

UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF PENNSYLVANIA

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IN RE: Request from the Netherlands )  
Pursuant to the Treaty )  
Between the United States of )  
America and the Kingdom of the )  
Netherlands on Mutual Assistance )  
in Criminal Matters in the )  
Matter of Caledonian Offshore )  
Limited )  
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MISC  
~~Criminal~~ No. 97-283

(1) *W*

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

The United States petitions this Court for an Order, pursuant to Article 5(1) of the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters T.I.A.S. 10734, 28 U.S.C. §1782, and its own inherent authority, appointing Dennis P. Kissane, Assistant U.S. Attorney for the Western District of Pennsylvania as Commissioner to collect evidence from witnesses and to take such other action as is required to execute the attached request from the Netherlands made pursuant to the Treaty.

Respectfully submitted,

FREDERICK W. THIEMAN  
UNITED STATES ATTORNEY

*Dennis P. Kissane*  
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DENNIS P. KISSANE  
Assistant U.S. Attorney

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MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR ORDER

The United States is seeking an Order appointing a Commissioner to collect evidence requested by the Netherlands in its attached Treaty Request made pursuant to the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters, June 12, 1981, T.I.A.S. 10734 (entered in force Sept. 15, 1983) [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. United States v. Erato, 2 F.3d 11, 15-16 (2d Cir. 1993).

A. The Treaty

The United States and the Netherlands entered into the Treaty for the purpose of promoting mutual legal cooperation in criminal matters. The Treaty obliges each state to provide assistance to the other in investigations of offenses covered under the Treaty and in court proceedings related to such offenses. Article 1(1). The assistance includes interviews and depositions of witnesses, production of documents and other things, and asset freezes. Article 1(2); see 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).

B. Use of the Treaty to Execute Requests for Assistance

In executing Dutch requests, the Treaty obligates the courts to follow its domestic law and procedures except to the extent that the Treaty provides otherwise. The Treaty states, at Article 12 (2), that:

Requests shall be executed according to the domestic law and procedures of the Requested State except to the extent that this Treaty provides otherwise. Procedures specified in the request, even if unfamiliar to the Requested State, shall be followed except to the extent specifically prohibited by the laws of the Requested State.

As stated in the Letter of Submittal to the President from the Department of State dated July 17, 1981, the Treaty is intended to be self-executing but, for the most part, will "utilize existing authority of the federal courts, particularly 28 U.S.C. 1782." 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 Dutch requests.

1. Appointment of a commissioner

Section 1782 provides in pertinent part that:

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 for assistance in criminal matters, a court typically appoints an Assistant United States Attorney as commissioner. However, a court also may commission a foreign authority together with (or in lieu of) an Assistant United States 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].

Application to a federal district court for appointment of a commissioner to execute a foreign request for judicial assistance is handled 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 (9th Cir. 1994); Hong Kong, 138 F.R.D. at 32. 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. In re Letter of Request from the Government of France, 139 F.R.D. 588, 590-591 (S.D.N.Y. 1991).

As summarized in the Letter of Submittal to the President from the Department of State dated July 17, 1981:

the treaty's basic requirement [is] that the requested State follow the same practices and procedures in executing a request for assistance as it normally follows in domestic investigations or judicial proceedings.

In other words, the Treaty requires courts to order the use of procedures comparable to those applicable in domestic

investigations and prosecutions of criminal matters rather than, by default, the Federal Rules of Civil Procedure.

a. Commissioner's subpoena

The Treaty contemplates that federal district courts will use compulsory measures to execute Dutch requests. The Treaty provides, at Article 5(1), that:

A person from whom evidence is sought shall, if necessary, be compelled by subpoena to appear and testify or produce documents, records and articles to the same extent as in investigations or proceedings in the Requested State.

