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International Cooperation in Penal Matters: The “Lockheed Agreements”

Bruno A. Ristau*

BACKGROUND

In February 1976, officials of the Lockheed Aircraft Corporation testified before a Senate committee that their company had paid \$12.6 million in bribes, commissions and fees to Japanese businessmen and government officials to promote sales of Lockheed planes.¹ News of these bribes rocked Japan's political establishment and governmental institutions. The Japanese Diet (parliament) passed a resolution urging that the United States government disclose to the Diet the names of the Japanese officials involved in these bribes.² Prime Minister Takeo Miki sent a personal letter to President Ford requesting that the United States make available all information in its possession bearing on illicit payments in Japan.³ Members of several Japanese political parties came to Washington and attended the ongoing Senate hearings.⁴ The Japanese press sent extra teams of reporters to Washington who deluged the staffs of the Senate committees with requests for the names of the corrupt Japanese officials or politicians.

The Lockheed company was only one of several American multinational firms whose name was linked in Congressional testimony with the payment of bribes and kickbacks to officials or political figures in Asia, Europe and Latin America in connection with military and commercial contracts. On the heels of the revelations in Congress, numerous governments requested access to information regarding the alleged payoffs to their officials. The various governments forwarded their requests to the Department of State, to the Department of Justice, to the Securities and Exchange Commission, to Senate committees, and in one instance even to the Comptroller General. It was evident that the United States Government faced a problem which, unless promptly resolved, could significantly

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affect the interests of the United States in its relations with several of its principal allies.⁵

The potential sources of the information sought by foreign governments were: the Senate Subcommittee on Multinational Corporations, which was looking into corporate political contributions in the United States and abroad; the Securities and Exchange Commission, which was examining the use of corporate funds for contributions, gifts, entertainment or other expenses related to political activity; the Internal Revenue Service, which was examining whether improper income tax deductions may have been claimed by the companies involved; and the Department of Justice, which was investigating possible violations of the False Statements Statute,⁶ in connection with the financing of some of the military sales programs involved. The public was surprised to learn that the payment of bribes to foreign officials as such did not constitute an offense under federal law.

Although the investigation by the Securities and Exchange Commission had been in progress for some time,⁷ the investigation by the Criminal Division of the Department of Justice was then only beginning, and the limited information gathered was, at best, fragmentary and unevaluated. The mounting foreign governmental requests for the names of those involved and for access to investigative files required a number of immediate policy decisions by the White House and by the Departments of State and Justice:

1. Should information from investigative files of domestic law enforcement agencies be made available to foreign governments? To all foreign governments who made a request, or only some governments? Was there any legal authorization for the release of information to foreign governments bearing on potential offenses?

2. To whom could, or should, information be released? To foreign governments generally? Only to foreign law enforcement agencies? To legislative committees, and if so, to what kind of committees?

3. Should foreign governments be required to substantiate their requests for information from domestic investigative agencies? If so, what substantiation or showing should be required?

4. Should information made available to foreign governments be limited to such information as was gathered by domestic law enforcement agencies in support of potential violations of domestic law, or should domestic agencies affirmatively seek out information on behalf of foreign governments even though such information may not be germane to any domestic investigation and potential prosecution?

5. If information were to be released to foreign governments, should some kind of machinery be devised for its orderly transfer? What sort of safeguards should be established to protect not only the rights of innocent

parties whose names became involved in the bribery scandals, but also those of potential defendants in the United States and abroad?

6. To what extent could information in the possession of the committees of the Senate be made available to foreign governments? Clearly, the executive branch did not have the right of access to the files of congressional committees, and it was up to the Senate to determine whether information gathered by its staffs should be disclosed. Yet, as far as foreign governments were concerned, they were now on notice that someone in the United States Government had information impugning the integrity of their officials, and they insisted on access to such information; foreign officials were not concerned with the fine points of American constitutional law. Moreover, Secretary of State Kissinger had occasion to remind some diplomatic missions in Washington that it was against diplomatic etiquette, if not against established rules of international law, for members of diplomatic missions to approach the Congress directly, and that official requests from foreign states should be made through customary diplomatic channels through the Department of State. In short, the frustration on the part of foreign states mounted; they were not allowed to approach the Senate directly, and at the same time the Department of State was seemingly unable to secure the information from the legislative branch.

