REPORT NO. 3 OF THE SECTION OF INTERNATIONAL LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association urge early ratification by the United States Senate of the Treaty between the Swiss Confederation and the United States of America on Mutual Assistance in Criminal Matters signed in Switzerland on May 25, 1973; and

Be It Further Resolved, That the President of the American Bar Association or his designee is authorized to present these views before the United States Senate.

REPORT

The Treaty between the Swiss Confederation1 and the United States of America on Mutual Assistance in Criminal Matters was formally signed in Berne, Switzerland, on May 25, 1973. Several letters exchanged between the Swiss Confederation and the United States, clarifying and/or implementing individual provisions of the Treaty, bear the same date and have become integral parts of the Treaty.


The Department of State anticipates submitting the Treaty to the White House shortly and further expects that it will be sent to the Senate early in 1975. The U.S. government agencies which participated in the negotiation of the Treaty included the Departments of State, Justice, and Treasury, and the Securities and Exchange Commission, and they all recommend its ratification. In Switzerland the Treaty has been approved by the Swiss Federal Council, and the necessary enabling legislation has been completed. The Swiss Lower House has just approved the Treaty and it will be considered by the Swiss Upper House early in 1975.

The United States and Switzerland have cooperated in the field of mutual assistance in criminal matters for almost three quarters of a century. As early as May 14, 1900, an Extradition Treaty was signed at Washington; it entered into force March 29, 1901 (31 Stat. 1928; TS 354; II Malloy 1771). Supplementary extradition treaties were signed: at Washington on January 10, 1935 (entered into force on May 16, 1935), (49 Stat. 3192; TS 889; IV Trenwith 4664; 159 LNTS 243) and at Berne on January 31, 1940 (entered into force on April 8, 1941), (55 Stat. 1140; TS 969).2 Accession by the United States and Switzerland to several multilateral treaties and agreements intended to combat typical international crimes, as well as cooperation on an ad hoc basis in the field of mutual assistance in criminal matters supplemented the above-mentioned treaty law. The Treaty of May 25, 1973, is a significant step forward in the field of international judicial cooperation and mutual assistance in criminal matters between our country and Switzerland. At the same time, it is also the first mutual assistance treaty in

*The recommendation was approved. See page 242.

1The Section is aware that Switzerland conducts the foreign affairs of Liechtenstein. However, it should be noted that the Treaty as drafted does not purport to bind Liechtenstein.

criminal matters between the United States, as a common law country of the Western Hemisphere, and Switzerland, as a civil law country of Continental Europe. It constitutes the first effort to reconcile the Continental European pattern of criminal proceedings with that of our Anglo-American law of criminal procedure. Therefore, it could possibly serve as Model Treaty for future treaties of this kind between our country and other Western European countries. This possibility is enhanced by the fact that the European countries who are Members of the Council of Europe have adopted common rules in the fields of extradition and mutual assistance in criminal matters—expressed in the European Convention and Extradition and the Convention on Mutual Assistance in Criminal Matters. One of the major difficulties in the drafting of the text of the May 25, 1973, Treaty was to find an accommodation between the various approaches of the civil law and common law legal systems which differ in many fundamental respects. In some cases it was indispensable to include provisions to safeguard certain basic constitutional rights which are peculiar to one or the other of the two legal systems.

The Treaty is divided into nine chapters, including 41 articles and a "Schedule of Offenses for Which Compulsory Measures Are Available." Some of the categories in the schedule are of special interest to our Section inasmuch as their inclusion may be also interpreted as a limited recognition of an international criminal jurisdiction of the Contracting Parties. Such are, for instance, item 29 (piracy and hijacking) and item 30 (narcotic drugs, poisonous substances and firearms offenses). The last category, item 35, is in the nature of a "catch-all clause" for United States federal offenses which otherwise would not qualify due to the element of a separate federal jurisdiction which is not known as Swiss criminal law.

After having listed the different kinds of judicial assistance and the preconditions under which mutual assistance will be available under the Treaty (Art. 1), matters not covered by the general obligation to provide judicial assistance are enumerated (Art. 2). First, there are excluded matters which are or should be the subject of special treaties, such as: extradition and arrests of accused or convicted persons; execution of judgments in criminal matters (Art. 2, par. 1(a), (b)). Second, there are excluded investigations or court proceedings concerning categories of offenses for which as a rule no international judicial assistance in criminal matters is granted: political, military, and fiscal offenses, as well as enforcement of cartel or antitrust laws (Art. 2, par. 1(c)). Here, however, exceptions are made if the element of international crime intervenes: the extent of assistance is broadened to an unprecedented degree.

Chapter II entitled "Special Provisions Concerning Organized Crime" and consisting of Articles 6–8 may be heralded as a welcome innovation with far-reaching consequences for international cooperation towards suppression of organized crime. In derogation of the principle to exclude investigations or proceedings concerning violations of fiscal, in particular tax, laws (principle firmly entrenched in Swiss and European treaties on mutual assistance in criminal matters), the Treaty extends judicial assistance under specified circumstances to tax offenses perpetrated by upper echelon members of an organized criminal group.

