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EDWARD H. KUBO, JR. #2499
United States Attorney
District of Hawaii

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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MAR 17 2008

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at 3 o'clock and 11 min AM
WALTER A.Y.H. CHINN, CLERK
WAC

Attorneys for UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

IN RE:)	MISC. NO. MC05 00075 HG
)	
Request from Australia)	
Pursuant to the Treaty)	APPLICATION FOR ORDER PURSUANT
Between the Government of the)	TO THE TREATY ON MUTUAL
United States of America and)	ASSISTANCE IN CRIMINAL MATTERS
the Government of Australia)	AND TITLE 28, UNITED STATES
on Mutual Assistance in)	CODE, SECTION 1782; MEMORANDUM
Criminal Matters in the)	OF LAW IN SUPPORT OF APPLICA-
Matter of FRANK YUEMAN CHAN)	TION FOR ORDER
)	
)	
)	

APPLICATION FOR ORDER PURSUANT TO THE TREATY
ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS
AND TITLE 28, UNITED STATES CODE, SECTION 1782

The United States of America petitions this Court for
an Order, pursuant to Article 5 of the Treaty Between the
Government of the United States of America and the Government of
Australia on Mutual Assistance in Criminal Matters, 1997 WL
597540 (Treaty) [entered into force September 30, 1999], 28
U.S.C. § 1782, and its own inherent authority, appointing Thomas

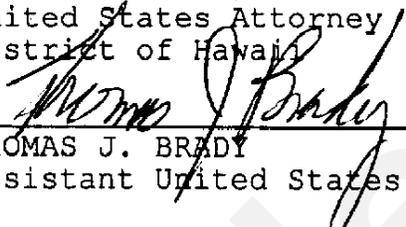
J. Brady as Commissioner to collect evidence from witnesses and to take such other action as is required to execute the attached request from Australia made pursuant to the Treaty.

DATED: March 17, 2005, at Honolulu, Hawaii.

Respectfully submitted,

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By:



THOMAS J. BRADY
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

IN RE:) MISC. NO.
)
Request from Australia)
Pursuant to the Treaty)
Between the Government of the) MEMORANDUM OF LAW IN SUPPORT
United States of America and) OF APPLICATION FOR ORDER
the Government of Australia)
on Mutual Assistance in)
Criminal Matters in the)
Matter of FRANK YUEMAN CHAN)
_____)

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR ORDER

The United States is seeking an order appointing a commissioner to collect evidence requested by Australia in its attached treaty request made pursuant to the Treaty Between the Government of the United States of America and the Government of Australia on Mutual Assistance in Criminal Matters, 1997 WL 597540 (Treaty), entered into force September 30, 1999 [hereinafter referred to as "the Treaty"].

A treaty constitutes the law of the land. U.S. Const. art. VI. The provisions of a treaty have equal footing with acts of Congress and are binding on the courts. Asakura v. City of Seattle, Washington, 265 U.S. 332, 341 (1924); United States v. The Peggy, 5 U.S. 103 (1801). To the extent that the provisions of a treaty are inconsistent with a preexisting statutory provision, the treaty supersedes the statute. Zschernig, et al. v. Miller, Administrator, et al., 389 U.S. 429, 440-441 (1968); United States v. Erato, 2 F.3d 11, 15-16 (2d Cir. 1993) [hereinafter Erato].

A. The Treaty

The United States and Australia entered into the Treaty for the purpose of improving the effectiveness of the law enforcement authorities of both states in the investigation and prosecution of crime. Preamble to the Treaty. The Treaty obliges each state to provide assistance to the other in investigations and prosecutions of offenses, and in proceedings related to criminal matters. Article 1. Assistance includes taking testimony or statements of persons, providing documents and other evidence, and immobilizing criminally obtained assets. Article 1(2); Barr v. U. S. Department of Justice, 645 F. Supp. 235, 237 (E.D.N.Y. 1986), aff'd, 819 F.2d 25 (2d Cir. 1987).

The Treaty empowers federal district courts to execute treaty requests in order to comply with the United States' treaty obligation. Article 5(1) provides that:

The courts of the Requested State are empowered to issue subpoenas, search warrants, or other orders necessary to execute the request.

The Treaty contemplates that federal district courts will use compulsory measures to execute such requests. Article 8(1) provides that:

A person in the Requested State from whom evidence is requested pursuant to this Treaty shall, if necessary, be compelled to appear and, subject to the law of that State on immunity, incapacity, or applicable privilege, testify or produce documents, records, or other articles of evidence.

The Treaty imposes no dual criminality requirement as a precondition for providing assistance. As a result, each state is obligated to provide assistance without regard to whether the

conduct under investigation or prosecution would constitute an offence under the laws of the Requested State. See Letter of Submittal of Treaty to the President from the Department of State, August 27, 1997.

