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International Action Against Drug Trafficking: Trends in United Kingdom Law and Practice**

I. The Context

In recent years the problems associated with the illicit use and misuse of narcotic drugs and psychotropic substances have assumed greater political and social prominence in the United Kingdom than ever before. This results, in part, from the fact that the scale of the problem has increased significantly throughout the 1980s. All of the admittedly imperfect statistical indicators, including the volume of drugs seized, the number of persons convicted or cautioned for drug offenses, and the number of drug "addicts" notified to the government by medical practitioners, tell the same disturbing story.¹ In addition:

There is evidence that drug misuse has become more pervasive. In the 1960s it tended to be associated with an alternative youth sub-culture, mainly centered in London, or—in the case of cocaine—with people in the higher socio-economic brackets. But drug misuse is now encountered in all social classes and in all parts of the country.²

Not only has illicit drug use in the United Kingdom expanded in scope, it has also started to change in nature. In 1985 the House of Commons Home Affairs

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1. See, e.g., HOME OFFICE, *TACKLING DRUG MISUSE: A SUMMARY OF THE GOVERNMENT'S STRATEGY 5-6* (H.M.S.O., London: 3d ed., 1988). In May 1989, the Home Secretary, Mr. Douglas Hurd, stated: "In the United Kingdom, all the main indicators have risen substantially over the last few years and continue to do so." Opening by Home Secretary: Speaking Notes, Pompidou Group Ministerial Meeting 1 (May 18-19, 1989) (unpublished typescript provided by the Home Office) [hereinafter *May 1989 Remarks*].

2. *TACKLING DRUG MISUSE*, *supra* note 1, at 6.

Committee, troubled by the pattern of cocaine abuse in the United States, expressed the fear that "unless *immediate* and effective action is taken Britain and Europe stand to inherit the American drug problem in less than five years. We see this as the most serious peace time threat to our national well-being."³ In spite of this warning, and subsequent governmental action, the Home Office in early 1989 confirmed that "the perceived threat from cocaine has materialized."⁴ As the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs was to inform Parliament on January 11, 1989:

There is, unfortunately, a considerable amount of evidence that the drug cartels have targeted the whole of Europe for an increase in the export of cocaine, especially from Latin America. Also, because of the difference between the wholesale price of cocaine in London and in the United States there is an increasing trend towards exporting refined cocaine directly from the United States to the United Kingdom and elsewhere in Europe.⁵

A further factor, worthy of note at this stage, is that "[d]rug-related mortality is in the process of being disastrously inflated by the advent of the Acquired Immune Deficiency Syndrome (AIDS)."⁶ Research has demonstrated that this results from the practice followed by intravenous drug users in certain parts of the country, and particularly in Scotland, of sharing infected equipment.⁷ As recently noted: "Most of the infected drug users are young, sexually active and heterosexual. Some are working prostitutes. The possible implications of this development for public health are extremely grave and threaten to dwarf those of illegal drug use itself."⁸

In the face of this ever growing threat, the British government has evolved a comprehensive strategy⁹ that affords full recognition to the global nature of the

3. House of Commons, Home Affairs Committee, *Misuse of Hard Drugs (Interim Report)*, H.C. Paper No. 399, para. 2 (1984-85) [hereinafter *Misuse of Hard Drugs*].

4. *Home Affairs Committee Inquiry into Drug Trafficking and Related Serious Crime: Memorandum Submitted by the Home Office*, H.C. Paper No. 370-i, at 6, para. 40 (1988-89) [hereinafter *Inquiry*].

5. 144 PARL. DEB., H.C. (5th ser.) No. 24, col. 823-24 (Jan. 11, 1989) (Oral Answers). On the street price of selected illicit drugs in the United Kingdom see 149 PARL. DEB., H.C. (5th ser.) No. 73, col. 538 (Mar. 21, 1989) (Written Answers). On the concern felt over the appearance in the United Kingdom of the cocaine derivative known as "crack," see the remarks of the Parliamentary Under-Secretary of State for the Home Department, 154 PARL. DEB., H.C. (5th ser.) No. 118, col. 520 (June 9, 1989), and House of Commons, Home Affairs Committee, *Crack: The Threat of Hard Drugs in the Next Decade (Interim Report)*, H.C. Paper No. 536 (1988-89).

6. Plant, *The Epidemiology of Illicit Drug Use and Misuse in Britain*, in *DRUGS IN BRITISH SOCIETY* 61 (S. MacGregor ed. 1989).

7. See Brettle, *Human Immunodeficiency Virus and Drug Misuse: the Edinburgh Experience*, 295 BRIT. MED. J. 421 (1987); see also Robertson, *Epidemic of AIDS Related Virus (HTLV-III/LAV) Infection Among Intravenous Drug Abusers*, 292 BRIT. MED. J. 527 (1986).

8. Plant, *supra* note 6, at 62; see also *May 1989 Remarks*, *supra* note 1, at 2.

9. See generally TACKLING DRUG MISUSE, *supra* note 1. The main strands are reducing supplies from abroad, increasing the effectiveness of enforcement, maintaining effective deterrents and tight domestic controls, developing prevention and education, and improving treatment and rehabilitation.

problem¹⁰ and the consequent need for international cooperation.¹¹ As the Home Office, which has the lead departmental responsibility for combating drug misuse,¹² recently stated in a report to a Parliamentary Committee: "A very high proportion of the drugs misused in this country are illegally imported. Support for international action to curb illicit drug production and trafficking is therefore a key element in the government's strategy against drug trafficking and abuse."¹³

The global dimension to British policy has been evident for some years, for example, through its commitment to the Single Convention on Narcotic Drugs, as amended by the 1972 Protocol.¹⁴ This Convention "provides for international controls over the production and availability of opium and its derivatives, synthetic drugs having similar effects, cocaine and cannabis."¹⁵ As a consequence of a number of reservations concerning the efficacy of the 1971 United Nations Convention on Psychotropic Substances,¹⁶ which extends the concept of international control to a wide range of synthetic drugs,¹⁷ the United Kingdom initially refrained from ratifying it. In the mid-1980s, however, the position was reexamined and the conclusion was reached that "these reservations are outweighed by the value of the Convention in combating drug misuse, and in promoting international cooperation."¹⁸ The United Kingdom took the necessary steps to secure full participation in 1986.¹⁹ The British government has also given its full support to new multilateral initiatives. It was an active participant in the June 1987 International Conference on Drug Abuse and Illicit Trafficking,²⁰ and was one of the first signatories of the December 19, 1988,

10. There is ever growing literature on the global nature and extent of the problem of illicit drug use. See, e.g., B. WHITAKER, *THE GLOBAL FIX: THE CRISIS OF DRUG ADDICTION* (1988); see also REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 1988, U.N. Doc. E/INCB/1988/1, U.N. Sales No. E.88.XI.6 (1988).

11. See, e.g., TACKLING DRUG MISUSE, *supra* note 1, at 9-12.

12. For a breakdown on British departmental responsibilities in this area, see *id.* at 36.

13. *Inquiry*, *supra* note 4, at 2, para. 7.

14. Aug. 8, 1975, 976 U.N.T.S. 106 [hereinafter Convention on Narcotic Drugs]. The United Kingdom ratified the Single Convention on Narcotic Drugs on Sept. 2, 1964, and ratified the amending Protocol of 1972 on June 20, 1978. See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1987, at 243, 258, U.N. Doc. ST/LEG/SER. E/6, U.N. Sales No. E.88.V.3 (1988) [hereinafter MULTILATERAL TREATIES].

15. See *Home Office Memorandum of December 1984*, reproduced in House of Commons, Home Affairs Committee, *Misuse of Hard Drugs*, H.C. Paper No. 66, Minutes of Evidence (Mar. 27, 1985) (1985-86).

16. See Aug. 16, 1976, 1019 U.N.T.S. 176 [hereinafter Convention on Psychotropic Substances].

17. See, e.g., S. K. CHATTERJEE, *A GUIDE TO THE INTERNATIONAL DRUGS CONVENTIONS 17-19* (Commonwealth Secretariat, London, 1988). For a brief overview of the international approach to narcotics matters, see Noll, *Drug Control International*, in 9 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 106 (1986).

18. *Misuse of Hard Drugs*, *supra* note 15, para. 21.

19. See MULTILATERAL TREATIES, *supra* note 14, at 251.

20. See 26 I.L.M. 1637 (1988); see also *U.N. Narcotics Conference Meets in Vienna*, DEP'T ST. BULL. 77 (Sept. 1987).

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.²¹ Similarly, the British government has actively encouraged European regional cooperation through its participation in the Council of Europe's "Pompidou Group."²²

Significant though the above initiatives have been, bilateral cooperation continues to play the central role in British policy. It is in this sphere that the most dramatic strides in international cooperation have been secured and on which the principal burden is likely to fall in the future. It is, thus, to some of the more important developments relevant to bilateral cooperation that this study now turns.

II. Extradition

Extradition has been and seems likely to continue to be the major mechanism through which the United Kingdom cooperates with other States in criminal matters, including drug trafficking.²³ In addition, the procedure of extradition lies at the heart of the enforcement system provided in both the Single Convention on Narcotic Drugs, as amended,²⁴ and the Convention on Psychotropic Substances²⁵ and continues to occupy an important place in the more ambitious structure provided in the 1988 United Nations Convention.²⁶

In the United Kingdom the subject of extradition has been governed by a number of statutes of which the most important, and the most antiquated, has

21. For the text, see DEP'T ST. BULL. 49 (Apr. 1989) [hereinafter 1988 U.N. Convention]. For the formal announcement of British signature see 148 PARL. DEB., H.C. (5th ser.) No. 63, col. 549 (Mar. 8, 1989) (Written Answers). As of the time of writing the United Kingdom has introduced into Parliament legislation which, when enacted, will permit ratification of this important Convention. See Criminal Justice (International Co-operation) Bill, H.L. Bill 11, 1988-89. This government measure received its Second Reading in the House of Lords on December 12, 1989. At that time Earl Ferrers, Minister of State, Home Office, noted that whilst some seventy-five states had signed the Convention, as of that date only three (the Bahamas, Nigeria, and China) had ratified it. See PARL. DEB., H.L., Vol. 513, No. 13, 12 December 1989, at col. 1217. He did not mention the important fact that the U.S. Senate has given its advice and consent to the ratification of this measure. See S. EXEC. REP. No. 15, 101st Cong., 1st Sess. (1989).

22. See, e.g., *Inquiry*, *supra* note 4, at 3 paras. 13-14. For a more detailed account of the history and nature of this body, see e.g., *20 March 1985 Supplementary Memorandum Submitted by the Home Office*, reproduced in *Misuse of Hard Drugs*, *supra* note 15. The problem of the international trade in narcotic drugs now regularly appears on the agenda of multilateral fora in which the United Kingdom participates. See, e.g., *The Economic Declaration of 16 July 1989*, DEP'T ST. BULL. 13, 16-17 (Sept. 1989) (issued by the seven major industrialized nations and the President of the Commission of the European Communities).

