

**STUDY OF EXCHANGE OF CONFIDENTIAL
INFORMATION AGREEMENTS AND TREATIES
BETWEEN THE US AND MEMBER STATES OF
THE EU IN AREAS OF SECURITIES, CRIMINAL,
TAX AND CUSTOMS**



**EUROPEAN
COMMISSION**

European Commission

**Study of Exchange of Confidential
Information Agreements and Treaties
between the US and Member States of
the EU in areas of Securities, Criminal,
Tax and Customs**

Laraine L. Laudati
European University Institute
Florence, Italy

Document

This document has been prepared for use within the Commission. It does not necessarily represent the Commission's official position

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (<http://europa.eu.int>)

Cataloguing data can be found at the end of this publication

Luxembourg: Office for Official Publications of the European Communities, 1996

ISBN 92-827-8470-3

© ECSC-EC-EAEC, Brussels • Luxembourg, 1996

Reproduction is authorized, except for commercial purposes, provided the source is acknowledged

Printed in Belgium

Table of contents

	<i>Page</i>
Introduction	5
I. EXECUTIVE SUMMARY	9
Information need being addressed	9
Enabling legislation	9
Involvement of international organisations	10
Powers established in enabling legislation	10
Provisions of enabling legislation	11
<i>Type of assistance</i>	11
<i>Execution of Request</i>	12
Exemption from assistance	13
Confidentiality	14
Disclosure and Use	15
Dual Criminality	16
II. SECURITIES AND EXCHANGE COMMISSION'S MEMORANDA OF UNDERSTANDING	17
Information need being addressed	17
Member State Participation	18
Enabling legislation	18
Provisions of enabling legislation compared with Member State MOU's	20
<i>Type of assistance</i>	20
<i>Execution of request and protection of individual rights</i>	20
<i>Exemptions from assistance</i>	21
<i>Confidentiality</i>	22
<i>Disclosure and Use</i>	24
<i>Dual Criminality</i>	26
Experience to date	26
III. DEPARTMENT OF JUSTICE CRIMINAL DIVISION'S MUTUAL LEGAL ASSISTANCE TREATIES	29
Information need being addressed	29
Member State Treaties	29
Provisions of MLAT's	30
<i>Type of assistance</i>	30
<i>Execution of request and protection of individual rights</i>	31
<i>Exemptions from assistance</i>	32
<i>Confidentiality</i>	32
<i>Disclosure and Use</i>	32
<i>Dual Criminality</i>	33
Experience to date	33

IV. THE TREASURY DEPARTMENT AND THE DEPARTMENT OF JUSTICE	
TAX DIVISION: TAX TREATIES	35
Information need being addressed	35
Member State Treaties	36
US and OECD Model treaty information exchange provision	36
Provisions of Treaties	37
<i>Type of assistance</i>	37
<i>Execution of request and protection of individual rights</i>	37
<i>Exemptions from assistance</i>	38
<i>Confidentiality</i>	38
<i>Disclosure and Use</i>	39
<i>Dual Criminality</i>	40
Experience to date	40
V. CUSTOMS MUTUAL ASSISTANCE AGREEMENTS	43
Information need being addressed	43
Member State Participation	43
Enabling legislation and model agreement	44
Provisions of enabling legislation and US model compared with Member State MAA's	45
<i>Type of assistance</i>	45
<i>Execution of request and protection of individual rights</i>	45
<i>Exemptions from assistance</i>	46
<i>Confidentiality</i>	46
<i>Disclosure and Use</i>	47
<i>Dual Criminality</i>	48
Experience to date	48
Annexes	49

STUDY OF EXCHANGE OF CONFIDENTIAL INFORMATION AGREEMENTS AND TREATIES BETWEEN THE US AND MEMBER STATES OF THE EU IN AREAS OF SECURITIES, CRIMINAL, TAX AND CUSTOMS

Introduction

This study has been undertaken in preparation for possible negotiations with the United States for a "second generation" bilateral agreement for mutual assistance between competition authorities, including the exchange of confidential information. Such negotiations are anticipated due to the limitations of the existing agreement with the US, and in light of the passage in November 1994 of the International Antitrust Enforcement Assistance Act ("IAEAA") by the United States Congress. This legislation enables the US antitrust enforcement agencies to pursue reciprocal arrangements with foreign antitrust enforcement agencies for the purpose of exchanging file information and retrieving new evidence located abroad in aid of these agencies' respective functions.

This study discusses bilateral agreements for exchange of confidential information which some of the Member States have entered with the US outside the field of competition law, in four areas: securities, criminal, tax and customs. An understanding of these agreements provides a useful background for negotiating a second generation agreement with the US. The comparison aids understanding with respect to the strategies and interests of US antitrust enforcement agencies in negotiating agreements pursuant to the IAEAA, the meaning of the terms of the IAEAA, and the implications of providing confidential information to US enforcers with respect to subsequent disclosure and use. It also provides a background for discussions between DG IV and the Member States, since many of them have entered agreements requiring them to provide confidential information to US enforcement agencies in these four areas.

As an initial matter, both *treaties* and *agreements* have been utilized to establish the framework for exchange of information. From a legal standpoint, the difference between the two is the following. Under US law, *treaties* are negotiated and signed by the executive branch, but they do not become operative until ratified by the Senate.¹ This implies a high degree of legislative involvement with respect to each treaty entered. The treaty ratification process may be very time consuming, and the timing is normally within the control of the legislature. Once ratified, however, treaties are the "supreme law of the land"²; enabling legislation is not required to establish their legal foundation. Treaties have been utilized in

¹ Article 2, Sec. 2 of the US Constitution provides: [*The President*] shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur. . . .

² U.S. Constitution, Article VI, para. 2.

the tax³ area (Tax Treaties), where exchange of information provisions have been incorporated into treaties to avoid double taxation, and in the criminal area (Mutual Legal Assistance Treaties, or "MLAT's").

In contrast, enabling legislation must be enacted to create the legal basis and to define the powers of the agency for entering an *agreement*. In the absence of enabling legislation, domestic law would prevail over the terms of an agreement.⁴ However, once enabling legislation has been enacted, agreements which conform with the requirements of the legislation can be entered and modified freely by the responsible agency without the involvement of the legislature, thereby providing greater flexibility than a treaty, which can only be modified with Senate approval. Agreements have been employed in the areas of securities (Memoranda of Understanding, or "MOU's") and customs (Mutual Assistance Agreements, or "MAA's"). Enactment of the IAEEA signifies that the US antitrust agencies have chosen to pursue exchange of confidential information with their foreign counterparts through the use of agreements, rather than treaties. In addition to treaties, agreements have also been employed in the area of tax (Tax Information Exchange Agreements, or "TIEA's"⁵).

It is possible that a foreign partner to an agreement would view it as a treaty because that country has not enacted enabling legislation. This has occurred with respect to some of the tax agreements (TIEA's). In such cases, the foreign party must pass domestic legislation for the agreement to take effect. If this is necessary, the responsible US agency (the US Department of Treasury for the tax agreements) may request adequate assurance that this will be done.

To establish a network of bilateral treaties or agreements in each of these areas, the US agencies have generally proceeded by first creating a US model, then modifying the model in response to specific requests by the foreign counterparty. The extent to which the provisions of the model form the basis of the agreements subsequently entered is striking. As of April 1996, the Department of Justice did not intend to develop a model for agreements entered pursuant to the IAEEA, in order to avoid the need to arrive at one which would represent the "lowest common denominator."⁶ Moreover, no agreements had been entered as of that time, although Justice officials indicated that an agreement with one country appeared to be near completion.

The US has also approached the international community through international organizations. For instance, the US has encouraged such organizations to adopt model legislation or principles resembling US model legislation. This has been done in the securities area and the

³ The US Treasury Department has also obtained enabling legislation to allow it to enter Tax Information Exchange Agreements, but it has not entered such agreements with any of the EU Member States. Instead, it has entered treaties to avoid double taxation with each of the Member States, all of which include exchange of information provisions. See discussion *infra* at Sec. IV.

⁴ Congressional authority to legislate may overlap with executive power. When this is so, an executive agreement cannot override a statute unless Congress has enacted a law which so provides.

⁵ For the most part, the US has TIEA's with the countries of the Caribbean and only has tax treaty relationships with the Member States of the EU.

⁶ Interview by the author of Charles Stark, Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice, Washington, D.C., April 1996.

tax area. The US raised the issue of exchange of confidential information in the antitrust area at a meeting of the OECD CLP committee in early 1995, but the response was "wariness," especially from the British delegation. The discussion was reported to be considerably more positive in the Committee's meeting one year later.

The type of assistance needed in each area substantially determines the terms of the treaty or agreement. In the criminal, securities and tax areas, US agencies were primarily interested in obtaining evidence located abroad for use in court proceedings. Thus, the terms of the treaties, enabling legislation, and agreements made pursuant to the enabling legislation in these areas include provisions to ensure that the information provided by the foreign authority will be in a form admissible in evidence in a US court proceeding (and vice-versa). These evidence requirements often differ substantially between the US and the foreign authority. In contrast, in the customs area, the focus is on obtaining background information rather than evidence for court proceedings.

Enforcement officials of securities, tax and customs laws all utilize not only MOU's, tax treaties and TIEA's, and MAA's, respectively. In addition, they utilize MLAT's under some circumstances, such as when the information cannot otherwise be obtained in a form admissible in court. However, the procedures under MLAT's are more cumbersome, with more formalities such as seals, signatures of various officials, etc., as compared with the procedures under the other means.

The section of this memorandum which follows is an executive summary of the findings. The remainder of the memorandum will discuss the treaties and agreements entered in the four areas. Each section will set forth the information need which the treaty or agreement was meant to satisfy and the list of Member States which have entered such treaties or agreements with the US; discuss the basic provisions of the US model (if any), including type of assistance, confidentiality, disclosure and use, and highlight the differences between the terms of the US model and those of the treaty or agreement actually entered with each Member State; and set forth some of the experiences which US enforcers have had to date in exchanging information under the treaty or agreement.

The appendix to this study is composed of five tables. Table 1 is a general summary setting forth which Member States have entered which agreements or treaties, and the effective date of the same. The remaining tables set forth the provisions of interest to this study from each model and Member State agreement and treaty: Table 2, for securities MOU's; Table 3, for MLAT's; Table 4, for tax treaties; and Table 5, for customs Mutual Assistance Agreements. The information in these tables is the basis for the statements made in this memorandum comparing the model agreement/treaty provisions and the Member State agreement/treaty provisions.

I. EXECUTIVE SUMMARY

Some general observations can be made about the four types of international information exchange arrangements discussed in this paper, and how they compare with agreements which may be entered under the IAEAA.

Information need being addressed

In the **securities** area, MOU's serve both the enforcement and regulatory functions of the SEC. With respect to enforcement, the SEC seeks information for use in investigations and US court proceedings to establish violations of US securities law. The information generally pertains to trading activities of individuals, although it could include a company's business plan. With respect to regulation, an array of information, especially related to capital adequacy, is exchanged.

In the **criminal** area, MLAT's serve criminal law enforcement officials at federal, state and local levels. They generally seek evidence for use in court proceedings, most often related to drug trafficking and fraud; few relate to other crimes.

In the **tax** area, tax treaty information exchange provisions serve federal tax enforcement officials who seek evidence for use in court proceedings. These may include bank records.

In the **customs** area, customs MAA's serve customs enforcement officials to obtain information related to collection of customs duties and enforcement of trade agreements, including, e.g., IRS numbers and competitive information about businesses.

In the **competition** area, agreements under the IAEAA focus on collecting information regarding antitrust law violations for use in court proceedings. However, a request might also be made before civil or criminal charges have been filed for the purpose of determining whether a violation has occurred. Such information might or might not be used or be intended for use in court. The focus on evidence for use in court is like that of MLAT's and tax treaty information exchange provisions, but different from that of customs MAA's, which are primarily focused on investigations but are not designed to achieve the collection of evidence for use in court.

Enabling legislation

The enabling legislation in the securities, tax and customs areas is vastly simpler than the IAEAA. In the securities area, the enabling legislation (which modifies Section 24D of the Exchange Act) is one paragraph long; in the tax and customs areas, it is also very succinct. In contrast, the IAEAA is ten pages long and contains detailed provisions on all aspects of agreements to be entered pursuant thereto. Antitrust Division officials explain that Congress exerted greater control in this area in response to concerns expressed by business community representatives.

The enabling legislation in the securities area allows the SEC to enter case-specific arrangements based on the same underlying principles as MOU's, even when no MOU has been entered. In contrast, Section 2 of the IAEAA requires that an agreement be entered before providing assistance.

Involvement of international organizations

In the **securities** area, US officials have utilized IOSCO to develop international consensus with respect to agreements for confidential information exchange. IOSCO adopted model principles and a memorandum regarding problems entering MOU's.

In the **tax** area, federal officials have utilized OECD, which adopted a model tax treaty with an information exchange provision. The US Treasury has modified the OECD model to strengthen information exchange.

In the **customs** area, US officials utilized the World Customs Organization for a similar purpose, which adopted a model code.

In the **competition** area, US officials have raised confidential information exchange under the IAEAA in the context of the OECD CLP committee, where discussions have made progress. At present, the idea of developing a model agreement has been dropped in order to avoid compromise to the "lowest common denominator."

Powers established in enabling legislation

In the **securities** area, the enabling legislation provides the basis for conducting an investigation on behalf of a foreign requesting state with whom an MOU has been entered. Although not specified, file information may also be provided.

In the **tax** area, the enabling legislation provides the basis for conducting an investigation on behalf of a foreign requesting state with whom a TIEA has been entered. Although not specified, file information may be provided.

In the **customs** area, the enabling legislation does not provide the basis for conducting an investigation on behalf of a foreign government (although the US model provides for investigation as a tool of execution). Thus, only information which is already in customs files may be provided pursuant to the enabling legislation; an investigation could be undertaken only if a separate ground for action existed under US law.

In the **competition** area, the IAEAA is similar to the securities enabling legislation in providing the basis for conducting an investigation on behalf of a foreign partner. It specifically empowers US enforcement officials to offer two types of assistance: 1) disclosure of antitrust information from within the files, and 2) use of investigative authority to obtain new evidence from private parties, which may include both the agency's normal investigative powers (CID's, subpoenas, etc.) and a US federal court order requiring a party to give

testimony or produce documents in response to a foreign request for assistance. Thus, the tools specified by the IAEEA are more powerful than those established by the enabling legislation in the other areas.

Provisions of enabling legislation

Type of assistance

The type of information need which the arrangement is designed to fulfil largely dictates the type of assistance for which it provides a basis.

The **securities** enabling legislation provides that assistance may be given to a requesting authority conducting an investigation of securities law violations. The MOU's normally cover file information, taking statements of individuals, and collecting documents; some also include conducting compliance inspections.

In the **criminal** area, MLAT's provide for the broadest possible array of assistance in investigations and proceedings, including location of persons, service of documents, transferring persons for testimonial purposes, voluntary appearance in US court proceedings, and seizure and forfeiture of assets. The type of assistance covered by MLAT's is broader than that provided by the other information exchange provisions reviewed in this study, including the IAEEA.

In the **tax** area, tax treaties generally provide for exchange of such information as is necessary for administering specified domestic tax laws. The US model tax treaty, adopted and modified from the OECD model, specifies the form of assistance, and these specified provisions appear in the more modern Member State treaties. Given the nature of the treaties, they generally cover documentary evidence of transactions.

In the **customs** area, MAA's provide for exchange of information needed to ensure enforcement of customs laws and accurate assessment of customs duties and taxes. Some of the agreements specify in detail the type of assistance, such as to provide all available information regarding activities which may result in offenses; to exercise special surveillance of means of transport suspected of being used in offenses; to initiate inquiries concerning transactions which appear to have violated customs laws, and to authorize officials to appear as witnesses regarding facts established by them in the course of their duties.

In the **competition** area, the information need being addressed by the IAEEA is evidence located abroad to help determine whether a person has violated or is about to violate antitrust laws administered by the contracting authority, and to enforce those laws. The information which may be requested under the IAEEA could, in some instances such as in merger cases, include detailed and sensitive competitive information about a business, such as business plans and strategies, market share information, and financial data. However, this will not always be the case. For instance, in cartel investigations, the critical information antitrust authorities are

likely to seek is evidence of anticompetitive agreements or communications among competitors.

Execution of Request

In the **securities** area, the SEC is empowered to use its full arsenal of administrative investigative powers to execute a request under an MOU, rather than seeking court powers, which are required for implementation of MLAT's and IAEEA agreements. Moreover, because MOU's are for investigative purposes, depositions are not taken under MOU's. They can, however, be taken under an MLAT's or IAEEA agreements.

In the **criminal** area, MLAT's create very strong powers regarding the gathering of new evidence on behalf of a foreign authority. They provide that the requested state will pursue all measures in furtherance of a request that it would pursue in satisfaction of its own investigations. Many of them provide for the use of court powers to execute these requests, and are frequently used in conjunction with 28 USC 1782 to this end.

In the **tax** area, the US model tax treaty contains a provision which would create similar powers to those created by MLAT's, but only three Member State tax treaties incorporate this provision. However, under case precedent, (which constitutes part of its law), the US has consistently used its full arsenal of powers even if the provision is absent.

In the **customs** area, MAA's generally provide that all reasonable measures will be taken to execute a request, and if required, they will seek official or judicial measures to carry out the request; that any necessary investigation will be made to execute the request; and that authorized officials of the requesting state may be present in the territory of the requested state to execute the request.

In the **competition** area, the IAEEA creates similar powers to those created by MLAT's and tax treaties. It provides that new evidence obtained on behalf of a foreign authority may be gathered using both normal investigative powers, such as CID's, subpoenas, etc., and using an order obtained from a US federal court, requiring a party to give testimony or produce documents. Thus, it attributes powers to the antitrust enforcement authorities which go beyond those attributed to securities and customs authorities.