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., United States v. Erato, 2 F.3d 11, 12-13 (2d Cir. 1993) (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. 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

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 Dutch 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 Dutch request asks for specific notice procedures.<sup>8</sup>

C. The Present Request

The instant Treaty Request has been made by the Netherlands Ministry of Justice, the Competent Authority under Article 14 of the Treaty, in connection with a current criminal investigation by the Public Prosecutor's Office of the District Court of Utrecht, Kingdom of the Netherlands, and the Economic Surveillance Department of the region of Utrecht, Kingdom of the Netherlands. As stated in the diplomatic notes accompanying the Treaty which "express the understanding" of the Treaty partners, Article 14 is to be interpreted so that "[r]equests made on behalf of public prosecutors in the Kingdom of the Netherlands, for purposes of applying the laws of the United States, shall be considered requests of a judicial authority." The Public

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Historically, United States authorities have executed requests for judicial assistance in criminal matters without notification to actual or potential targets of investigations, or even to parties in proceedings, in order to protect against compromising foreign investigations and proceedings. Moreover, United States authorities customarily rely on the requesting courts and authorities to provide such notice directly to the relevant parties as foreign law requires. Finally, requesting courts and authorities routinely request that United States executing authorities follow particular, stated notice procedures when such procedures are necessary or useful under the foreign law or practice. For example, foreign requests frequently ask (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.

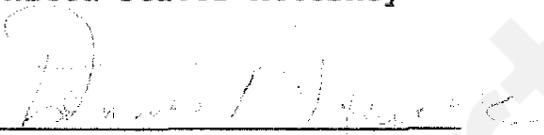
Prosecutor's Office of the District Court of Utrecht, Kingdom of the Netherlands is investigating companies known as Caledonian Offshore Limited, Worldwide Privacy, Joint Capital Assistance and Prime Call and an individual named Walttraud Weiniger (Date of Birth: March 11, 1945) in connection with a scheme to defraud individuals in Kuala Lumpur, Malasia by advertising in newspapers that applicants who respond and pay a \$78.00 (U.S. currency) fee will be provided information relating to high paying industrial sector employment opportunities in various countries. The applicants thereafter received no useful information. Transfers of money have been documented between Caledonian Offshore Limited and the other companies named above. Between December 1995 and May 1996, eleven [11] transfers of money occurred through the use of a Eurocard debit account, No. 59.84.225, in the name of W. Weininger (Date of Birth: March 11, 1945). The account was debited by Mellon Bank, N.A., One Mellon Bank Center, Pittsburgh, PA 15258, to the credit of Prime Call, Seattle, Washington. The Public Prosecutor's Office of the District Court of Utrecht, Kingdom of the Netherlands has asked for assistance in obtaining from Mellon Bank, N.A., Pittsburgh, Pennsylvania all records of transactions between December of 1995 and May of 1996 relating to the above-referenced account, companies and individual.

Accordingly, to execute this request, the government moves this Court to issue the attached Order appointing Assistant United States Attorney Dennis P. Kissane as Commissioner, authorizing him 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 in the Netherlands.

Respectfully submitted,

FREDERICK W. THIEMAN  
United States Attorney

  
Dennis P. Kissane  
Assistant U.S. Attorney

OffshoreAlert

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O R D E R

Upon application of the United States, and upon review of the request from the Netherlands seeking evidence under the Treaty on Mutual Assistance with Kingdom of the Netherlands, and the Court having fully considered this matter,

IT IS HEREBY ORDERED, pursuant to the authority conferred by the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters, T.I.A.S. 10734, as well as 28 U.S.C. §1782 and this Court's inherent authority, that Dennis P. Kissane, Assistant U.S. Attorney for the Western District of Pennsylvania is appointed as a Commissioner of this Court and is hereby directed to execute the Treaty request as follows:

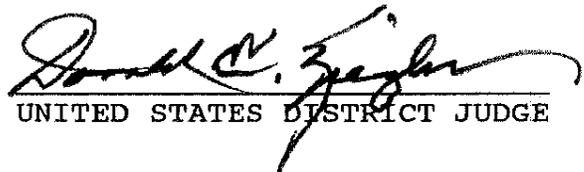
1. Take such steps as are necessary, including issuance of commissioner's subpoenas, to collect the evidence requested;
2. Provide notice with respect to the collection of evidence to those persons identified in the request as parties to whom notice should be given (and no notice to any other party shall be required);

3. Adopt procedures to collect the evidence requested, consistent with its use in the investigation or proceeding for which the Netherlands has requested assistance, which procedures may be specified in the request or provided by or with the approval of the Dutch Competent Authority under the Treaty;

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

5. Certify and submit the evidence collected to the Office of International Affairs, Criminal Division, United States Department of Justice, or as otherwise directed by that office for transmission to the Netherlands.

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 the Netherlands.

  
UNITED STATES DISTRICT JUDGE

Dated: May 29, 1997