23. See, e.g., H.C. Paper No. 399, *supra* note 3, para. 6.

24. See, Convention on Narcotic Drugs, *supra* note 14, art. 36. On the nature and importance of extradition in this context, see generally DIVISION OF NARCOTIC DRUGS, UNITED NATIONS, EXTRADITION FOR DRUG-RELATED OFFENSES, U.N. Doc. SU/NAR/5, U.N. Sales No. E.85.XI.6 (1985). See also Fisher, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse has Bolted*, 16 N.Y.U. J. INT'L L. & POL. 353, 382-83 (1984).

25. Convention on Psychotropic Substances, *supra* note 16, art. 22.

26. 1988 U.N. Convention, *supra* note 21, art. 6.

been the Extradition Act, 1870.²⁷ For a number of years there has been concern in governmental circles that the law concerning extradition to foreign states was both outdated and overly stringent and that the legislative scheme was incapable of dealing with "a substantial expansion in international crime, such as drug trafficking."²⁸

For these and other reasons the issue was remitted to an Interdepartmental Working Party which reported in 1982.²⁹ The radical reforms envisaged by that study were, in turn, subject to further examination and consultation in the context of a 1985 Green Paper.³⁰ Finally the British government signified its agreement to seek wholesale change through legislation in the Criminal Justice White Paper of 1986.³¹

Following a lengthy Parliamentary passage, due in part to the intervening British general election of 1987, the Criminal Justice Act received the Royal Assent on July 29, 1988. As expected, this Act³² paved the way for the introduction of profound changes in the law of extradition. Subsequent to the enactment of this statute, and prior to the entry into force of the relevant provisions, however, the decision was taken to consolidate the many Acts dealing with extradition to foreign States and to Commonwealth jurisdictions, the latter being governed by the Fugitive Offenders Act, 1967.³³ Following the *Report on the Consolidation of Legislation Relating to Extradition*, prepared by the Law Commission and the Scottish Law Commission,³⁴ Parliament swiftly passed the Extradition Act 1989,³⁵ which entered into force on September 27 of the same year.³⁶

From what has been said above it will come as no surprise that the resulting reforms in United Kingdom law have been far from straightforward. In particular, the system provided by the Extradition Act, 1870, as amended, has not been entirely abandoned and will continue to govern proceedings with foreign states with which the United Kingdom enjoys extradition treaties until such time as new

27. 33 & 34 Vict., ch. 57 [hereinafter Extradition Act of 1870]. For a brief overview of U.K. extradition law, see E.C.S. WADE AND A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 462-70 (10th ed. 1985).

28. EXTRADITION, CMND. No. 9421 (1985) at 1.

29. See generally A REVIEW OF THE LAW AND PRACTICE OF EXTRADITION IN THE UNITED KINGDOM: REPORT OF AN INTERDEPARTMENTAL WORKING PARTY (Home Office, London 1982) [hereinafter EXTRADITION IN THE U.K.].

30. See EXTRADITION, *supra* note 28.

31. See CRIMINAL JUSTICE: PLANS FOR LEGISLATION, CMND. No. 2658 (1986), paras. 47-52 [hereinafter CRIMINAL JUSTICE PLANS].

32. Criminal Justice Act, 1988, ch. 33 (U.K.) [hereinafter CJA]. See generally Warbrick, *Current Developments: International Law III. Extradition*, 38 INT'L & COMP. L.Q. 418, 424 (1989).

33. 1967 ch. 68 (U.K.) as amended by CJA, *supra* note 32, sch. 1, pt. III.

34. CM. No. 712 (1989). A Supplementary Report, dealing with issues arising in the context of certain multilateral treaties, is reproduced in H.L. Paper 68-II, at vii (1988-89).

35. 1989 ch. 33 (U.K.) [hereinafter EA].

36. *Id.* § 38(2).

agreements are concluded with them.³⁷ In addition, the 1989 Act does not address the subject of the return of offenders as between the United Kingdom and the Republic of Ireland, which remains governed by the simplified procedure provided for in the Backing of Warrants (Republic of Ireland) Act, 1965.³⁸

The 1989 British legislation brings into effect a number of major changes that will impact on the ability of the United Kingdom to extradite persons sought by other States for drug related offenses. The first such important innovation relates to ad hoc extradition. International law accepts the premise that a State has no duty to extradite in the absence of a treaty.³⁹ Equally clear, however, is that no customary international law rule precludes extradition where no treaty exists between the requesting and requested State. Indeed, many civil law countries provide such a facility.⁴⁰ By way of contrast, British law has traditionally contained no legal authority to extradite to a foreign State in the absence of such a treaty.⁴¹ The United Kingdom currently enjoys formal bilateral extradition relationships with just over forty foreign States, including the United States.⁴² In recent years the British government has continued to actively pursue negotiations and, in 1986, concluded a new general extradition treaty with Spain⁴³ as well as a Supplementary Treaty with the United States.⁴⁴ This leaves, however, in excess of sixty States with which Britain has no general

37. *Id.* § 1(3) & sch. 1. As Mr. James Rennie, Parliamentary Counsel, stated in evidence before the Joint Committee on Consolidation Bills:

The 1870 Act is still in force. I should explain to the Committee that it will continue to be in force because it will govern extradition between the United Kingdom and countries with which we have existing treaties until those treaties are denounced or replaced. There is no possibility now of a new 1870 treaty. That is prohibited by the 1988 Act. Any new extradition arrangements therefore will be made under the 1988 procedure . . . The situation is therefore that there are three statutes, 1870, 1967 and 1988. We are consolidating all of them. As the 1870 Act will gradually become less important, it is set out in a Schedule, Schedule 1 to the Bill.

H.L. Paper 68-II, at 8 (1988-89).

38. 1965 ch. 45 (U.K.), as amended by CJA, *supra* note 32, sch. 1, pt. II. For the reasons behind and the nature of this bilateral arrangement, see EXTRADITION, *supra* note 28, at 20.

39. See, e.g., D.W. GREIG, INTERNATIONAL LAW 408 (2d ed. 1976); see also *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

40. See Stein, *Extradition*, 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 222, 223 (1985).

41. See EXTRADITION, *supra* note 28, at 14-15. But see V.E. HARTLEY BOOTH, 1 BRITISH EXTRADITION LAW AND PROCEDURE 12-13, 300 (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980).

42. See EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, 8 JUNE 1972, CMND. No. 6723 (1977). For a listing of other bilateral treaties, see, e.g., EXTRADITION IN THE U.K., *supra* note 29, at 117-18.

43. See CMND. No. 9869 (1986).

44. See CMND. No. 9915 (1986); see also Kulman, *Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty*, 26 VA. J. INT'L L. 755 (1986); Lowe & Warbrick, *Current Legal Developments: II. Extradition: The Supplementary Extradition Treaty Between the United Kingdom and the United States*, 36 INT'L & COMP. L.Q. 404 (1987); Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 TEX. INT'L L.J. 47 (1989).

extradition arrangements.⁴⁵ In the course of its review, the British government concluded that provision should be made to permit extradition even in the absence of a treaty. This facility is commonly described as ad hoc extradition. As the Earl of Caithness stated in the House of Lords on October 20, 1987: "It remains our policy to maintain treaties as the normal basis for extradition but we believe that ad hoc extradition might be a useful supplement to our present arrangements."⁴⁶

The principal argument in favor of ad hoc extradition is administrative convenience. Furthermore, the British government believes that while treaties help to ensure reciprocity, the United Kingdom should not regard reciprocity in the extradition field as necessary in all circumstances. Finally, arrangements with the Commonwealth are based not on treaties, but on substantially uniform legislation among its members.⁴⁷

The Extradition Act, 1989 thus empowers the relevant British Secretary of State to make special extradition arrangements for particular cases with States with which the United Kingdom has no general extradition arrangements.⁴⁸ In such cases the statutory safeguards for the fugitive apply in the same manner as they would to extradition pursuant to a "general extradition arrangement" or treaty.⁴⁹ Following the recommendations of the Working Party, the Act has no specified requirement of reciprocity.

A second major departure from tradition concerns the prima facie case requirement. Under the 1870 Act the requesting State was obliged to provide British courts with adequate evidence of the conviction or guilt of the individual in question before extradition could take place. Insofar as the former is concerned, the only major problem that has arisen concerns cases in which the individual was convicted in absentia. In this context the British government

45. This is noninclusive of Commonwealth countries where the subject is governed by the 1966 Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, as amended. For the consolidated text, see COMMONWEALTH SCHEMES ON MUTUAL ASSISTANCE IN THE ADMINISTRATION OF JUSTICE I (Commonwealth Secretariat, London, 1989) [hereinafter 1966 SCHEME]. As the Legal Division of that body has explained "a 'Scheme' is not a formal multilateral Treaty or Convention, but rather a set of agreed recommendations endorsed by a Law Ministers' Meeting and collectively recommended as a guide to Commonwealth Governments for adoption to regulate their relations with other member countries." *Id.* at i. In addition, the United Kingdom has become a party to a relatively small number of multilateral treaties, dealing with certain types of serious crime of international concern, in which provision is commonly made for extradition. See, e.g., EXTRADITION, *supra* note 28, at 19; see also EA, *supra* note 35, §§ 22-25.

46. 489 PARL. DEB., H.L. (5th ser.) No. 20, col. 58.