As with MLAT's, the IAEEA is, in part, based on 28 USC 1782. Charles Stark explained:

We borrowed and modified that provision into [the IAEEA] to allow flexibility to get information through procedures that would, to the extent consistent with US law, be compatible with the evidentiary and other requirements of the foreign agency that asked for the information. So basically what would happen is we'd go to a US court and say judge, the EC Commission in its capacity as implementor of the European antitrust law has, pursuant to an agreement under the IAEEA, requested that we assist them in obtaining the following information, and we therefore move the court for an order requiring X person to provide such information as defined in this piece of paper in the following manner by a specified date.

Exemptions from assistance

In the **securities** area, the SEC's enabling legislation provides that assistance may be provided only if both reciprocity and public interest requirements are satisfied. The reciprocity standard has been interpreted to take into account the differences between the US system, which provides strong powers for obtaining evidence, and other systems, which do not provide such strong powers. The public interest standard has been interpreted to be satisfied if US officials know what is the violation being investigated, a connection exists between the violation and the information sought, and the law involved is not unrelated to securities.

In the **criminal** area, MLAT's provide an exemption where assistance would prejudice security or other essential public interests, and where requests relate to purely political or military offenses.

In the **tax** area, tax treaties establish an exemption with respect to administrative measures at variance with the laws and administrative practices of the requested state, to information not obtainable under the laws or in the normal course of administration of the requesting state, and to business and trade secrets.

In the **customs** area, the Customs MAA enabling legislation creates an exemption when compliance would infringe sovereignty, security, public policy or other substantive national interests.

In the **competition** area, the IAEEA contains the same type of limitations as some of those which apply to the other agreements. Under the IAEEA, US officials must conclude that a reciprocity standard is satisfied and that granting a request is in the public interest. As is the case with the reciprocity standard in the securities area, the reciprocity standard under the IAEEA would take into account the differences between the US system and other systems. It may be that the public interest standard is interpreted more broadly under the IAEEA than under the SEC's enabling legislation. The legislation specifies that the following elements will be considered, "among other factors":

*whether the foreign state or regional economic integration organization represented by the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by such investigation, by the granting of such order, or by the provision of such antitrust evidence.*⁷

The Senate Report states that assessment of public interest should also take into consideration the nature of the evidence requested, whether unwarranted disclosure of information provided by uninvolved third parties will be avoided and, where the requested evidence is grand jury testimony from an immunized witness, whether the foreign authority will grant similar immunity.⁸ The House Report also sets forth factors should be considered in making the

⁷ IAEEA, Sec. 8(a)(3).

⁸ Senate Report 103-388, 103rd Cong. (2d Session), 30 Sept. 1994, at 13.

public interest determination. It states that this standard is designed to permit the antitrust enforcement authorities "wide latitude" to determine whether the public interest would not be served by providing the requested information in a given case. It notes that while providing notice to affected parties prior to turning over information to a requesting authority is not required, it may be advisable in some cases. Another factor to consider is whether the information involves business or product plans for the future; if so, the US authority should balance the foreign authority's need for the information against its competitive impact.⁹

Confidentiality

All government officials are subject to the confidentiality requirements of 18 USC 1905, which prohibits them from disclosing any information not authorized by law.

In the **securities** area, the SEC's enabling legislation provides that non-public information obtained from a foreign authority will be kept confidential and will not be disclosed by creating an exemption from disclosure requirements of the FOIA. SEC officials are also bound not to disclose information in contravention of FOIA rules or where the SEC has determined to keep confidential the information.

In the **criminal** area, MLAT's take a less sympathetic approach towards the idea of keeping information obtained from a foreign authority confidential. Some MLAT's provide that when necessary, a requested state may require that evidence and information which it provides be kept confidential, but disclosure may be made when necessary as evidence in public proceedings. Some also provide that if necessary, the request will be kept confidential. Others provide that the requesting state shall use its best efforts to comply with a request that information and a request be kept confidential.

In the **tax** area, the US model tax treaty provides that information received by a contracting state shall be treated as secret in the same manner as information obtained under domestic law; some treaties provide simply that information obtained shall be treated as secret.

In the **customs** area, the model customs MAA provides that a requesting state shall treat all inquiries, information, etc. as confidential, and shall be afforded the same protection as applies under domestic law. Moreover, customs officials are prohibited from making unauthorized disclosures of personal data.

In the **competition** area, the IAEEA prohibits the antitrust enforcement agencies from disclosing information received from a foreign partner in violation of an antitrust mutual assistance agreement, thus exempting such evidence from the disclosure requirements of FOIA. Moreover, the IAEEA's reciprocity requirement includes an assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain the confidentiality of antitrust evidence, and protection will be not less than that provided under US law to such antitrust evidence.

⁹ House Report 103-772, 103d Congress (2d Session), 3 October 1994 at 20-21.

Disclosure and Use

In the **securities** area, the SEC's enabling legislation provides that disclosure shall not be required if it would violate the laws applicable to the foreign securities authority which provided the information. Disclosure would be required in court proceedings when the documents are used in evidence, in response to a subpoena, and in response to a request by Congress. Disclosure to other federal agencies would be allowed as long as the intended use by the agency falls within the purpose of the request. A subpoena from state authorities probably could be resisted; in any event, federal and state officials are not likely to be aware when a request has been made by the SEC. Use for purposes other than those stated in the request would be allowed only following notice to the requested authority and an opportunity to oppose. Use is limited to purposes stated in the request.

In the **criminal** area, in addition to disclosure to the federal, state or local authority from whom a request originates, disclosure is possible to others with permission of the requested state. Most MLAT's permit the requested state to impose limits on use, such as use only for purposes stated in the request. This implies that the information could not be used in conjunction with a different crime from the one covered by the request, even if arising out of the same facts. Most MLAT's allow the requested state to provide information under the condition that it may not be used publicly, which would preclude its use in court.

In the **tax** area, the model tax treaty provides that disclosure shall be made only to officials involved in tax collection, enforcement, etc. This could include officials in various government agencies. It provides that such persons may disclose the information in public court proceedings. Some Member States have not included the latter provision. Disclosure to state officials would not be allowed because they are not involved in federal tax collection.

In the **customs** area, whether or not confidentiality is requested in a given instance, customs officials are subject to certain disclosure requirements when they learn of ongoing crime in the US. Absent a request for confidentiality, customs officials can share information collected under an MAA with another federal agency if a basis exists to do so under domestic law. Disclosures to state agencies would be required, since they are not involved with enforcement of customs laws. However, absent a confidentiality request, the Customs Service would attempt to accommodate a state's request for information.

Most customs MAA's contain no disclosure provision. The model customs agreement, which only the UK has followed, provides that disclosure is allowed to the extent that there is an obligation to do so under the constitution or laws of the requesting state in a criminal prosecution, and the requesting state shall notify the requested state of any proposed disclosure in advance. Use is limited to proceedings on classification, value and other characteristics relevant to enforcement of customs law.

In the **competition** area, the IAEEA requires disclosure to a defendant in an action or proceeding brought by government officials for a violation of any federal laws, if required by law. In criminal cases, once a complaint is filed, exculpatory evidence must be disclosed when sought by a defendant. Moreover, in both civil and criminal cases, once a complaint

is filed, federal discovery rules require disclosure of documents relevant to the subject matter of the pending action. Otherwise, disclosure is limited to the terms and conditions specified in the agreement. Such terms and conditions could be "a significant law enforcement objective." However, unlike information provided under a securities MOU, disclosure to Congress of information obtained under an IAEEA agreement could not be compelled.

Dual Criminality

None of the agreements studied contain a dual criminality requirement, nor does the IAEEA.

II. SECURITIES AND EXCHANGE COMMISSION'S MEMORANDA OF UNDERSTANDING

Information need being addressed

The securities regulated by the Securities and Exchange Commission (SEC) are those listed or traded on US markets, which are the largest and most international securities markets in the world. The need for international cooperation in policing securities markets became evident with the internationalization of the securities marketplace beginning in the 1980's. Michael D. Mann, Director of the SEC's Office of International Affairs, explained¹⁰:

The problem is relatively straightforward: where violators of the US Securities laws conduct aspects of their schemes from beyond US borders, the SEC must be able to obtain evidence located in other countries. The SEC has broad powers to subpoena witnesses and evidence, but it cannot serve or enforce its subpoenas abroad. Moreover, institutions whose records are often critical to SEC investigations, such as foreign banks, frequently are prohibited by their own countries' secrecy laws from assisting the Commission.

Accordingly, in 1988 and 1990, the SEC obtained enabling legislation to enter a network of Memoranda of Understanding (MOU's). MOU's are designed to allow the SEC to obtain confidential investigative information and seek assistance in obtaining overseas evidence, in exchange for the SEC's agreement to reciprocate. In addition, they are designed to allow the parties to consult on all matters regarding the protection of investors and the operation of the securities markets in the two countries.

The SEC is involved in both regulation and enforcement. With regard to its enforcement activities, the SEC desires to obtain information under the information exchange provisions of MOU's for use as evidence in US court proceedings to establish violations of US securities laws. The type of information which the SEC would normally seek, and would be in a position to provide, is information about trading activities of individuals. A company's business plan could, theoretically be requested. For instance, it could be sought in conjunction with an investigation of a takeover battle if a question arose as to whether such plan had been accurately disclosed in a "13D filing" prior to the takeover offense. In conjunction with its regulatory activities, a vast amount of information of enormous proprietary value is exchanged, especially with respect to execution of capital adequacy regulations.

The SEC may also rely on MLAT's to obtain information. Although it is not empowered to enforce criminal provisions, it is empowered to investigate criminal violations. However, it prefers not to rely on MLAT's because of the complications of doing so.

¹⁰ Testimony of Michael D. Mann, Director, Office of International Affairs, US Securities and Exchange Commission, before the Subcommittee on Antitrust, Monopolies, and Business Rights, Committee on the Judiciary, United States Senate, August 4, 1994, p. 1.

Member State Participation

The SEC has entered MOU's with 15 countries, including 6 Member States (France (1989), Italy (1993), the Netherlands (1989), Spain (1992), Sweden (date not known¹¹) and the UK (1991)).¹² In an interview,¹³ Mann declined to reveal whether negotiations are currently underway with other Member States. No MOU has been entered with the EU, which is not competent to enforce securities regulations. However, a basic cooperation/non-confidential information sharing agreement was entered with the EC in 1982.

Enabling legislation

The enabling legislation appears in Sec. 21(a)(2) of the Exchange Act. It provides:

On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

In cases where information is located in countries where no MOU has been entered, the enabling legislation allows the SEC to enter case-specific arrangements based on the same underlying principles as the MOU's, provided all necessary confidentiality and use assurances have been received.

The SEC encouraged the International Organization of Securities Commissions (IOSCO) to take up the issue of information exchange because "it legitimized what we were trying to do on the MOU's. . . . It's been valuable because it represents an endorsement by a credible international organization, not simply a partisan such as the SEC."¹⁴ An enforcement cooperation resolution which resembles the SEC's enabling legislation was adopted by IOSCO

¹¹ The Swedish MOU was not available through DG XV, as were all other MOU's, nor was it made available through the SEC.

¹² The non-EU countries with which MOU's have been entered include Canada, China, Japan, Mexico, Norway and South Africa.

¹³ Interview by the author of Michael Mann, Director of Office of International Affairs, US Securities and Exchange Commission, March 1995.

¹⁴ Mann interview, supra n. 13.

in 1986, and an IOSCO working group prepared "Principles for Memoranda of Understanding," released in September 1989, further specifying the terms of a model MOU.¹⁵

IOSCO has also produced a paper addressing the problems in negotiating MOU's.¹⁶ The US has found that having an international consensus in IOSCO has been persuasive in dealings with other countries, both to encourage passage of domestic enabling legislation and to enter MOU's. The benefits of international consensus are evident, as 12 other countries have enacted similar legislation, of which 5 are EU Member States (France, Italy, the Netherlands, Spain and the UK),¹⁷ since passage of the enabling legislation in the US.¹⁸

¹⁵ The Principles for Memoranda of Understanding, IOSCO Working Party No. 4 of the Technical Committee, September 1991, are as follows:

1. *Subject Matter*: MOU's should provide that investigatory assistance will be granted without regard to whether the type of conduct under investigation would be a violation of the laws of the Requested Authority unless the Requested Authority is not permitted to provide assistance where the type of conduct under investigation would not be a violation of the laws of the Requested Authority.

2. *Confidentiality*: An MOU should provide that an Authority that receives information pursuant to an MOU request will protect the information with the highest possible level of confidentiality which, at a minimum, should provide that the information will be treated with the same level of confidentiality that is given to similar information that it collects in investigations of possible domestic violations. In addition, an MOU should provide the Requested Authority with the opportunity to identify the level of confidentiality that it expects to be attached to information that it transmits pursuant to an MOU request.

3. *Implementation Procedures*: In a mutually agreeable form, the signatories to an MOU should describe the procedures that they will follow in making and executing requests for information pursuant to the MOU; those procedures should be consistent with both signatories' legal requirements or impediments.

4. *The rights of persons subject to an MOU request*: The fact that an investigation is conducted on behalf of a foreign authority pursuant to an MOU request should not alter the legal rights and privileges granted to persons in the State of the Requested Authority.

5. *Consultation*: MOU's should contain a provision in which the Authorities agree to consult on relevant issues that arise during the operation of the MOU. Moreover, authorities should consult frequently to discuss developments or proposals likely to affect the other Authority's interests or the available means for cooperation.

6. *Public policy exception*: An MOU should provide that the Requested Authority maintains the right to refuse to provide assistance in instances where the provision of assistance would violate the public policy of its state. The concept of public policy would include issues affecting sovereignty, national security, or other essential interests.

7. *Types of assistance*: MOU's should provide that the Authorities will take all reasonable steps to ensure that they can utilize their full domestic powers to execute requests for assistance. The available assistance should include, where the Requested Authority has such powers, obtaining documents and the statements or testimony of witnesses, granting access to the Requested Authority's non-public files, and conducting inspections of regulated entities.

8. *Permitted uses*: MOU's should specify whether and under what circumstances the Requesting Authority may provide information it receives pursuant to an MOU to other domestic authorities for use in related matters, including investigations or proceedings instituted by other authorities and regulators, and SRO's.

9. *Participation by the requesting authority*: MOU's should provide that, to the extent permitted by the laws and policies of the Requested Authority, the Requesting Authority may be permitted to participate directly in the execution of a request for assistance.

10. *Cost-sharing*: MOU's should provide that, under certain circumstances, the Requested Authority can, if it deems it necessary, initiate a process for having the Requesting Authority share the costs of providing assistance that are incurred by the Requested Authority.

¹⁶ IOSCO Working Party No. 5 of the Technical Committee, "Report addressing the difficulties encountered while negotiating and implementing Memoranda of Understanding, 1 August 1990.

¹⁷ The non-Member States are Argentina, Australia, Canada, Chile, Hong Kong, Japan, and Mexico.

¹⁸ A resolution also was adopted by 14 members of the Council of Securities Regulators of the Americas ("COSRA") in 1994.

Provisions of enabling legislation compared with Member State MOU's

Type of assistance

The enabling legislation provides that the SEC may give assistance to a requesting authority which is "conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces."

The MOU's with the Member States specify in greater detail the type of assistance which may be provided. The assistance specified normally includes access to information in files, taking statements of persons, and providing documents. Some also provide for conducting compliance inspections or examinations of investment and securities businesses.

Execution of request and protection of individual rights

The enabling legislation provides that the SEC may conduct such investigation as it "deems necessary to collect information and evidence pertinent to the request for assistance." This enables the SEC to use its full arsenal of *investigative* powers for obtaining information in response to a request, including issuance of subpoenas, which may be very broad, and which may cover the production of documents and testimony.¹⁹ However, the enabling legislation does not empower the SEC to use *court* powers to satisfy such a request, such as taking depositions on behalf of a foreign authority. In practice, this distinction has made little difference.

IOSCO principles state that MOU's should provide that the authorities will take all reasonable steps to ensure that they can utilize their full domestic powers to execute requests for assistance; that the authorities agree to consult on relevant issues arising during the operation of an MOU; that the fact that an investigation is conducted on behalf of a foreign authority pursuant to an MOU request should not alter the legal rights and privileges granted to persons in the state of the requested authority; and that MOU's should provide that, to the extent permitted by the laws and policies of the requested authority, the requesting authority may be permitted to participate directly in the execution of a request for assistance.²⁰

The Member State MOU's provide greater details on execution of requests. Some provide that on request, the requested authority will communicate information contained in its files (France) or provide access to files (Italy, Spain); some provide that the requested authority may take the statement of all persons who have participated in the facts specified or having information relevant to these facts, or require production of relevant documents or other information (France, Italy, Spain), or conduct examinations of books and records of securities businesses (Netherlands, Spain). Normally, they provide that requests shall be executed pursuant to the procedures of the requested state (France, Italy, Netherlands, Spain, UK).

¹⁹ If a person failed to comply with an SEC investigative subpoena, the SEC would enforce it through court proceedings.

²⁰ IOSCO principles 4, 5, 7 supra n. 15.

Some provide that persons whose statements are taken have a right to have counsel present (France, Italy), or that they shall have all rights and protection provided by the laws of the requested state (Spain, UK); some provide that on request, testimony will be taken under oath and a verbatim transcript made (Italy, Spain, UK); some provide that on request and with the consent of the requested authority, representatives of the requesting authority may be present when a statement is taken and prescribe specific questions (France, Italy, Netherlands, Spain, UK), or that the requesting authority may request that a designated person be permitted to take testimony or conduct an inspection (Spain) or that the requested authority may allow the requesting authority's representatives to conduct an interrogation of any person, participate in the inspection of books and records of an investment business, and if such a request is denied, the authorities will consult (UK); some provide that as far as possible, information shall be obtained in the form and pursuant to procedures desired by the requesting state, including statements of persons (Netherlands). The Italian MOU provides that the authorities intend to utilize their full powers to implement the MOU but recognize the differences in the scope of their authority.

Exemptions from assistance

The enabling legislation provides that in exercising its discretion, the SEC is required to consider whether the foreign government has agreed to provide reciprocal assistance and whether compliance would prejudice the public interest of the US.

