

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW JERSEY

#1  
FILED

AUG 10 2001

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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 Jie A. Swie, et al. )  
-----X

AT 8:30  
WILLIAM T. WALSH  
CLERK M

No. 01-210 (DMC)

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 (\_\_\_ U.S.T. \_\_\_, T.I.A.S. 10734),  
28 U.S.C. § 1782, and its own inherent authority, appointing  
Matthew S. Queler, Assistant U.S. Attorney, 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,

ROBERT J. CLEARY  
UNITED STATES ATTORNEY

*Matthew Queler*

By: MATTHEW S. QUELER  
Assistant U.S. Attorney



U.S. Department of Justice

RECEIVED

AUG 10 2001

United States Attorney  
District of New Jersey

DENNIS M. CAVANAUGH  
U.S. DISTRICT JUDGE

970 Broad Street, Suite 700  
Newark, NJ 07102

973/645-2700

*Eden*

August 9, 2001

01-210 (dmc)

Hon. Dennis M. Cavanaugh  
United States District Judge  
United States Courthouse & Post Office  
Federal Square  
Newark, New Jersey 07102

U.S. DISTRICT JUDGE  
DENNIS M. CAVANAUGH

AUG 10 2001

Re: Foreign Assistance Request

RECEIVED

Dear Judge Cavanaugh:

Enclosed please find an original and two copies of an Application for an Order pursuant to 28 U.S.C. § 1782, a Memorandum of Law in support of the Application, and a proposed form of Order. If the Application and proposed Order meets with your approval, please execute the Order, and have your Deputy Clerk file it with the Clerk of the Court and mail a copy back to me in the enclosed self-addressed return envelope.

Thank you for your assistance in this matter.

Respectfully,

ROBERT J. CLEARY  
United States Attorney

*Matthew Queler*

BY: MATTHEW S. QUELER  
Assistant U.S. Attorney

*Queler*

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW JERSEY

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AT 8:30 <sup>M</sup>  
WILLIAM T. WALSH, CLERK

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No. 01-210 (DNC)

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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, \_\_\_ U.S.T. \_\_\_, T.I.A.S. 10734 (entered in force Sept. 15, 1983) [hereinafter referred to as "the Treaty," attached hereto as Exhibit 1]. 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[s] 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 form attached hereto as Exhibit 2, 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>1</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

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<sup>1</sup> 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.

or proceeding by the Public Prosecutor in Oranjestad, Aruba.<sup>2</sup> 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 Prosecutor in Aruba is investigating several suspects, including both individuals and corporations, for money laundering in connection with narcotics trafficking, as well as forgery. More specifically, the suspects allegedly use a form of "underground banking" to pay for narcotics purchased from Colombia. The payments were also laundered through the suspect corporations. The Public Prosecutor has asked for assistance in obtaining records regarding accounts at two financial institutions in New Jersey, which have been deemed to be relevant to the investigation.

Accordingly, to execute this request, the United States moves this Court to issue the attached Order appointing Assistant United States Attorney Matthew S. Queler as Commissioner, authorizing him to take the actions necessary, including the issuance of Commissioner's subpoenas, to obtain the evidence

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<sup>2</sup> Aruba is an autonomous state within the Kingdom of the Netherlands.

requested, and to adopt such procedures in receipt of the evidence as are consistent with the intended use thereof in the Netherlands.

Respectfully submitted,

ROBERT J. CLEARY  
UNITED STATES ATTORNEY

*Matthew Queler*

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By: MATTHEW S. QUELER  
Assistant U.S. Attorney

**NETHERLANDS JUDICIAL ASSISTANCE: CRIMINAL INVESTIGATIONS  
TIAS 10734**

Treaty, with exchange of notes, signed at The Hague June 12, 1981; Transmitted by the President of the United States of America to the Senate August 6, 1981 (Treaty Doc. No. 97-16, 97th Cong., 1st Sess.); Reported favorably by the Senate Committee on Foreign Relations November 20, 1981 (S. Ex. Rept. No. 97-36, 97th Cong., 1st Sess.); Advice and consent to ratification by the Senate December 2, 1981; Ratified by the President January 4, 1982; Ratified by the Netherlands, with reservation, July 12, 1983; Ratifications exchanged at Washington August 16, 1983, Proclaimed by the President October 11, 1983; Entered into force September 15, 1983.

