United Kingdom would probably accept the reasoning and result of the decision in Ocean Timber. The implications of Ocean Timber in transmitting evidence documents seized under a search warrant are clear. Its impact on intelligence is, however, debatable. The Hong Kong Legal Department has taken the view that Ocean Timber prevents the police from providing co-operation which would involve the sending of information based on materials seized or brought into police custody. This seems to be a very restrictive view. The court in Ocean Timber upheld the corporation's possessory rights in the relevant documents: it did not explicity refer to the use of intelligence gleaned from those documents. For example, if the documents indicated the names and activities of the associates of the suspected criminals, then such intelligence could be communicated to a foreign police force. It is difficult to see on what grounds a corporation might claim possessory rights with respect to that information.

D. Extradition

165. The law and practice regarding extradition forms an important part of international judicial assistance in criminal matters. The creation of the modern extradition treaties in the eighteenth and nineteenth centuries marks the effective beginning of international co-operation in the suppression of crime. Other forms of mutual assistance, such as bilateral or multilateral conventions dealing with criminal activities, are regarded as "off-shoots" of the extradition process. Extradition has two features which distinguishes it from other modes of judicial assistance. Firstly it involves the formal surrender by one State of a suspected or convicted criminal to the authorities of another State for the purposes of criminal prosecution and punishment. Secondly, it represents a highly developed formal arrangement which enshrines the principle of reciprocity. It would, however, be wrong to assume that formal extradition has been an effective mechanism for controlling crime, particularly commercial or corporate fraud. The legal and practical difficulties of ensuring extradition have led to alternative and less formal arrangements between States with historical and close political and economic ties.

(i) Informal and Irregular Procedures

166. There are a number of legal and extra-legal devices that may be seen as practical alternatives to formal extradition. The most extreme methods, such as the abduction or kidnapping by agents of one State and the return of the fugitive to another State, with or without the co-operation of the authorities of the latter State, violate basic human rights and also, perhaps, international law. The reliance by States on private "volunteers" to apprehend fugitive criminals may be objectionable, but it is not illegal. For example, the seizure of Ronald Biggs, the British fugitive train robber, in Brazil by private individuals and his subsequent placement in custody in Barbados did not impose any duty on the United Kingdom to refrain from requesting his extradition. The United Kingdom was thus entitled to take advantage of Bigg's fortuitous presence in Barbados.

167. "Disguised extradition" is an informal method by which a State, with the prime motive of extradition, uses its immigration laws to return a fugitive to another State. Expulsion and deportation orders on the grounds of illegal entry by an alien or the undesirable presence of a foreign resident provide the State with an important discretionary device in giving international judicial assistance. There is a temptation to use such procedures where there is no extradition treaty; where the extradition treaty does not cover a specific fraud offence; where there are long delays and huge costs in extradition, a common occurrence in fraud cases; or where the complex and often technical procedures of extradition are likely to inhibit extradition.

168. Traditionally, the English courts have assumed an ambivalent attitude to the British Government's use of deportation orders as an alternative to formal extradition. For example, in R. v Governor of Brixton Prison, ex parte Soblen, [227] Dr. Soblen, a fugitive convicted of espionage in the United States, unsuccessfully challenged the British Home Secretary's deportation order specifying the United States as his destination. The Court of Appeal considered that although the deportation order was prima facie lawfully issued on the ground of Soblen's illegal entry into the United Kingdom, the order would have been illegal if it had been made mala fide.[228]

169. It is interesting to note that the Court of Appeal in the Soblen case held that there was no evidence that the Home Secretary had acted with an ulterior purpose even though he had specified the United States as the destination of the deportee. This case illustrates the difficulty of establishing bad faith, particularly since the court has no power to compel the

Home Secretary to disclose the reasons for his decision or the materials on which he acted.[229]

170. Although the improper use of deportation orders has been described as an illegal evasion of the judicial safeguards and procedure which are a necessary concomitant of formal extradition, this has not stopped the practice. Indeed, it has been said that deportation as a method of co-operation in the international suppression of crime may be more frequent than formal extradition.

171. It is clear that when a fugitive is arrested abroad and brought back to England by irregular or illegal means the English court has jurisdiction to try him for any offence with which he is charged. Lord Goddard C.J. said in R. v O.C.Depot Battalion R.A.S.C.[230] that once a fugitive is in legal custody before the court it is no defence for him to say: "I was arrested contrary to the laws of State A or State B where I was actually arrested."

172. Although the court has jurisdiction to try the offence, it has also a discretion to prevent an abuse of its process.[231] If, for example, the British authorities participated in the illegality of the removal of a fugitive, an English court might dismiss the charges against the defendant. This occurred in Re Mackeson.[232] In 1977 Sir Rupert Mackeson was charged with sixteen offences of obtaining services by deception concerning the collapse of his Mayfair travel agency. Whilst on bail, Mackeson left England and travelled to Zimbabwe (then called Rhodesia). There was no extradition treaty in force between the United Kingdom and Rhodesia and subsequently Mackeson was deported as an "undesirable resident" to England. In ruling that the charges against Mackeson should be dropped,Lane L.C.J. found that the Metropolitan Police had asked for the "disguised extradition" of Mackeson. The judge said that the detention of Mackeson by the Rhodesian police on the plane to London and the delivery of him to the British police, who were waiting as pre-arranged at Heathrow airport, was evidence that the "real reason" for his deportation was a "back-door" extradition request from the police.

(ii) Formal Extradition

173. The proposals that have been made for amendment and alteration to the Commonwealth Scheme for the Rendition of Fugitive Offenders will be brought before the Commonwealth Law Ministers in a separate report and require no discussion here.

E. Recognition and Enforcement of Foreign Judgments in Criminal Cases

174. It is a general rule that the penal or criminal laws of a foreign State will not be enforced directly or indirectly in England. A similar rule applies to foreign penal judgments.[233] It has been claimed that there are three discernible reasons for this rule. First, in Huntington v Attrill[234] the Privy Council considered that a penal law is an exercise by a State of its sovereign power which "by the law of nations is exclusively assigned to the domestic forum." Second, English courts have had in the past limited confidence in a foreign State's administration of justice and particularly foreign judgments emanating from a criminal prosecution. Third, there are numerous practical difficulties arising from the enforcement of foreign judgments and the transformation of judgments in international law.

175. There are two views as to when a law will be regarded as a non-enforceable penal law. The first view is that expressed in Huntington to the effect that the character of the law depends on whether it is for the satisfaction of a private wrong or for the punishment for the infraction of a penal law.[235] In Huntington a New York law, which was designed to protect the public against fraudulent conduct by promoters of a corporation, provided that the directors of a corporation should be personally liable for its debts where false reports of its financial condition had been published. Creditors were entitled to recover sums under the statutory provision in satisfaction of their outstanding claims. A creditor instituted a suit under the statute in a New York court and obtained judgment for a large sum of money. He later brought an action on the judgment in Ontario. Although the New York courts had decided that the statute was of a penal character, the Privy Council held that the American classification was not binding on the Ontario court. The Privy Council expressed the view that the statute was remedial, and not penal, since it allowed a creditor to enforce a liability in his own interest and thus protected his own private rights.[236]

176. The implication of the decision in Huntington is that where a private party brings a civil suit based on a law which provides public and private remedies, such as the United

States Federal Securities Anti-Fraud laws, the ensuing judgment will be enforceable in England. It has been pointed out that the critical factor, according to Huntington, is the identity of the party at whose instance the suit is brought rather than the substance of what is being enforced. Consequently, if Huntington is correct, then, the numerous American regulatory laws will be enforceable in England at the request of a private party.

177. A different view as to the enforcement of penal laws was expressed in Attorney-General of New Zealand v Ortiz [237] In this case the New Zealand Government sought an injunction to restrain the sale by auction in London of a valuable Maori carving which had been illegally exported from New Zealand contrary to the Historic Articles Act 1962 and an order for the return of the carving. At first instance, Staughton J. held that section 12 of the 1962 Act provided for the automatic forfeiture to the Crown of an illegally exported article. He also held that the 1962 Act was enforceable in England because the purpose of the forfeiture provision was the preservation of national property and not the punishment for breach of the law. These views were rejected by the Court of Appeal which held that the 1962 Act did not provide for automatic forfeiture, [238] and even if it did, such a law was not enforceable in England. Ackner L.J., with whom O'Connor L.J. agreed, considered that the 1962 Act was a non-enforceable penal law because it sought to vindicate a State's rights through confiscation. Lord Denning M.R. thought that the 1962 Act was a non-enforceable public law. [239] He defined a public law as that class of laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they might be. In Lord Denning M.R.'s opinion, an English court will not enforce a foreign public law which purported to exercise sovereignty beyond the limits of the foreign State's authority. The implication of Lord Denning M.R.'s view is that the character of a foreign judgment will depend on whether it is in respect of a claim which is a manifestation of a foreign State's sovereign authority. If this is the case, it is arguable that the punitive damage awards under the United States anti-fraud securities laws should not be enforceable or registrable in England because in such cases the public interest is being enforced indirectly through the agency of the plaintiffs, rather than directly through regulatory bodies such as the Securities and Exchange Commission. [240]

178. The decision in Ortiz supports the view that where a foreign court orders the forfeiture of assets derived from theft, fraud or other criminal offences, such an order would not be enforceable in England. Similarly, a forfeiture order issued by an English court will not generally be enforceable in a foreign State. However, where a forfeiture order is made effective so as to reduce the property into the possession of a State, then, according to Brokaw v Seatrain U.K. Ltd., [241] the English courts will enforce the title to the property. This means that an English court has jurisdiction to enforce an actual possessory title even though it emanated from a penal order. Thus, if in Ortiz the Maori carving had been seized and condemned in New Zealand and reduced into the possession of the New Zealand Government, the English court would have enforced the government's proprietary title.

179. The strict rule requiring non-enforcement of penal laws applies not only to criminal judgments but also to preventative criminal actions, such as injunctions, civil suits and administrative hearings at the request of a public body. This is illustrated by Schemer v Property Resources Ltd. [242] In that case the receiver of a Panamian company, accused of fraudulent practices contrary to the Securities Exchange Act 1933, sought to have himself appointed as the receiver of the assets of that company's subsidiaries in England. Goulding J. denied the application on the ground, inter alia, that the receiver was a public official who had been appointed at the request of the Securities and Exchange Commission, and who was charged with reducing into possession the assets of the company in order to prevent the commission or continuance of a penal offence. This decision effectively curtails the enforcement of the civil injunctive suit by the Securities and Exchange Commission in an English court.

180. It is submitted that the general rule which prohibits the enforcement of foreign penal judgments should be reconsidered. The rule which views the enforcement of foreign penal judgments as impinging on the sovereignty of the State ignores the contemporaneous process whereby the enforcement of the penal judgments of its own courts abroad would widen the potential range of its sovereignty. In both national laws [243] and international conventions [244] there is an increased willingness to enforce foreign penal judgments. The most important recent initiative is the European Convention on the International Validity of Criminal judgments 1970, which seeks to assimilate a foreign criminal judgment from the sentencing country into the legal system of the enforcing country. The European Convention obliges a requested State to enforce the criminal judgment of another contracting State,

unless the principle of double criminality is not satisfied, or if the judgment is not final and enforceable in the requesting State,or where certain exculpatory grounds apply. [245] Acceptance of the Convention has been lukewarm. It has been signed by a mere seven European States which have similar criminal legal structures. It is arguable that the English criminal justice system is so different from the States on the Continent that England is unlikely to accede to the European Convention. On the other hand, the European Parliament has declared that harmonisation of laws within the European Common Market extends to civil, commercial and administrative laws, as well as criminal laws.[246] Changes in the English criminal legal system as a result of its membership of the European Economic Community is a distinct possibility in the future.

181. The recognition of a foreign penal judgment is distinguishable from its enforcement. A judgment must be recognised before it can be enforced. Moreover, a judgment may be recognised in a negative sense without it being positively enforced. Although the common law authorities are inconclusive on the issue whether a foreign criminal judgment would be recognised so as to prevent an English criminal prosecution for the same offence, [247] some academic writers view the double jeopardy principle as applying to foreign criminal judgments. If this view is correct, it is submitted that an English court would nevertheless be entitled to refuse to recognise a foreign penal judgment where it considered that the criminal act was committed on its territoy. This is because no foreign penal judgment can bind an English court from exercising its proper jurisdiction over a criminal offence.

182. Recognition may be possible in other circumstances. It should, for example, be possible for an English court to take into account an offence tried abroad in imposing a sentence on a convicted criminal. Similarly, where a court is ordering that a person be disqualified for participating in the control or management of a company, pursuant to section 188 of the English Companies Act 1948 as amended, [248] it is submitted that the basis of the disqualification order could be the conviction of that person before a foreign court for an offence of fraud in relation to a company. The wide wording of the statutory provision should be noted: the court is empowered to make a disqualification order "where it appears that... an officer... has been guilty of <u>any fraud</u> in relation to the company..."

183. Finally, recognition of foreign penal judgments may be important for administrative and self-regulatory bodies. For example in England it should be possible for the Department of Trade, pursuant to section 3 of the Prevention of Fraud (Investments) Act 1958, to refuse to grant a dealer's licence in securities to a person who has been convicted of a fraud in a foreign jurisdiction. However, since the Department of Trade would have the <u>onus</u> of proving that an applicant is not a fit and proper person to be given a licence, there is considerable scope for challenging the integrity of the foreign conviction.

184. In the report on commercial crime that was submitted to the Commonwealth Law Ministers' Meeting in Barbados in 1980 it was envisaged that information relevant to the standing of an individual or company seeking, for example, registration as a dealer in securities or a licence as an off-shore bank, could be collated by the Commonwealth Fraud Officer and provided on request to relevant authorities.

F. Bilateral Forms of Co-operation

185. The most important form of bilateral co-operation in criminal matters is bilateral extradition arrangements. For the purpose of investigating crime one or two countries have gone a step further and entered into bilateral mutual legal assistance treaties. In addition, double taxation treaties provide a limited method of exchanging information between taxation administration which may be valuable in investigating tax evasion or more usually only cases of tax fraud.

186. Few Commonwealth countries have ever considered entering into treaty obligations relating to mutual assistance in criminal matters. The reasons for this are manifold and do not solely depend on legal considerations. Common law countries are generally in a position to provide assistance to other jurisdictions and do not normally require or expect comity or reciprocity. On the other hand, most common law legal systems have great difficulty in accepting evidence obtained out of jurisdiction for the purposes of a criminal trial. Therefore, it has been argued that there is no obvious need for an elaborate treaty system within the common law world, in the absence of a radical shift away from the hearsay and best evidence rule in criminal law trials. Whether this is so or not, there is little doubt that very real practical advantages may be obtained in the execution of a bilateral arrangement with countries which do not necessarily espouse the flexibility of the common

law world in the provision of assistance. Therefore, there is great value in considering the most significant model for a bilateral mutual legal assistance treaty - that of the Swiss-United States Treaty on Mutual Assistance in Criminal Matters.[249]

187. The Swiss-United States Treaty is unique in that it marries a common law evidentiary system with a Napoleonic civil law system. The Treaty permits a request for legal assistance conerning criminal matters [250] to be directly communicated between the United States Department of Justice and the Swiss Federal Office for Police Matters. Legal experts in both authorities assist each other in a spirit of co-operation in overcoming important differences between the two countries in the investigatory process, evidence-collection procedures and admissibility rules. The Treaty also enables the Swiss bank secrecy rules to be waived in certain cases.

188. The Treaty provides that wide-ranging "compulsory assistance measures" may be rendered in either investigations or in proceedings in respect of offences committed within the jurisdiction of the requesting State. "Compulsory assistance measures" include but are not limited to:

(a) ascertaining the whereabouts and addresses of persons;
(b) taking the testimony or statements of persons;
(c) effecting the production or preservation of judicial and other documents, records or items of evidence;
(d) service of judicial and administrative documents; and
(e) authentication of documents.

189. The Treaty also makes an important distinction between general legal assistance in criminal matters and special legal assistance for the prosecution of organised crime. General legal assistance can only be invoked if the principle of double criminality [251] is satisfied and the offence is in the schedule of offences in the Treaty.

190. Special legal assistance is available for the investigation and prosecution of organised crime. Special legal assistance may be invoked where the perpetrator of the criminal act is reasonably suspected to be "knowingly involved in the illegal activities of an organised criminal group" and is either a member, affiliate or participant in any important activity of the group, or is a public official who has knowingly violated his duties in order to assist such a group. The term "organised criminal group" [252] is precisely defined since it serves as the basis for rendering legal assistance which is wider in scope than traditional Swiss practice. Where organised crime participation is reasonably suspected, legal assistance will be granted for fiscal offences, such as tax evasion [253] or foreign currency violations, or for political offences. In cases of organised crime the Swiss authorities will give assistance even if the relevant offence is not punishable in Switzerland. The Swiss Government's strong opposition to organised crime is evident in that fundamental principle of speciality is waived. Where the organised crime provisions apply, documents, testimony or other evidence obtained by the requesting State may be used without restriction, provided that the requested State is notified of such use and is given an opportunity to comment.