The reciprocity standard must be interpreted in light of the differences between the US system and the system of the foreign counterparty. Mann observed:

There isn't another agency that we deal with in Europe that is structured as we're structured. The SEC's legislation does not require this. Rather, it requires that the SEC look to whether the foreign authority is willing to provide assistance in similar cases on a reciprocal basis.²¹

According to Mann, the public interest standard is satisfied if the responsible SEC officials believe they know what is the violation being investigated by the foreign authority, a connection exists between the violation and the information being sought, and the law being enforced relates to securities.

The IOSCO principles state that an MOU should provide that the requested authority maintains the right to refuse to provide assistance in instances where provision of assistance would violate the public policy of its state, and that the concept of public policy would include issues affecting sovereignty, national security, or other essential interests.²²

The Member State MOU's provide more specific reasons for exemption from assistance, including: compliance would injure sovereignty, security, essential economic interests or public order of requested state (France, Italy, Netherlands, Spain, UK); the request is not in

²¹ Mann interview, supra n. 13.

²² Principle 6, IOSCO principles, supra n. 15.

accordance with the requirements of the MOU (France, Italy, Spain); the requested information concerns facts which originated before the effective date of the MOU (France, Italy); criminal proceedings based on the same facts have already been initiated in the requested state, unless the relief would not be duplicative (France, Italy); and compliance would interfere with an ongoing investigation in the requested state (Netherlands). The UK MOU provides very specifically that the authorities acknowledge that certain requests may relate to possible breaches of laws, regulations and requirements that involve assertions of jurisdiction not recognized by the requested state, and when compliance with such request would conflict seriously with and prejudice the sovereign interests of the requested state, the request shall be denied.

Confidentiality

Confidentiality of information provided by a foreign authority to the SEC would be governed generally by Section 24(d) of the Exchange Act. In addition, 18 US §1905 and Section 78x(b) of the Exchange Act impose confidentiality obligations on the responsible government officials.

Section 24(d) provides that non-public information cannot be disclosed. It does this by creating an exemption from disclosure requirements of the Freedom of Information Act (FOIA) for information obtained from a foreign securities authority by the SEC, which would otherwise apply. It provides:

Except as provided in subsection (e), the Commission shall not be compelled to disclose records obtained from a foreign securities authority if (1) the foreign securities authority has in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority, and (2) the Commission obtains such records pursuant to (A) such procedure as the Commission may authorize for use in connection with the administration or enforcement of the securities laws, or (B) a memorandum of understanding.

Subsection e creates an exception for disclosures to Congress:

Nothing in this section shall --

* * *

(2) authorize the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

As to the provisions focusing on government officials, the Trade Secrets Act, 18 US 1905, covers all government officers or employees of all departments or agencies, including the SEC. It provides:

Disclosure of confidential information generally. Whoever, being an officer or employee of the United States or of any department or agency thereof, any . . . agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 US 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment of official duties or by reason of any examination or investigation made by, or return, report, or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1000, or imprisoned not more than one year, or both; and shall be removed from office or employment. (emphasis added)

This provision creates the important caveat that disclosures are permitted if they are authorized by law. Thus, if another basis exists under US law to share information, then 18 US 1905 does not apply.

In addition, agencies issue their own directives and restrictions on their employees. With respect to SEC officials, 15 US §78x(b) of the Exchange Act provides:

It shall be unlawful for any member, officer or employee of the Commission to disclose to any person other than a member, officer or employee of the Commission, or to use for personal benefit, any information contained in any application, statement, report, contract, correspondence, notice or other document filed with or otherwise obtained by the Commission (1) in contravention of the rules and regulations of the Commission under section 552 of Title 5 [the FOIA], or (2) in circumstances where the Commission has determined pursuant to such rules to accord confidential treatment to such information. Nothing in this subsection shall authorize the Commission to withhold information from Congress.

The IOSCO principles state that:

An MOU should provide that an Authority that receives information pursuant to an MOU request will protect the information with the highest possible level of confidentiality which, at a minimum, should provide that the information will be treated with the same level of confidentiality that is given to similar information that it collects in investigations of possible domestic violations. In addition, an MOU should provide the Requested Authority with the opportunity to identify the level of confidentiality that it expects to be attached to information that it transmits pursuant to an MOU request.

The confidentiality provisions in the Member State MOU's generally require that each authority shall keep confidential requests made in the framework of the MOU's, and consultations (France, Italy, Netherlands, Spain, UK). The Spanish MOU also specifically covers unsolicited assistance. Further, the requesting authority will keep confidential any information received pursuant to an MOU to the same extent as it would be in the requested

state, unless it must be disclosed in its permitted use. (France, Italy, Netherlands, Spain, UK). The authorities may make exceptions (France, Italy, Netherlands, UK).

Disclosure and Use

The enabling legislation provides that the SEC shall not be compelled to disclose information received pursuant to an MOU if such disclosure would violate the laws applicable to that foreign securities authority.

The IOSCO principles provide that:

MOUs should specify whether and under what circumstances the Requesting Authority may provide information it receives pursuant to an MOU to other domestic authorities for use in related matters, including investigations or proceedings instituted by other authorities and regulators, and SRO's.²³

Certain disclosures of documents in the SEC's files which it has received from a foreign government pursuant to an MOU would be required pursuant to use for the purpose of the request, notwithstanding the confidentiality provisions discussed above. These include disclosure: in court proceedings when the documents are used in evidence; in response to a subpoena; and in response to a request by Congress.

With regard to disclosure in court proceedings, Mann explained that "the whole concept of the MOU's is to get the information to take action, and we have transparency in our process, so once we take action, it's in a public courtroom."

With regard to subpoenas, disclosure would be mandatory in cases where the SEC is the moving party. In addition, disclosure would be required when documents may contain information that is exculpatory. Mann explained:

The concept is when you're asking for information, you're asking for information that's relevant to the facts, and from a fairness point of view, to say that [the SEC] can look at it, and rely on it, and form theories based on it, and that the defense can't know that we know it, would be inconsistent with US law.

Information under US law is subject to subpoena, even confidential information. The Constitution recognizes the importance of balancing confidentiality versus the rights of litigants. And the law is courts will be able to enforce subpoenas. You could file it under seal also [subject to the court's discretion].

With respect to disclosure to Congress, information which the SEC has obtained through an MOU would also be disclosable to Congress, on request of Congress. Mann explained that the SEC is a "creature of Congress, so for us not to give information to Congress would be

²³ Principle 8, IOSCO principles, supra n. 15.

just an impossible situation." ²⁴ He stated that "we've had no issues with our Congress in giving them information. There are laws that cover Congress too, and they keep it confidential."

Disclosure to other federal agencies would be allowed as long as the intended use of the agency falls within the purpose of the request. Thus, the SEC can provide the information received to the criminal authorities responsible for prosecution of securities offenses, and would probably be compelled to do so in response to a subpoena.²⁵ Before doing so, the requested authority would be notified that this would occur. Otherwise, permission could be sought from the requested authority for disclosure.

If the SEC were to resist disclosure to another federal agency, it is not clear whether section 24(d) provides sufficient grounds to resist disclosure.

As to disclosure to state officials, Mann stated that "there is a very strong argument that [information would not have to be disclosed] to state enforcement authorities, that we could resist a subpoena from a state enforcement authority just like a third party subpoena from anybody else." However, the SEC has had no experience to date in this regard. In any event, Mann explained that such a case has not arisen because SEC investigations are conducted on a confidential basis.

As to use, the information can be used for the purpose stated in the request, and within the general framework of that purpose, including conducting civil, and administrative enforcement proceedings, assisting an SRO, and conducting an investigation related to a criminal enforcement proceeding. Prior to using the information for any other purpose, the SEC would notify the requested authority and provide the authority an opportunity to oppose its use. If an objection is raised, the authorities agree to consult.

The MOU's of 3 Member States (France, Italy, Netherlands) do not contain a disclosure provision. The Spanish MOU provides that the requesting authority will not offer information received under an MOU to, and will use its best efforts to ensure that it is not obtained by, any other person; that if another person obtains the information, the requesting authority will use his best efforts to ensure no further disclosure; and the requesting authority will inform the requested authority of a legally enforceable demand for information prior to complying, and assert such legal exemptions or privileges as appropriate. The UK MOU simply provides that if the information is obtained by another public body, the requesting authority will use its best efforts to ensure it will not be used in any way that involves disclosure to another person.

The Member State MOU's all provide that the information can be used solely for the purposes stated in the request, notably compliance with or enforcement of legal provisions specified in the request (France, Italy, Netherlands, and Spain)(the UK agreement allows use for the

²⁴ In contrast, documents obtained pursuant to an agreement entered under the IAEEA would not be subject to disclosure to Congress.

²⁵ The SEC has no criminal prosecution powers. Rather, criminal offenses for securities offenses are generally pursued by the Justice Department as violations of the mail and wire fraud statutes.

purposes specified in the request or related proceedings); for purposes within the general framework of the use stated in the request, notably conducting civil or administrative enforcement proceedings, assisting in a professional enforcement proceeding, or one to permit subsequent criminal prosecution (France, Italy, Spain, UK). The Netherlands MOU provides that prior approval of the requested state is required for use in criminal proceedings. For other uses, the requested authority must be notified and given the opportunity to oppose (France, Italy, Netherlands, Spain, UK). The MOU's of France, Italy and Spain provide that the authorities agree to consult regarding such opposition thereafter; the Netherlands MOU provides that the requested state may oppose only where the proposed use would not be in the interest of administration and enforcement of securities laws.

Dual Criminality

The enabling legislation provides that "such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States." It was thought best not to incorporate a "dual criminality" requirement in this area, since securities laws often differ.²⁶

None of the Member State MOU's contains a dual criminality requirement.

Experience to date

Mann believes that the parties to MOU's have generally acted in good faith, and that the successful use of MOU's increases as a relationship of trust builds between contracting states. He observed:

It's a matter of a learning curve, and developing a clear understanding of how things will operate, it's also having a track record.

* * *

MOU's are creating relationships among authorities that conduct not only enforcement, but also regulate their markets. These are vast international markets with enormous cross border trading; our cooperation in enforcement is now being dwarfed by our cooperation in regulatory matters. These agreements now facilitate all of this.

Mann indicated that using agreements rather than treaties in this context has been an advantage, given the greater flexibility of the former. This flexibility has allowed SEC officials to use MOU's for purposes not originally anticipated, especially in the regulatory context.

²⁶ Mann observed that many European securities laws have evolved over the last ten years, and are substantially similar to American securities law, especially in the area of fraud. The insider trading directive differs somewhat from American law because it defines insider trading. Mann interview, supra n. 13.

He gave the example of a case where a request was made for voluminous telephone records which proved crucial to establishing a violation: "I think that did more to raise the confidence level with this authority, that actually we do know what we're doing, we're not just trying to obtain vast quantities of information for no good purpose. And it improves the ability to come back with another request at a later time."

He noted that securities law has evolved considerably over the last 10 years in Europe, and is generally consistent with US law, especially with respect to fraud, although differences remain with respect to insider trading, and the EU's insider trading directive has taken a different approach. Procedural differences do, however, continue to exist, especially with respect to ability to obtain broad subpoenas expeditiously, both for documents and testimony. To date, there have been no disputes between MOU partners stemming from differences in either substantive or procedural law.

One problem which has arisen is that at times, evidence is received from the foreign authority in a form which is not admissible in evidence. In such cases, the information can still be relied upon as the basis for making an allegation in court. If it were to be used as evidence, it would have to be re-obtained in an admissible form, using procedures under the Hague convention²⁷ or through voluntary production. Hague convention procedures have been used by the SEC in EU Member States on numerous occasions. The French have been especially helpful in voluntarily obtaining the evidence in admissible form. However, in most cases, the SEC settles cases with defendants, so that the admissibility of the documents does not become an issue.

Mann reported that none of the Member States which have entered MOU's have had problems with the US agencies' handling of confidential information which they have provided or with disclosure requirements.

²⁷ Convention on the taking of evidence abroad in civil or commercial matters, 18 March 1970. Under this procedure, "[i]n civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." Art. 1. The procedures for doing so are described in Arts. 1-14. Evidence also may be taken by diplomatic officers, consular agents and commissioners of a contracting state in the territory of another contracting state. Arts. 15-22.

III. DEPARTMENT OF JUSTICE CRIMINAL DIVISION'S MUTUAL LEGAL ASSISTANCE TREATIES

Information need being addressed

MLAT's are designed to aid federal, state and local criminal law enforcement authorities in the contracting states in the investigation and prosecution of crimes by facilitating their ability to obtain information and evidence located overseas, often for use in court proceedings. Most requests for assistance made under MLAT's relate to drug trafficking and major fraud; few relate to business regulation or antitrust (although they have been used for such purposes as well). Law enforcement officials are interested in obtaining evidence abroad in a form which is admissible in evidence in a US court.

Federal officials explained that the use of treaties, rather than agreements, can probably be explained by the breadth of coverage of MLAT's. A broader analysis of the legal system and the implementation of laws of the potential partner is needed with respect to MLAT's than with respect to information exchange agreement in a specific sector. Thus, the legislature has a greater interest in the terms of an MLAT than it has in the terms of a sector specific agreement.

Obtaining information through use of an MLAT can sometimes be more cumbersome than through an MOU, MAA, tax treaty or TIEA for several reasons. First, MLAT's sometimes contain a dual criminality requirement. This would limit their usefulness in areas such as antitrust and securities, since US laws in these areas are often different from those of other countries. Moreover, even if dual criminality is not required, US officials have observed at times that requested states will pursue a request more vigorously if the matter at issue is a crime in that state as well. Second, a request made under an MLAT must be executed by domestic and foreign criminal authorities and not by officials of the agency in the requested state that is the counterpart of the agency in the requesting state needing the information. In the future, enabling legislation may be sought because of the advantages this would provide in terms of expeditious handling and flexibility. However, it may be difficult to obtain, because Congress has grown accustomed to having a role in providing advice and consent in passage of MLAT's.

Member State Treaties

As of spring 1995, MLAT's have entered into force with 13 countries, including 3 Member States (Italy (1982), the Netherlands (1981), and Spain (1980)).²⁸ An additional 12 countries had signed treaties with the US, including two Member States (Belgium and the United Kingdom) but were not yet in effect. Justice officials explained that once the treaties have been signed and transmitted to the Senate for ratification, the timing is in the latter's control.

²⁸ The other countries are Argentina, the Bahamas, the Caymen Islands, Canada, Mexico, Morocco, Switzerland, Thailand, Turkey, and Uruguay. The first MLAT was entered between the US and Switzerland in 1977.

The Justice Department has an active program of negotiating MLAT's with other countries, including at least three other Member States (Austria, Luxembourg and Sweden).

Provisions of MLAT's

No enabling legislation is required because MLAT's are treaties, which themselves have the force and effect of law. However, 28 USC 1782 does provide additional domestic legal authority for executing foreign requests for evidential assistance.

The US government has a model MLAT which is tailored to fit the specific country with which a treaty is negotiated. In addition, the U.S. has "certain goals in mind with respect to particular provisions when we sit down and negotiate."²⁹

MLAT's specify a government agency responsible to act as clearinghouse both to receive requests from prosecutors of its own government who seek to use MLAT's to obtain information³⁰ and to receive requests made by a requesting state and channel them to the appropriate individuals for execution. As to the former, the clearinghouse agency is responsible to receive requests from law enforcement officials of its own government, then forward them to the clearinghouse agency of the requested state. As to the latter, the clearinghouse agency is responsible to forward requests by a requesting state to the appropriate law enforcement officials of its own government for execution, and to ensure that the information is transmitted back to the requesting state.³¹

Type of assistance

MLAT's identify the specific forms of assistance that parties are obliged to provide each other. In general, this consists of mutual assistance in criminal investigations and proceedings (Italy, Netherlands, Spain). MLAT's facilitate location of persons (Italy, Netherlands, Spain), service of documents (Italy, Netherlands, Spain), searches and seizures (Italy, Netherlands, Spain), transfer of persons for testimonial purposes (Italy, Netherlands, Spain), voluntary appearance in US proceedings of foreign witnesses, and seizure and forfeiture of criminally obtained assets (Italy, Spain). The Spanish MLAT uniquely provides for assistance in initiating criminal proceedings in the requested state. Some also provide for taking testimony and providing documents (Italy, Netherlands, Spain).

²⁹ Interview by the author of Messrs. Harris and Snow, U.S. Department of Justice, Criminal Division, March 1995.

³⁰ Both state and federal agencies in the US are entitled to make requests under MLAT's.

³¹ Before MLAT's existed, foreign authorities had difficulties to determine the appropriate US agency to which a given letter rogatory (the mechanism then employed for discovery by a foreign authority) should be transmitted. Problems included transmission of requests through diplomatic channels causing needless diplomatic tension due to the lack of agreed ground rules on how such requests would be handled, execution strictly in accordance with the law of the requested state, delay, and often no useful evidence would be produced. Federal officials explained that "a hot case on the front page engendered . . . a lot of posturing and exchange of unpleasant diplomatic notes." This led to miscarriages of justice. Having a clearly identified agency serve as a clearinghouse, and clearly defined rules, allows for the acquisition of information in a more reliable and timely manner.

Execution of request and protection of individual rights

MLAT's generally provide that the requested state will pursue all measures in furtherance of a request by a requesting state that it would pursue in satisfaction of its own investigations.

In MLAT's, it is possible to provide for the use of court powers to satisfy requests. 28 USC 1782 establishes the authority of a federal court to execute a request for assistance from a foreign government. It is often used in conjunction with MLAT's and is considered the "de facto implementing legislation for MLAT's" by federal enforcers. It is designed to allow a court to order that evidence be gathered on behalf of a foreign requesting authority. It provides:

Assistance to foreign and international tribunals and to litigants before such tribunals:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Both the Italian and Spanish MLAT provide that courts of the requested state shall issue subpoenas, search warrants, or any other process necessary to execute a request, and that a person from whom evidence is sought shall, if necessary, be compelled to appear and testify to the same extent as he would be in a criminal investigation. The Italian MLAT provides that a person compelled to testify would have specified rights of an accused. The Spanish MLAT provides that a person who gives false testimony is subject to prosecution and punishment in the requested state.