B. Use of the Treaty to Execute Requests for Assistance

The Treaty is self-executing and requires no implementing legislation. See Letter of Submittal of Treaty to the President from the Department of State, August 27, 1997. Even so, it contains little in the way of a procedural framework for executing requests. Consequently, federal district courts routinely utilize the "commission" procedure authorized by 28 U.S.C. § 1782, the statute governing the provision of assistance for foreign judicial proceedings generally, to fulfill their judicial responsibility under the Treaty of executing such requests.

1. Appointment of a commissioner

Section 1782 provides in pertinent part:

The district court . . . may direct that the testimony or statement [of a person who resides or is found within the district] be given or the document or other thing be produced, before a person appointed by the court.

A federal district court customarily appoints or "commissions" a person ("commissioner") to collect evidence on behalf of the court and authorizes the commissioner to submit the evidence collected to the requesting foreign court or authority. With requests from foreign authorities for assistance in criminal matters, a court typically appoints an Assistant U.S. Attorney as

commissioner. [However, a court also may commission a foreign authority together with (or in lieu of) an Assistant U.S. Attorney. See, e.g., In re Letter of Request from the Supreme Court of Hong Kong, 138 F.R.D. 27, 29 (S.D.N.Y. 1991) [hereinafter Hong Kong].]

The application to a federal district court for appointment of a commissioner to execute a foreign request for judicial assistance is generally made ex parte. In re Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 688 (D.C. Cir. 1989); In re Letters Rogatory from the Tokyo District, Tokyo, Japan, 539 F.2d 1216, 1219 (9th Cir. 1976).

2. Establishment of an evidence-collecting procedure

Section 1782 further provides in pertinent part that:

To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A federal district court empowers a commissioner to collect the evidence using the procedure prescribed by the court. A court has "complete discretion in prescribing the procedure to be followed." Sen. Rep. No. 1580, 88th Cong., 2d Sess. 1 (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3782, 3789. When a court's order fails to specify a procedure by which a commissioner is to collect the evidence, the Federal Rules of Civil Procedure apply. In re Letters Rogatory from the Tokyo District Prosecutor's Office, Tokyo, Japan, 16 F.3d 1016, 1019

(9th Cir. 1994); In re Letter of Request from the Supreme Court of Hong Kong, 138 F.R.D. 27, 31 (S.D.N.Y. 1991) [hereinafter Hong Kong]. However, as Section 1782 makes clear, when a court does specify a procedure other than one in accordance with the Federal Rules of Civil Procedure, the alternative procedure shall apply. 28 U.S.C. § 1782(a); Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1098 (2d Cir. 1995) [hereinafter Euromepa].

a. Commissioner's subpoena

Article 5(1) provides for the issuance of procedural documents, such as subpoenas, to effectuate the gathering of evidence:

The courts of the Requested State are empowered to issue subpoenas, search warrants, or other orders necessary to execute the request.

If a federal district court so orders, a commissioner may use the attached form, entitled "commissioner's subpoena," to obtain the requested evidence. See, e.g., Erato, 2 F.3d at 13-14 (incorporating in pertinent part the district court's order directing the use of commissioner's subpoenas). The commissioner's subpoena is a creation of neither the Federal Rules of Criminal Procedure nor the Federal Rules of Civil Procedure, but is an order of the court for the production of evidence in accordance with both the Treaty and Section 1782. See Article 5(1); 28 U.S.C. 1651; White v. National Football League, et. al, 41 F.3d 402, 409 (8th Cir. 1994), cert. denied, 515 U.S. 1137 (1995) (a court may issue whatever process it deems necessary to facilitate disposition of the matter before it).

Upon authorization by a court, a commissioner may issue such commissioner's subpoenas as are necessary to execute the request.

b. Notice of evidence taking

Article 8(1) authorizes use of compulsory process in the execution of treaty requests comparable or similar to that used in domestic criminal investigations or prosecutions:

A person in the Requested State from whom evidence is requested pursuant to this Treaty shall, if necessary, be compelled to appear and, subject to the law of that state on immunity, incapacity, or applicable privilege, testify or produce documents, records, or other articles of evidence.

Inasmuch as grand jury and criminal trial subpoenas are issued without notice to other than the recipients (i.e., no notice to targets, defendants, or third parties), commissioner subpoenas issued in execution of treaty requests likewise should require no notice to other than the recipients. Accordingly, a federal district court should authorize a commissioner to collect the evidence requested without notice to any party other than the recipient of the commissioner's subpoena except to the extent that a request asks for specific notice procedures.¹

C. The Present Request

The Central Authority for Australia pursuant to Article 2 of the Treaty, has made the instant treaty request in

¹ Generally, U.S. authorities execute requests for judicial assistance in criminal matters without notification to actual or potential targets of investigations, or even to parties in proceedings. U.S. authorities rely on the requesting courts and authorities to provide such notice directly to the relevant parties as foreign law requires or to request that U.S. executing authorities follow stated notice procedures when necessary or useful under foreign law or practice. Foreign requests have asked (1) that a person to be interviewed (generally a defendant or suspect) be given notice of applicable testimonial privileges (e.g., against self-incrimination) at the time of the interview and (2) that a defendant and defense counsel be permitted to be present during the taking of testimony of a witness and be given sufficient notice to make arrangements.