191. Under the Treaty legal assistance includes the disclosure of banking information. Where such disclosure is mandatory, the Swiss authorities will identify bank account beneficiaries, where possible, examine banking tansactions and exchange information. Authentication of banking records for the purpose of complying with the American rules of admissibility of evidence is also within the purview of legal assistance. Neither Article 47(b) of the Swiss Banking Act nor article 273 of the Swiss Penal Code Limit the disclosure of banking information, except as provided by Article 10(2) of the Treaty. Article 10(2) forbids the disclosure of bank secrets of third parties who appear to have no connection with the offence under investigation, except where the offence is "serious", the evidence sought is of "substantial significance", and the information or evidence has not been obtained elsewhere despite reasonable efforts by the requesting State.

192. It may be useful to discuss briefly the effectiveness of the 1973 Treaty as a mechanism for international judicial assistance. During the first four years of the Treaty's implementation the American authorities made 131 requests whereas the Swiss authorities made 41 requests for judicial assistance. It is noteworthy that in 1980-81 the number of requests has significantly increased, indicating that as both sides become more familiar with the legal system of the other State the scope of assistance is immeasurably increased. The Treaty has been particularly useful in corporate fraud and narcotics investigations. Indeed, most of the requests relate to crimes against property where the offender has used the

normal commercial ties between the two States so as to avoid suspicion. It has been estimated that evidence obtained under the Treaty has contributed to about 80 convictions and guilty pleas in the United States and approximately 35 convictions in Switzerland. [254] Practical examples may seem to illustrate the importance of these statistics. For example, the Italian financier Sindona could never have been convicted in the United States on numerous counts for his role in the collapse of the Franklin National Bank without the bank records from Zurich and Geneva which were obtained under the Treaty. [255] In another case the Swiss authorities identified intermediaries who had received and/or handled bribes in connection with an offence under investigation in the United States. The Swiss authorities were willing and able to give assistance even though such intermediaries were not names in the documents containing the American request.[256] Indeed, under the Treaty it is possible to disclose the names of individuals or corporations who are involved in any way in the facts being investigated abroad. It is sufficient for the purposes of assistance that such parties participated in an act constituting one of the elements of the offence under investigation; it is not necessary that they be prima facie guilty of an offence or even have allegedly contravened a law. The Treaty may thus be effective where the American authorities do not know the identity of the criminal actors or their associates.

193. It would be wrong to create the impression that there have not been areas of great difficulty with the interpretation and application of the Treaty. One area which has evoked considerable disagreement is that of insider dealing regulation. In a nutshell, although the Americans consider insider dealing unlawful, it is rarely dealt with as a criminal offence, but more usually in the civil courts or through administrative enforcement proceedings. Insider dealing is not a criminal offence in Switzerland and until recently has not necessarily been regarded as seriously as it has in the United States. Given the requirement for double criminality the Swiss have been unwilling to provide assistance in compulsory matters to the various United States administrative agencies charged with "policing" the American law. A number of cases have arisen where the United States judicial and administrative authorities have attempted to force disclosure of banking information from Swiss financial institutions which in Switzerland is protected by the law. After much negotiation and a degree of antagonism the Swiss and United States governments have recently entered into a Memorandum of Understanding which in large measure resolves these problems.[257]

194. It has been claimed that the United States-Swiss Treaty provides a model for mutual assistance treaties between common law and civil law States. The United States Department of Justice has concluded similar treaties with Turkey, Colombia and the Netherlands and is negotiating treaties with Italy, France and Germany. The Swiss authorities have commenced discussions with Canada on this subject and preliminary negotiations with other countries which adhere to the common law concept of criminal law and procedure have been initiated. However, the United Kingdom Government has withdrawn from negotiations with the Swiss authorities for a bilateral treaty on judicial assistance in criminal matters. The British Government in a diplomatic note [258] in 1981 rejected the Swiss Government's suggestion of a bilateral treaty. The note stated:

> "The draft treaty... has been examined by the competent authorities in the United Kingdom. The latter have said, however, that they do not favour the conclusion of treaties on this subject since the system of criminal justice in the United Kingdom does not under present legislation, lend itself easily to the application of mutual assistance agreements... The United Kingdom Government... consider it preferable that the assistance rendered to the Swiss authorities should continue to be on the basis of comity rather than in accordance with a reciprocal treaty."

195. Such an approach by a common law jurisdiction is understandable given the present state of the law. Although, there are few cases where evidence obtained overseas can be satisfactorily introduced into a criminal trial in England without the attendance of the witness, the British approach appears to ignore the significance that information, which is not necessarily admissible in evidence, can have on the course of a criminal investigation. Experience suggests that a significant number of investigations have been frustrated by the inability to secure the co-operation of the Swiss authorities. Police officers as individuals would be the first to support this observation, and there is confirmation in many published reports by inspectors appointed under the English Companies Act and in the statements of such bodies as the City Panel on Take-overs and Mergers.

196 Perhaps an even more compelling reason for the reassessment of the traditional stance of common law countries is the recent enactment of the Swiss Federal Act on International

Mutual Assistance in Criminal Matters, [259] which came into force on 1 January 1983. Article 8 of this Act provides:

> "(1) As a rule, a request (i.e. for assistance in matters requiring compulsion) shall be granted only if the requesting State guarantees reciprocity. The Federal Office for Police Matters of the Federal Department of Justice and Police may require a guarantee of reciprocity if this is deemed necessary."

197. In the past the Swiss authorities have administered the general requirement for reciprocity with a good deal of flexibility. However, this rather relaxed attitude must now change. Unless, Commonwealth countries are prepared to "guarantee reciprocity" in the execution of requests from Switzerland, the Swiss authorities cannot accede to requests for assistance from that country. When it is remembered that it is a criminal offence under Swiss law for a person to conduct an investigation or assume any other judicial role other than in accordance with Swiss law, the implications of this new statutory requirement for reciprocity should be obvious.

198. Whilst the Swiss-United States Treaty provides a useful model it is likely that many Commonwealth countries would not require the same degree of co-operation in for example such matters as organised crime. A draft treaty prepared by the Swiss authorities as a basis for discussion with common law countries has been furnished to the Commonwealth Secretariat.

199. Although in this context the paper focusses attention on judicial co-operation in criminal matters between Switzerland and common law jurisdictions, given the significance of Switzerland as a financial centre and the reputation that it has for operating strict banking secrecy laws, similar considerations apply with equal force to other countries. It might also be added that, as an increasing number of Commonwealth countries develop as off-shore financial centres with their own forms of banking secrecy, the ease with which co-operation is afforded within the Commonwealth may decline. This is a matter which appears to have received little consideration in any forum.

200. A potentially important bilateral form of co-operation is the double taxation conventions. However, such conventions provide only a limited method of exchanging financial information between tax administrations. For example, Switzerland has entered into double taxation conventions with France, Germany, the United Kingdom and the United States, all of which contain a clause providing for the exchange of taxation information. [260] It is expressly stipulated in these conventions that information will only be exchanged for the purpose of correctly applying and preventing the abuse of such conventions. It is arguable that under such conventions a taxpayer can avoid any exchange of information between the taxation authorities by renouncing the advantages of the applicable convention.

201. Internal national legislation may restrict the exchange of taxation information. For example, the British Inland Revenue is prohibited under section 6 of the Taxes Management Act 1970 [261] from disclosing information except for the purposes of their duties or for the purposes of any prosecution for an offence relating to inland revenue or in such cases as may be required by law. The secrecy obligation is ameliorated by section 77 of the Finance Act 1978 which provides that the Inland Revenue may disclose to the taxation authorities of another member State of the EEC any information required to be so disclosed by virtue of the Directive of the Council of the European Communities.[262] Disclosure of taxation information to other member States is subject to a requirement of confidentiality [263] and is only allowed for the purposes of taxation or to facilitate legal proceedings for failure to observe the laws of the receiving State. [264]

G. Multilateral Forms of Co-operation

202. There is a distinct trend towards multilateral agreements of mutual assistance in the field of criminal law. This has been brought about by a recognition that a large number of crimes have extraterritorial elements and by the acknowledgement that the failure to provide co-ordinated assistance between groups of States has facilitated abusive practices. The forms of positive collaboration between States have ranged from international treaties that deal with universal crimes, such as drugs trafficking and counterfeiting, to draft conventions that seek solutions to controversial crimes, such as industrial fraud, cultural property offences and bribery. Regional treaties and international banking supervision are other forms of multilateral co-operation.

203. There are a number of international conventions which create international crimes or come close to establishing a universal jurisdiction over certain conduct. For example, the Geneva Convention for the Suppression of Currency Counterfeiting, 1929, fosters international co-operation in stamping out counterfeiting of currency. Another example is the Geneva Convention on the High Seas, 1958, which codifies the rule of customary international law that piracy is a universal crime. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, deals with the problem of aviation terrorism. [265] The issue of jurisdiction is often a contentious one in formulating a multilateral agreement. For example, the United Kingdom Government objected to the drafting of Article 4 of the International Agreement on Illicit Payments, which would have imposed an obligation on States to accept criminal jurisdiction over bribery offences when these have effects within the territory of the State or are committed by a national of the State. The United Kingdom delegation said that this would represent a fundamental departure from the country's territorial rules on jurisdiction and that there would be difficulty in enforcing a law based on such a jurisdiction. [266]

204. An inherent conflict of interest between developed and developing nations is evident in the formulation of an international agreement to deal with the problem of industrial fraud. Industrial fraud is the practice of making a copy of a commercial product with an established trade mark and passing it off as the genuine item. "Piracy" of inventions and industrial designs also causes economic damage to a developed country's trade in the developing countries. The Paris Convention for the Protection of Industrial Property, [267] establishes standards of substantive law with respect of industrial property, declares counterfeiting of commercial goods to be unlawful and leaves appropriate sanctions to the national law of the Convention States. The draft International Agreement to Combat Counterfeited Goods is a significant improvement on the Paris Convention because it allows owners of trade marks which have been fraudulently reproduced to directly approach national authorities and have imports seized. The developed countries [268] such as the United States, Japan, Australia and members of the EEC hope that the Draft Agreement will develop into an Anti-Counterfeiting Code and will be introduced in the General Agreement on Tariffs and Trade. The developed nations in the main see the problem simply as one of "theft of technology". [269] In contrast, the developing countries, which are both the primary source and market of counterfeited goods, are extremely reluctant to sign any code on industrial fraud. [270] These States see the main issue as one of economic competition and argue that the refusal of developed countries to transfer technology and the imposition of tariff barriers against their goods are the underlying causes of international industrial fraud.

205. International conventions dealing with copyright infringement face similar obstacles as conventions conerning industrial fraud. The Berne Convention for the Protection of Literacy and Artistic Works, 1886, and the Universal Copyright Convention, 1952, are the principal multilateral copyright conventions. These conventions are supplemented by other multilateral agreements relating to the protection of producers of records [271] and regional agreements relating to television and broadcasting.

206. The principle of "national treatment" is incorporated in Articles 4 and 6 of the Berne Convention and Article 11 of the Universal Convention. This means that under the conventions foreign copyright owners are accorded the same rights as nationals, and that the local courts apply the local national laws in copyright to both national and foreign authors. Since the copyright laws of various nations differ in substance, there is formal reciprocity but not material reciprocity. Whilst the western developed nations have sought to widen the property rights of authors, the developing nations have tried to impose definite limits on the proprietors of copyright. [272]

207. A serious problem particularly for developing countries has been the illicit trafficking of cultural property. In November 1970 the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention requires States to draw up an inventory of cultural property containing detailed descriptions and photographs of archaeological treasures, culturally and artistically valuable objects used in religious ceremonies, paintings, sculptures and church property. This represents, according to Mr. A. Bossard, [273] Secretary-General of ICPO-Interpol, a major step in facilitating the international circulation of information about stolen cultural property. Previously, a principal cause of delay in investigating stolen works of art has been the difficulty encountered by the police in obtaining good photographs of stolen articles. By establishing national inventories of cultural property, States can precisely identify items of stolen property and ICPO-Interpol can rely on such information to draw up speedy and accurate international stolen property notices.

208. The formulation of international codes of conduct for transnational corporations (TNCs) is another important development.[274] The scope and the machinery for monitoring and implementing the codes are matters of protracted and fierce disagreement. Difficult questions as to the definition of TNCs, [275] the applicability of the code to government corporations [276] and the binding nature of the codes have not yet been resolved. The developed countries consider that TNCs' codes should not be mandatory because it would be impracticable, given the existing diversity in laws, policies and objectives among States. The developing countries argue that voluntary codes would be ineffective. However, even voluntary codes are not without merit, provided there is some international regulatory or supervisory agency responsible for monitoring the conduct of TNCs.

209. The search for regional networks of inter-State co-operation by geographic, politi-cal or social entities is another form of international collaboration. The European Convention on Mutual Assistance in Criminal Matters, 1959, the Benelux Treaty on Mutual Assistance, 1967, the Treaty on Mutual Assistance between countries of the Arab League, 1966, and the attempt by the Association of South East Asian nations to formulate a treaty on mutual assistance are examples of regional inter-State co-operation.

210. The European Convention on Mutual Assistance in Criminal Matters, 1959, has been signed by 15 nations, including France, Germany, Italy and Switzerland, but not the United Kingdom. Under the auspices of the Council of Europe negotiations are under way to extend the concept of Mutual Assistance to all West European nations. The Convention's provisions for mutual assistance, include chapters on the processing of letters rogatory, [277] the service of writs, the appearance of witnesses and experts, and the communication of judicial records. The Convention contains the principles of double criminality and reciprocity and also imposes a duty on contracting States to use their respective judicial services in furtherance of the "widest measure" of mutual assistance. The Convention does not affect the obligations incurred under bilateral or other multilateral international conventions which contain clauses governing specific aspects of mutual assistance. The Convention has been of limited practical value for many areas of crime enforcement. For example, in the context of commercial crime although it was once envisaged that mutual assistance would include the lifting of bank secrecy for common law fraud crimes and tax fraud, this proposal has not yet come to fruition.

211. Under the sponsorship of the Benelux Commission for the Study of the Unification of Laws[278] the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters was signed in June 1962 and ratified in December 1967.[279] The Benelux Treaty is unique in that it contains extensive measures concerning inter-State police co-operation between Belgium, the Netherlands and Luxembourg. The following signigicant provisions are found in the Benelux Convention. Firstly, Article 26 of the Treaty permits the dispatching of investigators to another State so as to continue investigations and to be present when letters rogatory are executed. in such cases the investigator has the same status as police officials of the neighbouring territory. Secondly, Article 27 provides an opportunity for official investigators to continue "shadowing" a suspected criminal in another Treaty State,provided it concerns an extraditable offence. Thirdly, in cases of emergency, there is a right to chase a suspected criminal of an extraditable offence across the border and the right to arrest such a criminal, provided that the "hot pursuit" is uninterrupted and is within a radius not exceeding ten kilometres inside the foreign territory. Fourthly, Article 33 creates the possibility of "lending out" convicted criminals for the purpose of participating in and aiding a foreign investigation.

212. The need for elaborate investigative co-operation in the Benelux Treaty arises from the considerable ease of travel and the extent of border crimes in these small States. The Treaty has been hailed by Mr J. Nepote, a former Secretary-General of ICPO-INTERPOL, as a "first step towards disregarding the concept of national sovereignty" [280] and as a model for future international collaboration. This optimistic analysis is tempered by the fact that the treaty is not particularly useful wherre a criminal passes through more than three States. Moreover, the treaty should be seen in the context of three unusually friendly neighbouring States which have expressed a genuine desire to harmonise and unify their legal rules and procedures. Indeed, in spite of the conditions favouring extensive co-operation, the parties took fourteen years to agree on a final draft of the Treaty and another five years to ratify it. It is clear that the difficulties encountered in reaching any agreement on inter-State collaboration should not be underestimated.

213. The internationalisation of banking in the 1960s has produced considerable changes in

the banking system. The expansion of banks across national territories through subsidiaries and branches in a large number of countries and the growth of offshore markets which operate outside the controls of national central banks has created in effect a "supervisory vacuum". These developments, coupled with the collapse and failure of a number of banks in the United Kingdom, Germany and Italy in 1973-74, precipitated increased co-operation among banking supervisory authorities. In December 1975 the Governors of the world's major central banks endorsed the Concordat of the Group of Ten. The Concordat promulgated the following fundamental principles [281] for co-operation:

(a) host and parent bank authorities should share joint responsibility for the supervision of foreign banking establishments;
(b) no foreign banking establishment should escape supervision; and
(c) host countries should allow direct inspection by parent national banking authorities of offshore facilities operated by banks with headquarters in the parent country.

214. Although these measures were principally directed at improvng the banking authorities' ability to monitor the liquidity, solvency and country risk of national banks, the Concordat principles could apply equally to the regulation of the propriety of international banking operations. A small number of industrialised countries have recommended that national bank supervision should encompass the investigation of criminal activities of its offshore banks and that host nations should lift bank secrecy where grounds of suspicion of criminal activity exist. These proposals have not been accepted. Moreover, it should be noted that the Concordat explicitly provides that bank inspection cannot be used as a means of identifying tax evasion per se.

215. A considerable problem in the East Caribbean has been the creation of "free banking" sovereign crime zones. Free banking zones are located next to airports, are legally autonomous and are not subject to any supervision by local customs, immigration, banking or police authorities. Under the auspices of the International Monetary Fund (IMF), the East Caribbean Currency Authority (ECCA) was created with the object of becoming a central bank for the smaller countries of the East Caribbean. It was proposed that the ECCA would assert its authority so that "dirty money" would not be allowed into the national banking systems, banking licence applications would be vetted and depositors and accounts would be inspected with a view to discovering "irregularities". The ECCA has met with strong opposition. The proposed ECCA initiative has not been fully implemented in spite of considerable pressure from the IMF and the United States Government.