Exemptions from assistance

All MLAT's with the Member States establish an exemption from the agreement to assist where execution would prejudice security or other essential public interests of the requested state, and where requests relate to purely military or political offenses. Justice Department officials stated that in the negotiations for several unspecified MLAT's, it was understood that business secrets might fall within the public interest exemption. The Dutch MLAT also exempts requests which relate to prosecution of a person considered immune.

Confidentiality

Justice Department officials observed that the criminal law enforcement community was concerned about possible misuse of information collected in connection with a domestic criminal investigation that might be shared with a foreign government.

As in the other areas, the provisions of 18 USC 1905 apply to government officials dealing with information obtained under an MLAT.

All MLAT's with the Member States contain confidentiality provisions. The Italian and Dutch MLAT's provide that when necessary, a requested state may require that the evidence and information which it provides be kept confidential, but that disclosure may be made when necessary as evidence in public proceedings. The Italian MLAT also provides that if deemed necessary, the request for assistance also be kept confidential. The confidentiality provision of the Spanish MLAT takes a different approach, providing that the requesting state shall use its best efforts to comply with a request that information furnished be kept confidential, and that a requested state shall use its best efforts to keep the request confidential.

Disclosure and use

Information received from a foreign clearinghouse agency is forwarded to the federal, state or local enforcement authority from whom the request originated. It should be emphasized that state and local enforcement authorities are empowered to make requests under MLAT's, through the clearinghouse agency. In this respect, MLAT's differ from other information exchange agreements, which, except for tax treaties and TIEA's, empower only a specific federal agency to make requests. In addition, disclosure is also possible by the clearinghouse agency to a federal, state or local government agency other than that which initiated the request, depending on the use which they plan to make of it. Depending on the language of the applicable MLAT, permission of the requested state may be required prior to making such a disclosure.

The requirement that the information obtained pursuant to a request cannot be used in any other matter signifies that it could not be used in conjunction with a different crime from that made in the request without first obtaining the permission of the requested state, even if the

second crime arose out of the same facts or circumstances.³² As a result, Justice Department officials who serve as the clearinghouse for requests from the US under MLAT's will generally attempt to identify on a request all crimes which may arise out of the specified facts or circumstances.

Most MLAT's permit the requested state to request limitations on disclosure of information which they have provided. For instance, most MLAT's allow the requested state to provide information under the condition that it not be used publicly, which would preclude its use in court. This might happen, for example, in a case where disclosure of the information sought would adversely affect the national interest or sovereignty of the requested state, or where business secrets are involved. It is possible to impose a condition that the information can be used in court only if a protective order is sought from the court. However, whether a protective order will be granted is left to the discretion of the court. If the requesting state accepts the information subject to those conditions, it would be obliged to follow them. Moreover, when a requested state would be entitled to deny a request on the basis of the exemptions for national security or public interest, the Department might encourage the requested state to grant the request subject to conditions.

Once the information is used in court, it becomes a matter of public record, and it is no longer possible to police its use. The information may then be used for any purpose. The Spanish MLAT and several other recent ones state this explicitly.

The Italian and Dutch MLATs state that the requesting state shall not use the evidence obtained nor information derived therefrom for any purpose other than that stated in the request without the prior consent of the requested state. The Spanish MLAT provides that the requested state may request that information furnished be used only subject to the terms and conditions it may specify, and the requesting state will use its best efforts to comply.

Dual criminality

Dual criminality is generally not required in MLAT's. However, some limit certain aspects of the benefits provided under MLAT's to specified crimes. For instance, the Dutch MLAT provides that a request for search and seizure shall be executed only with respect to specified subject offenses. The Spanish MLAT makes a similar limitation when the assistance requested relates to forfeiture and restitution proceedings.

Experience to date

Justice Department officials report that they receive hundreds of requests each year from their own government agencies to be transmitted to requested states. They also receive hundreds of requests, which they transmit to various US Attorneys Offices around the country where

³² For example, under the swiss MLAT, tax matters are not covered except in the case of organized crime. Thus, a grand jury considering both tax and non-tax crimes for the same events could consider the information for the non-tax crimes only.

the evidence is located. Washington headquarters ensures that the request is in fact executed by the local authorities, and that the information is transmitted back to the requesting state.

Justice Department officials believe MLAT's have been a major improvement over the situation which existed before, where letters rogatory were the only available means to obtain the information.

One aspect of executing MLAT's which has been problematic is the need to obtain the evidence in a form admissible in evidence in the requesting state. Justice officials stated that the trial procedures in many partner states have been evolving. For instance, 20 years ago, many partner states vehemently opposed the idea of a camera in court. Now, some have come to accept such procedures as videotape depositions in their own systems. If not, they may still be willing to take a videotape deposition if they are provided with the means to do so. Another example is that many civil law countries do not produce a verbatim transcript of oral testimony given during an investigation. Rather, the magistrate simply prepares a summary of testimony. However, if provided the means for creating a verbatim transcript, many are willing to produce it.

As to situations where substantive laws differ, Justice officials have found it more difficult to get satisfaction of a request. They explained:

At the time we enter the treaty, we go through the kinds of requests the US is likely to make. Even if the treaty doesn't make dual criminality a requirement, we want to know how much disparity there is between our laws, so that we can anticipate the likely problems at the time we actually make requests. It has been our experience that sometimes it makes a difference to our treaty partner whether the act that we're investigating is a crime in their jurisdiction. We try not to be naive and to understand that it's going to make our counterpart's job harder. It may even make them unwilling to use the same kind of draconian evidence collection techniques as would be appropriate in a matter that's criminal in both states. . . . We sometimes had requests frustrated because of the differences in the laws between the two countries.

Justice officials meet periodically with their counterparts under each MLAT to discuss problems and ways to improve their performance. Justice officials believe that some MLAT's are enforced more rigorously and successfully than others. They declined to state what their experience has been with specific Member States.

IV. THE TREASURY DEPARTMENT AND THE DEPARTMENT OF JUSTICE TAX DIVISION: TAX TREATIES

Treaties entered by the Secretary of the Treasury which are designed to avoid double taxation between two sovereign nations usually contain a provision on exchange of information.³³ The principal purpose of tax treaties is to reduce or eliminate the double taxation of income earned by citizens or residents of one country from sources within another country, and to prevent unlawful evasion of income taxes in either country. Exchange of information is also possible through Tax Information Exchange Agreements (TIEA's), which are based on enabling legislation.

Several US agencies are involved in the entry and implementation of these treaties and agreements. It is within the discretion of the Treasury Department to decide whether to enter tax treaties or TIEA's; the Tax Division of the Justice Department plays an advisory role in this context. The Internal Revenue Service (IRS) is responsible for implementation, working primarily with the advice of the Chief Counsel's office and secondarily in consultation with the Tax Division. The IRS is empowered to issue "third party recordkeeping summonses" under the summons enforcement law to obtain bank records sought by a treaty partner.³⁴ The IRS is also assisted by the Tax Division in the formulation of requests to treaty partners.

Information need being addressed

Tax enforcement officials are interested in obtaining evidence abroad, which they would not otherwise be able to obtain, in a form which would be admissible in evidence in a US court. Justice Department officials explain that the US is well known for its desire to obtain tax information from other countries, and has, at times, been considered aggressive in its use of compulsory process extraterritorially to obtain information.

TIEA's have certain advantages over tax treaties from the enforcement perspective, which relate to their power to preside over domestic bank secrecy laws. The enabling legislation for information exchange agreements establishes that non-disclosure provisions of foreign law (bank secrecy and bearer shares) shall not inhibit information exchange.³⁵ Accordingly, Treasury cannot enter a TIEA that does not contain a provision which would require a foreign country entering such an agreement to overcome its own bank secrecy laws in implementing the agreement. However, no such requirement exists with respect to tax treaties, and the model treaty has no equivalent provision. Thus, facially, the model treaty is not as powerful as the model exchange of information agreement. As a matter of policy, however, treaties being negotiated in the current timeframe include such a provision as well.³⁶ Notwithstanding

³³ The sole treaty which did not contain such a provision was that with the former Soviet Union.

³⁴ If the party receiving the summons attempts to quash it through court proceedings, the Tax Division will represent the interests of the US.

³⁵ 26 USC 274(h)(6)(c).

³⁶ In the current timeframe, it is possible that the Senate would refuse to ratify a tax treaty which did not contain such a provision.

this advantage of TIEA's, it is not necessarily in the interest of the Treasury Department to enter such an agreement with a given country if it is also interested in entering a tax treaty with that country, for strategic reasons.

Generally, MLAT's are also relied upon to obtain information of criminal tax violations.

Member State treaties

US tax authorities have pressed for inclusion of exchange of information agreements in their tax treaties. France, Germany and Italy have also strongly favoured inclusion of such a provision. The UK has been less enthusiastic due to the "antiquated nature of their laws", according to Justice officials. Tax treaties have been entered with all Member States (Austria (1966); Belgium (1971); Denmark (1995); Finland (1971); France (1995); Germany (1989); Greece (1953); Ireland (1951); Italy (1984); Luxembourg (1996); Netherlands (1994); Portugal (1995); Spain (1990); Sweden (1994); United Kingdom (1980)). All tax treaties which the US has entered, with the exception of that with the former Soviet Union, contain a provision for the exchange of information.

No agreement has been entered with the EU, which is not a tax imposing authority. The EU passed a directive in 1977 in this area, requiring the Member States to enter exchange of information relationships with each other, following OECD model legislation (discussed below). It notes that Luxembourg is the one Member State resisting such efforts.

US and OECD Model treaty information exchange provision

Since the Member States have all entered tax treaties, this section will discuss only those, and will not address the provisions of the TIEA enabling legislation.³⁷

The treaties which the US has entered with other countries are based on a US Treasury Department Model Income Tax Treaty dated June 16, 1981. The exchange of information

³⁷ Section 274H(6)(C) of the Internal Revenue Code is the enabling legislation which empowers the Secretary of the Treasury to enter TIEA's and provides certain incentives for countries to enter such agreements. It provides:

(i) IN GENERAL - The Secretary is authorized to negotiate and conclude an agreement for the exchange of information with any beneficiary country. Except as provided in clause (ii), an exchange of information agreement shall provide for the exchange of such information (not limited to information concerning nationals or residents of the United States or the beneficiary country) as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares. The exchange of information agreement shall be terminable by either country on reasonable notice and shall provide that information received by either country will be disclosed only to persons or authorities (including courts and administrative bodies) involved in the administration or oversight of, or in the determination of appeals in respect of, taxes of the United States or the beneficiary country and will be used by such persons or authorities only for such purposes.

provision in the model US treaty tracks the language of the OECD Model Convention (1977), but contains additional provisions which strengthen requirements for obtaining specific information, as discussed below.

Provisions of treaties

Type of Assistance

The US and OECD model treaties provide that the competent authorities shall exchange such information as is necessary for carrying out the provisions of this convention (ie, the administration of specified domestic tax laws).

The treaties with the Member States generally follow the model provision. Some (Belgium, Finland, France, and Sweden) include a provision specifying that the exchange of information shall be either routine or on request with reference to particular cases. The Finnish treaty establishes an obligation for the parties to inform each other of amendments or published interpretations of relevant tax laws. Germany and Sweden also provide that the contracting states may, through diplomatic channels, exchange notes under which they may exchange information for taxes not covered by the treaty. The Swedish treaty provides explicitly that it is subject to reciprocity.

Execution of request and protection of individual rights

The US model treaty (but not the OECD model) provides that

If information is requested by a contracting state in accordance with this article, the other contracting state shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the first-mentioned state were the tax of that other state and were being imposed by that other state. If specifically requested by the competent authority of a contracting state, the competent authority of the other contracting state shall provide information under this article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other state with respect to its own taxes.

This provision is meant to ensure that whatever procedures are specified in the request by the requesting state, for the purposes of making the evidence admissible, will be used by the requested state to obtain the evidence requested, to the extent allowable under its law. For example, Italian tax authorities may request their US counterparts to examine a witness, summarize the testimony and stamp the summary, while US authorities may request their Italian counterparts to question a witness under oath, provide an opportunity for cross examination, take a verbatim transcript, and certify it. In each case, officials of the requested

state would execute the request; the treaty does not establish that the requesting state's officials could execute the request themselves on the territory of the requested state.

This provision is included in the more modern treaties of six Member States (France, Germany, Italy, Netherlands, Portugal and Spain).

Notwithstanding the absence of this provision in most Member State treaties, the US has consistently taken the position that it may use its traditional compulsory process and enforcement procedures to assist treaty partners, even if a request is made by a country that would not use compulsory process to satisfy a request from the US. US authorities have successfully pursued this position in US courts to honour treaty requests.³⁸

Exemptions from assistance

The model treaties provide:

In no case shall the provisions of paragraph 1 be construed so as to impose on a contracting state the obligation:

- a. to carry out administrative measures at variance with the laws and administrative practice of that or of the other contracting state;*
- b. to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the contracting state;*
- c. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public interest.*

This provision, or a somewhat modified form of it, is included in the treaties of 12 Member States (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, Netherlands, Portugal, Spain, and Sweden). Only the trade secret limitation is included in treaties with three Member States (Greece, Ireland and the UK)

Confidentiality

In addition to the confidentiality rules of 18 USC §1905 (which applies to government officials), section 6103 of the US Tax Code and the confidentiality provisions of the treaty apply to information exchanged under US tax treaties (as well as TIEA's).

Section 6103 provides for the confidentiality and circumstances of disclosure of tax returns and tax information gathered by the Internal Revenue Service in its domestic investigations. It states:

³⁸ See Springer, "An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases," 22 The George Washington Journal of International Law and Economics 277, 287 (1988).

A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement.

This permits US tax authorities to disclose information in order to make requests to treaty partners under tax treaties, and permits them to disclose tax information in response to requests from US treaty partners. (The same would apply for TIEA's).³⁹

The US model treaty's confidentiality provision states that any information received by a contracting state shall be treated as secret in the same manner as information obtained under the domestic laws of that state. This treaty provision makes the confidentiality rules under section 6103 applicable to information received from a treaty partner.

Eight Member State treaties (Austria, Belgium, Denmark, Finland, France, Greece, Ireland, and the UK) provide simply that any information exchanged shall be treated as secret. The treaties of five Member States (Germany, Italy, Luxembourg, Netherlands, Portugal, and Spain) track the language of the US model. The Swedish treaty contains no confidentiality provision.

Disclosure and use

As to disclosure, the model treaties provide that the information obtained:

shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

Thus, disclosure to any federal government agency involved in these activities would be allowed, but disclosure to state authorities would not be because the treaties apply only to federal taxes.⁴⁰ This provision clearly states that the information can be used in court proceedings, after which the material is in the public domain and can be used for any purpose.

The first sentence of this provision, or a somewhat modified form of it, is included in the treaties of all Member States except Sweden. The German treaty specifies that disclosure may be made in public court proceedings or judicial decisions, unless the competent authority of the requested state objects. The Dutch treaty also provides that disclosure is allowed in court

³⁹ Id. at 303.

⁴⁰ State tax authorities have never challenged this interpretation.

proceedings, but does not provide for the possibility to object to such use. The Dutch treaty also provides that the information may be released in conjunction with arbitration proceedings.

The second sentence of this provision, addressing use, is included in the treaties of 5 Member States (Germany, Italy, Netherlands, Portugal, and Spain). In addition, the Dutch treaty states that the information may be used in criminal proceedings only if prior authorization is given by the requested state, but that the prior authorization requirement could be waived.

As to use, the model provision allows the information to be used only for purposes of the assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by the treaty. The treaties of five Member States (Germany, Luxembourg, Netherlands, Portugal, and Spain) track this language. The Netherlands treaty also provides that the state may use the information obtained under the convention as evidence before a criminal court only if prior authorization has been given by the requested authority, but that the authorities could waive this requirement.

Nine Member State treaties do not contain any use provision (Austria, Belgium, Denmark, Finland, France, Greece, Ireland, Sweden and the UK).

Dual Criminality

Most tax treaties do not contain a dual criminality provision.

Experience to date

From the US perspective, not all treaties have been functioning equally well. US officials state that they have received "very helpful and complete assistance from certain treaty partners, such as Canada and France", but a disappointing level of assistance from others, including Greece, Italy, Luxembourg, and the UK.⁴¹ Problems are centered on the inability to obtain bank records. For instance, the 1964 treaty with Luxembourg simply provided that the authorities shall exchange information for the purpose of enforcing their respective laws; it contained no execution provision. This treaty was viewed by US officials to be inadequate to obtain necessary information, including bank records, mainly as a result of bank secrecy laws in Luxembourg. A new treaty was entered with Luxembourg in April 1996, which contains an execution provision requiring the parties to "lend each other support and assistance in the collection of taxes to the extent necessary to ensure that relief granted by the present convention from taxation imposed by a contracting state does not inure to the benefit of persons not entitled thereto," and setting forth details of how a request is to be executed.

⁴¹ Springer, *supra* n. 38, p. 289-90.

Another type of problem which enforcers have faced is obtaining evidence in admissible form. As discussed above, only three Member State treaties contain the compulsory process provision of the model US treaty. This creates problems in the view of US enforcers with respect to the other countries. This difficulty results from the difference between civil law countries, which distinguish between judicial and administrative functions, and common law countries, where this distinction is not so important. For instance, in the US, federal agencies have both administrative and judicial powers. The IRS may issue a summons to obtain evidence pursuant to a tax investigation, which the Justice Department holds certain powers to enforce in court. Thus, if an individual refuses to cooperate, the Justice Department can take enforcement action in court. In contrast, if the US would like a deposition taken of an individual in a contracting civil law country, this would involve compulsory process to force the foreign witness to come before a magistrate, which is typically a judicial function. Thus, the tax authorities who enter such treaties have administrative powers, but do not typically have powers to execute a judicial function. Moreover, in some countries, these authorities have no powers to obtain original records; they can simply issue a report on such records. But such a report would not be useful as evidence in a US court because it is hearsay.

The solution to this problem, in the view of US officials, is to include the language from the US model treaty in the exchange of information agreement, requiring the use of judicial processes where needed. The provision in the model US treaty would allow the foreign authority to use its own judicial processes to obtain the evidence in a form admissible in a US court.⁴² Many partners have domestic laws which prevent them from accepting this condition. However, the foreign authority would have to propose its own language to ensure that its own evidentiary needs are satisfied.