Here the banking secrecy principle, i.e., that banking information is internationally not obtainable in criminal cases to the extent they relate to tax offenses, is superseded—although to a very limited degree—by the Treaty provisions, in order to bring leaders of criminal groups to trial for an offense constituting a common danger for both the United States and Switzerland. Although it may be argued that the definition of the term "organized criminal group" (Art. 5, par. 3) does not appear broad enough and is in a way ambiguous, this does not minimize the overall importance of the Treaty as an efficient tool to fight international organized crime. This deficiency is by far outweighed by the Treaty rule that compulsory measures provided in the requested State for investigations or proceedings in respect to offenses committed within its jurisdiction may in specified cases be employed in the requested State even if the investigation or proceedings in the requesting State concerns acts which would not be punishable under the law of the requested State, or which are not listed in the Schedule, or do not fall in either group (Art. 7, par. 1).

Furthermore, the Treaty has incorporated in its Article 15 (Protection of Secrecy) an important exception to the general principle that evidence or information disclosed by the requested State pursuant to Article 10, paragraph 2 (i.e., banking, manufacturing or

Swiss Lower House has just approved a treaty and it will be considered by the House early in the year. States and Switzerland have agree[d] on a field of mutual assistance for almost three quarters of a century. The treaty was signed at Washington on March 29, 1901 (31 Stat. 154; II Malloy 1771). Supplementation treaties were signed on January 10, 1935 (entered into force May 16, 1935), (49 Stat. 3192, with 4664; 159 LNTS 243) and January 31, 1940 (entered into force April 8, 1941), (55 Stat. 1140; by the United States Act of 1960 adding several multilateral instruments to combat international crimes, as well as a new basis in the field of mutual assistance in criminal matters supersedes, or at least supplements, the treaties as a whole. The May 25, 1973, is a significant step in the field of international cooperation and mutual assistance between our countries. At the same time, it is a mutual assistance treaty in


business secrets) be kept from public disclosure. To accommodate the United States where, because of the Sixth Amendment to the Constitution, such evidence or information cannot be kept secret if it is introduced into evidence or otherwise used in a criminal trial, Article 15 received the following wording:

Evidence or information disclosed by the requested State pursuant to paragraph 2 of Article 10, shall, if in the opinion of that State its importance so requires and an application to that effect is made, be kept from public disclosure to the fullest extent compatible with constitutional requirements in the requesting State [italics added].

In addition to the special provisions concerning organized crime, the Treaty contains inter alia rules on personal appearance for testimony in the requested country, in particular provisions on the duty to testify and the right to refuse testimony, if under the law of either State the witness has the right to refuse; the conditions under which representatives of the requesting State may interview persons in the requested country; provisions on the authentication of court and investigative documents, official and business records.

Questions have been raised as to the possibility that procedures under the Treaty might involve unwarranted interference with the administration of justice by the several states under their individual constitutional and statutory provisions and further the Treaty might deprive United States citizens of individual rights now guaranteed to them by law. In view of the fact that revision of the signed Treaty is not possible at this late date, the United States Department of Justice has agreed, as a part of the Legislative history of the Senate's consideration of the Treaty, to go on record as to the extent it will exercise the discretion granted to the Department by the Treaty. More specifically Assistant Attorney General Henry E. Petersen in a letter to Chairman James T. Haight dated November 26, 1974 stated:

"We anticipate that most requests for assistance addressed by Switzerland to the United States will be executed by the Department of Justice through its 94 United States Marshals Service, the Federal Bureau of Investigation, the Drug Enforcement Administration and other components of the Department. Where necessary, other federal enforcement agencies will be requested to assist. Because of the available federal resources, we anticipate there will be few occasions when state assistance will be needed and in those instances, we could hope to work out some mutually satisfactory arrangement with the state authority involved."

"Paragraph 2 of Article 28 requires that requests for assistance by federal and state authorities must be approved by the Central Authority (Justice) before being sent to Switzerland. It was clearly understood during the treaty negotiations that each Central Authority would screen requests as to form and content and would limit the number of requests transmitted under the treaty. Let me assure you that the Department of Justice will exercise its discretion carefully balancing the legitimate needs of federal and state law enforcement authorities against the rights of the individuals involved."

The assurances set forth in Assistant Attorney General Henry E. Petersen's letter constitute in our view a satisfactory answer to the above questions which had been raised concerning the application of the Treaty.

We believe that ratification of the Treaty is in the best interests of the United States because it will be a valuable tool in combating organized crime. More specifically it will assist this country in the following manner:

1. It engages the Swiss government's cooperation in obtaining documentary evidence against organized crime, if requested by the United States.
2. It provides for limited access of the United States to Swiss bank accounts of depositaries who are involved in organized crime.
3. It provides for the cooperation of the Swiss government in obtaining the testimony of witnesses in Switzerland.
4. It provides for the Swiss government's cooperation in using its legal processes to search and seize evidence needed for a prosecution in this country.

In sum the Treaty represents an important step forward in the continuous progressive development of international judicial cooperation; and we feel that it deserves the strong support of the American Bar Association and prompt ratification by the United States Senate.

Copies of the 47-page Treaty are available upon request from the Section's office in Chicago.

A resolution urging early ratification of the Treaty by the Senate was adopted by the Council of the Section of International Law
at a meeting held on December 7, 1974, in
Marina Del Rey, California. Copies of the
Recommendation have also been sent to the
Chairmen of the Sections of Administrative
Law; Corporation, Banking and Business
Law; Criminal Justice; and Taxation; and to
the Chairman of the Special Committee on
Administration of Criminal Justice.

JAMES T. HAIGHT
Chairman