Developing Mutual Assistance in Criminal Matters

216. Assuming that Commonwealth countries would recognise the political, social and economic advantages in developing greater mutual assistance in criminal matters the question arises as to how best this may be achieved. There are no immediate or simple answers. The matter is one for deliberation the more so because in many jurisdictions to achieve effective improvements there would have to be legislative changes. The writers of this paper have therefore set out a number of possible approaches ranging from a Commonwealth scheme for mutual assistance in criminal matters to merely a refinement of the existing informal procedures.

(1) A Commonwealth Scheme for Mutual Assistance in Criminal Matters

217. The Government of Australia submitted a Memorandum to the Commonwealth Law Ministers Meeting in Winnipeg, Canada, in 1977 [282] suggesting that a meeting be convened by the Commonwealth Secretariat to negotiate a scheme analogous to the 1966 Scheme for the Rendition of Fugitive Offenders for general mutual assistance in criminal matters. This suggestion is attractive given the success of the Commonwealth Scheme for the Rendition of Fugitive Offenders. However, whilst the Australian delegation raised the matter again at the Meeting the matter was taken no further.

218. It seems clear that a Commonwealth-wide initiative in this field would in practical terms have to be conceived as a "scheme" and not an international convention. The weakness in basing such an initiative on a "scheme" is, of course, that individual countries are left with greater discretion in the adoption, implementation and administration of the "agreed" provisions. Whilst the Commonwealth Scheme for the Rendition of Fugitive Offenders has encountered practical difficulties it must be regarded as a success and could, it is respectfully submitted, provide a conceptual basis for a wider initiative. Of course, it would be wrong to underestimate the problems involved in developing an acceptable

Commonwealth Scheme for Mutual Assistance in Criminal Matters. Whilst there is comparatively little scope for fundamental disagreement on the desirability of returning fugitive offenders for ordinary criminal law offences to another Commonwealth country to face a fair trial there are exceedingly more controversial issues in arriving at a general scheme for mutual assistance in criminal matters. It is only necessary to consider the possible difference in views of Commonwealth countries on such matters as the provision of assistance in taking compulsory measures to secure and provide evidence, the admissibility of evidence obtained out of jurisdiction and the enforcement of foreign judicial orders, for example, in regard to the forfeiture or seizure of property associated with criminal activity. On the other hand, there are many matters where a consensus of opinion could be achieved with relative ease. After all, there are important common legal traditions in most Commonwealth countries.

219. Should Law Ministers consider it desirable that a formal scheme be devised for the Commonwealth then it may be appropriate for the Commonwealth Secretariat to undertake a more thorough study and then convene a meeting of relevant officials to develop a satisfactory draft. The British delegation to the 1977 Commonwealth Law Ministers' Meeting thought that "further exploration of the subject by the Secretariat" would be appropriate. A similar approach to that adopted in regard to the recognition of judgments and orders, and the service of process within the Commonwealth would seem to commend itself. [283]

220. It has been suggested that regional as opposed to a Commonwealth wide initiative would be more practicable. With respect, this may be doubted. Whilst there are special considerations pertaining to jurisdictions in close and regional geographic proximity the wider Commonwealth perspective should not be sacrificed. Regional initiatives should be in addition to and not in derogation from a Commonwealth initiative. Of course, on the basis of the experience gained in the Commonwealth initiative in regard to mutual assistance in civil matters the convening of regional working meetings may be appropriate.

(2) Bilateral Arrangements

221. The Australian Government in the memorandum to which reference has already been made, [284] referred to the Swiss-United States Treaty on Mutual Assistance in Criminal Matters which has been discussed earlier in this paper. [285] The Australian Government expressed the view that this treaty might provide a useful model for Commonwealth countries in arriving at satisfactory bilateral arrangements with other Commonwealth countries. Of course, the Swiss-United States Treaty involves the relationship of a common law and civil law criminal process, and may therefore require adaptation before it is readily acceptable to two common law jurisdictions. Of course, the Swiss-United States Treaty does provide a sound model for any Commonwealth country desirous of entering into a bilateral arrangement with a civil law jurisdiction and the Swiss Government has prepared a draft treaty, based on the United States one, for other common law countries.

222. The bilateral approach does have certain advantages over the multilateral approach. Governments are given greater freedom to determine exactly what obligations are undertaken and exactly to whom. This is an important political consideration and in practical terms means that bilateral development may proceed somewhat more expeditiously than a multilateral initiative. Furthermore, bilateral arrangements may be entered into with countries outside the Commonwealth on essentially the same terms as those within. This consideration might be particularly important where a Commonwealth country is already committed to some kind of regional initiative.

223. Commonwealth Law Ministers may feel that there would be advantage in the Commonwealth Secretariat undertaking further studies in this area with a view to arriving at a suggested draft treaty for Commonwealth countries which might serve as a model for the negotiation of bilateral arrangements. There might well be merit in convening a meeting of relevant officials to determine an appropriate Commonwealth model.

224. It should be emphasised that the suggestion that a Commonwealth Scheme for Mutual Assistance in Criminal Matters should be devised in no way effects the right of any Commonwealth jurisdiction to enter into a bilateral arrangement with any other country, inside or outside the Commonwealth, and to this extent the multilateral and bilateral approaches are not mutually exclusive. Indeed, the bilateral approach could be satisfactorily combined with the multilateral approach giving Commonwealth countries the "right" to secure co-operation and assistance in appropriate cases.

(3) Unilateral Initiative

225. It is for every country to determine what assistance it is prepared to give the agents of a foreign jurisdiction in their endeavour to administer their own criminal judicial process. The creation of a Commonwealth Scheme for Mutual Assistance in Criminal Matters, along the same lines of the Commonwealth Scheme for the Rendition of Fugitive Offenders, not reinforced by bilateral treaty obligations, would not vest in any Commonwealth jurisdiction the "right" to secure co-operation or assistance in another Commonwealth country, although there would, of course, be an expectation that such would be forthcoming in accordance with the Commonwealth Scheme, where the relevant jurisdiction had brought it into its domestic law.

226. There is no way of avoiding the practical problem that whatever approach is taken, in the end Commonwealth countries will have to consider amending their domestic laws to accommodate requests from overseas and, from their own standpoint - perhaps more importantly - extend the admissibility of evidence acquired from overseas. As already mentioned earlier in this paper, few Commonwealth countries have even considered this problem let alone prepared draft legislation which would significantly resolve these complex procedural and evidentiary difficulties. In the circumstances, Commonwealth Law Ministers may feel that there would be advantage in the Commonwealth Secretariat further studying the relevant laws and procedures and prepare suggestions as to how some of these problems might be resolved in the context of a Commonwealth initiative.

(4) Informal Assistance

227. Whilst there is considerable scope for increasing informal co-operation and assistance, in the final analysis where a criminal trial is involved resort will have to be made to judicial procedures. It is the absence of effective formal legal procedures for obtaining information and evidence from overseas, which is usable or admissible in evidence, before the domestic courts that remains at the heart of the problem. Police and judicial authorities are mandated and orientated to the criminal process whereby an offender is dealt with by the national courts according to the ordinary rules of procedure and evidence. Whether these procedures and rules are at all adequate for coping with the modern international criminal remains to be seen. But the fact remains that unless police officers have a hope of securing evidence from overseas which will result in a good chance of achieving a successful prosecution before their own criminal courts few will be prepared to deal with the matter on any other basis. For example, in practice very few ordinary police officers are concerned with loss prevention or the strategic use of intelligence where such is not referable to a potential prosecution. The restrictive attitude of prosecutionary authorities in certain Commonwealth jurisdictions both to the legal question of jurisdiction over crimes and to the practicality and cost of securing evidence overseas which may not in the final analysis be admissible in court, has led to a disturbing level of disenchantment and even frustration on the part of law enforcement officers. This has been especially so in regard to organised crime and commercial crime. Perhaps, even more disturbing is the reputation that certain countries are rapidly acquiring as centres for either operating criminal enterprises or laundering the proceeds of crime committed elsewhere. Many law enforcement officers feel that these unfortunate developments are directly related to the issues raised in this paper. Given the concern expressed by Commonwealth Law Ministers at their previous meetings about the level and extent of organised international commercial crime the significance of these developments should not be underestimated.

228. Whatever approach Law Ministers feel may be appropriate in regard to the provision of increased mutual judicial assistance in criminal matters on a more formal basis, devising a suitable scheme or programme will inevitably take time. In the short term Commonwealth Law Ministers may feel able to encourage prosecutors and law enforcement officers to adopt less parochial attitudes to requests for information and assistance from overseas than is presently adopted in some instances. This would have the immediate advantage of fostering a greater degree of goodwill and confidence at the law enforcement level. The Commonwealth Fraud Officer, whose appointment in November 1981 was partly as a result of the recognition by Law Ministers at their last Meeting that "co-operation on a police force-to-police basis" was not a complete answer, [286] has experienced some difficulty in assisting Commonwealth countries, particularly from the developing world, in securing effective co-operation from other police forces within the Commonwealth. In particular, some police forces feel unable to accede to a request for assistance, even if conveyed to them through the ICPO-Interpol network, with any degree of urgency. In other cases, requests are simply ignored or accorded a degree of priority which makes a mockery of international co-operation. Many police agencies refuse to acknowledge the practical

importance of inquiries relating to loss prevention and will not provide information, even where they are able to do so under their law, which would assist another jurisdiction in avoiding loss through the commission of a crime. The situation is exacerbated by the reluctance of ICPO-Interpol to become involved in the provision of assistance at this level where a specific crime has not been identified. Commonwealth Law Ministers may consider that it would be appropriate to reassert the importance of co-operation at this level and encourage their law enforcement agencies to accord this aspect of combatting crime a higher priority.

Conclusions

229. The paramount conclusion that the writers come to, is that there is a significant problem in the provision of judicial assistance in criminal matters at an international level, both within the Commonwealth and outside, Whilst informal co-operation and the utilisation of the ICPO-Interpol network is of considerable significance, neither resolve all the problems. There is a disturbing trend for domestic law enforcement agencies, for a variety of reasons, to almost give up when a substantial foreign element is involved in the commission of a crime. Unless urgent and proper attention is given to the problems confronting those called upon by society to investigate and prosecute criminals operating on an international level our legal systems are being asked to fight with their hands tied behind their backs. The successful convictions that are achieved in this context can only represent an exceedingly small proportion of the cases which could and should be brought before the courts if the arms of the legal system were freed.

230. The present writers would commend the suggestion of the Australian Government in its Memorandum to the Commonwealth Law Ministers' Meeting in Winnipeg, Canada, in 1977, that serious thought should be given to the creation of a Commonwealth Scheme for Mutual Assistance in Criminal Matters. This Scheme could usefully be reinforced by the negotiation of bilateral treaties with Commonwealth and non-Commonwealth countries along the same lines as the Swiss-United States Treaty of 1973, with suitable amendments. In the short term domestic law enforcement authorities should be encouraged, and if necessary given the resources, to more enthusiastically follow-up requests for assistance and information from other jurisdictions. In particular, there should be greater attention to the use of strategic and operational intelligence at the international level and greater emphasis should be given to the use of loss prevention techniques in certain areas of law enforcement.

Footnotes

1. See for example, American Law Institute, Restatement (Second) of the Foreign Relations Law of the United States (1965), ch.1, s.7 (The Restatement).

2. R.Y. Jennings, "Extraterritorial Jurisdiction and the United States Anti-Trust Laws," (1957) 33 British Yearbook of International Law 146, p.147.

3. The Lotus Case, (1927) P.C.I.J., Series A, No. 10.

4. See for example, Queen v Nillins (1884) 53 L.J.M.C. 157 (the offence of obtaining goods by false pretences is committed where the goods are obtained); King v Oliphant [1905] 2 K.B.67 (falsification of documents); Queen v Bull (1845) 1 Cox C.C. 281 (forgery).

5. See for example, Ford v United States (1927) 273 U.S. 593 (U.S. Supreme Court).

6. The Restatement, supra n.1, p.52.

7. R.Y. Jennings, supra n.2, p.158.

8. The Exchange of Greek and Turkish Populations (1928) P.C.I.J., Series B, No.10.

9. Nottebohm Case (1955) I.C.J. Rep. 4.

10. The Restatement, supra n.1, p.74.

11. See for example, The Foreign Asset Control Regulations 1959.

12. United Kingdom's Aide-Memoire to the European Commission in Imperial Chemicals Industries Ltd. v E.C. Com's (1972) 11. Com. Mkt. L.R. 555.

13. (1896) 2 Q.B. 425.

14. Lotus Case (1927) P.C.I.J., Series A, No.10, p.94, Per Judge Moore

15. The passive personality principle is, however, recognised in some treaties. See for example, the Convention on Offences Committed on Board Aircraft, Art.4(b), which provides that a State may exercise jurisdiction if the offence has been committed "against a national or permanent resident of such a State."

16. [1934] A.C. 585 (P.C.) The jurisdiction of piracy is now provided for by s.4 and the Schedule of the Tokyo Convention Act 1967. See also Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd., F.T. Commercial Law Reports, 30 June 1982, where it was held that maritime theft without force is not piracy.

17. See for example, Forgery and Counterfeit Currency Act 1982, the Hijacking Act 1971, the Protection of Aircraft Act 1973, and the Internationally Protected Persons Act 1978.

18. G. Williams, "The Venue and Ambit of the Criminal Law," (1965) 81 Law Quarterly Review 276, 395 and 518.

19. See for example, the judgments of Lord Reid and Lord Morris in Treacy v D.P.P. [1971] A.C. 537, pp. 552 and 555 (H.L.)

20. Lawson v Fox [1974] 1 All E.R. 738,p.785, per Lord Diplock. (H.L.); Bank Voor Handel en Scheepvaart v Slatford [1953]1 Q.B. 248, p. 258, per Devlin J.

21. Theophile v The Solicitor General [1950]A.C. 186, p.195, per Lord Diplock (H.L.); Schibsy v Westeholz [1870] Q.B. 155, p.160, per Lord Ellenborough ("Can the island of Tobago pass a Law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?")

22. Treacy v D.P.P. [1971] A.C. 537, p.561 (H.L.).

23. See generally, M. Hirst, "The Criminal Law Abroad", (1982) Criminal Law Review 496. See also R. v Kelly [1981]2 All E.R. 1098 (H.L.).

24. Criminal Justice Act 1948, S.31.

25. Army Act 1955, S.70.

26. Perjury Act 1911, s.1(5). Perjury is sometimes treated as an application of the territorial principle, but it is better considered as an illustration of the protective principle because its effects are not limited to the constituent elements of a crime.

27. Representations of the People Act 1949, s.155.

28. Exchange Control Act 1947 (suspended).

29. See G. Williams, supra n.18, p.518, where the initiatory and terminatory theories were first formulated. See also J. Lew, "The Extraterritorial Criminal Jurisdiction of Criminal Courts", (1978) International and Comparative Law Quarterly 168, where the inclusionary theory was added to Professor Williams' classification.

30. G. Williams, supra n.18, p.518.

31. Id., p.518.

32. Id., p.519.

33. In Treacy v D.P.P. [1971] A.C. 537, p.562, (H.L.), Lord Diplock claimed that the inclusionary theory would not expose the accused to double jeopardy, but it is respectfully submitted that his view is not supported by the authorities he cites.

34. [1971] A.C. 537 (H.L.).

35. See for example, Treacy v D.P.P. [1971] A.C. 537, pp. 558 and 560, per Lord Hodgson and Lord Diplock respectively. Cf. D.P.P. v Stonehouse [1978] A.C. 55, p.78 (H.L.) where Lord Salmon doubted that these theories had any "practical utility".

36. G. Gordon, Criminal Law in Scotland, (1978), 2nd ed. W. Greene & Co..

37. [1971] A.C. 537 (H.L.).

38. Id., p.558. Lord Hodgson also thought that it was open to the court to treat the demand as a "continuous demand subsisting until the addressee received it."

39. p.558.

40. pp.554-555.

41. pp.-550-551.

42. pp.560-561.

43. [1976] A.C. 35.

44. [1974] 3 All E.R. 705 (C.A.)

45. [1976] A.C. 35, p.61.

46. J. Lew, supra n.29, pp.177-179.

47. Id., p.78.

48. [1963] 1 Q.B. 8 (C.C.A.); Cf. R. v Ellis [1899] 1 Q.B. 230 where the accused was convicted of obtaining goods by false pretences in circumstances where the pretences had been made in Scotland but the goods had been obtained in England.

49. In D.P.P. v Stonehouse [1978] A.C. 55, p.74 (H.L.) Viscount Dilhorne doubted whether jurisdiction in Harden depended on the ground that the post office was the agent of the maker of the false pretences.

50. (1974) 59 Cr. App. R.80 (C.A.).

51. Id., p.85. See also Treacy v D.P.P. [1971] A.C. 537, p.563 (H.L.), where Lord Diplock said that Harden should be reconsidered, and suggested that it should be overturned in the light of the new offence found in s.15 of the Theft Act 1968.

52. The "postal rule" provides that if the offeror and intended recipient of the money has made known that acceptance should be communicated by post, the post office will be deemed to be the agent of the offeror for receipt of notification of acceptance, including the transmission of money. Anson's Law of Contract, ed. A.G. Guest, (1979), 25th ed. Clarendon Press Oxford, pp.42-44.