At times when US enforcers have not been successful in obtaining necessary information through treaties, they have continued to rely on extraterritorial measures. For instance, one practice which the US has used is to serve a summons or subpoena on the domestic US office of a bank that has a foreign office, in an attempt to obtain records located in the foreign office. Host countries of the foreign office have found such practice by US enforcers to be offensive, and have reacted negatively, such as by invoking blocking statutes. Justice officials declined to respond to other questions regarding experience due to sensitivity.

⁴²

Art. 4, para. 4 (a) provides:

The requested State shall have the authority to:

- (i) examine any books, papers, records, or other tangible property which may be relevant or material to such inquiry;
- (ii) question any person having knowledge or in possession, custody, or control of information which may be relevant or material to such inquiry;
- (iii) compel any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry to appear at a stated time and place and testify under oath and produce books, papers, records, or other tangible property;
- (iv) take such testimony of any individual under oath.

V. CUSTOMS MUTUAL ASSISTANCE AGREEMENTS

The US Customs Service, a part of the US Treasury Department, is responsible for administering the US customs laws, including the Tariff Act of 1930, trade agreements, and various export, money laundering and seizure and forfeiture laws. It is empowered to bring administrative actions to enforce these laws; civil and criminal enforcement actions filed in a US federal court, however, must be handled through the offices of the US Attorney.⁴³

Information need being addressed

The US Customs Service receives a substantial amount of confidential business information in the course of collecting customs duties and enforcing trade agreements. Such information may include IRS numbers, importing information about businesses, ID numbers which could be used for fraudulent purposes by competing businesses, and other data that may reveal information about a business' competitive practices.

Customs Mutual Assistance Agreements (MAA's) cover law enforcement investigations of both a civil and criminal nature. They are designed to provide background information, rather than court evidence. This satisfies the needs of the Customs Service because most customs cases are handled through administrative proceedings; only a small percentage are ultimately filed in court. Thus, a document may be obtained pursuant to an MAA which has been certified by the requested customs authority, which could be used in an administrative proceeding of the Customs Service. Such document may also be admissible in evidence in a US federal court if an official from the foreign customs authority testifies to its authenticity.

The US Customs Service has attache offices all over the world, who are accredited through diplomatic channels and who work directly with their foreign counterparts. This facilitates obtaining documents pursuant to MAA's.

In addition to MAA's, the Customs Service relies upon MLAT's to obtain information, especially if it is anticipated that it will be used for evidentiary purposes. However, like other agencies, the Customs Service prefers to avoid the use of MLAT's due to the complications involved. Since the Customs Service is not generally concerned with obtaining the information for use in court, obtaining it under an MAA is usually sufficient.

Member State participation

MAA's have entered into force with 20 countries, including 11 Member States (Austria (1987), Belgium (1993), Denmark (1991), Finland (1989), France (1993), Germany (1975),

⁴³ Accordingly, when a case is to be prosecuted in court, the Customs Service will gather information and package it in a "referral" to the US Attorney for prosecution. In such circumstances, information obtained pursuant to an MAA will often not meet evidentiary requirements, and will be used as a basis for requesting the information in a form which will be admissible in evidence.

Greece (1993),⁴⁴ Italy (1989), Spain (1993), Sweden (1988), and the United Kingdom (1989)).⁴⁵ As of spring 1995, an agreement with the Netherlands was almost completed, and the US Customs Service was in the process of negotiating an agreement with the European Commission.

Enabling legislation and model agreement

The enabling statute authorizes the Secretary of State to share information with foreign customs and law enforcement agencies pursuant to bilateral or multilateral Customs Mutual Assistance Agreements.⁴⁶ The US State Department has delegated to the US Customs Service authority to enter bilateral and multilateral agreements to share customs information with foreign governments.

The enabling legislation states:

a. In general. The Secretary may by regulation authorize customs officers to exchange information or documents with foreign customs and law enforcement agencies if the Secretary reasonably believes the exchange of information is necessary to:

- 1. insure compliance with any law or regulation enforced or administered by the Customs Service;*
- 2. administer or enforce multilateral or bilateral agreements to which the United States is a party;*
- 3. assist in investigative, judicial and quasijudicial proceedings in the United States; and*
- 4. an action comparable to any of those described in paragraphs (1) through (3) undertaken by a foreign customs or law enforcement agency, or in relation to a proceeding in a foreign country.*

b. Nondisclosure and uses of information provided.

- 1. Information may be provided to foreign customs and law enforcement agencies under subsection (a) only if the Secretary obtains assurances from such agencies that such information will be held in confidence and used only for the law enforcement purposes for which such information is provided to such agencies by the secretary.*
- 2. No information may be provided under subsection (a) of this section to any foreign customs or law enforcement agency that has violated any assurances described in paragraph (1).*

⁴⁴ The Greek MAA was not available from the US customs service, which provided copies of all other MAA's.

⁴⁵ The non-Member States are Argentina, Australia, Balarus, Canada, Cyprus, Korea, Mexico, Norway, Poland, and the Russian Federation. Authority to negotiate has been given to the USCS with respect to one Member State (Portugal) and Brazil, Chile, Cyprus, Ecuador, Haiti, Hong Kong, Israel, New Zealand, Panama, and China. Authority to negotiate was requested with respect to Colombia and the Philippines. Agreements are under possible consideration with respect to Bulgaria, Guatemala, India, Jamaica, Venezuela, and Mongolia.

⁴⁶ 19 USC 1628.

The enabling legislation does not provide the basis for conducting an investigation on behalf of a foreign government. An investigation could only be undertaken if a separate ground for action existed under US law. Some surveillance activity on behalf of a requested authority may be undertaken, even without a basis under US law. For instance, a search for information in the computer files of the Customs Service indicating whether a person has come through the border, and related information, would be possible. It should be noted, however, that the US model provides that an investigation may be performed.⁴⁷

In addition, the US has issued a model agreement, which corresponds to the model agreement of the World Customs Organization. The models are updated periodically to reflect needs that have become apparent through use of MAA's.

Provisions of enabling legislation and US model compared with Member State MAA's

Type of assistance

The model US agreement provides for assistance to prevent, investigate and repress any customs offense, including information necessary to ensure enforcement of customs laws and accurate assessment of customs duties and taxes by customs administrations. Such information may include enforcement actions, and new methods and techniques for combatting offenses.

The MAA's with the Member States vary in their degree of detail as to the type of assistance to be provided. The MAA's with Austria and Belgium essentially track the language of the US model. The agreements with the other Member States go into much greater detail. In addition to the provisions in the model, the Danish and Finnish MAA's provide that, voluntarily or on request, the parties shall furnish each other all available information regarding activities which may result in offenses in the territory of the other party; inform each other whether exported goods have been lawfully imported, and seek such information if it does not have it available; upon request, supply documentation on transactions which constitute a customs offense of that party; exercise special surveillance of means of transport suspected of being used in offenses; initiate inquiries, upon request, concerning operations which appear to violate customs laws; and authorize its officials to appear as witnesses and give evidence regarding facts established by them in the course of their duties.

Execution of request and protection of individual rights

The US model provides that all assistance shall be performed in accordance with domestic law; that the requested state shall take all reasonable measures to execute a request, and if

⁴⁷ See Section on "Execution of request and protection of individual rights"

required, seek official or judicial measure necessary to carry out the request; that it shall conduct, or permit the requesting state to conduct any necessary investigation, questioning of persons, etc., to execute the request; and if requested, authorize officials of the requesting state to be present in the territory of the requested state to execute the request. The model requires that certain procedures be followed in execution of the request.

The model provision, or at least some of its clauses, is adopted in 6 Member States (Austria, Belgium, Finland, France, Germany, Spain). The French MAA provides that the requested state "may" (rather than "shall") conduct investigations etc.

The Austrian MAA provides that the law of the requested state shall be applicable to execution of requests. The Danish MAA contains two provisions not in the model: that the requested state shall initiate all official inquiries concerning operations which are or appear to be contrary to customs laws; and that it shall notify the requesting state if it believes a representative of the requesting state should be present; the Finnish MAA also contains the first of these. The Italian MAA provides that the parties will adopt measures enabling their investigative services to maintain direct contacts to facilitate, through exchange of information, prevention, investigation and repression of violations of customs laws. The UK MAA contains no provisions on execution of requests.

Exemptions from assistance

The model MAA provides that where the requested state believes that compliance with a request would infringe upon sovereignty, security, public policy or other substantive national interest, assistance may be refused or compliance may be subject to satisfaction of certain requirements; and that assistance may be postponed by the requested state on the ground that it would interfere with an ongoing investigation, prosecution or proceeding.

This provision, or one very similar, is included in the MAA's of 10 Member States (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Spain, Sweden, and the UK).

The Danish MAA also provides that if the requesting state would be unable to give the assistance requested, it must so indicate in the request, and that compliance by the requested state would be discretionary. The UK provision adds that assistance may be refused if it would in the opinion of the requested state involve the violation of an industrial, commercial, or professional secret; and where the request is one that the requesting state itself could not satisfy, it will so state in the request, and compliance will be in the discretion of the requested state.

Confidentiality

Customs Service officials explain that the reason for confidentiality of the information exchanged pursuant to an MAA is not to jeopardize an ongoing case: release of the

information could make the subject of the investigation aware of the case, which will weaken enforcement.⁴⁸

As in the other areas, the provisions of 18 USC 1905 apply to government officials dealing with information obtained under a Customs MAA. Second, the Privacy Act, 5 USC 552a, prohibits unauthorized disclosures of personal data.⁴⁹ In addition, an internal Customs rule provides that business information shall be reviewed internally by the Customs Service to determine whether it can be shared with a foreign government. Some information may also be classified as secret under the National Security Act, such as evidence of trafficking in nuclear arms or stolen uranium.

The US model customs agreement provides that on request of the requested state, the requesting state shall treat all inquiries, information, etc. as confidential, and shall be afforded the same protection with respect to confidentiality and official secrecy as applies under domestic law in the requesting state with respect to that type of information. Further, that any request for confidential treatment shall set forth the reason for the request. Customs Service officials stated that in criminal cases, requests for confidentiality are normally made; most other information provided pursuant to an MAA is not accompanied by a confidentiality request. Information which has been provided with a request for confidentiality is used mainly to elicit further information.

The model is essentially followed in the MAA's of 10 Member States (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Spain, Sweden, and the UK). However, unlike the model, which requires confidential treatment only if requested, the Member State MAA's do not impose the need for a request.

The Spanish MAA adds that information shall not be treated as confidential when the supplying party expressly states that confidential treatment is not necessary.

Disclosure and Use

If confidentiality has been requested, but no colourable claim of confidentiality could be made under US domestic law, then the Customs Service cannot assure compliance with the request.

Absent a request for confidentiality, Customs Service officials can share information collected under an MAA with another federal agency provided a basis exists to do so under domestic law. For instance, if the Customs Service discovers that securities fraud has been committed, it could transmit the information to the SEC, since a basis exists to do so under domestic law. Under some circumstances, the Customs Service is obliged to transmit information to other

⁴⁸ Interview of Lars-Erik Hijenhjelm, staff attorney, Office of Chief Counsel, Department of the Treasury, US Customs Service, March 1995.

⁴⁹ New agreements with EU Member States must be especially sensitive to protection of personal data pursuant to the EU personal data collection directive. This directive provides that no Member State shall disclose such information to a non-Member State unless the latter abide by the same or higher rules on the release of personal data. Accordingly, a new MAA being negotiated with the Netherlands will contain an annex requiring protection of personal data, at the insistence of the Netherlands.

federal agencies. The Customs Service is subject to several mandatory disclosure requirements, such as those in criminal proceedings where the defendant has the right to request from the prosecution any evidence that relates to his guilt or innocence.

Disclosures to state agencies would not be required. However, absent a confidentiality request, the Customs Service would attempt to accommodate a state's request for information.

The model MAA provides that disclosure is allowed to the extent that there is an obligation to do so under the constitution or laws of the requesting state in a criminal prosecution, and that the requesting state shall notify any such proposed disclosure to the requested state in advance.

No disclosure provision is included in the MAA's of 9 Member States (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Spain, and Sweden). The explanation is that these agreements were entered at a time when the model agreements had not yet incorporated disclosure provisions. Only the UK MAA contains a provision similar to that in the model.

As to use, the model provides that the information obtained may be used in all proceedings, whether judicial, administrative, or investigative, and including proceedings on classification, value and other characteristics relevant to enforcement of customs laws and proceedings involving fines, penalties, forfeitures and liquidated damages. Use for other purposes can be made only when the supplying party has given its express consent.

The model is essentially followed in the MAA's of 9 Member States (Austria, Belgium, Denmark, Finland, France, Italy, Spain, Sweden, UK). The UK agreement specifies that the consent must be in writing, and provides further details than the model as to court use.

The German MAA contains no provision on use.

Information obtained under an MAA where confidentiality has been requested can be used in negotiations with the party in question, and to elicit further information not subject to a requirement of confidentiality.

Dual criminality

Neither the model agreement nor the Member State MAA's contain a dual criminality requirement.

Experience to date

Customs officials cautioned that the wording of an agreement does not present a clear picture of how it actually functions. Rather, the relationship between the Customs Service attache and its counterpart is the crucial determinant.

Annexes

TABLE 1: EXCHANGE OF INFORMATION AGREEMENTS
Between the United States and the EU Member States

MEMBER STATE	Securities MOU	Criminal MLAT	Tax Treaty	Customs MAA
Austria	no	negotiating	yes (1966)	yes (1987)
Belgium	no	signed but not in effect	yes (1971)	yes (1993)
Denmark	no	no	yes (1995)	yes (1991)
Finland	no	no	yes (1971)	yes (1989)
France	yes (1989)	no	yes (1995)	yes (1993)
Germany	no	no	yes (1989)	yes (1975)
Greece	no	no	yes (1953)	yes (1993)
Ireland	no	no	yes (1951)	no
Italy	yes (1993)	yes (1982)	yes (1984)	yes (1989)
Luxembourg	no	negotiating	yes (1996)	no
Netherlands	yes (1989)	yes (1981)	yes (1994)	no
Portugal	no	no	yes (1995)	no
Spain	yes (1992)	yes (1990)	yes (1990)	yes (1993)
Sweden	yes	negotiating	yes (1994)	yes (1988)
United Kingdom	yes (1991)	not in effect	yes (1980)	yes (1989)

TABLE 2: SECURITIES MEMORANDA OF UNDERSTANDING Between the United States and the EU Member States

France

TYPE OF ASSISTANCE : Authorities mutually agree to provide broadest possible assistance within framework of agreement, to communicate to other information relative to elements related to investigations, purpose of which is to determine whether a person has violated laws and regulations of state. Assistance shall include:

- a. access to information in files;
- b. taking statements of persons;
- c. communication of documents. (Art. 3.1)

EXECUTION OF REQUEST : Requests shall be executed in accordance with procedures of requested state. (Art. 3.2)

Requested authority will communicate to requesting authority information contained in its files on request. (Art. 6.1)

If requested, requested authority may take the statement of all persons who have participated in facts specified or having information related to these facts or require production of relevant documents. Statements will be taken in conformance with the regulations pertaining to investigations in the requested state. (Art. 6.2)

Person whose statement is taken has right to have counsel present during taking of statement. (Art. 6.3)

While not normal practice, if requested authority consents, representatives of requesting authority may be present when statement taken and may prescribe specific questions to be asked (Art. 6.4) and verbatim transcript may be made of statement (Art. 6.5).

EXEMPTIONS FROM ASSISTANCE : Assistance may be refused if:

- a. compliance would injure sovereignty, security, essential economic interests or public order of requested state.

- b. request not in accordance with requirements of MOU;
- c. information requested concerns facts that originated before effective date of MOU;
- d. criminal proceeding already initiated in requested state based on the same facts and against same persons or same persons already sanctioned by requested state, unless requesting authority can show relief would not be duplicative. (Art. 4.3)

CONFIDENTIALITY : Each authority shall keep confidential requests made within framework of this MOU, contents of such requests, and other matters arising during operation of MOU, notably consultations. (Art. 8.1)

Requesting authority shall keep confidential any information received pursuant to this MOU to same extent as would be in requested state, except when must be disclosed in course of permitted use. (Art. 8.2)

Authorities may make exception to these principles. (Art. 8.3)

USE : Requesting authority may use information solely:

- a. for purposes stated in the request, notably compliance with or enforcement of legal provisions specified in request; or
- b. for purposes within general framework of use stated in request, notably conducting civil or administrative enforcement proceeding; assisting in a professional enforcement proceeding, assisting in proceeding including one to permit subsequent criminal prosecution, or conducting investigation related thereto. (Art. 7.1)

For all other uses, must notify requested authority and provide opportunity to oppose use. If opposes, parties will consult. (Art. 7.2)

Italy

TYPE OF ASSISTANCE : Authorities intend to provide each other maximum assistance possible under MOU, to facilitate exchange of information between such authorities relating to facts in connection with investigations to determine whether any person has violated laws or regulations of requesting state, including:

- a. provide access to information in the files of requested authority;
- b. take statements from persons;
- c. obtain documents from persons; and
- d. conduct compliance inspections or examinations of investment businesses, securities processing businesses and securities markets. (Art. 3.1)

EXECUTION OF REQUEST : Authorities intend to utilize full powers to implement MOU but recognize differences in scope of authority by which they may implement and enforce laws and regulations of their respective states. (Art. 3.2)

Access to information in files of requested authority will be provided on request of requesting authority. (Art. 6.1)

If requested statement of persons who have participated in facts specified, or other person subject of control of requested authority with information related to facts, will be taken and production of relevant documents required.

