a Code on Measures to Discourage the Importation of Counterfeit Goods. It is essential that this code be concluded at an early date during the upcoming round of GATT negotiations.

6. However, since this code does not address critical intellectual property issues other than trade in counterfeit goods, such as patent and copyright protection, the upcoming negotiations should also have as an important goal, the conclusion of a more general intellectual property code or agreement to deal with broader intellectual property issues.

7. Such a code or agreement could include provisions: (i) improving minimum levels of protection for intellectual property rights which signatory nations would agree to implement and enforce both internally and at their borders; (ii) requiring signatories to follow certain rules of behavior designed to make consideration and promulgation of intellectual property rules and procedures more equitable, e.g., transparency of rule making and adequate provisions for notice; and (iii) establishing dispute resolution and enforcement mechanisms.

8. Consideration of intellectual property issues in the upcoming GATT negotiations should not supplant existing international intellectual property regimes; rather, it is contemplated that these other regimes will have an important continuing role to play, particularly in providing necessary technical expertise, in connection with such a code or agreement.

Conclusion

By means of this recommendation, the American Bar Association can provide the U.S. government with some of the support it needs to insure that intellectual property issues are placed on the agenda for the upcoming round of multilateral trade negotiations.

Respectfully submitted,

Robert S. Rendell
Chairman

December 1986

V. Report on Cayman Islands Treaty

BE IT RESOLVED that the American Bar Association supports ratification by the United States of the Treaty Between the United States of
America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, signed July 3, 1986.

REPORT

1. The purpose of this report is to analyze the provisions of the U.S.-Cayman Islands treaty relating to Mutual Legal Assistance in Criminal Matters, signed at Grand Cayman, Cayman Islands on July 3, 1986. The treaty has not yet been formally transmitted by the President to the Senate. A copy of the treaty and an accompanying exchange of diplomatic notes [are reprinted at 26 I.L.M. 536-52 (1987)].

2. Background: As one newspaper has recently noted, the Cayman Islands and other Caribbean islands with strict bank secrecy laws have been viewed for several years as "a thorn in the side of United States law enforcement officials, who have complained that drug traffickers, money launderers, and white-collar criminals have been able to hide their illicit profits in accounts in banks on those islands." New York Times, Section D, p. 10, Col. 2 (July 4, 1986). For example, one U.S. businessman organized and supervised the laundering of a $2.7 million kickback fund through an elaborate network of secret bank accounts in various countries, including one on the Cayman Islands. United States v. Davis, 767 F.2d 1025 (2d Cir. 1985). When U.S. prosecutors subpoenaed records from the Cayman Islands bank, the defendant instituted litigation in that country under its bank secrecy laws preventing the bank from supplying any records for more than a year. Id. at 1032-33.

3. The mutual assistance treaty signed July 3, 1986, was the result of three years of negotiations between U.S. and Cayman Islands' officials. Its obvious intent is to balance the U.S. Government's interest in more effective enforcement of its criminal laws against the Cayman Islands' desire to maintain its attractiveness to the financial community by protecting investors' privacy.

4. The United States has four mutual assistance treaties currently in force: with Switzerland, Turkey, the Netherlands, and Italy. A detailed comparative analysis of the contents of those four treaties was recently published in The International Lawyer, Vol. 19, No. 1 at pp. 189-223 (Winter 1985). The Cayman Islands treaty is generally similar to these other treaties. Where it varies in significant degree, the differences are understandable in light of the treaty's background.

5. Like the earlier mutual assistance treaties, the Cayman Islands treaty authorizes a wide variety of assistance between the two countries. Specified assistance includes taking of testimony, providing documents and records, locating persons, executing requests for searches and seizures, and immobilizing criminally obtained assets (Article 1.2). The treaty leaves
the list of assistance flexible by permitting under Article 1.2(i) "any other steps deemed appropriate" by both parties. Cf. Barr v. U.S. Department of Justice, No. 86 C 2447, slip op. at 3 (E.D. N.Y., filed October 15, 1986) (assistance under Swiss treaty not limited to specified activities).

6. Also like the earlier treaties, the Cayman Islands treaty does not create "any right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request" (Article 1.3). Case law makes clear that signatory states to a treaty may confer judicially enforceable rights on individuals in the treaty or preclude them as the states see fit. See United States v. Davis, supra, 767 F.2d at 1030 n.9. Where, as here, no such rights are granted, individuals lack standing to compel or to challenge activities under the treaty. Id. at 1030.