53. [1974] A.C. (H.L.)803. This decision accords with the general policy of preventing persons driving on English roads when their competence is impaired and is consistent with the terminatory theory of jurisdiction.

54. Similarly, the jurisdiction over a crime committed by a secondary party is determined by the State which enjoys jurisdiction over the principal offender. Robert Miller (Contractors) Ltd. and Robert Miller [1970] 2 Q.B. 54.

55. [1969] 1 W.L.R. 165.

56. [1957] A.C. 602 (H.L.).

57. Id., p.634.

58. See R. v Sinclair [1968] 3 All E.R. 241 (C.A.), which is authority for the view that a conspiracy to defraud may consist of a dishonest agreement to commit a direct

interference with another person's proprietary or legal rights, which may neither be criminal nor tortious.

59. Board of Trade v Owen [1957] A.C. 602, pp.630-631 (H.,L.)

60. (1864) 4 F.F. 68. See also the obiter dicta in R. v Cox [1968]. 2 All E.R. 410, p.413, and Board of Trade v Owen [1957]A.C. 602, p.630-631.

61. The proposition in Kohn is difficult to reconcile with cases on conditional intent, such as R. v Eason)[1971] 2 Q.B. 315, which held that if a dishonest person has the intention of stealing only what he finds worth stealing he has no present intention to steal, and also with definition of conspiracy in section 1(1) of the Criminal Law Act 1977, which refers to agreements to pursue a course of conduct necessarily involving the commission of an offence.

62. G. Williams, supra no.18, p.530.

63. [1972] 1 Q.B. 1.

64. [1978] A.C. 55 (H.L.).

65. P.67. Lord Diplock and Lord Edmund Davies described the offence as a "result crime".

66. (1980) 70 Cr. App. R.77 (H.L.).

67. Id., p. 110.

68. J.C. Smith, "Theft,Conspiracy and Jurisdiction: Tarling's Case", (1979) Criminal Law Review 220.

69. R. v Williams [1942] A.C. 541 (P.C.); London and South American Investment Trust v British Tobacco Co. (Australia) [1927] 1 Ch. 107; Brossard v Smith [1925] A.C. 371, (P.C.).

70. (1980) 70 Cr. App. R. 77, p.132.

71. [1973] 1 All E.R. 940 (H.L.).

72. (1980) 70 Cr. App. R. 77, p. 110.

73. Report on the Territorial and Extraterritorial Extent of the Criminal Law, (1979), Law Commision.

74. See also s.7 of the Crimes Act 1961 (N.Z.) for a similar provision.

75. Law Commission Report, supra n.73, para, 7.

76. Rule 10(b)-5 provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of inter-state commerce, or of the mails, or of any facility of any national exchange,
>
> (i) to employ any device, scheme, or artifice to defraud
>
> (ii) to make any untrue statement of a material fact, or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (iii) to engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

77. B. Rider & H.L. Ffrench, The Regulation of Insider Trading (1979) Macmillan, Ch.3.

78. Schoebaum v Firstbrook 405 F. 2d. 200, p.210 (2d Cir. 1968).

79. U.S. v Aluminium Corporation of America 148 F. 2d 416 (2d Cir. 1954).

80. Leasco Data Processing Equipment Corporation v Maxwell 468 F. 2d 1326, p.1334 (2d Cir. 1972).

81. Note section 30(b) which provides: "The provisions of this title or any rule or regulation thereunder, shall not apply to any person in so far as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent evasion of the title." The section was narrowly construed in Schoenbaum v Firstbrook 405 F. 2d 200 (2d Cir. 1968) which held that s.30(b) has no application to persons engaged in isolated foreign transactions.

82. See for example, Murray v Schooner "Charming Betsy" 6 U.S. 64 (Sup. Ct. 1804).

83. Restatement (Second) of Foreign Relations Law of the United States (1965).

84. See brief for the SEC as amicus curiae in Schoenbaum v Firstbrook 405 F. 2d 200 (2d Cir.1968).

85. See for example the SEC consent decree with Investors Overseas Service, Sec. Ex. Act Rel. No. 8088

86. See for example, Continental Grain v Pacific Oilseeds 592 F. 2d 409 (D.C. Minn.1979).

87. 468 F. 2d 1326 (2d Cir 1972).

88. Id., p.1330.

89. The decision in Leasco has been followed in a number of other cases. For example:

    (i) where a series of fraudulent communications, using international telephone and mail facilities, were made by a foreign corporation to a U.S. resident. Travis v Anthes Imperial 473 F. 2d 515 (8th Cir.1973);

    (ii) where securities were offered and sold to U.S. investors with fraudulent representations which stressed the issuer's ties with the U.S. SEC v Capital Growth 391 F. Supp 593 (1973)

    (iii) where U.S. inter-state commerce facilities were used in the preparation and distribution of fraudulent prospectuses to U.S. residents. SEC v United Financial Group Inc. 475 F 2d 354 (9th Cir. 1973);

    (iv) where the impugned transaction concerned trading in securities that were listed on a U.S. stock exchange. Selzer v Bank of Bermuda Ltd. 385 F Supp. 415 (S.D.N.Y. 1974); Roth v Fund of Funds 405 F. 2d 421 (2d Cir. 1968).

    All these cases involved American victims of fraud perpetrated by foreigners. The American courts were willing to extend the protection of Federal law to these plaintiffs even though the material conduct occurred outside the United States.

90. 519 F. 2d 974 (2d Cir. 1975).

91. 519 F. 2d 974, p. 988.

92. 519 F. 2d 1001 (2d Cir. 1975) Cf. ITT v Cornfield 462 F. Supp. (SDNY 1978) where it was held that there was no jurisdiction over a Rule 10(b)-5 claim by foreign shareholders of a foreign corporation against its foreign directors even when the allegedly fraudulent transaction occurred on the American securities exchange.

93. 548 F. 2d 109 (3d Cir 1977).

94. 405 F 2d 200 (2d Cir 1968).

95. Id., p. 206.

96. 473 F. 2d 515 (9th Cir. 1973).

97. 519 F. 2d 974 (2d Cir. 1975).

98. Id., p. 986.

99. See generally, W. Painter, "Proposed Changes in United States Securities Laws" in The Regulation of the British Securities Industry, ed. B.A.K. Rider, (1979), Oyez Pub. Ltd.; p.142 et seq.

100. See for example, In Re Uranium Contracts Litigation 480 F. Supp. 1138 (ND.III.1979); Arthur Anderson v Finesilver 546 F. 2d 338 (10th Cir. 1976). See also in regard to the Siberian Pipeline affair Aida Feliciano v Reliant Trading Co et al (1982) U.S. Court of Appeal 3rd Cir. Case No.82-1176.

101. (1975-1976 Transfer Binder) C.C.H. Fed. Sec. L. Rep. 1195 (D.D.C. 1975).

102. There is no authority supporting the conclusion that this is an international legal obligation.

103. Vital national interests refer to overriding interests, such as national security or general welfare.

104. The type and severity of a penalty imposed on a party, if it disobeys foreign laws are the relevant considerations in determining whether to modify enforcement jurisdiction.

105. American courts are more willing to waive jurisdiction over a foreign party who would be forced to disobey the laws of his country, than it would waive jurisdiction over an American corporation faced with an inconsistent foreign law. See U.S. v General Electric Co. 115 F. Supp.335 (D.C.N.J. - 1953); Molophone Co. v U.S. 352 U.S. 903 (Sup. Ct. - 1956).

106. Ref. No.81. Cir. 1836 (M.P.) Nov.16, 1981 (S.D.N.Y. 1981). See also U.S. v First National City Bank, 396 F 2d 897 (2d Cir. 1968) where the balancing formula in section 40 was also applied.

107. See also, Societe Internationale Pour Participacione Industriel et Commercial S.A. v Rogers 357 U.S. 1977 (Sup Ct. 1958) where it was indicated that a party who had made deliberate use of foreign law to evade American law might be subject to sanctions; Application of Chase Manhattan Bank 297 F. 2d 611 (2d Cir. 1962) where the court upheld the District Court's modification of subpoena duces tecum on a showing that compliance would violate Panamian law; Ings v Ferguson 282 F.2d 149 (2d Cir. 1960) where it was held that if a party served with a subpoena duces tecum was only a witness and the evidence could have been secured by letters rogatory, the subpoena had to be modified so as not to require production of documents protected by Canadian law; and First National Bank of New York v I.R.S. 271 F. 2d 616 (2d Cir. 1959) where production of record was not ordered because this would violate Panamian law.

108. See for example, article 271 of the Swiss Penal Code, 1937-71.

109. For example, the United States seizure of the Panama Canal.

110. United States Department of Justice, Civil Division Practice Manual, (1976), Volume 1, International Judicial Assitance, p.53. See also In re Request for Judicial Assistance from the Second District Criminal Court, Seoul, Korea, 428 F. Supp. 109 (N.D. Cal.1977), aff'd. 555 F. 2d 720 (9th Cir. 1977).

111. Opening address by Mr. E.C. Anyaoku, Deputy Commonwealth Secretary General, Meeting to discuss the Commonwealth Scheme for the Rendition of Fugitive Offenders, Marlborough House, London, 22 November 1982.

112. W. Clifford, White Collar and Corporate Crime: The Modern Challenge to Commonwealth Criminal Justice,(1977) Commonwealth Secretariat.

113. B.Rider, Supplementary Report on the International Criminal Police Organisation (ICPO-Interpol), (1980) LMM(80)2 Commonwealth Secretariat.

114. See Appendix I.

115. Report No.5 submitted by the General Secretariat of ICPO-Interpol to the 45th General Assembly Session, ICPO-Interpol, 1976, on International Frauds and Commercial Crime.

116. Court of Appeal No. 86, 1978 (Hong Kong), (1979) HKLR 298.

117. See R. v Sang [1979] 2 All E.R. 1222 (H.L.) where it was considered that the judge's discretion is limited to admissions, confessions and generally to evidence obtained from the accused after the commission of the offence. See also Report of the Royal Commission on Criminal Procedure, Chairman Sir C. Philips, (1981), HMSO, Cmnd. 8092, paras. 4.131-4.134.

118. See R. v Ali and Hussain [1965] 2 All E.R. 464 (C.C.A.); R. v Stewart (1970) 54 Cr. App. R. 210 (C.A.); R. v Keeton (1970) 54 Cr. App. 267 (C.A.)

119 See for example, Report on Affairs of Ferguson and General Investment Ltd. (formerly known as Dowgate and General Investments Ltd.); CSI Investment Ltd., Investigations under s. 165(b) of the Companies Act 1948, Report by J. Jackson Q.C. and K.L. Young, T.D., F.C.A., (1979), HMSO.

120. See for example, First Report of the Insider Dealing Tribunal, Chairman Mr. Justice Barker, (1982), Government of Hong Kong.

121. See B. Rider, The Promotion and Development of International Co-operation to Combat Commercial and Economic Crime, (1980) LMM(80)2 Commonwealth Secretariat.

122. Noted in (1982) 8 Commonwealth Law Bulletin 843.

123. (1884) 55 L.J. Ch. 791. On the other hand, an officer of the court may be ordered to attend without the issue of a subpoena. Re General Financial Bank (1888) W.N.47.

124. (1847) 10 Q.B. 827; 116 E.R. 313.

125. Criminal Justice Act 1967 s.2 as amended by the Criminal Justice Act 1972 s.46.

126. (1727) 1 Barn. K.B. 20; 94 E.R. 13.

127. R. v Briscoe (1831) 1 Dowl. 520.

128. R. v Bignell (1851) 16 L.T.N.S. 394.

129. Working Party Report on Investigation and Prosecution of Company Fraud, Chairman Mr. J. Jardine, (1979), unpublished, Director of Public Prosecutions, para. 72 and see Part III Canada Evidence Act.

130. The ground for granting a commission to examine a witness depended on the special circumstances of the case. Jessup v Du Port (1740) Barn. Ch. 197; 27 E.R. 609.

131. R.S.C. 1965, Ord. 39, r.1.

132. The phrase "purposes of justice" means the interests of all the parties. Berdan v Greenwood (1880) 20 Ch.D. 764n. (C.A.).

133. See Halsbury's Laws of England (1976), 4th ed. Butterworths, Vol. 17, paras. 294-304.

134. R.S.C. 1965, Ord. 39, r.2(1)(b).

135. Id., Ord. 39, r.2(2)(a).

136. Id., Ord. 39,r.2(2)(b).

137. Id., Ord. 39, r.2(1)(a).

138. Berdan v Greenwood(1880) 20 Ch. D. 764n (C.A.)

139. Armour v Walker(1883) 25 Ch. D. 673

140. Lawson v Vacuum Brake Co. (1884) 27 Ch. D. 137 (C.A.)

141. Merland v Huggins (1842) 11 L.J. Q.B. 271.

142. (1880) 20 Ch.D. 764n, p.766, per Baggallay L.J., p.768, per Cotton L.J. (C.A.).

143. (1882)20 Ch.D. 760.

144. Baddeley v Bailey (1893) W.N. 56; Cf. Macauley V Glass (1902) 47 Sol. Jo. 71.

145. See Swiss Penal Code, Article 271.

146. The examiner administers an oath to the witness, conducts an examination, which may include cross-examination, on questions prepared by the applicant, signs and seals the document and returns his commission to the relevant court.

147. Section 10 of the 1968 Act is reflected in a number of the Consular Conventions between the United Kingdom and other States. See for example, Article 26 of the Consular Convention with Austria, HMSO., Cmnd.2278.

148. See also s.5, Singapore Criminal Procedure Code.

149. An amendment of practice in 1907 required the Foreign Office to act as a channel between the foreign diplomatic mission and the court.

150. The magistrate or justice of the peace is obliged to take evidence in the same way as if the witnesses were appearing in connection with a charge for an indictable offence. Section 5 also provides for the giving of evidence, answering of questions and production of documents.

151. Working Party Report, Review of the Law and Practice of Extradition in the United Kingdom, (1982), unpublished, Home Office, para. 18.6. See also s.43, Singapore Extradition Act; Ch.76, s.27 of Ghana Extradition Act 1960 (No.22).

152. On the other hand, it is not necessary for the subject to have been charged and arraigned before a court. Id., para. 18.6.

153. Foreign requests for assistance will be received initially in the Nationality and Treaty Department of the Foreign and Commonwealth Office, who will then send them as appropriate to the Home Office (C3 Division), the Scottish Office, the Northern Ireland Office or the Senior Master at the Royal Courts of Justice.

154. See RSC 1965, Ord. 39 r.3 for a list of convention countries. These bilateral conventions codified or introduced practices which went beyond the vague and uncertain duties imposed by international comity.

155. The Hague Convention provides a master code for the 26 nations that have signed it and for the 10 nations, including the United Kingdom and the United States, which have ratified it. In implementing the Convention the ratifying countries have agreed to follow the practices and procedures of the requesting State in order that the evidence obtained or other judicial acts performed will be of use in the forum of the requesting State. Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, (1969) 8 International Legal Materials 804, p.806.

156. See also R.S.C. 1968, Ord. 70, which sets out the relevant procedure. An application for an order under the 1975 Act must be made on affidavit ex parte to a master of the Queen's Bench Division (Ord. 70, r.2). If an order so obtained is not contested, the examination is taken before any person nominated by the applicant or before an examiner of the court (Ord. 70, r.4(1)).

157. Evidence (Proceedings in Other Jurisdictions) Act 1975,s.1.

158. Id., s.5 and similarly, Zimbabwe, Witnesses Compulsory Attendance Act (Ch.55) s.3; Ghana, Courts Act 1971(No.372) s.70; Belize, Supreme Court of Judicature Ordinance, s.44; Canada, Evidence Act, S.43 and Hong Kong Evidence Ordinance Ch. 8, s.77B.

159. Report of the Committee of the Judiciary, (1963), H.R. Rep. No. 1052, 88th Cong. 1st sess., p.9.

160. [1978] 1 All E.R. 434 (H.L.).

161. In practice, the section 5 procedure governs the formal taking of evidence in Scotland for use in criminal proceedings before foreign and Commonwealth courts and also the taking of evidence in England and Wales for use in a Commonwealth court.

162. D.L. Jones, "Legislative attempts to protect trading interests", (1980) 6 Commonwealth Law Bulletin 353, p.369.

163. [1978] 1 All E.R. 434, p.467 (H.L.) Viscount Dilhorne, p.459, considered that the intervention of the Department of Justice altered the character of the proceedings.

164. In Re Westinghouse Electric Corp. [1977] 2 All E.R. 703 (C.A.).

165. Id., p.706

166. [1973] Q.B. 148, p.152.

167. Rio Tinto Zinc Corp. v Westinghouse Electric Corp. [1978] 1 All E.R. 434, p.467, per Lord Diplock (H.L.).

168. Evidence (Proceedings in other Jurisdictions) Act 1975, s.5(1)(c).

169. Id., s.2(2).

170. H.M. Advocate, Petitioner 1978 SLT NRD 17.

171. [1964] 1 Q.B. 40 (C.A.).

172. [1964] 2 Q.B. 647 (C.A.) See also Panthalu v Raymond Research Laboratories Ltd. [1966] 2 Q.B. 173 (C.A.).

173. Section 4 extends the powers available to the High Court under s.49 of the Supreme Court of Judicature (Consolidation) Act 1925 and also extends those powers given to the Court of Sessions and High Court of Justices in Northern Ireland under s.49 of the Attendance of Witnesses Act 1954.