47. See EXTRADITION IN THE U.K., *supra* note 29, at 6-9; see also EXTRADITION, *supra* note 28, at 14-15.

48. EA, *supra* note 35, § 3(3)(b).

49. *Id.* § 15. No Parliamentary control over this process is provided for. The expectation is, however, that in such cases the Secretary of State will take such steps as are required to satisfy himself "that the standards of justice and penal administration in the requesting state were such that it would be in the interest of justice to surrender the fugitive." EXTRADITION, *supra* note 28, at 15.

concluded that the law afforded inadequate safeguards. Consequently the Act provides that an individual "shall not" be returned if it appears to either the Secretary of State or the British courts that: (a) the conviction was obtained in his absence; and (b) it would not be in the interests of justice to return him on the ground of that conviction.⁵⁰

Considerable difficulties did, however, arise in cases in which the individual had been accused, but not yet convicted, of a criminal offense. In these circumstances section 10 of the 1870 Act required the foreign State to produce sufficient evidence under English law "to justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England . . ." This is what is known as the *prima facie* case requirement. The need to satisfy this requirement has been the source of considerable dissatisfaction among foreign States and particularly those in Western Europe. As the 1985 Green Paper noted:

Something like a third of applications made to the United Kingdom . . . fail, often because of the inability of the requesting state to satisfy the *prima facie* case requirement. Furthermore there are occasions on which some states are deterred from making a request at all because they believe it will be too difficult to meet the requirement.⁵¹

Eventually, the British government decided that the requesting State should judge the sufficiency of the evidence for a trial of the fugitive. Thus, in the Criminal Justice White Paper the intention to abolish the requirement was announced.⁵² In arriving at this controversial decision, the British government was seemingly persuaded by the view that other elements in British extradition law, such as double criminality, specialty, and the political safeguard, would ensure "that a fugitive is not surrendered in circumstances where this would be manifestly unjust or oppressive."⁵³

When the British government first presented the Criminal Justice Bill to Parliament, it envisioned a narrower scheme, apparently as a result of further consideration of British-American relations. This scheme provided for the progressive abolition of the *prima facie* requirement, by Order in Council, on a State-by-State basis. Even in this form, however, the proposal attracted considerable opposition in Parliament. There it was characterized as extradition on demand and as the elimination of an important and long-established protection for the individual. In short, it was widely regarded as going too far in changing the balance of law against the defendant.⁵⁴

50. EA, *supra* note 35, § 6(2).

51. EXTRADITION, *supra* note 28, at 4; see also Warbrick, *The Criminal Justice Act 1988: (1) The New Law on Extradition*, 1989 CRIM. L. REV. 4, 9-10.

52. See CRIMINAL JUSTICE PLANS, *supra* note 31, para. 50.

53. EXTRADITION, *supra* note 28, at 5; see also CRIMINAL JUSTICE PLANS, *supra* note 31, para. 50.

54. See, e.g., the speech of Lord Irvine of Lairg, 488 PARL. DEB., H.L., (5th Ser.) cols. 950-54 (July 14, 1987). The requirement remains in cases of ad hoc extradition. It also remains in respect

In the face of this opposition, particularly in the House of Lords, the British government made a number of concessions. First, it indicated that it would, in practice, take steps to abolish the requirement only in the context of the relationships with Western European States and parties to the 1957 European Convention on Extradition, which the United Kingdom now intends to ratify.⁵⁵ Second, the British government accepted an amendment whereby all Orders in Council that seek to dispense with the *prima facie* rule "shall be subject to annulment in pursuance of a resolution of either House of Parliament."⁵⁶

Thus, under the 1989 Act, a State requesting the return of an individual accused of an offense under a general extradition arrangement must satisfy the court, unless an Order in Council otherwise provides, "that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court."⁵⁷ The requirement also remains in all cases of *ad hoc* extradition.⁵⁸ In addition, the traditional *prima facie* case requirement continues to govern proceedings brought under the 1870 Act procedures and in respect of Commonwealth countries.⁵⁹ Finally, a number of improvements now obtain that should permit the fugitive to make more effective use of his or her right to make representations to the Secretary of State against return and to seek judicial review of any order by the Secretary of State authorizing return.⁶⁰

Another consequence of the 1989 Act is to expand significantly the range of offenses that attract extradition. This result has been accomplished primarily through the abandonment of the system of specifically listing offenses that are extraditable under U.K. law.⁶¹ A "no list" or "eliminative" method, which defines extraditable offenses in terms of severity of punishment, has replaced the former system. This procedure is favored by many civil law jurisdictions and is the one used in the European Convention of 1957.⁶² The 1989 Act defines an extradition crime as:

of rendition to Commonwealth countries. Commonwealth Law Ministers reaffirmed their support for the requirement at their meeting in Harare in 1986 though certain other changes to the Scheme were agreed at that time. See Commonwealth Law Ministers' Meeting Harare 26 July-1 August, Communiqué (LMM (86) 64).

55. See, e.g., 489 PARL. DEB., H.L. (5th ser.) No. 20, col. 27 (Oct. 20, 1987) (The Earl of Caithness). For the text of the European Convention on Extradition of December 13, 1957, see 359 U.N.T.S. 274 [hereinafter *European Convention*].

56. EA, *supra* note 35, § 4(5); see also 125 PARL. DEB., H.C. (5th ser.) No. 74, cols. 681-82 (Jan. 18, 1988) (Secretary of State for the Home Department); Warbrick, *supra* note 51, at 11.

57. EA, *supra* note 35, § 9(8)(a).

58. *Id.*

59. See clause 5(4)(a) of the 1966 SCHEME, *supra* note 45. The issue of modification of this requirement remains under active discussion in relevant British governmental circles within the Commonwealth.

60. See EA, *supra* note 35, § 13.

61. See EXTRADITION, *supra* note 28, at 9-11. For a listing of such offenses, see EXTRADITION IN THE U.K., *supra* note 29, at 106-07. Most drug related offenses are so included by virtue of § 1 of the Extradition Act, 1932, ch. 39 (U.K.). See also EA, *supra* note 35, sch. 1, § 20 and sch. 2.

62. See European Convention, *supra* note 55, art. 2.

conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offense punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony is so punishable under that law.⁶³

For these purposes the law of the United Kingdom "includes the law of any part of the United Kingdom."⁶⁴ At the Commonwealth Law Minister's Meeting in Harare in 1986, the British government sought and obtained agreement to the use of the eliminative method in the Commonwealth scheme and the Act makes appropriate provision to this end.⁶⁵

Under the new system, all common law offenses and a substantial number of additional statutory offenses will become appropriate vehicles for extradition.⁶⁶ Perhaps for this reason the British government unexpectedly recognized a need to include statutory safeguards against surrender on grounds of the triviality of the offense. Similarly, extradition is precluded if it appears that because of the passage of time or because the accusation was not made in good faith, "it would, having regard to all the circumstances, be unjust or oppressive to return him."⁶⁷ Also, given that provisions derived from the 1870 Act will continue to govern many extradition cases, the opportunity was taken to add to the list of extradition crimes contained in Schedule I thereof. These include offenses under section 24 of the Drug Trafficking Offences Act, 1986.⁶⁸

Since the United Kingdom has long been wedded to the territorial principle of jurisdiction, it is not surprising that the 1870 Act was formulated on the assumption of a strong territorial connection between the offense complained of and the requesting State. In practice, extradition was possible when the offense took place in the requesting State's land territory, territorial waters, or other locations "generally treated as part of its territory," such as on ships and aircraft registered in the requesting State.⁶⁹

Nevertheless, the United Kingdom has never relied exclusively on the territorial principle. As the English Law Commission noted in its 1978 *Report on the Territorial and Extraterritorial Extent of the Criminal Law*, limited reliance

63. EA, *supra* note 35, § 2(1)(a); *see also id.* § 2(4)(b) and (c).

64. *Id.* § 2(4)(a).

65. *See id.* § 2(1)(a). This uses the twelve-month punishment threshold despite the fact that the revised Commonwealth Scheme specifies the more exacting standard of "two years or a greater penalty." *See* clause 2(2) of the 1966 SCHEME, *supra* note 45. There is nothing to prevent a Commonwealth country from adopting a more concessive policy in its legislation than that required by the Scheme.

66. *See, e.g.,* EXTRADITION IN THE U.K., *supra* note 29, at 108–16.

67. *See* EA, *supra* note 35, § 11(3) and § 12(2)(a).

68. Such as assisting another to retain the benefit of drug trafficking. *See* EA, *supra* note 35, § 38(4).

69. For a discussion of this issue, *see* EXTRADITION IN THE U.K., *supra* note 29, at 16–18.

has been placed on other jurisdictional grounds.⁷⁰ Given these factors, the British government has concluded that it is in the interests of justice that the United Kingdom be able to surrender fugitives in respect of a broad range of extraterritorial offenses.⁷¹ To this end the Act makes provision for two specific categories where such surrender would be appropriate: (1) where "in corresponding circumstances equivalent conduct would constitute an extra-territorial offense against the law of the United Kingdom . . .";⁷² and (2) other extra-territorial offenses that satisfy all of the following conditions: (a) the requesting State bases its jurisdiction on the nationality of the offender; (b) the conduct occurred outside the United Kingdom; and (c) that, if it occurred in the United Kingdom, it would constitute an offense under the law of the United Kingdom.⁷³ This comprehensive recognition of the sufficiency of a nationality nexus for extradition purposes will again be of particular benefit to civil law countries that use it extensively.

Finally, a general feature of extradition practice requires that "the requested state should exercise some control over the prosecution of the surrendered fugitive for other crimes committed before his surrender . . ."⁷⁴ Under the Extradition Act, 1870 this takes the form of requiring that the individual may not "be tried in that foreign state for any offense committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."⁷⁵ By way of contrast, a much more flexible approach was adopted both in article 14 of the European Convention on Extradition and section 4(3) of the Fugitive Offenders Act. The latter, for example, "enables the fugitive to be dealt with for any lesser offense proved by the facts or for any other relevant offense to which the Secretary of State consents."⁷⁶ The British government reached the conclusion that the specialty rule should be relaxed along the lines of the 1967 Act. The Extradition Act, 1989 makes provision to that end.⁷⁷

In light of the above, it must be concluded that through these measures the United Kingdom has ensured that in the future foreign States may secure the extradition of fugitives more easily. In the words of one commentator:

The British Government intends that there should be more extradition and the new law is influenced more by the cooperative aspect of extradition than by the protective

70. Law Commission No. 91 (H.M.S.O., London, 1978); see also Ferguson, *Jurisdiction and Criminal Law in Scotland and England*, JURID. REV. 179 (1987); Lew, *The Extra-territorial Criminal Jurisdiction of English Courts*, 27 INT'L & COMP. L.Q. 168 (1978).

71. See, e.g., EXTRADITION, *supra* note 28, at 21.

72. EA, *supra* note 35, § 2(2); see also Warbrick, *supra* note 51, at 8.

73. EA, *supra* note 35, § 2(3).

74. EXTRADITION, *supra* note 28, at 13.

75. Extradition Act, 1870, *supra* note 27, § 3(2).

76. EXTRADITION, *supra* note 28, at 13.

77. EA, *supra* note 35, § 6(4)-(7). For similar provisions governing the position of an individual returned to the United Kingdom, see also *id.* §§ 18-20.

understanding of the process. . . . If the British Government is right that this country is being chosen as a refuge by fugitive criminals because they think they can count on protection against extradition, the new law will have a deterrent objective, although this can only work by diverting them to other jurisdictions.⁷⁸

III. Bilateral Treaty Practice

In addition to modernizing and reshaping the traditional weapon of extradition, the enhanced awareness of the need for international cooperation to combat the illicit trade in narcotic drugs has led the United Kingdom to conclude a number of innovative bilateral agreements. In this process the needs and demands of Anglo-American relations have been particularly influential.