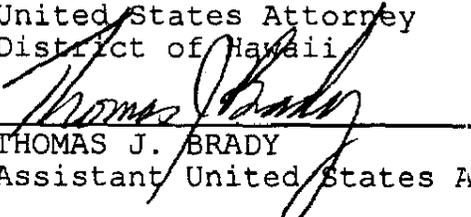
connection with a criminal investigation by the Australian Commonwealth Director of Public Prosecutions and the Australian Federal Police, specifically, the Victoria Police, a law enforcement agency responsible for investigating alleged breaches of the criminal laws of the State of Victoria, Australia. The Victoria Police are investigating Frank Yuman Chan and others for the offenses of aggravated burglary, false imprisonment, and conspiracy to commit the above offenses. These crimes allegedly occurred in Victoria, Australia, and it is believed that Frank Yuman Chan, from his home in Hawaii, used telephonic communications to arrange for the commission of these crimes. The Victoria Police have asked for assistance in obtaining Verizon Hawaii telephone records for two telephone numbers used by Frank Yuman Chan.

Accordingly, to execute this request, the government moves this court to issue the attached order appointing the undersigned Assistant U.S. Attorney as commissioner, authorizing the undersigned to take the actions necessary, including the issuance of commissioner's subpoenas, to obtain the evidence requested, and to adopt such procedures in receipt of the evidence as are consistent with the intended use thereof.

DATED: March 17, 2005, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By:


THOMAS J. BRADY
Assistant United States Attorney

Handwritten initials

EDWARD H. KUBO, JR. #2499
United States Attorney
District of Hawaii

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First Assistant U.S. Attorney

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAR 21 2005

at 2 o'clock and 04 min. P.M.
WALTER A. Y. H. CHINN, CLERK

LODGED

MAR 17 2005

CLERK, U.S. DISTRICT COURT
DISTRICT OF HAWAII

Attorneys for UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

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Criminal Matters in the)
Matter of FRANK YUEMAN CHAN)

MISC. NO.

ORDER

MC05 00075 HG BMK

ORDER

Upon application of the United States, and upon review of the request from Australia seeking evidence under the Treaty Between the Government of the United States of America and the Government of Australia on Mutual Assistance in Criminal Matters, 1997 WL 597540 (Treaty), entered into force September 30, 1999, and the Court having fully considered this matter,

IT IS HEREBY ORDERED, pursuant to the authority conferred by the Treaty, as well as 28 U.S.C. § 1782 and this Court's inherent authority, that Thomas J. Brady is appointed as

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a Commissioner of this Court and is hereby directed to execute the Treaty request as follows:

1. take such steps as are necessary, including issuance of commissioner's subpoenas, to collect the evidence requested;

2. provide notice with respect to the collection of evidence to those persons identified in the request as parties to whom notice should be given (and no notice to any other party shall be required);

3. disclose such copies of this Order as is necessary to accomplish the purposes of the request for assistance, notwithstanding that this Order may be filed and maintained under seal;

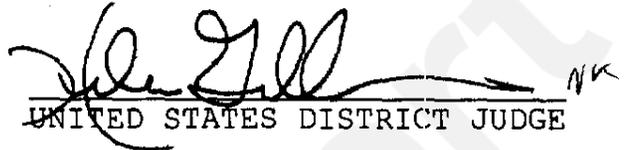
4. adopt procedures to collect the evidence requested, consistent with its use in the investigation or proceeding for which Australia has requested assistance, which procedures may be specified in the request or provided by or with the approval of the Australian Central Authority under the Treaty;

5. seek such further orders of this Court as may be necessary to execute this request; and

6. certify and submit the evidence collected to the Office of International Affairs, Criminal Division, U.S. Department of Justice, or as otherwise directed by that office for transmission to Australia.

IT IS FURTHER ORDERED that, in collecting the evidence requested, the Commissioner may be accompanied by persons whose presence or participation is authorized by the Commissioner, including, without limitation, special agents of the Federal Bureau of Investigation and/or representatives of Australia.

DATED: March 19, 2005, at Honolulu, Hawaii.


UNITED STATES DISTRICT JUDGE

IN RE:
Request from Australia
Pursuant to the Treaty
Between the Government of the
United States of America and
the Government of Australia
on Mutual Assistance in
Criminal Matters in the
Matter of FRANK YUEMAN CHAN

Misc. No.
"Order"