174. [1978] 1 All E.R. 434, p.478 (H.L.).

175. The time involved depends on such factors as the legal sytstem in the State of execution, the nature and complexity of the request and the attitude of the officials in the State of execution.

176. For a detailed list of reservations to the Hague Convention, see 7 Martingdale Hubbel Law Directory, (1978), pp. 4384-4387.

177. Fed. R. Civ. P. 28(b) (1966).

178. Fed. R.C. Civ. P. 26(b) (1966). See also Fed. R. Civ. P. 45(b) and (d) which authorise the serving of subpeonas on third parties for the taking of depositions and for production of papers and documents.

179. See for example Burchard v Macfarlane [1891] 2 Q.B. 241 (C.A.) Registrar v W.H. Smith [1956] 1 Q.B. 618 (C.A.); Penn-Texas Corp. v Murat Anstalt (No.2) [1964] 2 Q.B. 647 (C.A.); Panthalu v Raymond Research Laboratories Ltd. [1966] 2 Q.B. 173 (C.A.).

180. [1956] 1 Q.B. 618, (C.A.); Re Radio Corp. of America v Rauland Corp. (1956) 5 D.L.R. 2d. 242.

181. (1967) 1 Lloyd's List L.R. 222.

182. [1977] 3 W.L.R. 430, p.436 (C.A.).

183. [1978] 1 All E.R. 434, p.436, per Lord Wilberforce (H.L.) Lord Fraser, p.496, observed that the letters rogatory were drafted by the legal advisors of Westinghouse with the object of meeting the requirements of the English court and which were then signed by the American judge.

184. Id., pp.441-442 and 450.

185. [1974] A.C. 133 (H.L.).

186. [1980] 3 W.L.R. 1874 (C.A.).

187. [1978] 1 All E.R. 434, pp.441-442 (H.L.).

188. See generally, Halsbury's Laws of England, supra n. 131 Vol. 16, paras. 479-480, Vol 15, paras 420-428. Section 14 of the 1975 Act is extended to criminal proceedings by virtue of s.5 of the 1975 Act.

189. In the United States the Federal Government has an inherent right to grant immunity. United States v Carter 454 F. 2d. (4th Cir.1972). See also U.S.C., s.6002.

190. [1978] 1 All E.R. 434, p.448-449, per Lord Wilberforce (H.L.).

191. [1968] 2 W.L.R. 1479.

192. [1898] 1 Q.B. 761 (C.A.).

193. [1901] A.C. 196, pp.201 and 206. In Bullivant a solicitor was consulted as to how to do an illegal act. See also R.v Cox (1884) 14 Q.B.D. 153

194. [1919] 1 Ch. 320, pp. 336 and 349 (C.A.)

195. The Times, 20 May, 1982.

196. Companies Act 1948 s.175 as amended by Companies Act 1981 s.103.

197. [1968] A.C. 910 (H.L.).

198. [1981] 3 W.L.R. 33 (H.L.).

199. [1978] A.C. 171, (H.L.).

200. [1979] 3. W.L.R. 722 (H.L.) Burmah Oil has been equally successful in seeking disclosure of certain other governmental documents before Whitford J. (28 March 1980, High Court).

201. Financial Times Commercial Law Report, 12 May 1982. This decision has been overturned on appeal. See Air Canada v Secretary of State for Trade, The Times, 25 September 1982 (C.A.).

202. [1980] 3 All E.R. 475.

203. [1981] 2 All E.R. 321 (C.A.).

204. [1981] 1 All E.R. 417 (Cg.D) 435 (C.A.), 452 (H.L.).

205. See Attorney-General v Gough [1963] Q.B. 733; Attorney-General v Mullholland [1963] 2 Q.B. 477 (C.A.). See also McGuiness v Attorney-General of Victoria (1940) 63 C.L.R. 73 (High Ct. Australia).

206. Unreported, Court of Appeal, June 1981.

207. 326 U.S. 31, p. 316 (Sup. Ct. 1945).

208. 468 F. 2d 1326, p. 1340 (2d. Cir. 1972).

209. 100 F. Supp. 504 (S.D.N.Y.1951). See also Zenith Radio Corporation v Matsushita Electric Industria Co. Ltd. 402 F. Supp. 262 (E.D. Pa. 1975) Ferraioli v Cantor 259 F. Supp. 842 (S.D.N.Y. 1966).

210. See for example, Export Administration Act 1979.

211. See Lord Wilberforce's statement in Rio Tinto Zinc Corp. v Westinghouse Electric Corp. [1978] 1 All E.R. 434, p.448 (H.L.): "The policy of Her Majesty's Government has been against the recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts in such matters should speak with the same voice as the executive."

212. Business Records Protection Act 1947 (Ontario); Business Concerns Records Act 1947 (Québec).

213. Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1979 (Australia).

214. Evidence Amendment Act 1980 (New Zealand).

215. Department of Trade Press Notice, Ref. 445, 30 October 1981.

216. The Protection of Trading Interests Act 1980, s.1(3). The Secretary of State may allow limited compliance with a requirement and may take into account a companies consent to the release of the document (s.1(5)). The Secretary may also by order direct that s.1 applies to the measures of the foreign country (s.1(1)), and may require any person carrying on business in the U.K. to notify him of a foreign requirement or prohibition (s.1(2)). Note there is no mandatory reporting requirement.

217. Section 1(3).

218. Section 2(3)(b). This is identical with s.2(4) of the Evidence (Proceeedings in Other Jurisdictions) Act 1975, except that the Secretary of State, not the courts, makes the determination of admissibility.

219. United Kingdom Diplomatic Note to the United States, No. 225, p.2 (12 November 1979).

220. Protection of Trading Interests Act 1980,s.1(2).

221. 357 U.S. 197 (Sup. Ct. 1958).

222. J.P.M.D.L. Docket No. 50. Misc. No. 45-70 (D.D.C. 1974).

223. See for example, First National City Bank v IRS 271 F. 2d 616, p.619 (2d Cir. 1959); Application of Chase Manhattan Bank 297 F. 2d 611, p.613 (2d Cir. 1962).

224. 282 F 2d 149, p.155 (2d Cir. 1960).

225. (1979) HKLR 298, Court of Appeal No.86, 1978 (Hong Kong).

226. The judge also pointed out that the court would be deprived of effective control once the documents or copies thereof had left the jurisdiction. The question of control is also a matter of concern for the law enforcement agencies when they transmit information. At this level criminal intelligence may easily be used as political intelligence.

227. [1962] 3 All E.R. 641. (C.A.).

228. "If, therefore, the purpose of the Home Secretary in this case was to surrender the

applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conductive to the common good, then his action is lawful." Id., p.661, per Lord Denning M.R.

229. It has been argued that the ruling in Soblem seems inconsistent with the decision in R. v Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry [1917] 1 K.B. 922 (C.A.). In this case it was held that whereas the Secretary of State cannot order the deportation of an alien to a particular State, he can indirectly achieve the same result by selecting the means of departure.

230. [1949] 1 All E.R. 373.

231. See for example, Connelly v D.P.P. [1964] A.C. 1254, p.1302 (H.L.); Wong Ping Nam v Ministry of Justice (1972) S.L.T. 220. As to misuse of power by the executive, see R. v Governor of Brixton Prison ex parte Sarno [1916] 2 K.B. 742.

232. Unreported, Divisional Court, 25 June 1982.

233. See the classic statement of the law by the United States Supreme Court in Wisconsin v Pelican Insurance Co. 127 U.S. 265: "The rule that the courts of no country execute the law of another applies not only to prosecutions and sentences for crimes... but to all suits in favour of the State for the recovery of pecuniary penalties of any violation of statutes for the protection of its revenue and other municipal laws," which was adopted by the Privy Council in Huntington v Attrill [1893] A.C. 150 (P.C.). The same rule applies to revenue laws and judgments. See Government of India v Taylor [1955] A.C. 491.

234. [1893] A.C. 150 150, pp. 155-157 (P.C.).

235. A penal law is defined as a fine or other exaction imposed by and recoverable at the instance of the State for the violation of public order of a criminal character. Id., p. 255.

236. Id., p. 161 per Lord Watson "... a delict may give rise to a purely civil remedy as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State." See also Raulin v Fischer [1911] 2 K.B. 99 where it was held that a compensation order rendered in criminal proceedings is a civil judgment enforceable in England provided it is severable from the rest of the criminal judgment.

237. [1982] 2 W.L.R. 10 (Staughton J.), The Times 27 May 1982 (C.A.).

238. Lord Denning M.R. Construed s.12 of the 1962 Act in the light of s.251 of the Customs Act 1913 to support his finding that forfeiture took place when the goods were seized. Cf. Gold Star Publications Ltd. v Com. of Police of the Metropolis [1981] 1 W.L.R. 732.

239. The other judges did not consider whether there was any third category of "public laws".

240. See however the obiter dicta in the Court of Appeal in SA Consortium General Textiles v Sun and Sand Agencies Ltd. [1978] Q.B. 279, pp. 299-300, which suggest that a foreign judgment for multiple damages could be enforced in England.

241. [1971] 2 Q.B. 478.

242. [1975] Ch. 273.

243. See for example, Swiss Penal Code 1937, Articles 3(2) and 5(2) which permit the enforcement of foreign criminal judgments without any requirement of reciprocity.

244. See for example, the European Agreement on the Supervision of Conditionally Sentenced or Released Offenders 1964 and the European Convention on the Punishment of Road Traffic Offenders 1964.

245. Article 6 of the Convention excludes enforcement which would be contrary to the

"fundamental principles of the legal system" of the requested State, where the offence is of a political or military character, and where the offence was brought about or aggravated by considerations of race, religion, nationality or public opinion. Article 3 (1) provides that enforcement may be refused where the criminal act was committed outside the territory of the requesting State.

246. European Parliament, Sessional Documents 1965-1966, Document 54, pp.268-369.

247. R. v Hutchinson (1677) 3 Keeble 785; R. v Roche (1975) 1 Leach 134; R. v Aughet (1918) 13 Cr. App. R. 101.

248. Companies Act 1948, s. 188 as amended by Companies Act 1981, s.93.

249. Treaty signed at Berne, 25 May 1973 with date of entry into force being 23 January 1977. For the background to mutual ratification see B. Rider and H.L. Ffrench, The Regulation of Insider Trading, (1979) MacMillan & Co. Ltd., p.422 See Appendix II.

250. The Treaty does not apply to civil, commercial or administrative matters but may be invoked where, for example, the United States Department of Justice submits a request regarding investigations carried out by administrative agencies such as the Securities and Exchange Commission provided these investigations may result in criminal proceedings.

251. Article 4, para. 2(a) requires that the "acts described in the request contain the elements, other than intent or negligence, of an offence which would be punishable under the law in the requested State if committed within jurisdiction". The double criminality principle may be waived if the requested State determines that the offence is of sufficient importance to require its aid. Article 4, para.3. Note the watering down of the requirement of double criminality in The Memorandum of Understanding, 31 August 1982; see Appendix III.

252. The term "organised criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

"a: at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b: either:

(1) strives to obtain influence in politics or commerce, especially in political bodies or organisations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under sub-paragraph b (1)."

253 Assistance is only rendered in investigations or proceedings involving violations of tax laws that are committed by higher ranking members of organised crime groups. Article 7, para.2 and Article 2, para. 2.

254 The statistics were supplied by the United States Office of International Assistance in the Department of Justice and the Swiss Federal Office for Police Matters.

255. Another example is the case of Mark Stanley Rifkin, the computer specialist who caused the fraudulent transfer of $10.2 million from a bank in California to a Zurich bank and used most of the proceeds to buy Russian diamonds in Geneva which he then smuggled back into the United States. Pursuant to a request under the Treaty, evidence and sworn testimony were taken in Zurich and Geneva in the presence of American attorneys, counsel for defence and American court reporters, who were needed for making the verbatim transcript. The information from Switzerland was instrumental in closing the chain of evidence necessary for Rifkin's conviction.

256. The intermediaries unsuccessfully challenged the disclosure of their identity in the Swiss courts. See BGE 27 February 1980 i.s.Zc.BAP(Sup. Ct.).

257. Signed 31 August 1982, See Appendix III.

258. Note No. 029, British Embassy Berne, 14 July 1981.

259. Law of 20 March 1981. See L. Frei, "International Mutual Assistance in Criminal Matters: The Swiss Federal Act", (1982) 8 Commonwealth Law Bulletin 792.

260. See also Article 26 of the Draft Double Taxation Convention on Income and Capital (1963), OECD, Paris.

261. Taxes Management Act 1970, s.6 and Sch.1 as amended by Finance Act 1975, s.57(2); see also s.6103(1) of the Internal Revenue Code as amended by Tax Reform Act 1976 (U.S.); s.16 of the Income Tax Assessment Act 1977 (Australia).

262. No. 77/799/EEC, 19 December 1977.

263. Finance Act 1978, s.77(2).

264. Id., s.77(3).

265. See also the Tokyo Convention on Offences and certain other Acts committed on board Aircraft, 1963; Montreal Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation; Council of Europe Convention on Terrorism, 1976; Draft Convention on Terrorism and Kidnapping of Persons for the Peace and Security of Mankind 1975; see D.L. Jones, Three International Conventions on Hijacking and Offences on Board Aircraft (1982) Commonwealth Secretariat; A. Evans and J. Murphy (eds.) Legal Aspects of International Terrorism (1978) Lexington Books.

266. U.N. Documents, E/5838/Add.i, July 1976; E/1479/104, May 1979.

267. The Paris Convention is within the World Intellectual Property Organisation.

268. The developed States are supported by private international agencies such as the International Chamber of Commerce and nationally-based bodies, such as the Anti-Counterfeiting Coalition (U.S.).

269. Mr. C. Parkinson, M.P., Secretary of the Department of Trade, Financial Times, 5 June 1981, p.19.

270. Taiwan, reputedly the largest source of counterfeit goods, has introduced new regulations which require exporters to disclose whether their goods carry a trademark and whether they have a letter of authorisation for use of the trademark from the owner.

271. See, for example, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961; Geneva Convention for the Protection of Producers of Phonograms Against the Unauthorised Duplication of their Phonograms, 1971.

272. For example, in 1967 a Special Protocol for Developing Countries was promulgated at the Stockholm Diplomatic Conference. This Protocol would allow a more liberal use of protected works for education and for scientific research in developing countries.

273. A. Bossard, "Theft of Cultural Property", (1974) 276 International Criminal Police Review 58, p.66.

274. See generally, P. Maynard, "The Commission and Centre for Transnational Corporations", (1980) 1 Company Lawyer 226.

275. Report of the Intergovernmental Working Group on Code of Conduct (1978) General Secretariat, United Nations. Doc. No.E/C/10/A.C.2/3, pp. 10-13.

276. Views and Proposals of States on a Code of Conduct (1976) General Secretariat, United Nations, Doc. No.E/C.100/19, p.5.

277. 1959 Convention, Articles 3-6.

278. The Commission was established by a protocol of the Ministers of Justice of Belgium, the Netherlands and Luxembourg on 17 April 1948. Its main task is to harmonise and unify the rules of civil, commercial and criminal law.

279. Belgium ratified it in 1964, Luxembourg in 1965 and the Netherlands in 1967.

280. J. Nepote, "European Police Co-operation in Criminal Matters", (1970) 236 International Criminal Police Review 142, p.146. Mr. Nepote recommends that Interpol should co-ordinate the international movement of investigators, who would be empowered by local magistrates to intervene in another State.

281. See also the EEC Banking Directive which obliges member States to permit the exchange of information between banking supervisory authorities. See also the Banking Act 1979, Ss 19(6) and 20(4).

282. LMM(77)6.

283. The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth, Reports of J.D. McClean and K.W. Patchett, Commonwealth Secretariat: Reports of Working Meetings, Basseterre, St. Kitts, April 1978; Apia, Western Samoa, April 1979; and Nairobi, Kenya, January 1980, Commonwealth Secretariat, and see LMM(80)17.

284. LMM (77)6.

285. See supra at paras. 187-199.

286. Communiqué, para. 16.

APPLICATION OF THE PRINCIPLES OF DOUBLE CRIMINALITY AND OF RECIPROCITY AND A REQUIRED MINIMUM STANDARD OF SERIOUSNESS OF OFFENCES IN CASES WHERE CO-OPERATION IS REQUESTED:

(Extracted from Report No.5 submitted by the General Secretariat of ICPO-Interpol to the 45th General Assembly Session, Accra ICPO-Interpol, 1976, on International Frauds and Commercial Crime.)

(The following definitions were used in the questionnaire addressed to NCBs:

Double criminality:
According to this principle, assistance is ony given in cases where the act committed is an offence punishable by the courts in the requesting country and would also be punishable by the courts in the requested country had it been committed there.

Reciprocity:
According to this principle, assistance is only given if the requesting country would grant the same or similar assistance if the positions were reversed

Minimum standard of seriousness of an offence : For example; legal distinction such as "crime" or "indictable offence" etc., a requirement that offences must be liable to a specified minimum sentence.)

The following analysis relates to Part One of Report No. 5 and therefore only to Foreign Exchange and Currency Offences (and closely related economic crimes). None of the responding NCBs made any distinction between the type of assistance requested, with the exception of Finland with regard to the minimum seriousness of the offence.

It should also be noted that this analysis was prepared in 1976 and is thus not entirely accurate today.

N.B. The table is in French alphabetical order.