A. THE CARIBBEAN CONNECTION

The first novel and drug-related bilateral arrangement worthy of note was concluded with the United States in November 1981 and addressed the issue of narcotics interdiction at sea.⁷⁹ The need for such an agreement, recently examined in detail elsewhere,⁸⁰ arose out of the frequent use of private foreign flag vessels to import marijuana and, to a lesser extent, cocaine into the United States.⁸¹ Given the location of certain major source and transit countries in South America, Central America, and in the Caribbean, this problem presented itself in a particularly acute form in Florida and along the Gulf coast. Among the foreign vessels involved in this illicit trade were some registered in the United Kingdom and in Britain's Caribbean dependencies.⁸²

Although the international law of the sea affords coastal states adequate law enforcement powers within territorial waters and the contiguous zone,⁸³ the

78. Warbrick, *supra* note 51, at 14. The ability of the United Kingdom to take full advantage of the new law is somewhat circumscribed by the recent decision by the European Court of Human Rights as to the relevance of the Convention in the context of extradition to a non-Convention state. See *Soering v. United Kingdom*, (1/1989/161/217). See also 28 I.L.M. 1063 (1989).

79. EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONCERNING CO-OPERATION IN THE SUPPRESSION OF THE UNLAWFUL IMPORTATION OF NARCOTIC DRUGS INTO THE UNITED STATES, 13 NOVEMBER 1981, CMND. No. 8470 (1981) [hereinafter EXCHANGE OF NOTES].

80. See Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 MARINE POL'Y 218 (1989).

81. See OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, THE BORDER WAR ON DRUGS 24, 27 (1987).

82. Five such dependencies remain in the area of greatest concern in this context: Montserrat, Anguilla, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands.

83. The United States retained its traditional three-mile territorial sea claim until December 27, 1988 when it was extended to twelve nautical miles by Presidential Proclamation. See 28 I.L.M. 284 (1989). Narcotics law enforcement within this zone is facilitated by art. 19(1)(d) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. The United States and the United Kingdom are both parties to this convention. A limited contiguous zone claim is provided for in the United States Anti-Smuggling Act of 1935. See 19 U.S.C. §§ 1701-1711 (1982). Such zones are now

United States, for practical reasons, wished to extend its maritime interdiction program to the high seas.⁸⁴ As U.S. Circuit Judge Kravitch stated in *United States v. Gonzalez*:

One need only glance at a map of the [Caribbean] region and compare the vast length of the United States coast to the narrow straits between Yucatan and Cuba . . . and the other narrow passages through the West Indies to understand the reasonableness of enforcing our drug laws outside of our territorial sea.⁸⁵

The central international legal difficulty raised by such an interdiction strategy is reflected in the universally accepted doctrine of exclusive flag State jurisdiction on the high seas.⁸⁶ Thus, if the strategy was to be effective and comport with international law, the cooperation of the relevant foreign flag States was essential.

The initial approach adopted by the Department of State was to request ad hoc consent from foreign governments, including that of the United Kingdom,⁸⁷ to search and, if warranted, seize vessels suspected of narcotics trafficking.⁸⁸ This process was clearly unsatisfactory in that it was bound to be time-consuming, with attendant practical disadvantages for effective law enforcement.⁸⁹ The United States and the United Kingdom addressed these matters in negotiations between the two governments and eventually agreed to dispense with the need for formal case-by-case consent. This goal was realized through an Exchange of Notes on Cooperation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States on November 13, 1981.⁹⁰ This Agreement was

accepted in international law. See, e.g., 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 516 U.N.T.S. 205, art. 24.

84. See Anderson, *In the Wake of the Dauntless: The Background and Development of Maritime Interdiction Operations*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 11 (T.A. Clingan ed. 1988).

85. 776 F.2d 931, 939 (11th Cir. 1985).

86. See 1958 Geneva Convention on the High Seas arts. 6(1), 22; see also Sohn, *International Law of the Sea and Human Rights Issues*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 51, 59 (T.A. Clingan ed. 1988). Domestic law in the United States was amended in 1980 to facilitate prosecution. See 21 U.S.C. §§ 955a-955d (1982); see also Fisher, *supra* note 24, at 374-87; Lewis, *The Marijuana on the High Seas Act: Extending U.S. Jurisdiction Beyond International Limits*, 8 YALE J. WORLD PUB. ORD. 359 (1982). United States Law in this respect was further refined in the form of the Maritime Drug Law Enforcement Act, U.S.C. §§ 1901-1903 (Supp. IV 1986).

87. For a description of British involvement, see, e.g., *United States v. Green*, 671 F.2d 46, 49 (1st Cir. 1982). For an example of a U.S. seizure of a British flag vessel seemingly without prior consent, see *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979).

88. For a description by the U.S. Department of State of the normal practice, see Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 375, 379 (1982).

89. See, e.g., *Defining Customs Waters for Certain Drug Offenses: Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary, House of Representatives*, 99th Cong., 1st Sess. 55 (1985) (testimony of Admiral Cueroni of the U.S. Coast Guard). See also *id.* at 47 (testimony of Stuart P. Sidel). In 1986, the United States Congress found that "this process, and obtaining the consent of the country of registry to further law enforcement action, may delay the interdiction of the vessel by 3 or 4 days." See annotations to 46 U.S.C. § 1902 (Supp. IV 1986).

90. EXCHANGE OF NOTES, *supra* note 79. See generally Siddle, *Anglo-American Cooperation in the Suppression of Drug Smuggling*, 31 INT'L & COMP. L.Q. 726 (1982).

essentially nonreciprocal in nature and was designed solely to facilitate the effective enforcement of U.S. law subject to a number of necessary safeguards for the United Kingdom.

Paragraph 1 of the Exchange of Notes, which triggers U.S. involvement in any instance, provides that the British government:

will not object to the boarding by the authorities of the United States . . . of private vessels under the British flag in any case in which those authorities reasonably believe that the vessel has on board a cargo of drugs for importation into the United States in violation of the laws of the United States.

The area in which this right to board is afforded is defined in paragraph 9. It includes all of the Gulf of Mexico and the Caribbean Sea, an extensive area of the Atlantic Ocean "South of latitude 30 North and all other areas within 150 miles of the Atlantic coast of the United States."⁹¹ Subsequent provisions govern the search and seizure of crew and vessel.⁹² The Agreement also provides a number of safeguards⁹³ including the right of the United Kingdom, within specified time periods, to object to the continued exercise of U.S. jurisdiction over the vessel⁹⁴ and to the prosecution of any U.K. national found on board the vessel.⁹⁵ The consequence of such an objection is to require the United States to release the vessel or person in respect of which the objection has been lodged.

In spite of the obvious ability of the United Kingdom to frustrate the operation of this Agreement through frequent use of the power to require release of vessels and prevent prosecution of nationals, this does not appear to have happened. Indeed, the evidence suggests that the Agreement has been a valuable tool in actual law enforcement⁹⁶ and the relevant reported cases do not reveal that the nature or terms of the Agreement have restricted the ability of U.S. prosecutors to secure convictions.⁹⁷

91. Paragraph 1 has received judicial consideration in the United States. *See, e.g.*, *United States v. Quemener*, 789 F.2d 145 (2d Cir. 1986); *United States v. Reeh*, 780 F.2d 1541, 1544 (11th Cir. 1986). The former case also considers the terms of paragraph 9. 789 F.2d at 148-53. *See also* Gilmore, *supra* note 80, at 222-25. The terms and conditions of the 1981 Agreement have been used as the basis for ad hoc seizures in other areas. *See, e.g.*, *United States v. Biermann*, 678 F. Supp. 1437 (N.D. Cal. 1988), *discussed in International Decisions: United States v. Biermann*, 83 AM. J. INT'L L. 99 (1989).

92. *See* EXCHANGE OF NOTES, *supra* note 79, paras. 2, 3.

93. *See, e.g., id.* paras. 6, 7.

94. *See id.* para. 4.

95. *See id.* para. 5; *see also* Letter from the Head of the Maritime, Aviation and Environment Dep't, Foreign and Commonwealth Office to the U.S. Embassy, London (Nov. 13, 1981), *reproduced in* 1981 BRIT. Y.B. INT'L L. 472.

96. *See, e.g.*, UNITED STATES COAST GUARD, GENERAL LAW ENFORCEMENT DIGEST OF INTERDICTION STATISTICS (9/30/88) 19-20 (1988). Data also reproduced in Gilmore, *supra* note 80, at 227.

97. *See* Gilmore, *supra* note 80, at 227 n.73. The possibility of further cooperation among States in the interdiction of drug smugglers at sea is to be expected in the light of article 17 of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 21. For a recent example of Royal Navy assistance to the U.S. Coast Guard in the interdiction of a U.S. registered vessel off the coast of Mexico, *see Royal Navy helps seize drug boat*, *The Independent*

The second major innovation in British narcotics treaty practice also involved the United States and arose in the highly charged context of the debate on the proper limits to American assertions of extraterritoriality.⁹⁸ As one contributor to the debate explained:

[The most pervasive example of judicial extraterritoriality] has been the demands by U.S. prosecutors for production of documents and other evidence located aboard which are deemed necessary to Government investigations and court proceedings. Such demands, most often issued in the form of subpoenas for documents or testimony, have placed the recipients in the uncomfortable position of having to choose between complying, and thereby violating their own domestic law, and refusing to comply and thereby being charged with contempt by the American court.⁹⁹

Many States consider such unilateral American measures as violations of international law.¹⁰⁰

British involvement in this context flowed from the spectacular growth throughout the 1960s and 1970s of its small Caribbean dependency of the Cayman Islands as an offshore financial center. "In 1964 the Cayman Islands had two banks and no offshore business. By 1981 the Caymans had 360 branches of U.S. and foreign banks, over 8,000 registered companies, and more telex machines per capita . . . than any other country."¹⁰¹ Through its convenient location, "a short suitcase journey from Miami,"¹⁰² its well-developed bank secrecy legislation,¹⁰³ its tax-free status,¹⁰⁴ and its political stability, among other

(London), Sept. 4, 1989. Also of interest in this context was the announcement, on September 27, 1989, that bilateral assistance to the Republic of Colombia would include "Periodic deployments of Royal Navy vessels to assist the Colombians with maritime surveillance." Policy Statement: British Foreign Secretary Announces Package of Anti-Drugs Assistance for Colombia, (Sept. 27, 1989) (unpublished: text provided by Embassy of Colombia, London); see also *Navy to Join War on Drugs in Colombia*, The Times (London), Sept. 28, 1989. According to one report, "The idea is that the frigate could act as a surveillance center for identifying and tracking shipping on the Caribbean drug route from Colombia to the United States and Canada." *Aid Frigate Pays a Quiet Call*, The Guardian (London), Oct. 5, 1989.