Statements will be taken in same manner and to same extent as in proceedings in requested state. (Art. 6.2)

Person whose statement is taken has right to have counsel present during taking of statement. (Art. 6.3)

While not normal practice, if requested authority consents, representatives of requesting authority may be present when statement taken and may prescribe specific questions to be asked (Art. 6.4) and verbatim transcript may be made of statement. (Art. 6.5)

EXEMPTIONS FROM ASSISTANCE : Assistance may be denied where:

- a. execution would prejudice the sovereignty, security, fundamental economic interests, or public order of requested state;
- b. request not in accordance with MOU;
- c. information requested concerns facts that originated before effective date of MOU;
- d. criminal proceeding already initiated in requested state based on same facts and against same persons, or same persons already sanctioned by re-requested state for same actions, unless requesting authority can show relief would not be duplicative. (Art. 4)

CONFIDENTIALITY : Each authority shall keep confidential, to extent permitted by law, requests made within framework of this MOU, contents of such requests, and other matters arising during operation of MOU, including consultations. (Art. 8.1)

Requesting authority shall keep confidential any information received pursuant to this MOU to same extent as would be in requested state, except when must be disclosed in course of permitted use. (Art. 8.2)

Authorities may make exception to these principles. (Art. 8.3)

USE : Requesting authority may use information solely:

- a. for purposes stated in request, including ensuring compliance with or enforcement of legal provisions specified in request; or
- b. for purposes within general framework of use stated in request, including conducting civil or administrative enforcement proceeding; assisting with SRO enforcement proceeding or market surveillance; assisting in proceeding including one to permit subsequent criminal prosecution, or conducting investigation related thereto. For other use, must notify requested authority and provide opportunity to oppose use. If opposes, parties will consult. (Art. 7)

Netherlands

TYPE OF ASSISTANCE : Each authority undertakes to provide other with greatest possible measure of mutual administrative assistance in obtaining and exchanging information relating to administration and enforcement of other's securities laws and regulations. (Art. 2.1). Assistance includes:

- a. Obtaining and providing information and documents by requested state;
- b. Taking statements of persons by requested state; and
- c. Conducting compliance inspections or examinations of securities businesses by requested state. (Art. 2.2)

EXECUTION OF REQUEST : Requests shall be executed in accordance with laws and procedures of requested state. Insofar as possible, information shall be obtained in the form and pursuant to procedures desired by requesting state, including statements of persons. (Art. 5.3)

Requested state shall conduct examinations of books and records of securities business or its custodian. (Art. 5.4)

Requested state may permit presence of persons designated by requesting state, who shall be allowed

to formulate questions to be asked at execution of request. (Art. 5.5)

EXEMPTIONS FROM ASSISTANCE : Requested state may refuse to comply with request on grounds that:

- a. compliance would prejudice security or other essential public interest of requested state;
- b. would interfere with ongoing investigation being conducted by requested state. (Art. 3.3)

CONFIDENTIALITY : Each authority will maintain secrecy, to extent permitted by law, of request, and information gathered and provided pursuant to request. Secrecy may be waived by mutual agreement of both states. (Art. 7.1)

USE : Requesting state may use information only for use specified in request. Re use in criminal proceedings, prior approval of requested state required; re all other uses, requesting state must inform requested state before using information for reasons other than those indicated in request. Requested state may oppose only where would not be in interest of administration and enforcement of securities laws or for reasons listed in Art 3.3 (Art 6)

Spain

TYPE OF ASSISTANCE : Assistance to facilitate enforcement of securities laws, granting licenses etc., inspection of investment business, and conduct of investigations, litigation or prosecution where information located within jurisdiction of state of requested authority is needed to determine whether, or prove that laws or regulations of state of requesting authority may have been violated. (Cl. 3, Sec. 1, para. 1) Assistance to include:

- a. Providing access to information in the files of the requested Authority;
- b. Taking testimony and statements of persons;
- c. Obtaining information and documents from persons; and
- d. Conducting compliance inspections or examinations of investment businesses, securities processing businesses and securities markets. (Cl. 3, Sec. 1, para. 2)

EXECUTION OF REQUEST : Access to information in files of requested authority will be provided upon request of requesting authority. (Cl. 3, sec. 4, para. 1)

Requested authority will, on request, take testimony or statements of persons involved in activities underlying request or possessing information that may assist in carrying out request; requested authority may require production of other information or evidence from other persons (Cl. 3, Sec. 4, para. 2)

Testimony to be taken in same manner as in investigations or proceedings in requested state. Persons providing information or evidence will be entitled to all rights and protection of law of state of requested authority. (Cl. 3, Sec. 4, para. 3)

When requested, testimony will be taken under oath and a transcript made. Representative of requesting state may be present. (Cl. 3, Sec. 4, para. 4)

When requested, inspection or examination of books and records of investment business, its custodian or agent, a securities market, or a securities processing business will be conducted. (Cl. 3, Sec. 4, para. 5)

Requesting authority may request that designated person be permitted to take testimony or conduct inspection. Requested authority has discretion to grant. (Cl. 3, Sec. 4, para. 6)

EXEMPTIONS FROM ASSISTANCE :

- a. Provision of assistance would violate national or public interest or law of state of requested Authority; or
- b. Request not in accordance with provisions of MOU. (Cl. 3, Sec. 2, para. 4)

CONFIDENTIALITY : Each authority will keep confidential requests and consultations between authorities and unsolicited assistance; and any information received pursuant to MOU. (Cl. 3, Sec. 6, para. 1)

DISCLOSURE : Requesting authority will not offer information to, and will use best efforts to ensure

that it is not obtained by, any other person. Unless otherwise agreed, if other person obtains information, requesting authority will use best efforts to ensure no further disclosure. (Cl. 3, Sec. 6, para. 2)

Requesting authority will notify requested authority of legally enforceable demand for information prior to complying; will assert such legal exemptions or privileges as appropriate. (Cl. 3, Sec. 6, para. 3)

USE :

- a. For purposes stated in request, including ensuring compliance with or enforcement of laws of requesting authority.
- b. conducting civil or administrative enforcement proceeding, assisting in sro enforcement proceeding, in criminal prosecution, or conducting investigation. (Cl 3, Sec. 5, para. 1)

To use for other purpose, requesting authority must notify requested authority and provide it with opportunity to oppose use within 14 days. If opposes, authorities "agree to consult" concerning reasons for objections. (Cl. 3, Sec. 5, para. 2)

DUAL CRIMINALITY : No. (Cl. 3, Sec. 1, para. 1)

United Kingdom

TYPE OF ASSISTANCE : Each party to provide fullest possible measure of mutual assistance to other subject to its laws and national policy. Such assistance may include:

- a. Providing access to information in files of requested authority;
- b. questioning or taking testimony of persons designated by requesting authority;
- c. obtaining specified information and documents from persons;
- d. obtaining compliance inspections or examinations of investment or futures businesses;
- e. permitting representatives of requesting authority to participate in conduct of enquiries made by requested authority pursuant to above. (Para. 6)

If one authority obtains information which it recognizes as clearly giving rise to suspicion of a

breach of any legal rule or requirement of any other authority, then it will, to extent permitted by law, offer to provide such information to such authority for any purpose and subject to conditions applicable to a request under MOU. (Para. 20)

EXECUTION OF REQUEST : Questioning or taking testimony of persons will be conducted in same manner and to same extent as investigations or other proceedings under laws of jurisdiction of requested authority. (Para. 13a)

When requested, questioning or taking testimony will be conducted under oath and transcript will be made. (Para. 13B)

Representative of requesting authority may be present at questioning or testimony, may prescribe specific questions to be asked of any witness, and

may otherwise participate in examination of any witness. (Para. 13c)

Requested authority may in its discretion grant request that requesting authority's representatives be permitted to conduct interrogation of any person, participate in inspection or examination of books and records of investment or futures business or its custodian or agent. If request denied, authorities agree to consult. (Para. 14)

Person providing testimony, information or documents will be entitled to all rights and protections of laws of jurisdiction of requested authority. Where assertions made regarding other rights and privileges arising pursuant to laws of requesting state, authorities agree to consult. (Art. 15)

EXEMPTIONS FROM ASSISTANCE : Assistance may be denied on grounds of public interest. (Para. 7)

Authorities acknowledge that certain requests may relate to possible breach of laws, regulations, and requirements that involve assertion of jurisdiction not recognised by requested authority. Where requested authority considers that an assertion of jurisdiction in a matter that is subject of request would conflict seriously with and prejudice its sovereign interests, the request will be denied. (Para. 8)

Authorities intend to consult about individual cases falling outside scope of legal rules or requirements

covered by agreement, to determine whether assistance will be provided in such cases. (Para. 9)

CONFIDENTIALITY : Requesting authority will keep confidential any information provided, unless disclosed in furtherance of purpose for which requested. (Para. 17)

Each authority will keep confidential to extent permitted by law any request for information made under this MOU and any matters arising in course of its operation, including consultation, unless disclosure absolutely necessary to carry out request or requesting authority waives confidentiality. (Art. 19)

DISCLOSURE : If information obtained by another public body, requesting authority will use best efforts to ensure it will not be used in any way that involves disclosure to another person. (17a)

USE : Use for purpose of securing compliance with or enforcement of legal rules specified in request and others alleged in same proceedings; or if not alleged in same proceedings, with permission of requested authority; or conducting civil or administrative enforcement proceedings, assisting in a criminal prosecution, or conducting an investigation related to legal rule alleged in request. (Para. 16)

DUAL CRIMINALITY : No. (Para. 4)

TABLE 3: MUTUAL LEGAL ASSISTANCE TREATIES Between the United States and the EU Member States

Italy

TYPE OF ASSISTANCE : Contracting parties to provide mutual assistance in criminal investigations and proceedings, including:

1. locating persons
2. serving documents
3. producing documents and records
4. executing requests for search and seizure
5. taking testimony
6. transferring persons for testimonial purposes
7. immobilizing and forfeiting assets (Art. 1)

Re documents, requested state shall provide a copy of publicly available documents or records; may in its discretion provide documents or records not publicly available to extent would be available to own law enforcement or judicial authorities. (Art. 12)

EXECUTION OF REQUEST :

1. Competent officials of requested state shall do everything in their power to execute request; courts of requested state shall issue subpoenas, search warrants, or any other process necessary in execution of request. (Art. 4)
2. A person from whom evidence is sought shall, if necessary, be compelled to appear and testify to same extent as would be required in criminal investigations or proceedings; have specified rights of accused. (Art. 14)

EXEMPTIONS FROM ASSISTANCE :

1. execution would prejudice security or other essential public interests of the requested state
2. request relates to purely military or political offense
3. request does not comply with treaty requirements (Art. 5)

CONFIDENTIALITY :

1. When necessary, requested state may require that evidence and information provided, and information derived therefrom, be kept confidential in accordance with stated conditions. Nevertheless, disclosure may be made where necessary as evidence in public proceeding.
2. If deemed necessary, Requesting State may request that application for assistance, contents of request and its supporting documents, and the granting of such assistance be kept confidential. (Art. 8)

USE : The requesting state shall not use evidence obtained, nor information derived therefrom, for purposes other than those stated in request without the prior consent of the Requested State. (Art. 8)

DUAL CRIMINALITY REQUIREMENT : no (Art. 1.3)

Netherlands

TYPE OF ASSISTANCE : Contracting parties to provide mutual assistance in criminal investigations and proceedings, including:

1. locating persons
2. serving documents
3. providing records
4. taking testimony or statements of persons
5. producing documents
6. executing requests for search and seizure
7. transferring persons in custody for testimonial purposes (Art. 1)

Re documents, requested state shall provide copy of publicly available records; may in its discretion

provide any record or information in its possession but not publicly available to extent and under conditions would be available to own law enforcement or judicial authorities. (Art. 4)

EXECUTION OF REQUEST : Requested state shall execute requests for search and seizure in accordance with its laws and practices. (Art. 6)

EXEMPTIONS FROM ASSISTANCE :

1. execution would prejudice security or other essential public interests of the requested state
2. request relates to matter considered political offense by the requested state

3. request relates to prosecution of person considered immune
4. request does not comply with provisions of treaty. (Art. 10)

CONFIDENTIALITY : When necessary, requested state may require that evidence and information provided under treaty and information derived therefrom be kept confidential in accordance with stated conditions, except to extent that disclosure necessary as evidence in public proceeding. (Art 11)

USE : The requesting state shall not use any evidence obtained under treaty nor information derived therefrom for purposes other than those stated in the request without prior consent of requested state. (Art. 11.2)

DUAL CRIMINALITY REQUIREMENT : Requested state shall execute requests for search and seizure if subject offense is punishable under laws of both contracting parties by deprivation of liberty for period >1 year; or if less, if listed in annex to Treaty. (Art. 6)

Spain

TYPE OF ASSISTANCE : Contracting states to provide mutual assistance in investigations and prosecutions in criminal matters, including:

1. taking testimony or statements of persons
2. providing documents, records, and articles of evidence
3. serving documents
4. locating or identifying persons or items
5. transferring persons in custody for testimony or other purposes;
6. executing requests for searches and seizures
7. immobilizing assets
8. assisting in proceedings related to forfeiture and restitution
9. initiating criminal proceedings in requested state, and
10. any other form of assistance not prohibited by laws of requested state. (Art. 1.1)

EXECUTION OF REQUEST : Requested state shall do everything in its power to execute request. Its courts shall have authority to issue subpoenas, search warrants, or other orders necessary to execute request. (Art. 5.1)

Person in requested state from whom evidence requested pursuant to Treaty shall be compelled, if necessary, to appear and testify or produce any item, including documents, records, and articles of evidence. Person who gives false testimony subject to prosecution and punishment in requested state. Has certain rights. (Art. 8)

EXEMPTIONS FROM ASSISTANCE :

1. request relates to offense under military law which would not be an offense under ordinary criminal law; or
2. execution of request would prejudice security or similar essential interests of requested state. (Art. 3.1)

CONFIDENTIALITY : Requested state shall use best efforts to keep confidential a request and its contents if requested by requesting state; if impossible, former shall so inform latter, who will determine whether request should nevertheless be executed. (Art. 5.5)

Requested state may request that information furnished be kept confidential, and requesting state shall use best efforts to comply. (Art. 7)

USE : Requested state may request that information furnished under treaty be used only subject to terms and conditions it may specify, and requesting state shall use best efforts to comply. Information made public in requesting state may in accordance with Treaty thereafter be used for any purpose. (Art. 7)

DUAL CRIMINALITY REQUIREMENT : No, unless assistance is requested for purposes of assistance in proceedings related to forfeiture and restitution, when it will be necessary for act giving rise to that proceeding to constitute a crime and be punishable by a sentence consisting of the deprivation of liberty for a period of more than one year under the laws of both Contracting States. (Art. 1.3)

TABLE 4: TAX TREATIES
Between the United States and the EU Member States
Provisions governing exchange of information

US MODEL

TYPE OF ASSISTANCE : Exchange of such information as is necessary for carrying out provisions of treaty or domestic tax law of the contracting states concerning taxes covered by the convention and not contrary to the convention. (Art. 26.1)

EXECUTION OF REQUEST : Requested state shall obtain information in same manner and to same extent as if tax of requesting state were tax imposed by requested state. Requested state, if requested to do so, shall provide information in form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings) to same extent such depositions and documents could be obtained under laws and administrative practices of requested state with respect to its own taxes. (Art. 26.3)

EXEMPTIONS FROM ASSISTANCE : No obligation to:

1. carry out administrative measures at variance with laws and administrative practice of that or other contracting state;

2. supply information which is not obtainable under laws or in normal course of administration of that or other contracting state;
3. supply information which would disclose trade, business, industrial, commercial or professional secret or trade process, or information, disclosure of which would be contrary to public policy. (Art.. 26.2)

CONFIDENTIALITY : Any information received by a contracting state shall be treated as secret in same manner as information obtained under the domestic laws of that state. (Art. 26.1)

DISCLOSURE : Disclosure only to persons or authorities (including courts and administrative bodies) involved in assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by treaty. Art. 26 .1)

USE : Only for purposes of assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by treaty. (Art. 26.1)

OECD MODEL

TYPE OF ASSISTANCE : Exchange of such information as is necessary for carrying out the provisions of the convention or domestic laws of the contracting states concerning taxes covered by the convention and not contrary to the convention.

EXEMPTIONS FROM ASSISTANCE : No obligation to:

1. carry out administrative measures at variance with laws and administrative practice of that or other contracting state;
2. supply information which is not obtainable under laws or in normal course of

administration of that or other contracting state;

3. supply information which would disclose trade, business, industrial, commercial or professional secret or trade process, or information, disclosure of which would be contrary to public policy.

CONFIDENTIALITY : Any information received received by a contracting state shall be treated as secret in same manner as information obtained under domestic laws of that state.

DISCLOSURE : Disclosure only to persons or authorities (including courts and administrative bodies) involved in assessment or collection of , enforcement or prosecution in respect of, or determination of appeals in relation to, taxes covered by convention. They may disclose information in

public court proceedings or judicial decisions.

USE : Use only for purposes of assessment or collection of , enforcement or prosecution in respect of, or determination of appeals in relation to, taxes covered by convention.

Austria

TYPE OF ASSISTANCE : Such information (being information available under respective taxation laws of contracting states) as necessary for carrying out provisions of present Convention or for prevention of fraud or the like in relation to taxes which are subject of Convention. (Art. XVI(1)).

No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process. (Art. XVI(1)).

EXEMPTIONS FROM ASSISTANCE : No obligation to carry out administrative measures at variance with regulations and practice of either contracting state or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of state making application. (Art. XVI (2)).

CONFIDENTIALITY: Any information exchanged shall be treated as secret. (Art. XVI(1)).

DISCLOSURE : Disclosure only to persons concerned with assessment and collection of taxes which are subject of Convention. (Art. XVI(1)).

Belgium

TYPE OF ASSISTANCE : Such information as is pertinent to carrying out provisions of convention or preventing fraud or fiscal evasion in relation to taxes which are subject of convention. (Art. 26(1)).

obtainable under laws, or in normal course of administration, of that contracting state or other contracting state, or to supply information which would disclose trade, business, industrial, commercial, or professional secret or trade process or information, disclosure of which would be contrary to public policy. (Art. 26, para. 2)

Exchange of information shall be either routine or on request with reference to particular cases. Competent authorities of contracting states may agree on list of information which shall be furnished on routine basis. (Art. 26(3)).

CONFIDENTIALITY : Any information so exchanged shall be treated as secret. (Art. 26(1)).