COUNTRY	Application of the principle of double criminality (cf.definition under 7.2)	Application of the principle of reciprocity (cf.definition under7.2)	Required minimum standard of seriousness of offences (cf.7.2)
Netherlands Antilles	Yes	No	Yes (the offence should be of sufficient seriousness in Netherlands Antilles legislation).
Bahrain	Yes. However, see Bahrain's reply on police powers (7.3.1); the question on possibilities for co-operation (cf.7.3.2) was considered "not applicable".	Yes, but it is not applied strictly (cf.preceding column).	No (cf. remark in first column).
Bermuda	No	Yes, the Bermuda authorities would expect total co-operation in return.	No
Burundi	No explicit reply, but apparently not.	No explicit reply, but apparently not.	No explicit reply, but apparently not.
Canada	No	No	No
Chile	No	No	No
Finland	Yes, but no account is taken of the value limits which are part of the offence committed.	Yes, but it is not applied very strictly (the requesting country does not have to give exactly the same service in return).	No. However, exercising of coercive powers relies upon certain minimum standards in Finnish legislation.
France	Yes	Yes, depending on the requesting country.	"There must be a criminal offence punishable under French legislation". (It is not clear whether this reply is merely a repetition of the principle of double criminality, or if it has a more far-reaching significance.)

COUNTRY	Application of the principle of douple criminality (cf. definition under 7.2)	Application of the principle of reciprocity (cf. definition under 7.2)	Required minimum standard of seriousness of offences (cf. 7.2)
Hong Kong	Yes, provided that the offence has been partly committed in Hong Kong and exists under Hong Kong law.	Yes	No
India	Yes	No	No
Ireland	The service which drafted the reply thinks not.	The service which drafted the reply thinks not.	The service which drafted the reply thinks not.
Japan	No	Yes (applied strictly)	-
Malaysia	No. However, see Malaysia's reply concerning police powers (7.3.1)	Yes (cf. remark in preceding column).	Yes ("on reciprocal basis and to the most extent possible as permitted by the legislation of our country". This is taken to mean that there are minimum requirements of seriousness in relation to Malaysian legislation) cf. remark in column 1.
Nigeria	Yes	Yes	-
Pakistan	Usually, yes (according to the NCB's reply; another service which assisted in replying to the questionnaire stated that this principle is not applied).	There is no strict rule (according to the NCB; another service stated that, in practice, this principle is not applied).	Usually, yes.
Philippines	"The principle is applied only when the offence is likewise punishable by any of our penal laws."	Yes, but it is not strictly applied.	No
Portugal	Yes	No reply given.	No
Singapore	No. However, see Singapore's reply on police powers (7.3.1); the question on the possibilities of co-operation (cf. 7.3.2) was considered "not applicable".	No	-
Sri Lanka	No	No	No
Sweden	Yes	No	No
Venezuela	Yes	Yes (the requesting country must be prepared to render a more or less similar service in exchange wherever possible).	Yes (the offence must be a "delito" punishable by a prison sentence).

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

The President of the United States of America
and
the Swiss Federal Council,

Desiring to conclude a treaty on mutual assistance in criminal matters.

Having appointed for that purpose as their Plenipotentiaries:

The President of the United States of America:

Walter J. Stoessel, Jr.
Assistant Secretary of State for European Affairs

Shelby Cullom Davis
Ambassador Extraordinary and Plenipotentiary
of the United States of America to Switzerland

The Swiss Federal Council:

Dr. Albert Weitnauer
Swiss Ambassador to Great Britain

who, having exchanged their respective full powers, which were found in good and due form, have agreed as follows:

INDEX

Chapter I
APPLICABILITY

Article 1

Obligation to Furnish Assistance

1. The Contracting Parties undertake to afford each other, in accordance with provisions of this Treaty, mutual assistance in:

a. investigations or court proceedings in respect of offences the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof;

b. effecting the return to the requesting State, or a state or canton thereof, of any objects, articles or other property or assets belonging to it and obtained through such offences;

c. proceedings concerning compensation for damages suffered by a person through unjustified detention as a result of action taken pursuant to this Treaty.

2. For the purposes of this Treaty, an offence in the requesting State is deemed to have been committed if there exists in that State a reasonable suspicion that acts have been committed wihch constitute the elements of that offence.

3. The competent authorities of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offence falling within the purview of this Treaty. Agreements to this affect shall be concluded by exchange of diplomatic notes.

4. Assistance shall include, but not be limited to:

a. ascertaining the whereabouts and addresses of persons;
b. taking the testimony or statements of persons;
c. effecting the production or preservation of judicial and other documents, records, or articles of evidence;
d. service of judicial and administrative documents; and
e. authentication of documents.

Article 2

Non-Applicability

1. This Treaty shall not apply to:

a. extradition or arrests of persons accused or convicted of having committed an offence;
b. execution of judgments in criminal matters;
c. investigations or proceedings:
(1) concerning an offence which the requested State considers a political offence or an offence connected with a political offence;
(2) concerning offences in violation of the laws relating to military obligations;
(3) concerning acts by a person subject to military law in the requesting State which constitute an offence under military law in that State but which would not constitute an offence in the requested State if committed by a person not subject to military law in the requested State;
(4) for the purpose of enforcing cartel or anti-trust laws; or
(5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed in items 26 and 30 of the Schedule to this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

2. Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in sub-paragraphs c. (1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article 6 and

a. in the case of subparagraphs c. (1) and (4), the request relates to an offence committed in furtherance of the purposes of an organized criminal group described in paragraph 3 of Article 6, or
b. in the case of subparagraph c. (5), any applicable conditions of Article 7 are satisfied.

3. Contributions to social security and governmental health plans, even if levied as taxes, shall not be considered as taxes for the purpose of this Treaty.

4. If the acts described in the request contain all the elements of an offence for the investigation or prosecution of which assistance is required to be or may be granted as well as all the elements of an offence for which such assistance cannot be granted, assistance shall not be granted if under the law of the requested State punishment could be imposed only for the latter offence unless it is listed in the Schedule.

Article 3

Discretionary Assistance

1. Assistance may be refused to the extent that:

a. the requested State considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests;
b. the request is made for the purpose of prosecuting a person, other than a person described in paragraph 2 of Article 6, for acts on the basis of which he has been acquitted or convicted by a final judgment of a court in the requested State for a substantially similar offence and any sentence has been or is being carried out.

2. Before refusing any request pursuant to paragraph 1, the requested State shall determine whether assistance can be given subject to such conditions as it deems necessary. If it so determines, any conditions so imposed shall be observed in the requesting State.

Article 4[1]

Compulsory Measures

1. In executing a request, there shall be employed in the requested State only such compulsory measures as are provided in that State for investigations or proceedings in respect of offences committed within its jurisdiction.

2. Such measures shall be employed, even if this is not explicitly mentioned in the request, but only if the acts described in the request contain the elements, other than intent or negligence, of an offence:

a. which would be punishable under the law in the requested State if committed within its jurisdiction and is listed in the Schedule;
or
b. which is described in item 26 of the Schedule.

3. In the case of such an offence not listed in the Schedule, the Central Authority of the requested State shall determine whether the importance of the offence justifies the use of compulsory measures.

4. A decision as to whether the conditions of paragraph 2 have been met shall be made by the requested State only on the basis of its own law. Differences in technical designation and constituent elements added to establish jurisdiction shall be ignored. The Central Authority of the requested State may ignore other differences in constituent elements which do not affect the general character of the offence in that State.

5. In those cases where the conditions of paragraph 2 or 3 have not been met, assistance shall be granted to the extent that it can be furnished without the use of compulsory measures.

Article 5

Limitations on Use of Information

1. Any testimony or statements, documents, records or articles of evidence or other items, or any information contained therein, which were obtained by the requesting State from the requested State pursuant to the Treaty shall not be used for investigative purposes nor be introduced into evidence in the requesting State in any proceeding relating to an offence other than the offence for which assistance has been granted.

2. Nevertheless, the materials described in paragraph 1 may, after the requested State has been so advised and given an opportunity to make its views known as to the applicability of subparagraphs a, b and c of this paragraph, be used in the requesting State for the investigation or prosecution of persons who:

a. are or were suspects in an investigation or defendants in a proceeding for which assistance was granted and who are suspected or accused of having committed another offence for which assistance is required to be granted;
b. are suspected or accused of being participants in, or accessories before or after the fact to, an offence for which assistance was granted; or
c. are described in paragraph 2 of Article 6.

3. Nothing in this Treaty shall be deemed to prohibit governmental authorities in the requesting State from:

a. using the materials referred to in paragraph 1 in any investigation or proceeding concerning the civil damages connected with an investigation or proceeding for which assistance has been granted; or
b. using information or knowledge educed from the materials referred to in paragraph 1 in continuing any criminal investigation or proceeding, provided that:

(1) for such investigation or processing assistance may be given;
(2) prior to the date of the request for assistance referred to in paragraph 1 inquiries have already been carried out for the purpose of establishing an offence;
and
(3) the materials referred to in paragraph 1 are not introduced into evidence.

Chapter II

SPECIAL PROVISIONS CONCERNING ORGANIZED CRIME

Article 6

General Requirements

1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:
(1) a member of such a group; or
(2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services;

or

(3) a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accommodate the desires of such a group or its members.

3. For the purposes of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

(1) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article 7

Extent of Assistance

1. Compulsory measures referred to in Article 4 shall also be employed in the requested State even if the investigation or proceeding in the requesting State concerns acts which would not be punishable under the law in the requested State, or which are not listed in the Schedule, or neither. This paragraph is subject to the limitations of paragraph 2.

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income referred to in Article I of the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income[1] only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

3. Paragraphs 1 and 2 apply only if the requesting State reasonably concludes that the securing of the information or evidence is not possible without the co-operation of the authorities in the requested State, or that it would place unreasonable burdens on the requesting State or a state or canton thereof.

Article 8

Applicable Procedure

1. In all cases where this Chapter requires a reasonable suspicion or a reasonable conclusion, or the opinion of the requesting State, that State shall furnish to the requested State information in its possession on the basis of which suspicion, conclusion, or opinion has been arrived at. However, this shall not oblige the requesting State to identify the persons

who have provided such information. Upon application of the requesting State, the Centrel Authority of the requested State shall treat any information furnished in the request as confidential.

2. The Central Authority of the requested State shall have the right to review the determination of the requesting State as to the applicability of this Chapter. It need not accept such determination where the suspicion, conclusion or opinion underlying such determination has not been made credible.

3. In rendering assistance pursuant to paragraph 2 of Article 7, all courts and authorities in the requested State shall apply such investigative measures as are provided for in its rules of criminal procedure.

4. Provisions in municipal law which impose restrictions on tax authorities concerning the disclosure of information shall not apply to disclosure to all authorities engaged in the execution of a request under paragraph 2 of Article 7. This paragraph shall not limit the applicability of provisions for disclosure otherwise provided by municipal laws in the Contracting States.

Chapter III
OBLIGATIONS OF REQUESTED STATE IN EXECUTING REQUESTS

Article 9

General Provisions for Executing Requests

1. Except as otherwise provided in this Treaty, a request shall be executed in accordance with the usual procedure under the laws applicable for investigations or proceedings in the requested State with respect to offenses committed within its jurisdiction.

2. The requested State may, upon application by the requesting State, consent to apply the procedures applicable in that State for:

a. investigations or proceedings; and

b. certification and transmission of documents, records or articles of evidence;

to the extent that such procedures are not incompatible with the laws in the requested State. A search or seizure may only be made in accordance with the law of the place where the request is executed.

3. The appropriate judicial officers and other officials in each of the two States shall, by all legal means within their power, assist in the execution of requests from the other State.

Article 10

Duty to Testify in Requested State

1. A person whose testimony or statement is requested under this Treaty shall be compelled to appear, testify and produce documents, records and articles of evidence in the same manner and to the same extent as in criminal investigations or proceedings in the requested State. Such person may not be so compelled if under the law in either State he has a right to refuse. If any person claims that such a right is applicable in the requesting State, the required State shall, with respect thereto, rely on a certificate of the Central Authority of the requesting State.

2. The Swiss Central Authority shall, to the extent that a right to refuse to give testimony or produce evidence is not established, provide evidence or information which would disclose facts which a bank is required to keep secret or are manufacturing or business secrets, and which affect a person who, according to the request, appears not to be connected in any way with the offence which is the basis of the request, only under the following conditions:

a. the request concerns the investigation or prosecution of a serious offence;

b. the disclosure is of importance for obtaining or proving facts which are of substantial significance for the investigation or proceeding; and

c. reasonable but unsuccessful efforts have been made in the United States to obtain the evidence or information in other ways.

3. Whenever the Swiss Central Authority determines that facts of the nature referred to in paragraph 2 would have to be disclosed in order to comply with the request, it shall request from the United States information indicating why it believes that paragraph 2 does not prevent such disclosure. Where, in the opinion of the Swiss Central Authority, such belief has not been made credible, it need not accept the determination of the United States.

4. Any acts of a witness or other person, in connection with the execution of a request, which would be punishable if committed against the administration of justice in the requested State shall be prosecuted in that State in accordance with the laws and enforcement policies therein, regardless of the procedure applied in executing the request.

Article 11

Locating Persons

If in the opinion of the requesting State information as to the location of persons who are believed to be within the territory of the requested State is of importance in an investigation or proceeding pending in the requesting State, the requested State shall make every effort to ascertain the whereabouts and addresses of such persons in its territory.

Article 12

Special Procedural Provisions

1. Upon express application of the requesting State that the testimony or statement of a person be under oath or affirmation, the requested State shall comply with such request even in the event no provisions therefor exist in its procedural laws. In that event, the time and form of the oath or affirmation shall be governed by the procedural provisions applicable in the requesting State. Where an oath is incompatible with law, an affirmation may be substituted, even though an oath has been requested, and testimony or a statement so obtained shall be admitted in the requesting State as though given under oath.

2. The presence of the suspect or defendant, his counsel or both, at the execution of a request will be permitted whenever the requesting State so requests.

3. (a) Where the presence of representatives of an authority in the requesting State at the execution of a request is required by its law in order to obtain admissible evidence, the requested State shall permit such presence.

(b) Where the requested State agrees that the complexity of the matter involved or other special factors described in the request for assistance indicate that such-presence is likely to substantially facilitate a successful prosecution, it shall also permit such presence.

(c) In other cases the requested State may also permit such presence upon application by the requesting State.

(d) Nevertheless, if such presence would result in providing to the United States facts which in Switzerland a bank is required to keep secret, or facts which are manufacturing or business secrets therein, Switzerland shall permit such presence only where the requirements for disclosure in paragraph 2 of Article 10 have been met.

(e) Switzerland may, furthermore, at any time in the course of the execution of a request, exclude such representatives until it has been determined whether such requirements for disclosure are met.

4. Any person whose presence is permitted under paragraph 2 or 3 shall have, in accordance with the procedures in the requested State, the right to ask questions which are not improper under the laws of either State.

5. If in the requested State testimony or statements are sought in accordance with the procedures in the requesting State, persons giving such testimony or statements shall be entitled to retain counsel who may assist them during the proceeding. Such persons shall be expressly advised at the beginning of the proceeding of their right to counsel. After consent has been given by the Central Authority of the requesting State, counsel may be appointed, if necessary.

6. If the requesting State expressly requests that a verbatim transcript be taken, the executing authority shall make every effort to comply.

Chapter IV
OBLIGATIONS OF REQUESTING STATE

Article 13

Restrictions on Use of Testimony

Any testimony obtained pursuant to this Treaty from a citizen of the requested State, interrogated as a witness and not advised of his right to refuse testimony under paragraph 1 of Article 10, may not be introduced as evidence against such witness in a criminal proceeding in the requesting State unless the prosecution is for an offence against the administration of justice.

Article 14

Exclusion of Sanctions

No citizen of the requested State who has refused to give non-compulsory testimony or information or against whom compulsory measures had to be applied in the requested State pursuant to this Treaty shall be subjected to any legal sanction in the requesting State solely because he has exercised such rights as permitted under this Treaty.

Article 15

Protection of Secrecy

Evidence or information disclosed by the requested State pursuant to paragraph 2 of Article 10 shall, if in the opinion of that State its importance so requires and an application to that effect is made, be kept from public disclosure to the fullest extent compatible with constitutional requirements in the requesting State.

Chapter V
DOCUMENTS, RECORDS AND ARTICLES OF EVIDENCE

Article 16

Court and Investigative Documents

1. Upon request, the requested State shall make available to the requesting State on the same conditions and to the same extent as they would be available to authorities performing comparable functions in the requested State the following documents and articles:

   a. judgments and decisions of courts; and
   b. documents, records, and articles of evidence, including transcripts and official summaries of testimony, contained in the files of a court or an investigative authority, whether or not obtained by grand juries.

2. Items specified in subparagraph b. of paragraph 1 shall be furnished only if they relate solely to a closed case, or to the extent determined by the Central Authority of the requested State in its discretion.

Article 17

Completeness of Documents

All documents and records to be furnished, whether originals or copies thereof or extracts therefrom, shall be complete and in unedited form except to the extent paragraph 1 of Article 3 applies or the documents or records would disclose facts described in paragraph 2 of Article 10 and the requirements of subparagraphs a, b and c are not met. Upon application of the requesting State, the requested State shall make every effort to furnish original documents and records.