**BY THE PRESIDENT OF THE UNITED STATES OF AMERICA  
A PROCLAMATION**

CONSIDERING THAT:

The Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters, together with a related exchange of notes, was signed at The Hague on June 12, 1981, the texts of which, in the English and Dutch languages, are hereto annexed;

The Senate of the United States of America by its resolution of December 2, 1981, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Treaty and related exchange of notes;

The Treaty and related exchange of notes were ratified by the President of the United States of America on January 4, 1982, in pursuance of the advice and consent of the Senate, and duly ratified on the part of the Kingdom of the Netherlands;

It is provided in Article 19 of the Treaty that the Treaty shall enter into force 30 days after the exchange of the instruments of ratification;

The instruments of ratification of the Treaty were exchanged at Washington on August 16, 1983: And accordingly the Treaty entered into force on September 15, 1983;

NOW, THEREFORE, I, Ronald Reagan, President of the United States of America, proclaim and make public the Treaty and related exchange of notes, to the end that they be observed and fulfilled with good faith on and after September 15, 1983, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eleventh day of October in the year of our Lord one thousand nine hundred eighty-three and of the Independence of the United States of America the two hundred eighth.

RONALD REAGAN

By the President:

GEORGE P. SHULTZ  
Secretary of State

Treaty between the United States of America and the Kingdom of  
the Netherlands  
on mutual assistance in criminal matters

The Government of the United States of America and the Government of the Kingdom of the Netherlands, desiring to conclude a Treaty on mutual assistance in criminal matters, have agreed as follows:

**Article 1**

**Obligation to Render Assistance**

1. The Contracting Parties undertake to afford each other, upon request and in accordance with the provisions of this Treaty, mutual assistance in criminal investigations and proceedings.
2. Assistance shall include, but not be limited to:
  - a. locating persons;
  - b. serving documents;
  - c. providing records;
  - d. taking the testimony or statements of persons;
  - e. producing documents
  - f. executing requests for search and seizure; and
  - g. transferring persons in custody for testimonial purposes.

**Article 2**

**Locating Persons**

The Requested State shall make thorough efforts to ascertain the location of persons specified in the request and believed to be within the Requested State.

**Article 3**

**Serving Documents**

1. The Requested State shall cause service of any legal document transmitted for this purpose by the Requesting State.
2. Any request for the service of a document requiring the appearance of a person before an authority in the Requesting State shall be transmitted a reasonable time before the scheduled appearance.
3. The Requested State shall return as proof of service a dated receipt signed by the person served or a declaration signed by the officer making service, specifying the form and date of service.

**Article 4**

**Providing Records of Government Offices or Agencies**

1. The Requested State shall provide a copy of a publicly available record of a government office or agency, duly authenticated by an appropriate official.

2. The Requested State may provide any record or information in the possession of a government office or agency, but not publicly available, to the same extent and under the same conditions as it would be available to its own law enforcement or judicial authorities. The Requested State in its discretion may deny the request entirely or in part.

#### **Article 5**

##### **Taking Testimony and Producing Documents in the Requested State**

1. 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. Testimonial privileges under the laws of the Requesting State shall not apply in the execution of requests under this Article.

2. On request, the Requested State shall state the date and place of the taking of testimony.

3. At the execution of a request, the Requested State shall permit the presence of an accused, counsel for the accused, and any other interested person specified in the request.

4. The executing authority shall provide any person permitted to be present the opportunity to pose questions for the person whose testimony is sought.

#### **Article 6**

##### **Executing Requests for Search and Seizure**

1. The Requested State shall execute requests for search and seizure in accordance with its laws and practices if the subject offense is punishable under the laws of both Contracting Parties by deprivation of liberty for a period exceeding one year, or, if less, is specified in the Annex of this Treaty.

The competent Authorities referred to in Article 14 may agree in writing upon any modifications of the Annex. Such modifications shall take effect on a date to be determined in an exchange of diplomatic notes.