7. To what extent could information in the possession of the Securities and Exchange Commission be made available to foreign governments? To begin with, as an independent administrative agency, the Commission was not subject to the direction and control of the executive. At the same time, the Commission was not vested with any foreign policy responsibility and it ought not to deal directly with foreign states. Here, too, foreign governments insisted that the executive branch make relevant information gathered by the S.E.C. available to them.

To complicate matters, some months earlier the S.E.C. had brought an action against Lockheed in federal court in the District of Columbia to enforce an administrative subpoena seeking documents bearing on the payment of bribes to foreign officials.⁸ In that action the Department of Justice had filed, on behalf of the Department of State, a "suggestion of interest," urging the court to order the subpoenaed documents sealed in the files of the S.E.C. The suggestion focused on the potential harm to the foreign policy interests of the government if the documents' allegations of wrongdoing and corruption by foreign political leaders were not shielded from premature or unauthorized disclosure.⁹ Acceding to the suggestion, the court ordered the subpoenaed documents produced but sealed in the files of the agency. The court's order provided that if the agency decided to release any subpoenaed documents to parties other than the Department of Justice—for example, in response to a request from the Senate or a

Freedom of Information Act request—Lockheed was to be given notice and afforded an opportunity to challenge the proposed release in court.¹⁰

Identification of these problems revealed that existing law made little provision for mutual assistance and an orderly exchange of information and evidence to foreign governments regarding offenses within the enforcement jurisdiction of both states—what in civil law countries is sometimes referred to as “*kleine Rechtshilfe*” or “*petite entraide judiciaire*.”¹¹ Although the federal statute dealing with international judicial assistance and cooperation had undergone a comprehensive revision in 1964, the statute deals solely with the power of the *federal judiciary* to render assistance to *foreign tribunals*.¹² To this writer’s knowledge, the executive had never asked for, or proposed, legislation detailing the circumstances and conditions under which executive branch law enforcement agencies could, without the aid of a treaty or other international agreement, cooperate with foreign authorities in the investigation and prosecution of transnational offenses.¹³

BLUEPRINT FOR THE AGREEMENTS

After a series of hurried consultations, the Departments of State and Justice, the Securities and Exchange Commission and Senate staff members decided that the government should cooperate with the foreign investigations. The government would provide foreign authorities with information from the files of domestic law enforcement agencies only if: the interested foreign states agreed to formal arrangements; the exchange of information and the rendition of assistance proceeded on a reciprocal basis; and the government obtained adequate assurances that the information exchanged would be safeguarded. In addition, if Senate investigating committees determined that potential evidence in their files should be released to foreign governments, the Department of Justice would serve as a conduit for the transmission of the information abroad. No one in the government was prepared to consider any scheme under which the government would merely provide foreign authorities with the names of officials in high places alleged to have received bribes from American companies.¹⁴

The following considerations influenced the U.S. posture for the negotiations with foreign governments on the exchange of investigative information:

1. Government officials should not publicly disclose unverified allegations until appropriate authorities, either in this country or abroad, had an opportunity to examine the reliability of the evidence. Much of the information available at that time consisted of documentation and files supplied by American corporations in response to subpoenas issued by the S.E.C.

and by the Senate. These files included day-to-day correspondence between the American companies and their commission agents abroad. Even a cursory review showed that various foreign agents were inclined to exaggerate the value of their services, the level of their contacts, and the sums of money required to achieve the objective of selling expensive military equipment and aircraft. Some agents tended to justify their demands for more money by claiming the necessity of making "political contributions" in order to secure purchase orders. Clearly, the mere suggestion, by a commission agent abroad, of the improprieties of powerful foreign government officials, was of little probative value.¹⁵ Although much of the information in the hands of American investigating agencies pertained to potential offenses committed by foreigners abroad, rudimentary fairness required that this information not be publicly revealed until its trustworthiness had been investigated by proper law enforcement officials abroad and a determination made that formal charges be brought or other disciplinary action taken.

2. Because of domestic political pressure, several foreign states insisted on the immediate disclosure of the names of the corrupt officials. However, the United States responded that the concept of fairness is central to the principles of human rights. For example, Articles 55 and 56 of the U.N. Charter provide that all United Nations members undertake to promote human rights.¹⁶ Article 12 of the Universal Declaration of Human Rights¹⁷ guarantees the individual the protection of the law against arbitrary interference with his privacy and against "attacks against his honor and reputation." These established principles clearly mandated efforts by all countries concerned to protect the rights of persons whose names became linked with these bribery scandals.