Article 18

Business Records

1. If the production of a document, including a book, paper, statement, record, account or writing, or extract therefrom, other than an official document provided for in Article 19, of whatever character and in whatever form is requested, the official executing the request shall, upon specific request of the requesting State, require the production of such document pursuant to a procedural document. The offical shall interrogate under oath or affirmation the person producing such document and examine it in order to determine if it is genuine and if it was made as a memorandum or record of an act, transaction, occurrence, or event, if it was made in the regular course of business and if it was the regular course of such business to make such document at the time of the act, transaction, occurrence or event recorded therein or within a reasonable time thereafter.

2. The official shall cause a record of the testimony taken to be prepared and shall annex it to the document.

3. If the official is satisfied as to the matters set forth in paragraph 1, he shall certify as to the procedure followed and his determinations and shall authenticate by his attestation the document, or a copy thereof or extract therefrom, and the record of the testimony taken. Such certification and attestation shall be signed by the official and state his official position. The seal of the authority executing the request shall be affixed.

4. Any person subsequently transmitting the authenticated document shall certify as to the genuineness of the signature and the official position of the attesting person, or, if there are any prior certifications, of the last certifying person, the final certification may be made by:

a. an official of the Central Authority of the requested State;
b. a diplomatic or consular official of the requesting State stationed in the requested State; or
c. a diplomatic or consular official of the requested State stationed in the requesting State.

5. Where a request under this Article pertains to a pending court proceeding, the defendant, upon his application, may be present or represented by counsel or both, and may examine the person producing the document as to its genuineness and admissibility. In the event the defendant elects to be present or represented, a representative of the requesting State or a state or canton thereof may also be present and put such questions to the witness.

6. Any document, copy thereof, entry therein or extract therefrom authenticated in accordance with this Article, and not otherwise inadmissible, shall be admissible as evidence of the act, transaction, occurrence or event in any court in the requesting State without any additional foundation or authentication.

7. In the event that the genuineness of any document authenticated in accordance with this Article is denied by any party to a proceeding, he shall have the burden of establishing to the satisfaction of the court before which the proceeding is pending that such document is not genuine in order for the document to be excluded from evidence on such ground.

Article 19

Official Records

1. Upon request, the requested State shall obtain a copy of an official record, or an entry therein, and shall have it authenticated by the attestation of an authorized person. Such attestation shall be signed by, and state the official position of, the attesting person. The seal of the authority executing the request shall be affixed thereto. The procedures for certification set forth in paragraph 4 of Article 18 shall be followed.

2. In addition to any provision therefor in the municipal law of the requesting State, a copy of any official record in the requested State, or entry therein, shal be admissible in evidence without any additional foundation or authentication if authenticated and certified as provided in paragraph 1 and otherwise admissible.

Article 20

Testimony to Authenticate Documents

1. The Central Authority of the requested State shall have the authority to summon persons to appear in that State before representatives of the requesting State or canton thereof in order to produce documents, records or articles of evidence supplied or to be supplied by the requested State and give testimony with respect thereto, whenever, under the applicable law in the requesting State, that its necessary for their admissibility in evidence in a criminal proceeding and such State makes a request to that effect.

2. The Central Authority of the requested State shall have the right to designate a representative to be present at the proceeding under paragraph 1. He shall be entitled to object to questions which either:

a. are incompatible with the law and practices in the requested State; or
b. go beyond the scope of paragraph 1.

Article 21

Rights in Articles of Evidence

If the requested State, a state or canton thereof, or a third party claims title or other rights in documents, records or articles of evidence, the production of which was requested or effected, such rights shall be governed by the law of the place where they have been acquired. An obligation for production or surrender under this Treaty shall take precedence over the rights referred to in the preceding sentence. These rights, however, remain otherwise unaffected.

Chapter VI
SERVICE FOR REQUESTING STATE
AND RELATED PROVISIONS

Article 22

Service of Documents

1. The competent authority in the requested State shall effect service of any procedural document, including a court judgment, decision or similar document, which is transmitted to it for this purpose by the requesting State. Unless service in a particular form is requested, it may be effected by registered mail. The requested State shall, upon application, effect personal service or, if consistent with the law in the requested State, service in any other form.

2. The requested State may refuse to effect service of legal process on a person, other than a national of the requesting State, calling for his appearance as a witness in that State if the person to be served is a defendant in the criminal proceeding to which the request relates.

3. A request must be received by the Central Authority of the requested State not later than 30 days before the date set for any appearance. This time limit must be taken into consideration when setting the date for the appearance and forwarding the request. This period may be shortened by the Central Authority of the requested State in very urgent cases.

4. Proof of service shall be made by a receipt dated and signed by the person served or by a declaration specifying the form and date of service and signed by the person effecting it.

Article 23

Personal Appearance

1. When the personal appearance of a person, other than a defendant in the criminal proceeding to which the request relates, is considered especially necessary in the requesting State, such State shall so indicate in its request for service and shall state the subject matter of the interrogation. It will also indicate the kind and amount of allowances and expenses payable.

2. The executing authority shall invite the person served to appear before the appropriate authority in the requesting State and ask whether he agrees to the appearance. The requested State shall promptly notify the requesting State of the answer.

3. If requested by the requesting State, the requested State may grant an advance payment to the person agreeing to appear. This shall be recorded on the document calling for his appearance and taken into consideration by the requesting State when making payment.

Article 24

Effect of Service

1. A person, other than a national of the requesting State, who has been served with legal process calling for his appearance in the requesting State, pursuant to Article 22, shall not be subjected to any civil or criminal forfeiture, other legal sanction or measure of restraint because of his failure to comply therewith, even if the document contains a notice or penalty.

2. The effect in the proceeding to which any procedural document served pursuant to Article 22 relates, arising from a refusal to accept it or comply therewith, shall be governed by the law in the requesting State.

3. Service of a procedural document pursuant to Article 22 on a person, other than a national of the requesting State, does not confer jurisdiction in the requesting State.

Article 25

Compelling Testimony in Requesting State

1. A person appearing before an authority in the requesting State pursuant to a legal process served under this Treaty may not be compelled to give testimony, make a statement or produce a document, record or article of evidence if under the law in either State he has a right to refuse, or if paragraph 2 below is applicable. Such a right shall be deemed to exist in the requested State to the extent that it could be invoked there if the acts which are the subject of the investigation or proceeding had been committed within its jurisdiction.

2. Such a person appearing before an authority in the United States may only be compelled to give testimony, make a statement or produce a document, record or article of evidence which would disclose facts described in paragraph 2 of Article 10 to the extent that the requirements of subparagraphs a, b and c thereof are met.

3. If any person claims that a right to refuse, pursuant to paragraph 1, exists in the requested State, or invokes the restrictions of paragraph 2, the requesting State shall in that regard rely on a certificate of the Central Authority of the requested State except that, after due consideration of the certificate, the requesting State may make its own determination as to the applicability of subparagraphs a, b and c of paragraph 2 of Article 10.

Article 26

Transfer of Arrested Persons

1. A request pursuant to Article 22 may also be made if a person held in custody by an authority in the requested State is needed as a witness or for purposes of confrontation before an authority in the requesting State.

2. The person in custody shall be made available to the requesting State if:

a. he consents;
b. no substantial extension of his custody is anticipated; and
c. the Central Authority of the requested State determines that there are no other important reasons against the transfer.

3. Execution of the request may be postponed for as long as the presence of the person is necessary for a criminal investigation or proceeding in the requested State.

4. The requesting State shall have authority, and be obligated, to keep the person in custody unless the requested State authorizes his release. The requesting State shall return the person to the custody of the requested State as soon as circumstances permit or as otherwise agreed. That person, however, shall have the right to use such remedies and recourses as are provided by the law in the requesting State to assure that his custody or return is consistent with this Article and the constitution of that State.

5. The requesting State shall not decline to return a person transferred solely because such person is a national of that State.

Article 27

Safe Conduct

1. A person appearing before an authority in the requesting State pursuant to legal process served under this Treaty shall not be prosecuted or, except as provided in paragraph 4 of Article 26, be detained or subjected to any other restriction of his personal liberty in that State with respect to any act or conviction which preceded his departure from the requested State.

2. The restrictions of paragraph 1 shall not apply as to a person of whatever nationality appearing for the purpose of answering a criminal charge with respect to any act or conviction which is mentioned in the document calling for his appearance, or a lesser included offence.

3. The safe conduct provided in this Article shall cease if ten days after the person appearing has been officially notified that his appearance is no longer required he has not used the opportunity to leave the requesting State or, after having left it, has returned.

Chapter VII
GENERAL PROCEDURES

Article 28

Central Authority

1. Requests for assistance shall be handled by a Central Authority. For the United States, the Central Authority shall be the Attorney General or his designee. For Switzerland, the Central Authority shall be the Division of Police of the Federal Department of Justice and Police in Bern.

2. Such requests which are approved by the Central Authority of the requesting State shall be made by that Authority on behalf of federal, state or cantonal courts or authorities which by law have been authorised to investigate or prosecute offences.

3. The Central Authorities of the two States may communicate with each other directly for the purpose of carrying out the provisions of this Treaty.

Article 29

Content of Requests

1. A request for assitance shall indicate the name of the authority conducting the investigation or proceeding to which the request relates and insofar as possible shall also indicate:

a. the subject matter and nature of the investigation or proceeding and, except in cases of requests for service, a description of the essential acts alleged or sought to be ascertained;
b. the principal need for the evidence or information sought; and
c. the full name, place and date of birth, address and any other information which may aid in the identification of the person or persons who are at the time of the request the subject of the investigation or proceeding.

2. Such requests, to the extent necessary and insofar as possible, shall include:

a. information described under subparagraph c of paragraph 1 concerning any witness or other person who is affected by the request;
b. a description of the particular procedure to be followed;
c. a statement as to whether sworn or affirmed testimony or statements are required;
d. a description of the information, statement or testimony sought;
e. a description of the documents, records or articles of evidence to be produced or preserved as well as a description of the appropriate person to be asked to produce them and the form in which they should be reproduced and authenticated; and
f. information as to the allowances and expenses to which a person appearing in the requesting State will be entitled.

Article 30

Language

1. Requests for assistance and all accompanying documents shall be accompanied by a translation into French in the case of a request to Switzerland, and into English in the case of a request to the United States. The Swiss Central Authority may, whenever necessary, request a translation into German or Italian instead of French.

2. The translation of all transcripts, statements, or documents made, or documents or records obtained, in executing the request shall be incumbent upon the requesting State.

Article 31

Execution of Requests

1. If, in the opinion of the Central Authority of the requested State; a request does not comply with the provisions of this Treaty, it shall immediately so advise the Central Authority of the requesting State, giving the reasons therefore. The Central Authority of the requested State may take such preliminary action as it may deem advisable.

2. If the request complies with the Treaty, the Central Authority of the requested State shall transmit the request for execution to the federal, state or cantonal court or authority having jurisdiction or selected by the Central Authority as appropriate. The court or authority to which a request is transmitted shall have all the jurisdiction, authority and power in executing the request which it has in investigations or proceedings with respect to an offence committed within its jurisdiction. In the case of a request by Switzerland, this paragraph shall authorize the use of grand juries to compel the attendance and testimony of witnesses and the production of documents, records and articles of evidence.

3. The court or authority to which a request is transmitted pursuant to paragraph 2 shall, when necessary, issue a procedural document in accordance with its own procedural law to require the attendance and statement or testimony of persons, or the production or preservation of documents, records or articles of evidence.

4. With the consent of the Central Authority of the requesting State, execution of a request may be entrusted to an appropriate private party, if circumstances so require.

5. A request shall be executed as promptly as circumstances permit.

Article 32

Return of Completed Requests

1. Upon completion of a request, the executing authority shall return the original request together with all information and evidence obtained, indicating place and time of execution, to the Central Authority of the requested State. The latter shall forward it to the Central Authority of the requesting State.

2. The delivery of documents, records or articles of evidence may be postponed if they are needed in an official action pending in the requested State and, in case of documents or records, copies have been offered to the requesting State.

Article 33

Inability to Comply

The requested State shall promptly inform the requesting State with a brief statement of the reasons when a request cannot be fully complied with because:

a. of the limitations of this Treaty;
b. after diligent search, the person whose testimony or statement is sought or who is to be served cannot be located or is believed to be dead;
c. after diligent search, the evidence cannot be located; or
d. of other physical impediments.

Article 34

Costs of Assistance

1. The following expenses incurred by an authority in the requested State in carrying out a request shall, upon application, be paid or reimbursed by the requesting State:

travel expenses; fees of experts; costs of stenographic reporting by other than salaried government employees; costs of interpreters; costs of translation; and fees of private counsel appointed with the approval of the requesting State for a person giving testimony or for a defendant.

2. No reimbursement shall be claimed for any other expenses.

3. All expenses incurred in relation to a request pursuant to Article 26 shall be borne by the requesting State.

4. No bond, guarantee, or other security for the expected costs shall be required.

Article 35

Return of Articles of Evidence

Any original documents, records or articles of evidence, delivered in execution of a request, shall be returned by the requesting State as soon as possible, unless the requested State declares that return will not be required. However, an authority in the requesting State shall be entitled to retain articles for disposition in accordance with its law if such articles belong to persons in that State and if no title or other rights are claimed in such articles by a person in the requested State, or if any claims with respect to such rights have been secured.

Chapter VIII
NOTICE AND REVIEW OF DETERMINATIONS

Article 36

Notice

Upon receipt of a request for assistance, the requested State shall notify:

a. any person from whom a statement or testimony or documents, records, or articles of evidence are sought;
b. any suspect or defendant in a criminal investigation or proceeding in the requesting State who resides in the requested State if the municipal law in the requesting State generally or for admissibility of evidence so requires, and that State so requests; and
c. any defendant in a criminal proceeding in the requesting State, where the law in the requested State requires such notice.

Article 37

Review of Determinations

1. The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty, except with respect to paragraph 2 of Article 9; paragraph 1 of Article 10; Article 13; paragraph 7 of Article 18; paragraph 1 of Article 25; and Articles 26 and 27.

2. The right to and procedures for appeal in Switzerland against decisions of Swiss authorities in connection with requests under this Treaty shall be regulated in accordance with this Treaty by domestic legislation.

3. In the case of any claim that a State, either as the requesting State or the requested State, has failed to comply with obligations imposed by this Treaty and as to such claim a remedy is not provided by paragraph 1 or 2, the claimant may inform the Central Authority of the other State. Where such claim is deemed by that other State to require explanation,

an inquiry shall be put to the first-mentioned State; if necessary, the matter shall be resolved under Article 39.

Chapter IX
FINAL PROVISIONS

Article 38

Effect on Other Treaties and Municipal Laws

1. Whenever the procedure provided by this Treaty would facilitate assistance in criminal matters between the Contracting Parties provided under any other convention or under the law in the requested State, the procedure provided by this Treaty shall be used to furnish such assistance. Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any available under any other international convention or arrangement or under the municipal laws in the Contracting States

2. This Treaty shall not prevent the Contracting Parties from conducting investigations and proceedings in criminal matters in accordance with their respective municipal laws.

3. The provisions of this Treaty shall take precedence over any inconsistent provisions of the municipal laws in the Contracting States.

4. The furnishing of information for use in cases concerning taxes which come under the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income, shall be governed exclusively by the provisions thereof, except for investigations or proceedings described in Chapter II of this Treaty to the extent that the conditions in paragraph 2 of the Article 7 are satisfied.

Article 39

Consultation and Arbitration

1. When it appears advisable, representatives of the Central Authorities may exchange views in writing or meet together for an oral exchange of opinions on the interpretation, application or operation of this Treaty generally or as to a specific case.

2. The Central Authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Treaty. Any dispute between the Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily resolved by the Central Authorities or through diplomatic negotiation between the Contracting Parties, shall, unless they agree to settlement by some other means, be submitted, upon request of either Contracting party, to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator who shall be a national of that State and these two arbitrators shall nominate a chairman who shall be a national and resident of a third State.

3. If either contracting Party fails to appoint its arbitrator within three months from the date of the request for the submission of the dispute to arbitration, he shall be appointed, at the request of either Party, by the President of the International Court of Justice.

4. If both arbitrators cannot agree upon the choice of a chairman within two months following their appointment, he shall be appointed, at the request of either Contracting Party, by the President of the International Court of Justice.

5. If, in the cases specified under paragraphs 3 and 4, the President of the International Court of Justice is prevented from acting or is a national of one of the Parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the Parties, the appointments shall be made by the next senior Judge of the Court who is not a national of either Party.

6. Unless the Contracting Parties decide otherwise, the tribunal shall determine its own procedure.

7. The decisions of the tribunal shall be binding on the Contracting Parties.

Article 40

Definition of Terms

1. In this Treaty:

   a. the terms "requesting State" and "requested State" shall be deemed to mean the United States of America or the Swiss Confederation, as the context requires;
   b. the term "state" or "states" shall be deemed to mean any one or more of the states of the United States of America, its territories and possessions, the District of Columbia and the Commonwealth of Puerto Rico, as the context requires;
   c. the term "canton" or "cantons" shall be deemed to mean any one or more of the cantons of the Swiss Confederation;
   d. in any place where the word "in" precedes "requesting State" or "requested State", the phrase is used to refer to all of the territory under the jurisdiction of the United States including its states as defined in subparagraph b, and subdivisions thereof, or to the territory of Switzerland, including its cantons, as, and to the extent, the context requires; and
   e. references to law or procedure in the requesting State or law or procedure to be used in executing requests, are, respectively, intended to refer to the law or procedure which is applicable to the investigation or proceeding being conducted or which would ordinarily be used in comparable investigations or proceedings by the authority executing the request.