2. An offense shall be deemed punishable under the laws of the Requested State if the acts or omissions alleged, occurring in similar circumstances in the Requested State, would constitute a criminal offense under the laws of that State. For purposes of this paragraph, purely jurisdictional elements of United States Federal offenses, such as the use of the mails or interstate commerce, shall not be considered as essential elements of these offenses.

3. A request to the Kingdom of the Netherlands for the production of documents from private persons shall comply with this Article.

4. A request to the United States for a search and seizure shall be accompanied by a statement made under oath before, or by a judge in the Kingdom of the Netherlands, which shall establish good cause to believe that an offense has taken place or is about to take place and that evidence of the offense is to be found on the persons or the premises to be searched, and shall provide a precise description of the person or premises to be searched. Such a statement shall be considered in the United States in lieu of an affidavit sworn before a United States judicial officer.

5. Documents produced under this Article shall be duly authenticated as specified in the request, and a record shall be made of every transfer of other articles or evidence seized. Such records of transfer shall be admitted as evidence of the truth of the facts they assert.

#### **Article 7**

##### **Transferring Persons in Custody to the Requesting State**

1. A person in custody needed as a witness or for purposes of confrontation before an authority in the Requesting State shall be transported to the Requesting State if:

- a. the person in custody consents;
- b. no substantial extension of that person's custody is anticipated; and
- c. the Requested State has no reason to deny the transfer.

2. The Requested State may postpone execution of the request for as long as the presence of the person is necessary for an investigation or proceeding in the Requested State.

3. The Requesting State shall have authority and be obligated to keep the person in custody unless the Requested State has ordered release.

4. The Requesting State shall return a person not released under paragraph 3 to the custody of the Requested State as soon as circumstances permit or as otherwise agreed. The Requesting State shall not decline to return a person transferred because such person is a national of that State.

#### **Article 8**

##### **Transferring Persons in Custody to the Requested State**

1. When the Requesting State requires the transfer to the other State of a person in custody for purposes of confrontation, the request shall so state.

2. The Requested State shall hold the person in custody, unless the Requesting State has ordered release.

3. The Requested States shall return a person not released under paragraph 2 to the custody of the Requesting State as soon as circumstances permit or as otherwise agreed. The Requested State shall not decline to return the person transferred because such person is a national of that State.

#### **Article 9 Safe Conduct**

1. A person appearing before an authority in either State pursuant to this Treaty shall not be subject to suit, or be detained or subjected to any other restriction of personal liberty, with respect to any act or conviction which preceded departure, except as provided in Articles 7 and 8 and in the following paragraph.

2. A person, of whatever nationality, summoned before the judicial authorities of the Requesting State as an accused, shall not be prosecuted or subjected to any restriction of personal liberty for acts or convictions prior to departure from the Requested State and not specified in the summons.

3. Safe conduct provided in this Article shall cease if, ten days after the person appearing has been notified that his or her presence is no longer required, that person has not left the Requesting State or, having left, has returned.

4. A person appearing as a witness in the Requesting State may refuse to testify when that person, because of occupation, has an obligation or right to do so under the laws of the Requested State and the testimony required relates to protected information. The Requesting State shall respect the obligation or right when the Competent Authority of the Requested State verifies that such obligation or right exists.

#### **Article 10 Limitations on Compliance**

1. The Requested State may deny a request to the extent that:

- a. execution of the request would prejudice the security or other essential public interests of the Requested State;
- b. the request relates to a matter considered a political offense by the Requested State;
- c. the request relates to the prosecution of a person who is immune from prosecution for the offense for which assistance is requested, by reason of the

laws of the Requested State relating to prior jeopardy; or

d. the request does not comply with the provisions of this Treaty.

2. The Requested State may postpone execution of a request or grant it subject to conditions, if execution would interfere with an ongoing investigation or legal proceeding in the Requested State.

3. The Requested State shall immediately inform the Requesting State of the reason for denying or postponing the execution of a request.

#### **Article 11**

##### **Protecting Confidentiality and Restricting Use**

1. When necessary, the Requested State may require that evidence and information provided under this Treaty and information derived therefrom be kept confidential in accordance with stated conditions, except to the extent that disclosure is necessary as evidence in a public proceeding.