98. See generally A.V. LOWE, *EXTRATERRITORIAL JURISDICTION* (1983); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 340-66 (1987).

99. Nadelmann, *Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions*, 18 INTERAMERICAN L. REV. 33, 50 (1986); see also Zagaris & Rosenthal, *Securing Documents Overseas by the United States*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 373 (M.C. Bassiouni ed. 1986).

100. See, e.g., Geiger, *Legal Assistance Between States in Criminal Matters*, 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 248, 249 (1986); Knecht, *Extraterritorial Jurisdiction and the Federal Money Laundering Offense*, 22 STAN. J. INT'L L. 389, 415-19 (1986). For an overview of the British position, see Havers, *Good Fences Make Good Neighbors: A Discussion of Problems Concerning the Exercise of Jurisdiction*, 17 INT'L LAW. 784 (1983).

101. Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467, 499 (1985).

102. R. BLUM, *OFFSHORE HAVEN BANKS, TRUSTS, AND COMPANIES: THE BUSINESS OF CRIME IN THE EUROMARKET* 62 (1984).

103. See, e.g., Smith, *Bank Secrecy in the Cayman Islands*, 10 W. INDIAN L.J. 114 (1986).

104. See Horowitz, *Piercing Offshore Bank Secrecy Laws Used to Launder Illegal Narcotics Profits: The Cayman Islands Example*, 20 TEX. INT'L L.J. 133, 138 (1985).

factors,¹⁰⁵ the Cayman Islands had become "the quintessential secrecy haven in this hemisphere."¹⁰⁶

In the course of time both the American government and U.S. prosecutors became convinced that this British dependency was being extensively used both for the evasion of U.S. revenue laws and for the "laundering"¹⁰⁷ of illicit profits derived from narcotics trafficking and other criminal activities.¹⁰⁸ In these circumstances clashes between the needs of U.S. prosecutors and the requirements of Caymanian secrecy legislation were, perhaps, inevitable.¹⁰⁹

Despite efforts to address the issue of the need for enhanced cooperation through diplomatic channels,¹¹⁰ and the occasional use of noncontroversial methods to obtain confidential information located in the Cayman Islands,¹¹¹ matters came to a head in 1983. The specific cause of tension between the two States arose when the Miami branch of the Bank of Nova Scotia was fined

105. In 1984 the U.S. Department of the Treasury stated: "There is no single, clear, objective test which permits the identification of a country as a tax haven. There are, however, a number of factors which are generally accepted as characteristic of tax havens. These include: relatively low rates of tax; bank or commercial secrecy laws or administrative practices which the country is generally unwilling to breach; a banking and financial sector which is large in relation to general levels of domestic economic activity; the availability of modern communications facilities; the absence of currency controls on foreign deposits of foreign currencies; and self promotion as an offshore financial center." DEPARTMENT OF THE TREASURY, *TAX HAVENS IN THE CARIBBEAN BASIN 2* (1984). For a recent review of U.S. law and practice in respect of such entities, see Caccamise, *U.S. Countermeasures Against Tax Haven Countries*, 26 COLUM. J. TRANSNAT'L L. 553 (1988).

106. Horowitz, *supra* note 104, at 136. In March 1989 the U.S. Department of State noted that "The Cayman Islands has become the largest offshore banking center in the Caribbean." BUREAU OF INTERNATIONAL NARCOTICS MATTERS, DEPARTMENT OF STATE, *INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 41* (1989) [hereinafter INCSR].

107. A 1987 Staff Report prepared for the use of the Senate Caucus on International Narcotics Control stated: "Money laundering is the process of changing money gained from illegal operations into a manageable form while concealing its illicit origins. Narcotics trafficking creates the largest demand for money laundering, but organized crime activities such as gambling and loan sharking also create a demand." LEGISLATION AIMED AT COMBATING INTERNATIONAL DRUG TRAFFICKING AND MONEY LAUNDERING, S. PRINT NO. 67, 100th Cong. 1st Sess. 13 (1987), [hereinafter S. PRINT NO. 67].

108. See DEPARTMENT OF THE TREASURY, *supra* note 105, at 34, 40; see also S. PRINT NO. 67, *supra* note 107, at 15; Grilli, *Preventing Billions from being Washed Offshore: A Growing Approach to Stopping International Drug Trafficking*, 14 SYRACUSE J. INT'L L. & COM. 65, 67 (1987).

109. The initial clash arose out of a tax evasion investigation and resulted in the celebrated case of *United States v. Field*, 532 F.2d 404 (5th Cir. 1976). See Westreich, *Federal Judicial Compulsion of an Alien's Testimony Contrary to the Mandate of the Laws of His Native Land*, 16 COLUM. J. TRANSNAT'L L. 356 (1977); see also Horowitz, *supra* note 104, at 150-52. For a subsequent discussion of this case, see, e.g., *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389-91 (11th Cir. 1982).

110. As with the so-called Gentlemen's Agreement of 1982. For the substance of this exchange, see *United States v. Bank of Nova Scotia*, 740 F.2d 817, 823-25 (11th Cir. 1984). The U.S. Court of Appeals characterized the 1982 Agreement as "not a binding, enforceable agreement but rather as an experimental and tentative alternative for the production of documents." *Id.* at 829-30.

111. As with the use of letters rogatory. For a discussion of the use of this procedure in the context of U.S.-Cayman Islands relations, see Horowitz, *supra* note 104, at 152-56. See generally Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 22 COLUM. J. TRANSNAT'L L. 233, 253-57 (1984).

\$1,825,000 for a civil contempt of court that resulted, in part,¹¹² from its failure to produce documents held by its branch in the Cayman Islands even though compliance with the grand jury subpoena, issued in the course of a narcotics investigation, would have constituted a violation of the secrecy laws of that jurisdiction.¹¹³

The Bank of Nova Scotia case colored relations between the two States and, in the words of the English Attorney General, Sir Michael Havers, "prompted the U.K. and U.S. governments in the context of the extraterritoriality talks then being held to agree to talks to try and reach a settlement acceptable to all parties involved for dealing with narcotics cases in future."¹¹⁴ The outcome was the Exchange of Letters of July 26, 1984, between the United States and the United Kingdom "concerning the Cayman Islands and Matters connected with, arising from, related to, or resulting from any Narcotics Activity referred to in the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961."¹¹⁵ The Agreement entered into force in the following month after the Cayman Islands legislature enacted the Narcotic Drugs (Evidence) (United States of America) Law, which was needed in order to give domestic legal effect to its terms.¹¹⁶

This Agreement, which is nonreciprocal in nature, establishes a simple and straightforward procedure whereby the United States can obtain assistance in investigations and prosecutions involving drug trafficking.¹¹⁷ Provision is made, upon receipt of a certificate from the U.S. Attorney General,¹¹⁸ for the "production of documents and records, together with provision of foundation testimony, authentication, and certification necessary for these documents and records to be admissible in court in the United States."¹¹⁹ In exchange for these concessions the American government agreed to limit the use of unilateral

112. As the U.S. Court of Appeals stated in *Bank of Nova Scotia*, 740 F.2d at 821 n.5: "[O]f the \$1,825,000 fine imposed by the district court, only \$100,000 is attributable to the failure to produce records from both the Bahamas and the Cayman Islands. The remainder of the fine is imposed solely because of the failure to produce the Bahamian records. . . ."

113. This case, frequently cited as *Bank of Nova Scotia II*, has been much discussed in the scholarly literature. See, e.g., Horowitz, *supra* note 104, at 158-61; Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025, 1026-27 (1986); Zagaris & Rosenthal, *supra* note 99, at 382-83.

114. Havers, *Legal Cooperation: A Matter of Necessity*, 21 INT'L LAW. 185, 190 (1987); also reproduced in *United Kingdom Materials on International Law 1986* (G. Marston ed.), in BRIT. Y.B. INT'L L. 574 (1986). See also Nadelmann, *supra* note 99, at 54-56. For one characterization of the British view prior to these events, see Blum, *supra* note 102, at 226-32.

115. CMND. No. 9344 (1984).

116. Law 17 of 1984 (Cayman Islands).

117. See *supra* note 115, art. 2.

118. See *id.* art. 3. Upon receipt of such a certificate the Cayman Islands Attorney General lacks discretion to refuse. See *id.* art. 3(2)(a); see also Law 17, *supra* note 116, § 4.

119. See *Joint Responses of Department of Justice and Department of State to Questions Asked by Senator Kerry*, S. EXEC. REP. NO. 8, 101st Cong., 1st Sess. 101, 126 (1989) [hereinafter *Joint Responses*]; see also Horowitz, *supra* note 104, at 161-64; Nadelmann, *supra* note 99, at 56.

measures in narcotics cases. Article 6 provides "No Federal subpoena (including a Grand Jury subpoena) relating to documentary information located in Cayman in any matter falling within . . . this Agreement will be enforced in the United States without the prior agreement of either the United Kingdom Government or the Cayman Government." Although this provision dealt with the specific source of friction at issue in the Bank of Nova Scotia case, it was not a complete solution to the judicial extraterritoriality controversy in that it did not seek to "prevent the Americans from obtaining subpoenas in non-narcotics cases."¹²⁰

Since its adoption, the Agreement has been extensively used and of practical utility in law enforcement. As early as June 30, 1986, the English Attorney General, in the course of a speech to the American Bar Association, reported that the evidence produced as a result of the Agreement "has been instrumental in furthering federal investigation into several hundred million dollars of drugs trafficking. Several notorious drugs offenders have been put behind bars as a result."¹²¹ Similarly, the evidence suggests that "[p]rosecutors and agents concerned with drug cases . . . have been largely satisfied with the agreement's limited but effective reach."¹²² Indeed, the respective governments have been so pleased with the experiment that they have since concluded similar agreements in respect of all of the remaining Caribbean dependencies of the United Kingdom.¹²³

The process of British-American cooperation in criminal matters in a Caribbean context did not, and was not intended to, end with the 1984 Exchange of Notes.¹²⁴ Indeed, the text of the Agreement expressly directed the parties to take active steps to consider a treaty of wider scope concerning the Cayman Islands. Article 7(3) reads:

120. Nadelmann, *supra* note 99, at 56 n.64.

121. Havers, *supra* note 114, at 190-91. As of August 1988 the United States had issued some fifty-seven certificates pursuant to the Agreement, noninclusive of supplementary requests. See *Banking Close-Up*, Newstar (Grand Cayman, Cayman Islands) 10, 12 (Aug. 1988).

122. Nadelmann, *supra* note 101, at 501. In 1989 U.S. Attorney General Thornburgh informed the Senate Foreign Relations Committee that existing MLATs "and related Executive Agreements, particularly the ones with the Cayman Islands, have been very successful." S. EXEC. REP. No. 15, 101st Cong., 1st Sess. 186 (1989).