7. Private parties continue to have available other forms of discovery, such as letters interrogatory. See Fustok v. Banque Populaire Suisse, 546 F. Supp. 506 (S.D.N.Y. 1982). Some concern, however, has been expressed that forcing criminal defendants to utilize the much slower procedures of letters interrogatory, while allowing U.S. law enforcement agencies to utilize the treaty's quicker provisions, offers the prosecution an unfair advantage. E.g., 19 International Lawyer at 221. Restricting direct access to the treaty's mechanisms to the party states is an appropriate and efficient structure for a bilateral treaty, particularly one that is intended to remove a serious block to prosecution of crimes. The current U.S. practice is apparently for the government to make requests under mutual legal assistance treaties on behalf of the defense upon a showing of necessity and where the court so orders. See 19 International Lawyer at 222 n.181. This approach is acceptable and provides a reasonable balancing of interests between the government and the defendant.

8. The purpose of mutual assistance is restricted under the Cayman Islands treaty to "the investigation, prosecution, and suppression of criminal offenses" as the latter term is defined in Article 19.3. Article 19.3(a) employs the principle of dual criminality in defining a "criminal offense" as any felony that is a crime in both countries; however, Articles 19.3(b) through (k) list a number of financial and other crimes for which assistance is authorized without regard to their criminality under Cayman Islands law. These offenses include racketeering, insider trading, securities fraud, foreign corrupt practices (such as bribing foreign officials), and failing to report the international transfer of currency which constitutes the proceeds of a criminal offense.

9. Not surprisingly, in light of the Cayman Islands' history and concerns, the treaty expressly excludes from the definition of a criminal offense "any conduct or matter which relates directly or indirectly to the regulation, imposition, calculation or collection of taxes" (Article 3.1). Never-
theless, the treaty does authorize assistance in prosecuting two types of 
tax-related crime: fraud connected with income tax shelters and false 
statements on tax returns with respect to unlawful proceeds of other 
crimes covered by the treaty. Compare Article 3.1 with Article 19.3(d) 
and (e).

10. The Cayman Islands treaty contains special provisions relating to 
exclusivity of assistance (Article 17). While acknowledging that assistance 
may be granted pursuant to any other applicable “international agree-
ments or arrangements,” the treaty prohibits any party from enforcing 
any “compulsory measure, including a grand jury subpoena,” to obtain 
documents unless that party’s obligations under the treaty have been 
fulfilled (Article 17.1, 17.3). The treaty establishes in certain cases a time 
limit of 90 days for the requested party’s fulfillment of its obligations 
(Article 17.4). Article 17 reflects the parties’ unhappy experience in con-
nection with United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th 
Cir. 1982) (“Nova Scotia I”), and 740 F.2d 817 (11th Cir. 1984) (“Nova 
Scotia II”). In that case, U.S. law enforcement officials subpoenaed the 
Miami branch of the Bank of Nova Scotia for records of its Cayman Islands 
affiliate. When the bank refused to produce the documents, a U.S. district 
court levied a $1.8 million fine against the bank, which was later upheld 
on appeal.

11. One other provision of the Cayman Islands treaty differs somewhat 
from earlier treaties. Pursuant to Article 3.2(c), the requested party may 
deny assistance if the request does not “establish that there are reason-
able grounds for believing: (i) that the criminal offense specified . . . has 
been committed; and (ii) that the information sought relates to the of-
fense. . . .” Such a provision again is not surprising given the Cayman 
Islands’ concern for protecting the privacy of investors and for allaying 
concerns about opening bank records to mere “fishing expeditions.”

12. The Cayman Islands treaty is of significance as a model for mutual 
legal assistance treaties with other Caribbean islands with similar bank 
secrecy laws. Pursuant to a protocol agreed to upon the signing of the 
treaty and made an integral part of the treaty, the terms of the Cayman 
Islands treaty may be made applicable in whole or in part to Anguilla, 
the British Virgin Islands, Montserrat, and the Turks and Caicos Islands 
by Exchange of Notes between the U.S. and the United Kingdom. Similar 
treaties are in the process of negotiation with Jamaica and the Bahamas.

Conclusion

The mutual assistance treaty with the Cayman Islands represents a 
valuable step in eliminating barriers to effective law enforcement in the
Caribbean and is consistent with other such treaties previously signed by the United States. The treaty should be ratified by the President with the advice and consent of the Senate.

Respectfully submitted,

Robert S. Rendell
Chairman

December 1986