EXEMPTIONS FROM ASSISTANCE : No imposition on contracting states of obligation to carry out administrative measures at variance with laws or administrative practice of that or other contracting state; to supply particulars which are not

DISCLOSURE : Disclosure to persons (including a court or administrative body) concerned with assessment, collection, enforcement or prosecution in respect of taxes which are subject of convention. (Art. 26(1)).

Denmark

TYPE OF ASSISTANCE : Such information (being information available under respective taxation laws of contracting states) as is necessary for carrying out provisions of present convention or prevention

of fraud or administration of statutory provisions against tax avoidance in relation to taxes which are subject of present convention. (Art. XVII)

EXEMPTIONS FROM ASSISTANCE : State may refuse to comply with application for information or assistance for reasons of public policy or if compliance would involve violation of trade, business, industrial or professional secret or trade process. (Art. XIX)

CONFIDENTIALITY : Any information so exchanged shall be treated as secret. (Art. XVII)

DISCLOSURE : Disclosure to persons concerned with assessment and collection of taxes which are subject of present convention. (Art. XVII)

Finland

TYPE OF ASSISTANCE : Such information as is pertinent to carrying out the provisions of this Convention or preventing fraud or fiscal evasion in relation to the taxes which are the subject of this Convention. (Art. 29.1)

Exchange of information either on routine basis or on request with reference to particular cases. Competent authorities of contracting states will agree on list of information which shall be furnished on routine basis. (Art. 29.3)

Competent authorities of contracting states shall notify each other of any amendments or published interpretations of relevant tax laws. (Art. 29.4, 5)

EXEMPTIONS FROM ASSISTANCE : No imposition of obligation to carry out administrative measures at variance with laws or administrative

practice of that or other contracting state; to supply particulars which are not obtainable under laws or in normal course of administration of that or other contracting state; to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy. (Art. 29.2)

CONFIDENTIALITY : Any information so exchanged shall be treated as secret. (Art. 29.1)

DISCLOSURE : Disclosure to persons (including a court or administrative body) concerned with assessment, collection, enforcement, or prosecution in respect of taxes which are subject of this convention. (Art. 29.1)

France

TYPE OF ASSISTANCE : Such information as is pertinent to carrying out the provisions of this convention or preventing fraud or fiscal evasion in relation to the taxes which are the subject of this convention. (Art. 26.1)

Exchange of information shall be either on routine basis or on request with reference to particular cases. Competent authorities of contracting states shall agree on list of information which shall be furnished on routine basis. (Art. 26.3)

EXEMPTIONS FROM ASSISTANCE : No imposition of obligation to carry out administrative measures at variance with laws or administrative practice of that or other contracting state; to supply particulars which are not obtainable under laws or

in normal course of administration of that or other contracting state; to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, disclosure of which would be contrary to public policy. (Art. 26.2)

CONFIDENTIALITY : Any information so exchanged shall be treated as secret. (Art. 26.1)

DISCLOSURE : Disclosure to persons (including a court or administrative body) concerned with the assessment, collection, or administration of, or the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes which are the subject of the convention. (Art. 26.1)

Germany

TYPE OF ASSISTANCE : Such information as is necessary for carrying out provisions of this Convention and of domestic law of contracting states concerning taxes covered by this convention insofar as the taxation thereunder is not contrary to this convention. [The exchange of information is not restricted by Art. 1 (personal scope)]. (Art. 26.1)

Contracting states may, through diplomatic channels, exchange notes under which they may exchange information for purposes of taxes imposed by a contracting state not referred to in Art 2 (Taxes Covered). (Art. 26.6)

EXECUTION OF REQUEST : Requested state shall obtain information to which request relates in same manner and to same extent as if tax of requesting state were tax of requested state and were being imposed by it. If requesting state so requests, requested state shall provide information in form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings) to same extent such deposition and documents can be obtained under laws and administrative practices of requested state with respect to own taxes. (Art. 26.3)

EXEMPTIONS FROM ASSISTANCE : No imposition of obligation to carry out administrative measures at variance with laws and administrative

practice of that or other contracting state; to supply information not obtainable under laws or in normal course of administration of that or other contracting state; to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy. (Art. 26.2)

CONFIDENTIALITY : Any information received by a contracting state shall be treated as secret in the same manner as information obtained under the domestic laws of the state. (Art. 26.1)

DISCLOSURE : Disclosure to persons or authorities (including courts and administrative bodies) involved in assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by this convention. (Art. 26.1) Disclosure may be made in public court proceedings or judicial decisions, unless competent authority of contracting state supplying the information raises an objection. (Art. 26.1)

USE : Use only for purposes of assessment, collection, or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to the taxes covered by this convention. (Art. 26.1)

Greece

TYPE OF ASSISTANCE : Such information (being information which competent authorities have at their disposal) as is necessary for carrying out the provisions of the present convention or for prevention of fraud or administration of statutory provisions against legal avoidance in relation to taxes which are subject of present convention. (Art. 18)

EXEMPTIONS FROM ASSISTANCE : No information shall be exchanged which would

disclose a technical secret, or process relating to trade, industry, business or a profession. (Art. 18)

CONFIDENTIALITY : Any information so exchanged shall be treated as secret. (Art. 18)

DISCLOSURE : Disclosure to persons concerned with the assessment and collection of the taxes which are the subject of the present convention. (Art. 18)

Ireland

TYPE OF ASSISTANCE : Such information (being information available under the respective taxation laws of the contracting parties) as is necessary for carrying out the provisions of the present convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of the present convention. (Art. 20.1)

EXEMPTIONS FROM ASSISTANCE : No information shall be exchanged which would

disclose any trade secret or trade process. (Art. 20.1)

CONFIDENTIALITY : Any information so exchanged shall be treated as secret. (Art. 20.1)

DISCLOSURE : Disclosure to persons concerned with the assessment and collection of the taxes which are the subject of the present convention. (Art. 20.1)

Italy

TYPE OF ASSISTANCE : Such information as is necessary for carrying out provisions of this convention or of domestic laws of contracting states concerning taxes covered by convention insofar as taxation thereunder is not contrary to the convention, and for prevention of fraud or fiscal evasion. Exchange of information not restricted by Art. 1 (personal scope). (Art. 26.1)

EXEMPTIONS FROM ASSISTANCE : No imposition of obligation to carry out administrative measures at variance with laws and administrative practices of either contracting state; to supply information which is not obtainable under laws or in normal course of administration of either contracting state; or to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy. (Art. 26.2)

CONFIDENTIALITY : Any information received by a contracting state shall be treated as secret in same manner as information obtained under domestic laws of that state. (Art. 26.1)

DISCLOSURE : Disclosure to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by the convention. (Art. 26)

USE : Use only for purposes of assessment or collection of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by the convention. (Art. 26.1)

Luxembourg

TYPE OF ASSISTANCE : Such information as is necessary for carrying out provisions of present convention or of the domestic laws of the contracting states concerning taxes covered by convention insofar as taxation not contrary to convention. (Art. 28.1)

EXECUTION OF REQUEST : Contracting states undertake to lend each other support and assistance in collection of taxes to extent necessary to ensure that relief granted by present convention from taxation imposed by contracting state does not inure

to benefit of persons not entitled thereto. With respect to specific request for collection assistance:

- a. requesting state must produce a copy of a document certified by its competent authority specifying that sums referred to it for collection of which it is requestion intervention of other state, are finally due and enforceable;
- b. document produced in accordance with provisions of this paragraph shall be rendered enforceable in accordance with laws of requested state;
- c. requested state shall effect recovery in accordance with rules governing recovery of

- similar tax debts of its own; however, tax debts to be recovered shall not be regarded as privileged debts in requested state; and
- d. appeals concerning existence or amount of debt shall lie only to competent tribunal of requesting state. (Art. 28.4)

EXEMPTIONS FROM ASSISTANCE : In no case shall assistance under convention be construed to impose on a contracting state the obligation:

- a. to carry out administrative measures at variance with laws and administrative practice of that state or other contracting state;
- b. to supply information which is not obtainable under laws or in normal course of administration of that state or other contracting state;
- c. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information disclosure of which would be contrary to public policy. (Art. 28.2)

Provisions of para. 4 shall not impose upon either contracting state obligation to carry out

administrative measures that would be contrary to its sovereignty, security, public policy or essential interests. (Art. 28.4)

CONFIDENTIALITY : Any information received by competent authority of contracting state from competent authority of other contracting state shall be treated as secret in same manner as information obtained under domestic law of that state. (Art. 28.1)

DISCLOSURE : Disclosure only to persons or authorities (including courts and administrative bodies) involved in assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by convention. Such persons or authorities may disclose the information in public court proceedings or judicial decisions. (Art. 28.1)

USE : Use only for purposes of assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by convention. (Art. 28.1)

Netherlands

TYPE OF ASSISTANCE : Such information as is necessary for carrying out provisions of convention or of the domestic laws of the states concerning taxes covered by the convention including for the assessment, collection, administration, enforcement, prosecution before an administrative authority or initiation of prosecution before a judicial body, or determination of appeals with respect to the taxes covered by the convention. [Exchange of information not restricted by Art. 1 (General scope)]. (Art. 30.1)

EXECUTION OF REQUEST : Requested state shall obtain information to which request relates in same manner and to same extent as if tax of requesting state were tax of requested state and were being imposed by requested state. If specifically requested, requested state shall endeavour to provide information in form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings), to same extent such depositions and documents can be obtained under laws and administrative practices

of requested state with respect to own taxes. (Art. 30.2)

EXEMPTIONS FROM ASSISTANCE : Obligation limited with respect to assistance in enforcing domestic laws insofar as taxation thereunder is not contrary to convention.

No obligation to carry out administrative measures at variance with laws and administrative practice of either state, to supply information not obtainable under laws or in normal course of administration of either state; or to supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information, the disclosure of which would be contrary to public policy. (Art. 32)

CONFIDENTIALITY : Any information received by one of the states shall be treated as secret in the same manner as information obtained under domestic laws of that state. (Art. 30.1)

DISCLOSURE : Disclosure to persons or authorities (including courts and administrative bodies) involved in above functions in relation to taxes covered by convention. (Art. 30.1)

Disclosure allowed in public court proceedings or in judicial decisions. (Art. 30.1)

States may release information to arbitration board in conjunction with arbitration procedure regarding interpretation or application of convention. (Art. 30.3). Arbitration board receiving information subject to same requirements. (Art. 30.3)

USE : Use only for purposes of assessment, collection, administration, enforcement, prosecution before an administrative authority or initiation of prosecution before a judicial body, or determination of appeals with respect to taxes covered by convention. (Art. 30.1)

State may use information obtained under convention as evidence before a criminal court only if prior authorization has been given by competent authority which has supplied the information, but authorities may agree to waive condition of prior authorization. (Art. 30.1)

Portugal

TYPE OF ASSISTANCE : Such information as is necessary for carrying out provisions of this convention or of the domestic laws of contracting states concerning taxes covered by convention insofar as taxation thereunder is not contrary to convention. Exchange of information not restricted by Art. 1 (Personal scope). (Art. 28.1)

EXECUTION OF REQUEST : Requested state shall obtain information to which request relates in same manner and to same extent as if tax of requesting state were tax of requested state and were being imposed by requested state. If specifically requested, requested state shall provide information in form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings) to same extent such depositions and documents can be obtained under laws and administrative practices of requested state with respect to its own taxes. (Art. 28.3)

EXEMPTIONS FROM ASSISTANCE : No obligation to carry out administrative measures at variance with laws and administrative practice of either contracting state; to supply information not

obtainable under laws or in normal course of administration of either contracting state; or to supply information that would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy. (Art. 28.2)

CONFIDENTIALITY : Any information received by a contracting state shall be treated as secret in same manner as information obtained under domestic laws of that state. (Art. 28.1)

DISCLOSURE : Disclosure to persons or authorities (including courts and administrative bodies) involved in assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by convention. (Art. 28.1)

USE : Use limited to purposes of assessment, collection or administration of, enforcement or prosecution in respect of, or determination of appeals in relation to taxes covered by convention. (Art. 28.1)

Spain

TYPE OF ASSISTANCE : Such information as is necessary for carrying out provisions of this convention or domestic laws of contracting states concerning taxes covered by convention insofar as taxation thereunder is not contrary to convention.

Exchange of information is not restricted by Art. 1 (General Scope). (Art. 27.1)

EXEMPTIONS FROM ASSISTANCE : No obligation to carry out administrative measures at

variance with laws and administrative practice of either contracting state; to supply information not obtainable under laws or in normal course of administration of either contracting state; or to supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy. (Art. 27.2)

CONFIDENTIALITY : Any information received by a contracting state shall be treated as secret in the same manner as information obtained under the domestic laws of that state. (Art. 27.1)

DISCLOSURE : Disclosure to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the convention. (Art. 27.1)

Information may be disclosed in public court proceedings or in judicial decisions. (Art. 27.1)

USE : Use limited to purposes of assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the convention. (Art. 27.1)

Sweden

TYPE OF ASSISTANCE : Subject to reciprocity, each contracting state undertakes to furnish such information in the matter of taxation which the authorities of the state concerned have at their disposal or are in the position to obtain under their own law, as may be of use to other state in assessment of taxes in question. Such information and correspondence shall be exchanged in the ordinary course or on demand. (Art. 15)

Provides specifics of what US shall furnish to Sweden at end of each calendar year (Art. 16.1) and Sweden to US at end of each calendar year (Art. 16.2) Requesting state shall be entitled to obtain, through diplomatic channels, from requested state, particulars in concrete cases relative to application to citizens or corporations or other entities of

requesting state, of taxes to which present convention relates. With respect to particulars in other cases, each state will give consideration to requests from other. (Art. 18)

EXEMPTIONS FROM ASSISTANCE : Art. 18 imposes no obligation to carry out administrative measures at variance with regulations and practices of either contracting state, or to supply particulars which are not procurable under its own legislation or that of requesting state.

Requested state may refuse to comply with request for reasons of public policy or if compliance would involve violation of business, industrial or trade secret or practice. (Art. 19)

United Kingdom

TYPE OF ASSISTANCE : Such information (being information available under respective taxation laws of contracting states) as is necessary for carrying out provisions of this convention or for prevention of fraud or administration of statutory provisions against legal avoidance in relation to taxes which are subject of this convention. (Art. 26.1)

EXEMPTIONS FROM ASSISTANCE : No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process. (Art. 26.1)

Contracting states shall consult with each other for purpose of cooperating and advising in respect of any action to be taken in implementing this Article. (Art. 26)

CONFIDENTIALITY : Any information exchanged shall be treated as secret. (Art. 26.1)

DISCLOSURE : Disclosure to persons (including a court or administrative body) concerned with assessment, collection, enforcement or prosecution in respect of taxes which are subject of this convention. (Art. 26.1)

TABLE 5: CUSTOMS MUTUAL ASSISTANCE AGREEMENTS
Between the United States and the EU Member States
Provisions governing exchange of information

US MODEL

TYPE OF ASSISTANCE : Assistance to prevent, investigate and repress any offense, in accordance with provisions of agreement. (Art. 2.1)

Assistance to include information necessary to ensure enforcement of customs laws and accurate assessment of customs duties and other taxes by customs administrations. Such information, which may be provided upon a party's own initiative or upon request, shall include:

- a. enforcement actions that might be useful to suppress offenses and special means of combatting offenses;
- b. new methods used in committing offenses;
- c. observations and findings resulting from successful application of new enforcement aids and techniques; and
- d. techniques and improved methods of processing passengers and cargo. (Art. 3.1)

EXECUTION OF REQUESTS : All assistance shall be performed in accordance with domestic law. (Art. 2.2)

Requested state shall take all reasonable measures to execute request, and if required, shall endeavour to seek any official or judicial measure necessary to carry out request. (Art. 6.1)

Requested state shall, upon request of requesting state, conduct, or permit requesting state to conduct, any necessary investigation, verification, inspection or fact-finding inquiry in connection with matters referred to in Agreement, including questioning of experts, witnesses and persons suspected of having committed an offense. (Art. 6.2)

Upon request, requested state shall, to fullest extent possible, authorize officials of requesting state to be present in territory of requested state to assist in inquiries into, or formulation of official report of, offense of concern to requesting state. (Art. 6.3)

Request that certain procedure be followed shall be complied with, subject to domestic law of requested state. (Art. 6.4)

EXEMPTIONS FROM ASSISTANCE : Where requested state believes compliance with request would infringe upon sovereignty, security, public policy or other substantive national interest, assistance may be refused or compliance may be subject to satisfaction of certain conditions or requirements. (Art. 6.1)

Assistance may be postponed by requested state on ground that will interfere with an ongoing investigation, prosecution or proceeding. Parties shall consult. (Art. 6.2)

CONFIDENTIALITY : Upon request of requested state, requesting state shall treat all inquiries, information, documents and other communications received as confidential. In making request for confidentiality, requested state shall state its reasons for such request. (Art. 4.2)

Any information, documents, or other communications obtained or communicated under Agreement shall be afforded in requesting state same protection with respect to confidentiality and official secrecy as applies under domestic law in requesting state to same kind of information, documents or other such communications. (Art. 4.3)

DISCLOSURE : Disclosure allowed to extent there is obligation to do so under Constitution or law of requesting state in criminal prosecution. Requesting state will notify any such proposed disclosure to requested state in advance. (Art. 4.1)

USE : Use in all proceedings, whether judicial, administrative or investigative and shall include but not be limited to proceedings on classification, value and other characteristics relevant to enforcement of customs laws and proceedings involving fines, penalties, forfeitures, and liquidated damages. (Art. 3.3)

Use for other purposes only when supplying party has given express consent. (Art. 4.1)

Austria

TYPE OF ASSISTANCE : Assistance to prevent, investigate and repress any offense (Art. 2.1); and for assessing customs duties and other taxes by the Customs Services. (Art. 2.2)

EXECUTION OF REQUESTS : Law of requested state shall be applicable in execution of requests; requested state shall be required to seek any official or judicial measure necessary to carry out request. (Art. 7.1) To execute request, requested state shall conduct any necessary investigation, including questioning of persons suspected of having committed offense, as well as experts and witnesses. (Art. 7.2)

Requested state shall undertake verifications, inspections, and fact-finding inquiries in connection with matters referred to in Agreement. (Art. 7.3) Request that certain procedure be followed shall be complied with pursuant to laws. (Art. 7.4)

Request that requesting state's representative be present when action carried out shall be complied with to fullest extent possible. (Art. 7.5)

EXEMPTIONS FROM ASSISTANCE : Where compliance with a request would infringe upon [a party's] sovereignty, security, public policy (ordre public) or other substantive national interests, assistance can be refused or compliance may be made subject to the satisfaction of certain conditions. (Art. 4.1)

CONFIDENTIALITY : Inquiries, information, documents and other communications received by either party shall, upon request of the supplying party, be treated as confidential. The reasons for such a request shall be stated. (Art. 3.1)

USE : Information, documents and other communications received in the course of mutual assistance may only be used for the purposes specified in the present Agreement, including use in judicial or administrative proceedings. Such information, documents and other communications may be used for other purposes only when the supplying party has given its express consent. (Art. 3.2)

Belgium

TYPE OF ASSISTANCE : Assistance to prevent, investigate and repress any infractions of customs laws (Art. 2.1); and to ensure the accurate assessment of customs duties and other taxes by the Customs Administrations. (Art. 2.2.)