123. For the September 18, 1986, Exchange of Letters in respect of the Turks and Caicos Islands, see CM. No. 136 (1987). This was given legal effect within the territory by virtue of the terms of the Narcotic Drugs (Evidence) (United States of America) Ordinance, 1986; Ordinance No. 1 of 1986 (Turks and Caicos Islands). As of October 1988 only one certificate had been issued pursuant to this Agreement. See, e.g., *Narcotics Issues in the Bahamas and the Caribbean: Hearing Before the Committee on Foreign Affairs, House of Representatives*, 100th Cong., 1st Sess. 92 (1987). For the Exchanges of Letters in respect of Montserrat, the British Virgin Islands and Anguilla, see CM. No. 426 (1988), CM. No. 216 (1987), and CM. No. 169 (1987), respectively. See also Nadelmann, *supra* note 99, at 58-59. There is no similar agreement with respect to Bermuda. For a description of the attitude of the Bermuda government in this area, see Froomking, *Money Laundering—An International Perspective*, in MEETING OF LAW OFFICERS OF SMALL COMMONWEALTH JURISDICTIONS: 5-9 DECEMBER 1988, HAMILTON, BERMUDA 144, 149-50 (Commonwealth Secretariat, London, 1989).

124. For example, in 1987 two agreements between the United Kingdom and the United States were signed. One provided for the United States:

The Governments of the United States and United Kingdom, including Cayman, will use their best endeavors to conclude a Law Enforcement Treaty within fifteen months of the date this Agreement comes into operation with the intention to bring such a treaty into force as soon thereafter as their constitutional procedures will allow.

In order to give effect to this undertaking, the parties involved initiated negotiations in November 1985. "The meetings between the Governments of the United Kingdom, the United States and Cayman were preceded by discussions in London between the Cayman Islands and the United Kingdom to agree strategy for the negotiations."¹²⁵ These essentially tripartite discussions, later described by the Attorney General of the Cayman Islands as "long and arduous,"¹²⁶ were successfully concluded in the following year. The product of these efforts was 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 reached on July 3, 1986.¹²⁷

Although, subject to what is said below, the Cayman Islands' Mutual Legal Assistance Treaty (MLAT) is broadly similar in nature to earlier such treaties entered into by the United States,¹²⁸ the MLAT "represents a major breakthrough in United States efforts to enlist the cooperation of Caribbean 'bank secrecy' jurisdictions in the investigation and prosecution of transborder

to deliver an aircraft to the Government of the Turks and Caicos Islands to be used in the fight against drug traffickers. The aircraft . . . will also be used by the Government of the British Virgin Islands . . . A second Agreement has been signed to install an anti-drugs radar tracking station on the island of Providenciales in the Turks and Caicos Islands, thus extending U.S. surveillance of the area to cover both the Bahamas and TCI.

Foreign and Commonwealth Office Press Release (July 31, 1987). Neither agreement has thus far been published in the United Kingdom. *See also* 145 PARL. DEB., H.C. (5th ser.) No. 33, col. 791 (Jan. 27, 1989) (Written Answers). In 1988 the United States transferred a patrol-type vessel to the Cayman Islands and another to Anguilla pursuant to agreements, in the form of Memoranda of Understanding, with the United Kingdom. *See* INCSR, *supra* note 106, at 51. Other negotiations including the possible extension of the Operation Bahamas and Turks and Caicos (OPBAT) arrangements with the Commonwealth of the Bahamas to the Turks and Caicos Islands, are taking place at the time of writing. *See, e.g., id.* at 123. The United Kingdom and the United States also participated in certain Caribbean regional initiatives. Thus, both accepted invitations to attend the Caribbean Ministerial Drugs Conference in Jamaica in October 1989. *See* Foreign and Commonwealth Office, Press Release No. 134 (Sept. 26, 1989).

125. Cayman Islands Government Information, Press Release (May 8, 1986).

126. Statement of Michael Bradley, Attorney General, during the Second Reading of the Mutual Legal Assistance (United States of America) Bill, Sept. 1986 (transcript provided by the Attorney General, Grand Cayman) [hereinafter Bradley].

127. CMND. No. 9862 (1986).

128. *See, e.g., Report on Cayman Islands Treaty*, 21 INT'L LAW. 1240, 1241 (1987); *see also* Leich, *Contemporary Practice of the United States Relating to International Law*, 82 AM. J. INT'L L. 103, 112-18 (1988) (Judicial Assistance—U.S.-U.K. Treaties Concerning the Cayman Islands). On the evolving United States practice in this area, *see, e.g., Ellis & Pisani, The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189 (1985).

crime.”¹²⁹ For the United Kingdom the Treaty, though confined geographically to a dependency, also sets a potentially important precedent in that it is the first, and thus far the only, instance of British participation in either bilateral or multilateral full scale MLATs in the criminal law sphere.¹³⁰

The Treaty, which unlike the 1984 Agreement is fully reciprocal in nature, makes provision for a wide variety of differing forms of assistance, which include:

- (a) taking the testimony or statements of persons;
- (b) providing documents, records and articles of evidence;
- (c) serving documents;
- (d) locating persons;
- (e) transferring persons in custody for testimony;
- (f) executing requests for searches and seizures;
- (g) immobilizing criminally obtained assets;
- (h) assistance in proceedings relating to forfeiture, restitution and collection of fines; and
- (i) any other steps deemed appropriate by both Central Authorities.¹³¹

Such procedures are available “for the investigation, prosecution and suppression of criminal offenses,” as well as “civil and administrative proceedings” arising out of, relating to, or resulting from narcotics trafficking.¹³² It should be noted that the term “narcotics trafficking” is defined in article 19(3)(e) in a manner broader than that contained in the 1984 Exchange of Notes. The definition in the 1986 Treaty encompasses not only activities covered by the Single Convention on Narcotic Drugs, but also “any other international agreements or arrangements binding upon both the Parties.” As the Technical Analysis prepared by the U.S. Departments of Justice and State opines:

This is significant because the United Kingdom has now, like the United States, become a party to the Convention on Psychotropic Substances . . . Other international agreements may come into force in the future, and the scope of offenses covered by the treaty has the flexibility to grow as the international regulation of illegal narcotics trafficking grows.¹³³

129. *Letter of Submittal from Secretary of State Schultz to President Reagan on July 23, 1987*, S. TREATY DOC. No. 8, 100th Cong. 1st Sess. (1987) [hereinafter *Letter of Submittal*].

130. See INTERNATIONAL MUTUAL ASSISTANCE IN CRIMINAL MATTERS—A DISCUSSION PAPER (Home Office, London, 1988) [hereinafter DISCUSSION PAPER].

131. See CMND. No. 9862, *supra* note 127, art. 1(2). Requests are to be made through the Central Authority of each party. *Id.* art. 2. The Cayman Mutual Legal Assistance Authority “shall be the Chief Justice, who shall exercise his functions under the Treaty and this Law acting alone and in an administrative capacity, or another Judge of the Grand Court designated by the Chief Justice to act on his behalf.” Mutual Legal Assistance (United States of America) Law, 1986; Law 16 of 1986, s.4 (Cayman Islands). For the reasons behind this somewhat unusual decision, see Bradley, *supra* note 126.

132. CMND. No. 9862, *supra* note 127, art. 1(1).

133. *Technical Analysis of the Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in*

In the course of the negotiations the parties concluded that the Treaty would not cover all criminal activity. The interaction of article 3(1) and article 19 results, in the words of the Attorney General of the Cayman Islands, in the fact that the Treaty "does not extend to tax matters and it does not extend to trivial criminal offenses."¹³⁴ The British and Caymanian negotiators deemed the restriction on tax matters necessary to safeguard the viability of the latter's offshore financial business so critical to the local economy.¹³⁵ The protection afforded in this regard is not, however, absolute in nature. As has been pointed out elsewhere, "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."¹³⁶ Finally, assistance is permitted in narcotics related tax matters. In the words of the Technical Analysis, "a civil or administrative tax proceeding involving the assets acquired through illegal drug trafficking could qualify as an offense under article 19(3)(c) for which assistance could be provided under the treaty."¹³⁷

The restriction of the Treaty to what might be termed serious criminal offenses is attained through the inclusion of a general rule limiting its scope to "[a]ny conduct punishable by more than one year's imprisonment under the laws of both the Requesting and Requested Parties."¹³⁸ The Treaty, however, specifies exceptions to the strict requirements of double criminality that include, in addition to narcotics trafficking, such offenses as "racketeering" and "foreign corrupt practices."¹³⁹ A further element of flexibility has been provided by article 19(3)(k), which states that the term "criminal offense" shall also include: "Such further offenses as may from time to time be agreed upon by exchange of diplomatic notes between the United States and the United Kingdom, including the Cayman Islands."

The prospect for using this provision to add to the list of criminal offenses in a manner contrary to the perceived interests of the Cayman Islands should not, however, be overstated.¹⁴⁰ As the Attorney General informed the Cayman Islands Legislature:

We, the Government of the Cayman Islands, have a specific, categorical undertaking from our Sovereign Mother, the United Kingdom, that there will be no further offense added to this list, even though the United Kingdom and the United States both agree, without the specific consent, Sir, of the Government of the Cayman Islands. We have the say so. They cannot do it without us.¹⁴¹

Criminal Matters, S. EXEC. REP. NO. 8, 101st Cong., 1st Sess. 8, 48 n.40 (1989) [hereinafter *Technical Analysis*].

134. Bradley, *supra* note 126.

135. See *Technical Analysis*, *supra* note 133, at 14.

136. *Report on Cayman Islands Treaty* at 1243.

137. *Technical Analysis*, *supra* note 133, at 14.