3. The authority of the Department of Justice to negotiate formal evidence-exchange agreements was within the Attorney General's plenary authority, as chief law enforcement officer of the United States, to detect and prosecute crimes against the United States.¹⁸ Release of materials from active investigative files to foreign law enforcement authorities could, however, be justified only on the grounds that the agreements would protect the confidentiality of these materials¹⁹ and enable the Department of Justice to benefit from the foreign government's investigation and in this manner further the domestic investigation and potential prosecution. This justification also mandated that the evidence-exchange agreements be limited to ongoing or impending investigations relating to specific companies.

4. To preclude any possible argument that the Department of Justice was partial to a given foreign law enforcement agency, the arrangements to be reached with different states should ideally be identical as to terms and conditions.

5. All arrangements agreed upon would be executive agreements and would be publicized at once.

6. The United States would transmit information from congressional committees to foreign governments subject to all conditions and strictures that may be agreed upon with respect to materials from the investigative files of the Department of Justice and other law enforcement agencies.

7. Foreign authorities could obtain information and evidence in the possession of the Securities and Exchange Commission in the same manner in which the Department of Justice routinely obtains information from the S.E.C. for its own investigations.²⁰ If relevant to a foreign government's request, the United States would provide the foreign authority with the information under the terms and conditions of the contemplated evidence-exchange arrangements. As to information obtained by the S.E.C. from Lockheed in obedience to subpoenas, the Department of Justice would notify Lockheed of the intended release of such materials to a foreign agency and Lockheed would be afforded the opportunity to challenge the proposed release in court (although the consensus was that this was not legally required).

On March 11, 1976, in response to Prime Minister Miki's request of February 24 for information and evidence from the United States, President Ford proposed that an arrangement be worked out between the two countries along the following lines:

I suggest that officials of our two governments meet without delay to work out such arrangements. These procedures would permit law enforcement officials from Japan to work in close cooperation with their counterparts here, with access, on a confidential basis, to relevant information held by United States investigatory agencies. The legal and administrative practice of the SEC is not to make public any material relating to an investigation until the investigation is completed. Premature disclosure of such information could well prejudice the investigation and any law enforcement actions which might ultimately be taken in the United States. It could also prejudice the rights of individuals, whether or not they may ultimately become defendants in criminal actions. These basic requirements of United States law and practice must be respected, as of course must those of Japan. If these principles are protected, I am sure we can work together effectively.²¹

The factors listed by the President served as the basis for all evidence-exchange agreements negotiated thereafter.²²

THE STRUCTURE OF THE AGREEMENTS

In early March 1976, the Department of Justice embarked upon a long series of negotiations with representatives of foreign states. In the ensuing three years, some twenty-four evidence-exchange and cooperation agreements were concluded.²³

In the broadest sense, the agreements impose a reciprocal obligation on the parties to cooperate in criminal investigations and spell out the procedures for the exchange of evidence and for cooperation between the Department of Justice and foreign law enforcement agencies. They envisage close consultations between the parties so that the activities of law enforcement agencies in one country should not adversely affect investigations in the other. They mandate that, during the period of investigation, the evidence exchanged be treated as confidential. Although the cooperation mutually pledged was limited to investigations respecting specific target companies named in the agreements, the procedures could be extended to other companies that become future targets of investigation either in this country or abroad.

The first agreement was concluded with Japan on March 23, 1976, and came into force the same day.²⁴ It was followed in short order by almost identical agreements with Italy and the Netherlands. Since all subsequent agreements followed almost verbatim the language employed, and the pattern developed, in the Japanese agreement, the provisions of that agreement will be highlighted in the following paragraphs.

Parties to the Agreements

The named parties to all agreements are the United States Department of Justice and its foreign counterparts. In the Japanese agreement, as in most other instances, the foreign counterpart is the Ministry of Justice.²⁵

In the case of the Netherlands, the counterpart was a special commission—the “Netherlands Commission of Three”—established by the Council of Ministers to investigate allegations of wrongdoing by a member of the Royal House. This was due to a Dutch constitutional provision pursuant to which members of the Royal House are not subject to the jurisdiction of ordinary law enforcement agencies; allegations of wrongdoing by such members must be investigated by special bodies established for that purpose.