2. Where a provision of this Treaty requires the use of a seal by an authority, other than the Central Authority, that authority may employ a hand stamp in lieu thereof, if that authority customarily uses such a stamp in connection with its own matters of like importance. The imprint of such stamp shall be treated as a seal for the purposes of this Treaty and the admissibility of evidence.

3. The expression "articles of evidence" shall not be construed to exclude items which may not be admissible in evidence.

4. Provisions in this Treaty as to admissibility of evidence shall not affect the principle of free consideration of evidence insofar as the courts of Switzerland are concerned.

5. References to assistance required to be, or which may be, furnished pursuant to this Treaty shall be deemed to include assistance of a compulsory as well as noncompulsory nature.

6. References to a "request" or "request for assistance" shall be deemed to include any attachments and supplements thereto.

7. References to "acts" in connection with offences shall be deemed to include omissions.

8. The term "defendant" shall, unless the context otherwise indicates, be deemed to include a suspect who is a subject of an investigation.

9. The term "counsel" shall be deemed to mean counsel admitted in either State.

10. The term "antitrust laws", as applied to laws in the United States, refers to those provisions compiled in Chapter 1, Title 15, United States Code, and Chapter 2 of the same Title up to but not including Section 77a, et seq.

Article 41

Entry into Force and Termination

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

2. This Treaty shall enter into force 180 days after the date of the exchange of the instruments of ratification[1] and apply with respect to acts committed before or after entry into force of this Treaty.

3. This Treaty may be terminated by either Contracting Party at any time after five years from entry into force, provided that at least six months prior notice of termination has been given in writing.

IN WITNESS WHEREOF the Plenipotentiaries have signed this Treaty.

DONE at Bern, in duplicate, in the English and German languages, the two texts being equally authoritative, this 25th of May, 1973.

For the President of the United States of America:

[2]

[3]

For the Swiss Federal Council:

[4]

[SEAL]

SCHEDULE

OFFENCES FOR WHICH COMPULSORY MEASURES ARE AVAILABLE

1. Murder.

2. Voluntary manslaughter.

3. Involuntary manslaughter.

4. Malicious wounding; inflicting grievious bodily harm intentionally or through gross negligence.

5. Threat to commit murder; threat to inflict grievious bodily harm.

6. Unlawful throwing or application of any corrosive or injurious substances upon the person of another.

7. Kidnapping; false imprisonment or other unlawful deprivation of the freedom of an individual.

8. Wilful nonsupport or wilful abandonment of a minor or other dependent person when the life of that minor or other dependent person is or is likely to be injured or endangered.

9. Rape; indecent assault.

10. Unlawful sexual acts with or upon children under the age of sixteen years.

11. Illegal abortion.

12. Traffic in women and children.

13. Bigamy.

14. Robbery.

15. Larceny; burglary; house-breaking or shop-breaking.

16. Embezzlement; misapplication or misuse of funds.

17. Extortion; blackmail.

18. Receiving or transporting money, securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.

19. Fraud, including:
    a. obtaining property, services, money or securities by false pretenses or by defrauding by means of deceit, falsehood or any fraudulent means;
    b. fraud against the requesting State, its states or cantons or municipalties thereof;
    c. fraud or breach of trust commited by any person;
    d. use of the mails or other means of communication with intent to defraud or deceive, as punishable under the laws of the requesting State.

20. Fraudulent bankruptcy.

21. False business declarations regarding companies and co-operative associations, including speculation, unfaithful management, suppression of documents.

22. Bribery, including soliciting, offering and accepting.

23. Forgery and counterfeiting, including:
    a. the counterfeiting or forgery of public or private securities, obligations, instructions to make payment, invoices, instruments of credit or other instruments;
    b. the counterfeiting or alteration of coin or money;
    c. the counterfeiting or forgery of public seals, stamps or marks;
    d. the fraudulent use of the foregoing counterfeited or forged articles;
    e. knowingly and without lawful authority, making or having in possession any instrument, instrumentality, tool or machine adapted or intended for the counterfeiting of money, whether coin or paper.

24. Knowingly and wilfully making, directly or through another, a false, fictitious or fraudulent statement or representation in a matter within the jurisdiction of any department or agency in the requesting State, and relating to an offence mentioned in this Schedule or otherwise falling under this Treaty.

25. Perjury, subornation of perjury and other false statements under oath.

26. Offences against the laws relating to bookmaking, lotteries and gambling when conducted as a business.

27. Arson.

28. Wilful and unlawful destruction or obstruction of a railroad, aircraft, vessel or other means of transportation or any malicious act done with intent to endanger the safety of any person travelling upon a railroad, or in any aircraft, vessel or other means of transportation.

29. Piracy; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.

30. Offences against laws (whether in the form of tax laws or other laws) prohibiting, restricting or controlling the traffic in, importation or exportation, possession, concealment, manufacture, production or use of:
    a. narcotic drugs, cannabis sativa-L, psychotropic drugs, cocaine and its derivatives;
    b. poisonous chemicals and substances injurious to health;
    c. firearms, other weapons, explosive and incendiary devices;
    When violation of such laws causes the violator to be liable to criminal prosecution and imprisonment.

31. Unlawful obstruction of court proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by the influencing, bribing, impeding, threatening, or injuring of any officer of the court, juror, witness, or duly authorized criminal investigator.

32. Unlawful abuse of official authority which results in deprivation of the life, liberty or property of any person.

33. Unlawful injury, intimidation or interference with voting or candidacy for public office, jury service, government employment, or the receipt or enjoyment of benefits provided by government agencies.

34. Attempts to commit, conspiracy to commit, or participation in, any of the offences enumerated in the preceding paragraphs of this Schedule; accessory after the fact to the commission of any of the offences enumerated in this Schedule.

35. Any offence of which one of the above listed offences is a substantial element, even if, for purposes of jurisdiction of the United States Government, elements such as transporting, transportation, the use of the mails or interstate facilities are also included.

APPENDIX III

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

THE GOVERNMENT OF SWITZERLAND

MEMORANDUM OF UNDERSTANDING

I. Introduction

1. This MOU is a statement of intent setting forth the understandings reached by the delegations of Switzerland and the United States acting on behalf of their respective governments ("the parties") to establish mutually acceptable means for improving international law enforcement co-operation in the field of insider trading. These understandings continue a long tradition of law enforcement co-operation between Switzerland and the United States and were reached in the course of consultations between representatives of Switzerland and the United States in Bern on March 1 and 2, 1982, and in Washington, D.C. on August 30 and 31, 1982. The Swiss delegation was headed by Minister Jean Zwahlen, head of the Economic and Financial Section of the Federal Department of Foreign Affairs, and included other representatives of the said department, Lutz Krauskopf, Deputy Chief of Division, and Lionel Frei, Chief of Section, in the Federal Department of Justice and Police, and representatives of the Federal Banking Commission and the Swiss National Bank. The delegation of the United States included John M. Fedders, Director of the Division of Enforcement of the Securities and Exchange Commission ("SEC"), Edward F. Greene, General Counsel of the SEC, other representatives of the SEC, Roger M. Olsen, Deputy Assistant Attorney General, Criminal Division, Department of Justice, John R. Crook, Assistant Legal Adviser for Economic and Business Affairs, Department of State, and other representatives of the Department of State and the Department of Justice.

2. The consultations included a discussion of concerns in both countries with respect to recent cases involving persons who used Swiss banks as intermediaries to effect securities transactions in the United States, at a time when such persons may have possessed material

non-public information concerning the securities involved. Trading while in possession of material non-public information (insider trading) confers an unfair advantage upon persons who engage in such trading and impairs the integrity of United States capital markets). Such conduct is a violation of the United states securities laws and insofar as it is not yet per se punishable under Swiss law is considered dishonorable in Switzerland as well.

3. The parties noted that, when it appears that a securities transaction has been made by persons while in possession of material non-public information, the SEC is responsible for conducting an investigation of the matter. This requires that the SEC be able to learn the identity of the person on whose behalf the transaction was effected and other relevant information. However, Swiss law prohibits banks in principle from disclosing information with respect to a customer utilizing its services.

4. The parties concluded that the conduct of persons who utilize Swiss banks to effect securities transactions in the United States, in order to take advantage of material non-public information, is detrimental to the interests of both nations.

5. On the basis of the foregoing consultations, the parties reaffirmed the two countries' interest in mutual assistance in law enforcement matters in accordance with mutually acceptable procedures and in conformity with international and national law, in particular assistance with respect to transactions effected by persons in possession of material non-public information.

6. During the consultations the parties engaged in an exchange of opinions pursuant to Article 39, paragraph 1 of the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, which became effective on January 23, 1977 (the "1977 Treaty"). Section II of this Memorandum of Understanding memorializes the exchange of opinions and related understandings that the parties have reached.

7. The parties also entered into certain understandings with respect to a private Agreement Among Members of the Swiss Bankers' Association, which is discussed in Section III of this Memorandum of Understanding and is attached hereto.

II. Exchange of Opinions Regarding the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters

1. The parties note the importance of the 1977 Treaty which provides for co-operation between law enforcement authorities in connection with investigations or court proceedings involving criminal offences, including fraud. Such co-operation may include assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of judicial or business records and service of judicial or administrative documents.

2. The 1977 Treaty has been used on numerous occasions by the law enforcement authorities of both nations. The parties understand that the 1977 Treaty provides an important means of obtaining information needed to enforce the criminal or penal laws of each nation and should be used to the extent feasible.

3. The parties hereby exchange opinions, pursuant to Article 39, paragraph 1, of the 1977 Treaty concerning the interpretation, application or operation of that Treaty:

a. Article 1, paragraph 1 of the 1977 Treaty provides that the Contracting Parties undertake to afford each other, in accordance with provisions of the Treaty, mutual assistance in "investigations or court proceedings in respect of offences the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof." This means, for example, that an investigation by the SEC should be considered an investigation for which assistance could be furnished (if the other requirements of the Treaty are met) as long as the investigation relates to conduct which might be dealt with by the criminal courts.

b. The 1977 Treaty requires that a particular offence be a crime under the laws of each nation in order for compulsory assistance to be required under the Treaty. The parties understand that transactions effected by persons in possession of material non-public information could be an offence under Articles 148 (fraud), 159 (unfaithful management) or 162 (violation of business secrets) of the Swiss

Penal Code. As a result, the parties understand that it will often be possible for compulsory measures to be ordered under the Treaty in order to assist the SEC in obtaining information from the banks that executed the securities transactions in the United States that are the subject of the request for assistance.

4. Paragraph 3 of Article I of the 1977 Treaty provides that, "The competent authorities of the Contracting Parties may agree that assistance as proivided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offence falling within the purview of this Treaty." The laws of both parties provide for administrative and judicial proceedings in which sanctions and remedies are available other than prison sentences and fines imposed in criminal prosecutions. The parties have agreed in principle to an exchange of diplomatic notes to facilitate the application of the 1977 Treaty to such ancillary administrative proceedings in cases of offences covered by the Treaty and relating to trading by persons in possession of material non-public information. Moreover, the parties undertake to consider whether comparable diplomatic notes should be exchanged with respect to other offences relating to securities transactions covered by the Treaty.

III. The Private Agreement Among Members of the Swiss Bankers' Association

1. The parties recognize that there may be securities transactions effected in the United States by Swiss banks acting on behalf of persons who possess material non-public information, for which compulsory measures would not be available under the 1977 Treaty. Such assistance could not be ordered if available information did not indicate the existence of an offence under the Swiss Penal Code. As the Swiss Federal Council will submit to the Parliament a Bill on the misuse of inside information, this lacuna could be filled. For cases in which the Treaty is not applicable, or in which it is not possible to gather evidence by employing compulsory process, pending the enactment of such legislation, the parties discussed a proposed private Agreement under the aegis of the Swiss Bankers' Association, which would permit participating banks to disclose the identity of a customer and certain other relevant information, under certain specified circumstances, in response to a request made by the Department of Justice on behalf of the SEC and processed through the Federal Office for Police Matters. It would also contain certain safeguards regarding protection of customers and the sovereignty of Switzerland.

2. The said "Agreement with regard to the handling of requests for information from the SEC on the subject of misuse of inside information" which is annexed to the present memorandum will be submitted for signature by the Swiss Bankers' Association to those of the banks located in Switzerland which may trade in the United States securities markets. This agreement will also govern the relationship between the signatory banks and the clients placing orders with the signatory banks for execution in the United States securities markets.

3. As regards specific points of the private Agreement, the parties came to the following understanding:

- The private Agreement establishes certain criteria for volume and price changes in the period preceding an Announcement which, if met, shall satisfy the Commission of Enquiry that the SEC has reasonable grounds to request assistance under the terms of the private Agreement and this Memorandum of Understanding. The parties understand that these thresholds are set at high levels because they are intended to define the circumstances under which the Commission of Enquiry "shall" be satisfied that the SEC has reasonable grounds to make the request. In all other cases in which the criteria are not met, the parties understand that the Commission of Enquiry will be required to review the information submitted by the SEC to decide whether it is reasonably satisfied that the SEC has reasonable grounds to make a request. Accordingly, the parties understand that a failure by the SEC to meet the threshold criteria specified in the private Agreement shall not result in any presumption that the SEC does not have reasonable grounds to make the request for assistance under the terms of the private Agreement and this Memorandum of Understanding.

- The parties understand that the failure of a bank customer to provide information which may demonstrate that the transaction in question was not made in violation of the United States securities laws, as provided for by the private Agreement, shall not result in any presumption of guilt.

- The parties understand that information obtained through the mechanism established by this memorandum and the private Agreement will be used or introduced as evidence only in administrative or judicial proceedings brought by the SEC or Department of Justice relating to trading by persons in possession of material non-public information, and may not be used or introduced as evidence in any other proceeding.

- The parties understand that information obtained through the mechanism established by this memorandum and private Agreement shall be kept to the fullest extent compatible with constitutional or legal requirements from disclosure to any other administrative body in the United States or to the public, except to the extent necessary for administrative or judicial purposes of the specific case. Each party understands that the other will use its best efforts to assert legal rights to prevent disclosure of such information other than as authorized by this memorandum or the private Agreement.

- If the Commission of Enquiry arrives at the conclusion that a client is not an insider as defined by the private Agreement, the SEC will judge this opinion as one made in good faith, use moderation and take into account the existence of this memorandum and the private Agreement when considering alternative measures.

- The parties understand that there may be instances in which the Federal Office for Police Matters may determine that a report submitted by a bank pursuant to the terms of the private Agreement may not be transmitted to the SEC without considerable harm either to the essential interests of Switzerland or to third persons who appear to have no relationship to the offence which gave rise to the request for assistance. In such cases, it is understood that the Federal Office for Police Matters will use its best efforts to adapt the report so that useful information may be provided to the SEC without causing such harm to the interests of third persons or to Switzerland. In the same spirit, it is understood that the SEC will judge this opinion as one made in good faith and use moderation when considering alternative measures.

IV. Further Consultations

1. In order to continue and improve international law enforcement co-operation in a manner consistent with the interests of both nations, the parties understand that the SEC and the Federal Office for Police Matters will undertake further contacts or consultations in the future when the need to do so is recognized mutually.

2. There will be contacts or consultations between the parties concerning the following matters:

a. The parties understand that the SEC will exercise its best efforts to inform appropriate Swiss authorities when an investigation has been initiated with respect to transactions effected by a Swiss bank. Further communications will occur, as appropriate, as an investigation proceeds in order to assure that the interests of both nations are protected. Such contacts or consultations may be related to requests for assistance on behalf of the SEC under the 1977 Treaty or the private Agreement. The parties understand that the Government of Switzerland will use its best efforts to assure that the information obtained in such communications will not be disclosed to any person except in connection with a request for assistance by the SEC or an investigation or enforcement action conducted by Swiss authorities, and to handle such information with appropriate care to prevent it from becoming known to the bank customer or customers involved.

b. At the termination of the private Agreement, the parties will consult regarding experience under the private Agreement and the 1977 Treaty as well as the effect of such termination on this memorandum.

c. The parties agree that any questions or disputes between them with rspect to the interpretation or application of this Memorandum of Understanding, the exchange of opinions included herein pursuant to Article 39, paragraph 1, of the 1977 Treaty or the operation of the private Agreement shall be settled by means of consultations.

V. **Other**

1. Notwithstanding any other provision herein, the parties agree that this Memorandum does not modify or supersede any laws or regulations in force in the United States or Switzerland.

2. The parties agree that they do not intend to confer any right on any customer of a bank which is a signatory of the private Agreement to judicial review in the courts of the United States with respect to any decision to disclose information to United States' authorities under the terms of the private Agreement.

3. The parties understand that the Swiss Bankers' Association will use its best efforts promptly to obtain the signatures of the banks concerned and to keep the SEC informed through the Federal Office for Police Matters of the banks which are signatories to the private Agreement.

IN WITNESS WHEREOF, the respective representatives, duly authorized for this purpose, have signed this Memorandum of Understanding.

Done at Washington, D.C., in duplicate this 31st day of August, 1982.

SIGNATURES

On behalf of the Government of the United States of America

John S.R. Shad
Chairman
Securities and Exchange Commission

On behalf of the Government of Switzerland

Jean Zwahlen, Minister
Chief of the Financial and Economic Section,
Federal Department of Foreign Affairs