138. CMND. No. 9862, *supra* note 127, art. 19(3)(a); see also *id.* art. 3(1)(b).

139. See *id.* art. 19(3).

140. See, e.g., Grilli, *supra* note 108, at 87.

141. Bradley, *supra* note 126.

The Cayman Islands Treaty, like other MLATs concluded by the United States, contains a number of specified limitations on assistance. Thus assistance may be denied if the request is not made in conformity with the Treaty,¹⁴² if it “relates to a political offense or to an offense under military law which would not be an offense under ordinary criminal law,”¹⁴³ or where the requested party, through its Attorney General, certifies “that the execution of the request is contrary to the public interest of the Requested Party.”¹⁴⁴ In addition, however, and for the first time in U.S. practice in this area, the Treaty permits assistance to be denied where: “the request does not establish that there are reasonable grounds for believing: (i) that the criminal offence specified in the request has been committed; and (ii) that the information sought relates to the offence and is located in the territory of the Requested Party.”¹⁴⁵ This innovation was included in the text because the British and Caymanian negotiators wanted to ensure that the MLAT was not used as a mechanism for indulging in mere “fishing expeditions.”¹⁴⁶

Whether this provision will cause difficulties in practice is hard to predict, though it is apparent that problems may arise out of differing conceptions as to the exact burden of proof to be discharged by the requesting party. Thus, according to the U.S. Technical Analysis:

The phrase “reasonable grounds to believe” is not the equivalent of a *prima facie* case . . . Rather the phrase was intended to require each Party to support its request with a precise, rational explanation for its belief that a crime covered by the Treaty has occurred or will occur, and to set forth in detail the justification for seeking the evidence.¹⁴⁷

By way of contrast, the Attorney General of the Cayman Islands has informed the territory’s Legislature that the same phrase “basically is saying that there must be established, to use lawyers’ terms, a good *prima facie* case.”¹⁴⁸ The potential for friction between the parties is self-evident; however,

[t]he negotiators realized that occasionally there will be differences of opinion which the law enforcement authorities who implement the treaty will be unable to resolve despite the best of intentions. The second paragraph of Article 18 specifically recognizes that in such cases either side may seek the assistance of the diplomatic and political authorities to resolve the difficulty.¹⁴⁹

142. CMND. No. 9862, *supra* note 127, art. 3(2)(a).

143. *Id.* art. 3(2)(b). The U.S. Technical Analysis records the view that “we would not expect the Central Authority of either party to deny a request as a ‘political offense’ if it involves the kind of conduct listed in the Supplementary Treaty to the Extradition Treaty between the United States and the United Kingdom. . . .” *Technical Analysis*, *supra* note 133, at 14–15 n.8; *see also Joint Responses*, *supra* note 119, at 142 (testimony).

144. CMND. No. 9862, *supra* note 127, art. 3(3). For the view of the United States on this provision, *see Technical Analysis*, *supra* note 133, at 15–16. For the views of the Caymanian authorities, *see Bradley*, *supra* note 126.

145. CMND. No. 9862, *supra* note 127, art. 3(2)(c).

146. *See Joint Responses*, *supra* note 119, at 122–23 (testimony).

147. *Technical Analysis*, *supra* note 133, at 15.

148. *Bradley*, *supra* note 126.

149. *Technical Analysis*, *supra* note 133, at 47.

One area in which the potential for friction has been reduced, but not eliminated, by the Treaty is that of judicial extraterritoriality. As has been pointed out:

[S]ome methods of evidence gathering permitted under United States internal law have the practical result of evidence being collected in the Cayman Islands and being turned over to United States authorities without the permission of the Cayman Islands authorities, and are hence viewed by the Cayman Islands and the United Kingdom as impermissible intrusions into their sovereignty. They insisted that the mutual legal assistance treaty contain at least the same kind of restriction on United States extraterritorial evidence gathering that the Drug Information Agreement contains.¹⁵⁰

Such concerns are addressed in article 17, section 3, which is of central importance:

No Party shall enforce any compulsory measure, including a grand jury subpoena, for the production of documents located in the territory of the other Party with respect to any criminal offence within the scope of this Treaty, unless its obligations under the Treaty have first been fulfilled pursuant to paragraph 4 of this Article with respect to a request concerning those documents.

This provision covers not only grand jury subpoenas but also other compulsory measures for the production of documents. The parties agreed that this wording encompasses trial subpoenas and "court orders to a person commanding that he sign a waiver of foreign bank secrecy or direct his bank abroad to turn over records to United States authorities. . . . Thus, this paragraph of the treaty is somewhat broader in scope than the cognate provision of the Drug Information Agreement."¹⁵¹ Although this extended coverage constitutes an improvement from the point of view of both the British and Caymanian governments, other unilateral practices regarded as either undesirable or objectionable are not covered. As U.S. Secretary of State Schultz noted in his July 23, 1987, Letter of Submittal to the President:

The article does not, however, cover administrative summonses of agencies such as the Internal Revenue Service or the Securities and Exchange Commission, so long as the matter being investigated does not constitute a criminal offense under the treaty. Neither does it preclude issuance of a subpoena or material witness warrant for any persons temporarily in the United States, even though the disclosure of information protected by Caymanian secrecy laws may be required.¹⁵²

The above should be read in conjunction with article 17(4), which outlines the procedure to follow if a party wishes to free itself from the specified restrictions:

Where denial of a request or unreasonable delay in its execution may be jeopardizing the successful completion of an investigation, prosecution or other proceeding, the

150. *Id.* at 44; *see also id.* at 220–21 (statement of Principal Deputy Legal Adviser, Department of State).

151. *Id.* at 45. The Caymanian courts have declined to accept compelled consents of this kind. *See In re ABC Ltd.*, 1984 C.I.L.R. 130; *Attorney General v. Bank of Nova Scotia*, 1985 C.I.L.R. 418. On June 22, 1988, the United States Supreme Court upheld the constitutionality of this procedure in a case concerning, in part, the Cayman Islands. *See Doe v. United States*, 487 U.S. 201 (1988).

152. *Letter of Submittal*, *supra* note 129, at xi.

Central Authority of the Requesting Party shall so inform the Central Authority of the Requested Party in writing. Thereafter, either Contracting Party may give at least 45 days' notice in writing to the other Contracting Party that, unless otherwise agreed, the Parties' obligations under this Article shall be deemed to have been fulfilled; provided that in no case shall the obligations under this Article be deemed to have been fulfilled sooner than 90 days after the date of receipt of the request for assistance.

As was pointed out in the Technical Analysis:

[T]he basic thrust of the paragraph is to insure that when the United States seeks records which are in the Cayman Islands in a case covered by the treaty, it will use the treaty as the avenue of first resort, and will not utilize unilateral compulsory measures unless it has first notified the Caymanian authorities of the problem, sought their aid in the production of the records pursuant to Cayman law, accorded them a reasonable period of time for their response, then waited a further period to permit such diplomatic consultations as the parties deem appropriate.¹⁵³

Given the potential for conflict in this area, article 17 was the subject of a side letter dated July 3, 1986, between the American Embassy in London and the Foreign and Commonwealth Office, which spelled out a number of nonbinding understandings.¹⁵⁴ Among other things, the correspondence records that "[e]ven in those cases in which the Parties' obligations under Article 17 have been fulfilled with respect to a particular request, each Party shall continue to exercise moderation and restraint in considering the enforcement of unilateral measures to which the other objects for the production or withholding of evidence."¹⁵⁵

Although the conclusion of the MLAT was a highly controversial issue in the domestic politics of the Cayman Islands,¹⁵⁶ its legislature acted promptly to enact the necessary implementing legislation.¹⁵⁷ In spite of this fact the Treaty, the terms of which can be extended by Exchange of Notes to the other British dependencies in the Caribbean region,¹⁵⁸ did not receive the requisite assent by the U.S. Senate to its ratification until October 24, 1989, a situation which caused some dismay both in Cayman and in the United Kingdom.¹⁵⁹

B. OTHER BILATERAL AGREEMENTS AND SIGNIFICANT DEVELOPMENTS

Much though the above treaty practice broke new ground for the United Kingdom, one should not lose sight of the fact that it was generated by, and in the main limited to, the actual and alleged misuse of the otherwise relatively insignificant Caribbean dependencies of the Crown for criminal purposes. The opportunity to involve the United Kingdom directly and centrally was not,

153. *Technical Analysis*, *supra* note 133, at 46.

154. *Reproduced in* 26 I.L.M. 550 (1987).

155. *Id.* at 551.

156. *See, e.g.*, Nadelmann, *supra* note 99, at 57.

157. *See supra* note 131.

158. *See* CMND. No. 9862, *supra* note 127 (Protocol).

159. It is understood that the problem was not with the Cayman Islands Treaty as such, but with two of the other five MLATs then before the Senate in the ratification "package": Mexico and the Bahamas. *See, e.g.*, *TECHNICAL ANALYSIS*, *supra* note 133, at 6.

however, to be for long neglected, and again the subject of international action against drug trafficking was the catalyst.

In the mid-1980s the British government concluded that new legislative powers were needed to deprive narcotics traffickers of the proceeds of their criminal activities. In this they had the full support of the influential House of Commons Home Affairs Committee. In its May 1985 interim report on the "Misuse of Hard Drugs" the Committee stated:

The American practice, which we unhesitatingly support, is to give the courts draconian powers in both civil and criminal law to strip drug dealers of all the assets acquired from their dealings in drugs . . . We recommend that the civil and criminal law of the United Kingdom be amended to provide for the seizure and forfeiture of assets connected with drug traffic in accordance with the American practice.¹⁶⁰

This recommendation was, save in respect of civil forfeiture, generally accepted by the British government and was given legislative expression for England and Wales in the Drug Trafficking Offences Act, 1986.¹⁶¹ As has been officially stated: "The Act provides comprehensive new powers for tracing, freezing and confiscating the proceeds of drug trafficking, and measures to combat the laundering of illegal drugs money."¹⁶² Similar powers were assumed in respect of Scotland by the Criminal Justice (Scotland) Act, 1987¹⁶³ while legislation along these lines for Northern Ireland "is expected to be introduced in the near future."¹⁶⁴ In addition to thus covering the United Kingdom proper "[l]egislation similar to the Drug Trafficking Offences Act 1986 has been enacted in the Isle of Man, Jersey, Guernsey and several dependent territories, and the necessary steps are being taken to enable the United Kingdom and all these territories to act on behalf of one another."¹⁶⁵

160. *Misuse of Hard Drugs*, *supra* note 3, para. 9.

161. 1986 ch. 32 (U.K.). For an account of the disinclination of the British government to follow the U.S. example in respect of civil forfeiture, see M. ZANDER, CONFISCATION AND FORFEITURE LAW: ENGLISH AND AMERICAN COMPARISONS 44-45 (1989).

162. TACKLING DRUG MISUSE, *supra* note 1, at 20. On December 12, 1989, the Minister of State, Home Office, informed the House of Lords that: "Confiscation orders have been made totalling more than £13 million, and more than £22 million has been restrained." PARL. DEB., H.L., Vol. 513, No. 13, col. 1230 [hereinafter Parliamentary Statement]. Since that time a number of significant confiscation orders have been reported in the press. See, e.g., *Mastermind of Drugs Plot Jailed for Fifteen Years*, *The Independent* (London), Dec. 22, 1989; *Bags of Cash Deposited in London Bank*, *The Independent* (London), Dec. 16, 1989. In 1988 the provisions of the Criminal Justice Act (CJA) extended the attack on assets to those derived from other serious crimes. See generally D. FELDMAN, CRIMINAL CONFISCATION ORDERS: THE NEW LAW (1988). In 1989 a further initiative was adopted in respect of the assets of terrorists. See Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 4 (U.K.).