EXECUTION OF REQUESTS : Requested state shall conduct verifications, inspections, investigations, including those involving inquiries and research, and interrogations of persons suspected of having committed an offense as well as witnesses and experts. (Art. 7.1)

Investigations to be conducted in conformity with laws and regulations of requested party. (Art. 7.2) Requested state shall to fullest extent possible, authorize customs officials of requesting state to be present for investigations undertaken for it. (Art. 7.3)

EXEMPTIONS FROM ASSISTANCE : Where compliance with the request would harm [a party's] sovereignty, security, public policy or other substantive national interest, assistance can be

refused or compliance may be made subject to the satisfaction of certain conditions or requirements. (Art. 4.1)

CONFIDENTIALITY : Inquiries from either party, information, documents and other communications received by either Party shall, upon request of the supplying party, be treated as confidential.. The reasons for such a request shall be stated. (Art. 3.2) Intelligence, documents or other information communicated under Agreement shall be afforded same protection regarding confidentiality and secrecy in requesting state as applies to that type of information obtained in own territory. (Art. 3.3)

USE : Information, documents and other communications received within the framework of this agreement may only be used for the purposes specified in the present agreement, including use in judicial or administrative proceedings. Such information, documents and other communications may be used for other purposes only with the express consent of the supplying party. (Art. 3.1)

Denmark

TYPE OF ASSISTANCE : Assistance to prevent, investigate and repress any offence (Art. 2.1); and for assessing customs duties, taxes and other liabilities and for the purpose of enforcing controls within the authority of the Customs Service. (Art. 2.2)

The Customs Services shall, on their own initiative or upon request, furnish each other all available information regarding activities which may result in offenses within the territory of the other party. This would include documentation relating to transportation and shipment of goods showing value, disposition and destination of those goods. (Art. 3.1)

They shall inform each other whether goods exported from the territory of one of the parties have been lawfully imported or brought into the territory of the other Party. (Art. 3.2)

If the Customs Service so requested does not have the information asked for, it will seek that information in accordance with the provisions of its customs laws. (Art. 3.3)

The services shall, upon request, supply reports, records of evidence or certified copies of documents giving all available information on transactions, detected or planned, which constitute an offence of the customs laws of that Party. (Art. 4.1)

The services shall to the extent of their abilities exercise special surveillance of means of transport known or suspected of being used in offenses. goods designated as the object of extensive clandestine traffic, and persons suspected of being engaged in the offense. (Art. 5)

"If the Customs Service of one Party so requests, the Customs Service of the other party shall initiate all official inquiries concerning operations which are or appear to be contrary to the customs law."(Art. 6)

Requested state may authorize its officials to appear as witnesses or experts before courts or authorities of requesting state.; they may give evidence

regarding facts established by them in course of their duties. (Art. 10)

EXECUTION OF REQUESTS : Requested state shall initiate all official inquiries concerning operations which are or appear to be contrary to customs laws. It shall communicate results to customs service making request. (Art. 6.1)

Inquiries shall be conducted under laws and regulations of requested state. (Art. 6.2)

Requested state shall notify requesting state if it believes representative of requesting state should be present. (Art. 7.1)

EXEMPTIONS FROM ASSISTANCE : Where compliance with a request for assistance is considered to infringe upon the sovereignty, security, public policy or other essential interests of the requested State, compliance may be refused, or assistance provided partly or subject to certain conditions or requirements. (Art. 8.1)

If requesting state would be unable to give assistance requested, it must so indicate in request; compliance by requested state discretionary. (Art. 8.2)

CONFIDENTIALITY : Information, documents and other communications received by the Customs Service of one Party shall be subjected to the same official confidentiality as applied in that State to the same kind of information and documents. (Art. 9.1)

USE : Information, documents and other communications received in the course of mutual assistance may only be used for the purposes specified in the present Agreement including use in judicial or administrative proceedings. Such information, documents and other communications may be used for other purposes only when the supplying Customs Service has given its express consent. (Art. 9.2)

Finland

TYPE OF ASSISTANCE : Mutual administrative assistance to prevent, investigate and repress any offense" (Art. 2.1); and "all information apt to ensure the accurate assessment of customs duties, taxes and other liabilities and charges by the customs services. (Art. 2.2)

The Customs Services shall, upon request, furnish each other all available information regarding activities which may result in offenses within the territory of the other Party. In serious cases such information shall be provided without a request being made. (Art. 3.1) They shall inform each other whether goods exported from the territory of one Party have been lawfully imported or brought into the territory of the other Party. (Art. 3.2)

If the Customs Service so requested does not have the information asked for, it will seek that information in accordance with the provisions of its customs laws. (Art. 3.3)

The services shall, upon request, supply reports, records of evidence or certified copies of documents giving all available information on transactions, detected or planned, which constitute or appear to constitute an offense under the customs laws of that Party. (Art. 4.1)

The services shall to the extent of their abilities exercise special surveillance of means of transport known or suspected being used in offenses within the territory of the requesting Party", goods designated as the object of extensive clandestine trade, or persons known or suspected of being engaged in an offense. (Art. 5)

If the Customs Service of one Party so requests, the Customs Service of the other Party shall initiate all official inquiries or investigations concerning operations which are or appear to be contrary to the customs laws.", or undertake verifications, inspections and fact-finding inquiries."(Art. 6)

EXECUTION OF REQUESTS : Requested state shall initiate all official inquiries or investigations concerning operations which are or appear to be contrary to customs laws. It shall communicate results of such inquiries or investigations to requesting state. (Art. 6.1)

Requested state shall undertake verifications, inspections, and fact finding inquiries in connection with matters referred to in present Agreement. (Art. 6.2)

Request that certain procedures be followed shall be complied with pursuant to laws of requested state. (Art. 6.3)

Request that representatives of requested state be present when action carried out shall be complied with to fullest extent possible. (Art. 6.4)

EXEMPTIONS FROM ASSISTANCE : Where compliance with a request would infringe upon [a party's] sovereignty, security, public policy or other substantive national interest, assistance can be refused or compliance may be made subject to the satisfaction of certain conditions or requirements. (Art. 7.1)

CONFIDENTIALITY : Inquiries, information, documents and other communications received by either Party shall, upon request of the supplying Party, be treated as confidential. The reasons for such a request shall be stated. (Art. 10.1)

USE : Information, documents and other communications received in the course of mutual assistance may only be used in judicial or administrative proceedings. Such information, documents and other communications may be used for other purposes only when the supplying Party has given its express consent. (Art. 10.1)

France

TYPE OF ASSISTANCE : Assistance to prevent, investigate, record and repress violations of customs laws. (Art. 2.1)

Assistance may include investigations or inquiries, interrogation of suspects, questioning of witnesses. (Art. 6.1)

Information as to whether merchandise legally imported; information about activities possibly giving rise to an offense; exchange information to facilitate the identification, detection and if necessary, seizure of merchandise or proceeds held by violators. (Art. 7.1)

Monitor transportation methods suspected of being used to commit offenses, merchandise identified as the object of large-scale clandestine traffic, and persons known or suspected of committing offenses. (Art. 7.3)

Upon request, information, proof or copies of documents regarding operations which may constitute a violation of the customs laws of the requesting party. (Art. 9.1)

At request of courts or authorities, Customs Administration of other party may authorize its agents to appear as witnesses or experts to give evidence regarding their findings in the exercise of their duties. (Art. 10.1)

EXECUTION OF REQUESTS : Requested state may conduct investigations or inquiries, interrogate suspects, or question witnesses. Findings shall be communicated to requesting state. (Art. 6.1)

Investigations shall be conducted in accordance with laws of requested state. (Art. 6.2)

Requested state may authorize representatives of requesting state to be present during these operations. (Art. 6.3)

EXEMPTIONS FROM ASSISTANCE : Where assistance may be prejudicial to the sovereignty, security of its State, law and order or any other vital interests. (Art. 3.1)

CONFIDENTIALITY : Information obtained is confidential and enjoys the same protection accorded by national laws with respect to information of the same nature. (Art. 4.2)

USE : Documents, material and other information may only be used in administrative or legal procedures, or for other purposes only when the Customs Administration which has provided them gives its express consent. (Art. 4)

Germany

TYPE OF ASSISTANCE : Assistance to prevent, investigate and repress breaches of customs laws. (Art. 2.1) Assistance to cover determinations involving classification, value, etc., investigative and criminal proceedings, and US proceedings on fines, penalties, forfeitures, and liquidated damages, and German monetary fine proceedings. (Art. 2.2)

Parties shall exchange lists of goods known or suspected of being imported or exported in violation of customs laws. (Art. 4)

Upon request, exercise special surveillance of conveyances suspected of being in breach of the customs laws, movements of goods designated as the objects of an extensive clandestine trade,

localities where unusual deposits of goods have been established; persons known or suspected of being engaged in breaches of the customs laws of the other party. (Art. 5)

Issue certifications, upon request, attesting that specific goods exported from territory of one party were lawfully imported into the territory of the other party. (Art. 6)

Furnish all information, upon request, regarding acts which may infringe customs laws of other party, by forwarding documents related thereto. (Art. 7.1)

To prevent, investigate, repress narcotics smuggling, provide all such information without request. (Art. 8)

Upon request, undertake verifications, inspections and fact-finding inquiries. (Art. 9.1)

EXECUTION OF REQUESTS : Requested state shall undertake verifications, inspections, and fact finding inquiries in connection with assistance under agreement. (Art. 9.1)

EXEMPTIONS FROM ASSISTANCE : Where compliance would infringe upon the sovereignty,

security, public policy or other substantive national interests. (Art. 3)

CONFIDENTIALITY : Inquiries, information, reports and expert opinions, etc., shall be kept secret in accordance with the legal requirements of the receiving party and subject to such conditions as may be imposed by the supplying party, to the extent permitted under the laws of the receiving party. (Art. 10)

Italy

TYPE OF ASSISTANCE : Mutual assistance to prevent, investigate and repress the violations of the Customs laws of the parties. (Art. 1.1)

Parties will exchange, on request, information enabling them to ensure the correct assessment of the Customs duties and other importation and exportation taxes. Information to be furnished spontaneously if involves serious danger to the economy, public health, public security or other vital interest of the other country. (Art. 3.1)

The authorities shall exchange lists of goods known to involve illicit trafficking. (Art. 4)

Authorities shall exercise special surveillance of movements of persons suspected of violating customs laws, unusual storage places, movements of goods, currency and monetary instruments, vehicles suspected of being used to commit violations, etc. (Art. 5)

Upon request, information that goods exported from one have been imported to other. (Art. 6)

Make available records in the customs authorities possession. (Art. 9)

Conduct any necessary investigation, as requested. (Art. 10)

EXECUTION OF REQUESTS : Parties will adopt measure enabling their investigative services to maintain direct contacts to facilitate, through exchange of information, prevention, investigation and repression of violations of customs laws. (Art. 8)

EXEMPTIONS FROM ASSISTANCE : Where assistance would be prejudicial to the sovereignty, security and public order of other fundamental interests of their respective countries. (Art. 9.1)

CONFIDENTIALITY : Information, communications and documents obtained under the agreement are considered confidential. (Art. 15.1)

Information obtained from one party protected by national law in same way as domestic documents and information. (Art. 15.2)

USE : Utilize in civil, criminal and administrative proceedings all information and documents obtained pursuant to the agreement. (Art. 11)

Information may be used only for the purposes of the agreement. They may be furnished to offices other than those which shall use them for such purposes only if the authorities furnishing them explicitly consent thereto. (Art. 15)

Spain

TYPE OF ASSISTANCE : Assistance to prevent, investigate and repress any offense, in accordance with agreement. Assistance shall include, on request, all information apt to ensure the accurate assessment of customs duties and other taxes by the customs administrations. (Art. II)

Conduct investigations and take official and judicial measures aimed at obtaining evidence relating to customs offense being investigated; question subjects suspected of having committed an offense. (Art. VII)

Forward copies of documents; have officials appear as witnesses in judicial or administrative proceedings of other state; make available records in the customs authority's possession. (Art. VIII)

Inform each other whether goods exported from the territory of one party have been lawfully imported into the territory of the other party; exercise special surveillance of means of transport suspected of being used in offenses, goods designated as the object of an extensive clandestine trade; persons known or suspected of being engaged in an offense. (Art. X.2)

On request, furnish all information which may result in offenses within the territory of the other party; without request in cases involving substantial damage to economy, public health, public security, or vital interests. (Art. X.3)

On request, furnish documentation relating to transportation and shipment of goods. (Art. X.4)

EXECUTION OF REQUESTS : Requested state shall undertake to conduct investigations and endeavour to take official and judicial measures aimed at obtaining evidence relating to customs offense being investigated in requesting state and shall conduct questioning of subjects suspected of having committed an offense, as well as witnesses and experts. (Art. 7a)

EXEMPTIONS FROM ASSISTANCE : Where providing information would infringe upon sovereignty, security, public policy or other substantive national interest, assistance may be refused or made subject to certain requirements. (Art. IV.2)

CONFIDENTIALITY : Inquiries, information, documents and other communications shall be treated as confidential, except when the supplying party expressly states that confidential treatment is not necessary. (Art. III.2)

Information obtained under agreement shall be afforded same protection as applies to the same kind of information domestically. (Art. III.3)

USE : Use in all proceedings, whether judicial, administrative or investigative. (Art. II.3)

Information, documents and other communications received in the course of mutual assistance may only be used for the purpose specified in the agreement, including use in judicial and administrative proceedings, or for other purposes only when the supplying party has given express consent. (Art. III.1)

Sweden

TYPE OF ASSISTANCE : Mutual administrative assistance to prevent, investigate, and repress any offense, in accordance with agreement. (Art. 2.1)

Provide assistance on request for purpose of assessing customs duties, taxes and other liabilities and charges by the Customs Services. (Art. 2.2)

Furnish all available information regarding activities which may result in offenses within the territory of the other party. (Art. 3.1)

Inform each other on request whether goods exported from the territory of one of the parties have been lawfully imported or brought into the territory of the other party. If Customs service doesn't have this information,, it will seek it in accordance with the provisions of its customs laws. (Art. 3.3)

On request, reports, records of evidence or certified copies of documents giving all available information on transactions which may constitute an offense. (Art. 4.1)

On request, exercise special surveillance of means of transport used in offenses, goods designated as object of an extensive illicit traffic, and persons known or suspected of being engaged in offense. (Art. 5)

On request, initiate official inquiries concerning operations violative of customs laws. (Art. 6.1)

On request, officials may appear as witnesses for other party regarding facts established by them in the course of their duties. (Art. 10)

EXECUTION OF REQUESTS : Requested state shall initiate all official inquiries concerning operations which are or appear to be contrary to customs laws. (Art. 6.1)

Inquiries shall be conducted under laws and regulations of party which has been requested to make them. (Art. 6.2)

EXEMPTIONS FROM ASSISTANCE : Where compliance with a request is considered to infringe upon the sovereignty, security, public policy or other essential interests of the requested State, it may be refused or made subject to certain conditions. (Art. 8)

CONFIDENTIALITY : Information, documents and other communications received by the Customs Service of one party shall be subject to the same official confidentiality as applied to domestic information. (Art. 9)

USE : Information may only be used for the purposes specified in the agreement, including judicial or administrative proceedings, or for other purposes only when the supplying Customs Service has given its express consent. (Art. 9.2)

United Kingdom

TYPE OF ASSISTANCE :

- a. assist in prevention and investigation of contraventions of customs laws;
- b. upon request, assist by providing information to be used in administering and enforcing customs laws; (Para. 2)

If court or customs administration of requesting state request in connection with contraventions of customs laws brought before them, customs administration of requested state may authorize officials to appear as witnesses or experts, who will give evidence regarding facts established by them in course of duties and produce files, documents, or other materials as considered essential for proceedings. (Para. 12)

EXEMPTIONS FROM ASSISTANCE : Where compliance with a request for assistance is considered to be prejudicial to sovereignty, security, public order, public policy or other essential interests of requested state or would in the opinion of that state involve violation of an industrial, commercial or professional secret, it may refuse assistance. (Para. 5)

Where request is one that requesting state itself could not satisfy, requesting state will so state in

request; compliance is in discretion of requested state. (Para. 5)

CONFIDENTIALITY : Requests, information, reports of experts and other communications provided to requesting state will be accorded same protection, including confidentiality, as is afforded to documents and information of like nature under its national law. (Para. 3)

DISCLOSURE : If requesting authority required to inform competent authorities of contraventions, will notify requested authority prior to so informing. (Para. 3(a)).

USE : Information, communications and documents obtained will be used solely for purposes of this memorandum, unless written authorization for other use. (Para. 3)

Information may be used in records of evidence, reports, and testimonies, and proceedings or charges brought before courts. (Para. 4)

Use made as evidence in courts will be determined in accordance with national legal system of requesting state. (Para. 4)

Price (excluding VAT) in Luxembourg: ECU 11.50

ISBN 92-827-8470-3



OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L-2985 Luxembourg