2. The Requesting State shall not use any evidence obtained under this Treaty, nor any information derived therefrom, for purposes other than those stated in the request, without the prior consent of the Requested State.

#### **Article 12**

##### **Executing Requests**

1. The Competent Authority of the Requested State shall promptly comply with the request or, when appropriate, transmit it for execution to the authority having jurisdiction.

2. 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.

#### **Article 13**

##### **Contents of Requests**

1. A request for assistance shall indicate:

a. the name of the authority conducting the investigation or proceeding to which the request relates;

b. the subject matter and nature of the investigation or proceeding;

- c. a description of the evidence or information sought or the acts to be performed; and
- d. the purpose for which the evidence, information or action is sought.

2. include:

- To the extent necessary and possible, a request shall
- a. available information on the identity and whereabouts of a person to be located;
  - b. the identity and location of a person to be served, that person's relationship to the proceeding and the manner in which service is to be made;
  - c. the identity and location of persons from whom evidence is sought;
  - d. a description of the manner in which any testimony is to be taken and recorded;
  - e. a list of questions to be answered;
  - f. a precise description of the place to be searched and the objects to be seized;
  - g. a description of any particular procedure to be followed in executing the request; and
  - h. information as to the allowances and expenses to which a person appearing in the Requesting State will be entitled.

**Article 14**  
**Competent Authorities**

All requests for assistance shall be made and executed through a Competent Authority for each Contracting Party. The Competent Authorities of the two States shall communicate directly with each other for the purpose of carrying out the provisions of this Treaty. For the United States of America, the Competent Authority shall be the Attorney General or that person's designee. For the Kingdom of the Netherlands, the Competent Authority shall be the Minister of Justice in the Netherlands or the Minister of Justice in the Netherlands Antilles or their designees.

**Article 15**  
**Return of Completed Requests**

1. Upon completion of a request the Requested State shall, unless otherwise agreed, return the original request together with all information and evidence obtained, indicating place and time of execution, to the Requesting State.

2. To the extent possible, all documents and records to be furnished pursuant to a request under this Treaty shall be complete and in unedited form. Upon application of the Requesting State, the Requested State shall make every effort to furnish original documents and records.

#### **Article 16**

##### **Return of Documents, Records or Articles of Evidence**

The Requesting State shall return any documents, records or articles of evidence furnished in execution of requests as soon as possible unless the Requested State waives their return.

#### **Article 17**

##### **Costs and Translations**

1. The Requested State shall render assistance without cost to the Requesting State except for fees of private experts specified in the request.

2. The Requesting State shall bear all expenses related to the transfer under Articles 7 and 8 of a person in custody.

3. Requests shall be provided in both Dutch and English. Translation of documents provided pursuant to requests is incumbent on the Requesting State.

#### **Article 18**

##### **Other Treaties and Domestic Laws**

1. Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any assistance or procedure available under other international conventions or arrangements or under the domestic laws of the Contracting Parties.

2. Except where this Treaty specifically sets forth rules for the admissibility of evidence, the provisions of this Treaty shall not give rise to a right on the part of any person to take any action in a criminal proceeding to suppress or exclude any evidence. This Treaty does not expand or limit rights to judicial review otherwise available under domestic law.

3. No provision governing extradition of persons, whether of domestic law or treaty, shall apply to the transfer of persons under Articles 7 and 8 or to appearance under paragraph 2 of Article 9.

#### **Article 19**

##### **Entry into Force**

1. This Treaty shall be subject to ratification; the instruments of ratification shall be exchanged at Washington D.C. as soon as possible.

2. This Treaty shall enter into force 30 days after the exchange of the instruments of ratification.<sup>1</sup> This Treaty shall apply both with respect to acts committed before or after its entry into force.

**Article 20**  
**Scope of Application**

1. As regards the Kingdom of the Netherlands, the present Treaty shall apply to the territory of the Kingdom in Europe and to the Netherlands Antilles, unless the instrument of ratification of the Government of the Kingdom of the Netherlands, referred to in Article 19, shall otherwise provide.