163. 1987 ch. 41 (U.K.). The subject of enacting legislation similar to the CJA is currently under review in Scotland. See SCOTTISH LAW COMMISSION, FORFEITURE AND CONFISCATION (DISCUSSION PAPER No. 82) (H.M.S.O., Edinburgh, 1989).

164. *Inquiry*, *supra* note 4, at 11.

165. *Id.* at 13. For the current position in the Cayman Islands, see Misuse of Drugs (Amendment) Law, 1988; Law 8 of 1988 (Cayman Islands); and Misuse of Drugs (Amendment) Law, 1989. Law 3 of 1989 (Cayman Islands). See also CMND. No. 9862, *supra* note 127, art. 16. For the position in the Turks and Caicos Islands, see Control of Drugs (Trafficking) Ordinance 1988. Ordinance No. 13

It should be stressed that the above legislation is not limited to facilitating cooperation between the various jurisdictions with the United Kingdom and with the remaining dependencies. Provision is also made for the enforcement:

of orders made by courts in designated countries for the recovery of the proceeds of drug trafficking. This will provide the basis for reciprocal agreements with other countries, with a view to the enforcement overseas of orders made by our courts against assets held by convicted traffickers and vice versa.¹⁶⁶

It is perhaps fitting that the first bilateral agreement to make use of these powers was concluded with the United States on February 9, 1988.¹⁶⁷ As Sir Geoffrey Howe, the British Foreign Secretary, stated at the signing ceremony in London: "It will strengthen the already close cooperation between our enforcement agencies. It will enable us jointly to trace, freeze and confiscate the assets of drug traffickers. The vicious circle of profiteering from the drug trade will be broken."¹⁶⁸ Since that time Britain has concluded similar agreements with Canada, Australia, the Bahamas, Switzerland, Spain, Nigeria, Malaysia, and Sweden¹⁶⁹ and others are in prospect.¹⁷⁰

of 1988 (Turks and Caicos Islands). For an enactment outside of the Caribbean of great potential significance, see Drug Trafficking (Recovery of Proceeds) Ordinance, 1989; Ordinance No. 35/89 (Hong Kong). It is understood that final designation arrangements have been concluded with Anguilla, Bermuda, and Gibraltar thus far.

166. TACKLING DRUG MISUSE, *supra* note 1, at 20. For an overview of the growing global practice in this regard, see, e.g., McClean, *Seizing the Proceeds of Crime: The State of the Art*, 38 INT'L & COMP. L.Q. 334 (1989).

167. AGREEMENT CONCERNING THE INVESTIGATION OF DRUG TRAFFICKING OFFENSES AND THE SEIZURE AND FORFEITURE OF THE PROCEEDS AND INSTRUMENTALITIES OF DRUG TRAFFICKING, CM. No. 755 (1989).

168. Foreign and Commonwealth Office, Press Release (Feb. 9, 1988) [hereinafter Press Release]. Article 1(2)(a) of the Agreement reads: "This Agreement shall apply: (a) in relation to the United Kingdom: to England and Wales, and subject to any necessary modifications, by agreement between the Parties embodied in an exchange of Notes, to Scotland and Northern Ireland and to any territories for the international relations of which the United Kingdom is responsible." The necessary domestic law designation in relation to England and Wales was provided by The Drug Trafficking Offenses Act 1986, (United States of America) Order 1989. S. I. 1989 No. 485. See also SECOND STANDING COMMITTEE ON STATUTORY INSTRUMENTS, PARL. DEB., H.C. (5th ser.) (Mar. 7, 1989). Pursuant to article 14 of the Agreement it was brought into force on Apr. 11, 1989. See DEP'T ST. BULL. 70 (June 1989). Press reports indicate that this Agreement was used by the United States in December 1989, following its military incursion in Panama, to freeze the U.K.-based assets of General Noriega. See *Noriega Sits Tight*. . . . The Independent (London), Dec. 29, 1989. Similar cooperation has been requested from other European governments. See e.g., *Nunciature Nine Surrender*, The Independent (London), Dec. 28, 1989.

169. See *May 1989 Remarks*, *supra* note 1, at 8. For the text of the Agreement with the Bahamas, see CM. No. 475 (1988). The Agreement with Nigeria is understood to break new ground in that it extends to the confiscation of the proceeds of crime generally and is not restricted to drug trafficking offenses. See Foreign and Commonwealth Office Press Conference (Sept. 18, 1989) (unpublished: text provided by Foreign and Commonwealth Office). The most recent agreement, that with Sweden, also covers all serious crime. See Foreign and Commonwealth Office, Press Release No. 175 (Dec. 14, 1988).

170. See *id.*; see also Parliamentary Statement, *supra* note 162, col. 524; and the *May 10, 1989 evidence of Mr. J. Potts of the Home Office*, H.C. Paper No. 370-i, at 14 (1988-89). Other arrangements, such as the United Kingdom/Brazil Drugs Agreement, 1988, are somewhat less ambitious. It provides, in relevant part, as follows:

As with the Cayman Islands where a narcotics agreement led to the conclusion of a full mutual legal assistance treaty, so the February 1988 Agreement with the United States commits the parties to enter into negotiations for a full MLAT within nine months of its entry into force.¹⁷¹ As was noted above, the United Kingdom has not thus far directly joined in the growing practice of cooperation offered by this international mechanism; however, in February 1988 an inter-departmental working group issued a discussion paper in which it "concluded that there are strong arguments in favor of reform of United Kingdom mutual assistance law with a view to participation in formal mutual assistance arrangements."¹⁷² In late 1989 the government introduced, in the House of Lords, the Criminal Justice (International Co-operation) Bill, which is designed to give effect to this intention.¹⁷³ Part I of the Bill provides the necessary power to give domestic effect to any arrangement eventually concluded with the United States and facilitates British participation in the 1959 European Convention on Mutual Assistance in Criminal Matters¹⁷⁴ and the 1986 Commonwealth Scheme.¹⁷⁵ In particular, the Bill makes provision, among other things, for: the service of process; the provision of evidence; the transfer of prisoners to give evidence or assist in investigations overseas; powers of entry, search, and seizure in furtherance of overseas proceedings; and, the enforcement of certain overseas forfeiture orders. As the Minister of State for the Home Office, Earl Ferrers, was to state during the Second Reading of this measure: "Having recognized the inadequacies of our existing legislation, we have been determined to secure arrangements which will place us in the first rank internationally in our ability to co-operate with other countries in this most important of areas."¹⁷⁶

1. The two Governments, subject to the laws and regulations in force in their respective countries, propose to promote mutual co-operation to prevent the illicit production of, traffic in, and improper use of narcotic drugs and psychotropic substances, in accordance with the present Agreement, in the following fields: . . . (d) exchange of information about the confiscation of goods obtained illicitly through traffic in drugs, as well as the examination of future complementary arrangements for reciprocal assistance in this field.

CM. No. 769 (1989). The above initiatives are fully in accord with the Paris Economic Declaration of July 1989, *supra* note 22, at 17, where the participants, including the United Kingdom, resolved to "conclude further bilateral or multilateral agreements and support initiatives and cooperation, where appropriate, which include measures to facilitate the identification, tracing, freezing, seizure and forfeiture of drug crime proceeds."

171. See *supra* note 167, art. 13. It is understood that such negotiations are now under way.

172. DISCUSSION PAPERS, *supra* note 130, at 6.

173. Criminal Justice (International Co-operation) Bill. H.L. Bill 11, 1989-90.

174. July 30, 1963, 472 U.N.T.S. 185.

175. For the text of the Commonwealth Scheme and an explanatory commentary thereon, see, e.g., 4 SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH 1-51 (Commonwealth Secretariat, London, 1989). See also McClean, *Mutual Assistance in Criminal Matters: The Commonwealth Initiative*, 37 INT'L & COMP. L.Q. 177 (1988). A further impetus for mutual assistance is provided by the terms of article 7 of the 1988 U.N. Convention. See *supra* note 21.

176. PARL. DEB., H.L., Vol. 513, No. 13, 12 December 1989, col. 1217.

IV. Conclusion

In recent years, as has been demonstrated, the United Kingdom has taken radical steps to enhance its ability to play a full and active role in the fight against international crime. In part this has taken the form of liberalizing the law relating to extradition, which will make it significantly easier for foreign States to secure the return from the United Kingdom of fugitives from justice.

Perhaps more importantly for the future, concern about the global nature of the drug trade has been instrumental in the taking of the first major steps to set aside the traditional reluctance to aid other States in the execution of their penal laws. The new underlying approach of the British government in respect of drug trafficking was articulated in 1988 by the Foreign Secretary thus:

The costs of this vice are incalculable. The misery all too clear. This is why [Her Majesty's Government] is taking a lead in fighting the menace of drug abuse. There is no place in our societies for drug traffickers. Alone we are weak in fighting them, but together we will win.¹⁷⁷

The prospects for further developments in enhancing international law enforcement along a broader front are also bright.¹⁷⁸ In the near term emphasis is to be placed on securing the enactment of legislation to enable the United Kingdom to ratify the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁷⁹ This is seen by the British government as a most important instrument "in the fight against the evil men who produce, manufacture and distribute drugs, and who thereby corrupt society."¹⁸⁰

¹⁷⁷. Press Release, *supra* note 168.

¹⁷⁸. It should be noted that the nature and extent of U.K.-U.S. cooperation is kept under periodic review, in part through the U.K./U.S. High Level Steering Group on Drugs Co-operation which met for the first time in July 1987. See Foreign and Commonwealth Office, Press Release (July 23, 1987). The two governments also cooperate in the provision of drugs related assistance to third countries. See, e.g., Memorandum of Understanding between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Drug Detector Dog Training for Third Countries (unpublished agreement signed in Washington D.C. on Mar. 29, 1988; text provided by the Foreign and Commonwealth Office). The value of the provision of this service was specifically recorded in paragraph 25 of the "Drugs Law Enforcement Conference Communique" following the conclusion of a twenty-five-country regional conference held in Barbados on March 7-8, 1988 (unpublished text provided by the Foreign and Commonwealth Office). For one analysis of the legal status of such a memorandum of understanding, see Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986). Further cooperation between the United Kingdom and the United States is facilitated by the presence of drug law enforcement specialists within the jurisdiction of the other. Thus the British Drugs Liaison Officer scheme extends to the United States. The United States "have DEA staff, Customs staff and an FBI representative in London." *Memorandum submitted by the National Drugs Intelligence Unit to the Home Affairs Committee 12 July 1989*, H.C. Paper No. 370-vii, at 117 para. 4-4 (1988-89).

¹⁷⁹. See *supra* note 21.

¹⁸⁰. *Supra* note 176, col. 1217.