2. The Kingdom of the Netherlands reserves the right to declare at the time of ratification that this Treaty shall not apply to requests for assistance relating to fiscal offenses addressed to the Netherlands Antilles.<sup>2</sup> This reservation may at any time be wholly or partially withdrawn through an exchange of diplomatic notes between the Contracting Parties.

**Article 21**  
**Denunciation**

1. Either Contracting Party may terminate this Treaty at any time by giving notice to the other Party and the termination shall be effective six months after the date of receipt of such notice.

2. Termination of this Treaty by the Government of the Kingdom of the Netherlands may be limited to one of the constituent parts of the Kingdom.

DONE at The Hague on 12 June 1981 in two copies in the English and Dutch languages, each version being equally authentic.

**Annex**

Requests for search and seizure may be executed under paragraph 1 of Article 6 of the Treaty, if they relate to offenses covered by:

**I**

A. For the Kingdom of the Netherlands (Europe): The Criminal Code (Wetboek van Strafrecht), Articles 194, 272, 328 bis, 328 ter and 336.

B. For the Kingdom of the Netherlands (Netherlands Antilles): The Criminal Code of the Netherlands Antilles (Wetboek

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<sup>1</sup> September 15, 1983.

<sup>2</sup> Declaration was made in Dutch note of August 16, 1983.

van Strafrecht van de Nederlandse Antillen), Articles 200, 285, 341a and 349.

## II

For the United States of America: Title 26, United States Code (The Internal Revenue Code), Section 7203.

Texts of the relevant legal provisions:

### **Netherlands Criminal Code**

#### **Article 194**

Any person who has been declared bankrupt or is married "in community of property" to a bankrupt or who is a manager or director of a public or private company, association or foundation, and who has been legally summoned to give information in such capacity and either fails to appear without good reason or appears but refuses to give the required information or deliberately furnishes false information shall be liable to a term of imprisonment not exceeding one year.

#### **Article 272**

(1) Any person who deliberately discloses information which he knows or should reasonably be assumed to know he is bound not to disclose on account of his present or former profession or office or of a statutory regulation, shall be liable to a term of imprisonment not exceeding one year or a fine not exceeding 6,000 guilders.

(2) If such an offense is committed against a particular person proceedings may be brought only if the person concerned registers a complaint.

#### **Article 328 bis**

Any person who commits a fraudulent act in order to mislead the public or a particular person, with the intention of building up, protecting or increasing his own sales or those of another person, shall, if this could result in any disadvantage to his competitors or those of such other person, be guilty of engaging in unfair competition and be liable to a term of imprisonment not exceeding one year or a fine not exceeding 1,800 guilders.

#### **Article 328 ter**

(1) Any person other than a public servant, who is in paid employment or acts as an agent and who accepts a gift or promise in consideration of his performing or failing to perform some act in the course of his duties as employee or agent and dishonestly conceals the fact from his employer or principal shall be liable to a term of imprisonment not exceeding one year or a fine not exceeding 100,000 guilders.

(2) The same penalty shall be applicable to any person who offers a gift or makes a promise to another person, who is not a

public servant but is in paid employment or acts as an agent, in consideration of the latter performing or failing to perform some act in the course of his duties as employee or agent, if the gift or promise is of such a nature or is offered or made under such circumstances that it is reasonable to assume that he will dishonestly conceal the gift or promise from his employer or principal.

**Article 336**

The "merchant", manager, managing partner or member of the board of a company, association or foundation who deliberately discloses untrue accounts, or a balance sheet, profit and loss account, statement of assets and liabilities or information explaining any of the above or who deliberately permits disclosure shall be liable to a term of imprisonment not exceeding one year.

**Criminal Code of the Netherlands Antilles**

**Article 200**

Any person who has been declared bankrupt or is married "in community of property" to a bankrupt or who is a manager or director of a public or private company, association or foundation which has been declared bankrupt and who has been legally summoned to give information in such capacity and either fails to appear without good reason or appears but refuses to give the required information or deliberately furnishes false information shall be liable to a term of imprisonment not exceeding one year.

**Article 285**

(1) Any person who deliberately discloses information which he is bound not to disclose on account of his present or former profession or office shall be liable to a term of imprisonment not exceeding six months or a fine not exceeding six hundred guilders.

(2) If such an offence is committed against a particular person, proceedings may be brought only if the person concerned registers as compliant.

**Article 341(a)**

Any person who commits a fraudulent act in order to mislead the public or a particular person, with the intention of building up, protecting or increasing his own sales or those of another person, shall, if this could result in any disadvantage to his competitors or those of such other person, be liable to a term of imprisonment not exceeding one year or a fine not exceeding nine hundred guilders.

**Article 349**

The "merchant", manager, managing partner or member of the board of a company, association or foundation who deliberately discloses untrue accounts, or a balance sheet, profit and loss account, statement of assets and liabilities or information

explaining any of the above or who deliberately permits disclosure shall be liable to a term of imprisonment not exceeding one year.

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**The Internal Revenue Code (Title 26, United States Code)  
Section 7203**

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

**(EXCHANGE OF NOTES)  
EMBASSY OF THE UNITED STATES OF AMERICA  
The Hague, June 12, 1981  
No. 55**

Excellency,

I have the honor to refer to the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters signed today, and in particular to Articles 4, 6, 11 and 14 thereof, and express the understanding of the United States with respect to those Articles.

**Article 4**

Paragraph 2 of Article 4 permits each Party to provide to the other records in the possession of the government, other than those publicly available, and information derived therefrom. It also allows each Party the option of refusing to provide, or placing conditions on the disclosure of, such records and information. The Parties intend to furnish such records and information, to the extent permitted by domestic law, except where disclosure would cause harm to individuals cooperating in criminal investigations, compromise voluntary sources of information crucial to government operations, or otherwise adversely affect the operations of government or the administration of justice.

The Parties recognize that disclosure of tax records and information is strictly limited under their respective domestic tax laws because the proper operation of those laws depends upon taxpayer cooperation. Accordingly, tax records and information will be provided under the Treaty with respect to criminal investigations and proceedings only to the extent, and under the same conditions, that they would be available in criminal investigations and proceedings in the Requested State.

**Article 6**

The Parties understand that Article 6 establishes a far-reaching mutual obligation to comply with requests for search

and seizure. Since this kind of assistance entails compulsory measures which may seriously intrude into the private life and affairs of the individual, the Parties agree that requests for search and seizure will be granted only where the criminal acts or omissions are punishable under the laws of both States and the request is executed according to the domestic laws and administrative practices of the Requested State.

In the Kingdom of the Netherlands, the established administrative practice is that with respect to offenses called "fiscal offenses," which relate to duties, taxes, customs and exchange, compulsory measures of this kind are judiciously invoked. Accordingly, the Government of the Kingdom of the Netherlands takes the view that in executing requests for search and seizure under international agreements, it will not depart from its policy of restraint. The Government of the Kingdom understands Article 6 to allow it to retain its customary discretion in the execution of requests relating to fiscal offenses.

Certain Federal laws of the United States, such as those governing drugs, poisonous chemicals, substances injurious to health, firearms and other weapons, explosive and incendiary devices, are based on constitutional powers as the power to tax and promote public health and, consequently, are couched in terms of tax, health, and other laws. In executing requests by the United States with respect to such laws, the Kingdom of the Netherlands does not intend to retain the discretion ordinarily exercised with respect to fiscal offenses under the laws of the Kingdom of the Netherlands. This discretion will be retained only when the subject offenses relate to duties, taxes, customs or exchange according to the laws of both Parties.

Under the laws and practices of the United States, the requirements for search and seizure in fiscal cases are no stricter than in other kinds of cases. An application for a warrant for search and seizure in the United States must establish good cause to believe that an offense has taken place and that evidence of the offense is to be found on the person or premises to be searched. The description of the person or premises to be searched and the objects to be seized must be precise. Accordingly, a request by the Kingdom of the Netherlands to the United States for search and seizure should ordinarily be accompanied by a statement, made by or before a judge of the Kingdom of the Netherlands, of the facts establishing the basis for the issuance of the warrant.

#### **Article 11**

Although paragraph 1 of Article 11 allows either Party to impose restrictions on evidence and information provided, both Parties recognize that where judicial procedures require evidence to be presented in a public proceeding, such evidence and information may be so used to the extent the Requesting State deems necessary.

With respect to paragraph 2 of Article 11, both Parties agree that consent to use tax records and information for a purpose other than that stated in the initial request can be given. However, such consent will be limited to those instances where the subsequent use is consistent with the domestic laws and practices of the Requested State.

#### **Article 14**

Requests made by the Competent Authorities specified in Article 14 are to be honored in the Requested State in a way which harmonizes with domestic law. It is understood that whereas requests under this Treaty and all subsequent communications are exchanged between the Competent Authorities designated, such requests will originate from prosecutors, investigating authorities or courts. The Competent Authorities of the Kingdom of the Netherlands will convey requests from public prosecutors, examining magistrates and courts. The Competent Authority of the United States will make requests on behalf of prosecutors and law enforcement agencies and will convey requests from courts.

Certain domestic laws of the Parties provide for assistance to foreign authorities only when the originator of the request is a judicial authority. Although prosecutors and law enforcement agencies are not considered judicial authorities under the laws of the United States, requests made on their behalf by the Attorney General of the United States, for purposes of applying the laws of the Kingdom of the Netherlands, shall be considered requests of a judicial authority. Requests 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.

I would appreciate from your Excellency confirming that the understanding described above is also the understanding of the Kingdom of the Netherlands.

Accept, Excellency, assurances of my highest consideration.

/s/ THOMAS J. DUNNIGOR

**MINISTERIE VAN BUITENLANDSE ZAKEN**

The Hague, 12 June 1981

Sir,

I have the honor to acknowledge receipt of your letter of today's date, which reads as follows:

(For the text of the U.S. note, see pp. . . .)

I have the honor to confirm that the understanding described above is also the understanding of the Kingdom of the Netherlands.

Please accept, Sir, the assurance of my highest consideration.  
/s/ C.A. VAN DER (ILLEGIBLE)



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COMMISSIONER'S SUBPOENA

UNITED STATES DISTRICT COURT

\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I, Commissioner \_\_\_\_\_, an Assistant United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, acting under the authority of the Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters, and under Title 28, United States Code, Section 1782, for the purpose of rendering assistance to the Netherlands, command that you appear before me in Room \_\_\_\_\_, in the building located at \_\_\_\_\_, in the city of \_\_\_\_\_, in the state of \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m., to provide testimony/documents regarding an alleged violation of:

The laws of the Netherlands,  
namely, \_\_\_\_\_,

among other alleged violations,

and that at the time and place aforesaid you provide the following:

For failure to attend and provide testimony/said documents,  
you will be deemed guilty of contempt and liable to penalties  
under the law.

Dated:

COMMISSIONER \_\_\_\_\_  
Assistant United States Attorney for the  
\_\_\_\_\_ District of \_\_\_\_\_  
Telephone (\_\_\_\_) \_\_\_\_-\_\_\_\_

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UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW JERSEY

FILED

AUG 10 2001

AT 8:30 \_\_\_\_\_ M  
WILLIAM T. WALSH  
CLERK

-----X  
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 Jie A. Swie, et al. )  
-----X

No. 01-210(DMC)

ORDER

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, \_\_\_ U.S.T. \_\_\_, T.I.A.S. 10734, as well as 28 U.S.C. § 1782 and this Court's inherent authority, that Assistant U.S. Attorney Matthew S. Queler is appointed as a Commissioner of this Court and is hereby directed to execute the Treaty request as follows:

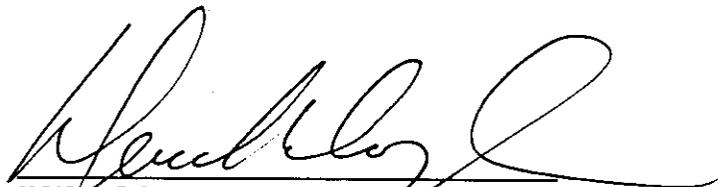
1. take such steps as are necessary, including issuance of commissioner's subpoenas, to collect the evidence requested;
2. provide notice with respect to the collection of evidence to those persons identified in the request as parties to whom notice should be given (and no notice to any other party shall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



HON. DENNIS M. CAVANAUGH  
UNITED STATES DISTRICT JUDGE

Dated: August 10, 2001