Nature of the Agreements

The evidence-exchange agreements are binding international agreements. In the context of American domestic law, they are “executive agreements.”

The sources of the power to negotiate these executive exchange agreements are: the plenary authority of the President to conduct the foreign relations of the Nation;²⁶ the President's authority as Chief Executive, in whom all law enforcement authority of the National Government ultimately reposes;²⁷ and the Attorney General's authority to detect and prosecute crimes against the United States.²⁸

In their initial discussions, the U.S. negotiating team and its foreign counterparts spent much time on the nature of the arrangements to which the Department of Justice would agree. Representatives of several foreign states approached the discussions with the preconception that the Department of Justice would negotiate a general treaty on mutual assistance in criminal matters. Some foreign officials knew that the United States had recently concluded a bilateral mutual assistance treaty with Switzerland,²⁹ and these officials urged that the occasion was propitious to negotiate a similar, permanent treaty arrangement with their countries. The U.S. negotiators had to stress repeatedly that they had no mandate from the Secretary of State to negotiate a general treaty on mutual assistance in criminal matters. They were authorized to seek an agreement on a technical evidence-exchange and cooperation arrangement with foreign law enforcement authorities, limited to ongoing or impending criminal investigations involving allegations of bribery of foreign officials by specific American multinational corporations.

Moreover, under American constitutional law, a general agreement on mutual assistance in criminal matters, entered into in the name of the United States and binding all agencies and instrumentalities of the government, would probably have to take the form of a treaty;³⁰ this, in turn, would require the involvement of the Senate of the United States—a procedure which could take years. When the U.S. team pointed out that the negotiations with Switzerland regarding a mutual assistance treaty began as early as 1969, that the treaty was signed in May of 1973, and that ratification had not yet been advised by the Senate as of March 1976, the foreign teams' treaty bias rapidly waned. It was simply unrealistic to expect a treaty arrangement to be negotiated and to enter into force in a matter of days or weeks.

Finally, the U.S. team pointed out that these legal realities necessarily led to yet another limitation imposed by American law, namely, any procedures agreed upon would have to be consistent with existing federal statutes. This meant that the parties could not establish new substantive legal rules under these technical cooperation agreements. The U.S. negotiators could not impose new obligations upon federal courts at variance with the powers which Congress had conferred upon them in regard to international judicial assistance.³¹

These constraints have led some foreign observers to question the bind-

ing character of the Lockheed Agreements. Thus, one Italian commentator speculated:

From a purely subjective point of view the Agreement would, in fact, appear as a mere understanding between State organs (the American Department of Justice and the Italian Ministry of Justice) with no legal content and having only a political and moral worth.³²

An analysis of the agreements—in light of the criteria applied by the Department of State in determining whether a binding international agreement has come into existence—refutes this speculation. The relevant criteria are: (1) intention of the parties to be bound in international law; (2) significance of the arrangement; (3) requisite specificity, including objective criteria for determining enforceability; (4) the necessity for two or more parties to the arrangement; and (5) proper form.³³

As regards the intention of the parties, it is manifest that the Department of Justice and its foreign counterpart intended to be bound by the evidence-exchange and cooperation arrangements. Most of the agreement is couched in mandatory terms³⁴ and it imposes reciprocal obligations on the parties which, in the absence of the agreement, would not exist.

The significance of the arrangement should be self-evident. These were not minor or trivial undertakings, but formal arrangements between cabinet-level departments of two states, dealing with a matter of immense public interest in both countries. The parties undertook substantial obligations.

The arrangements are as specific as could be expected under the circumstances. For example, Article 2 of the Japanese agreement provides that "the parties shall use their best efforts to make available to each other . . . statements, depositions, documents, business records, correspondence or other materials, available to them." Similarly, Article 7 requires that "the parties shall use their best efforts to assist in the expeditious execution of letters rogatory." The best effort standard is frequently employed in international agreements, and requires good faith efforts by the parties to accomplish a desired result. This standard does not—and under the circumstances, could not—guarantee that the desired result would in each instance be accomplished. It would have been unrealistic for the parties, for example, to undertake an absolute obligation to produce specified evidence or to give assurance that a domestic court would execute all letters rogatory. While the negotiations were in progress neither party could predict with any degree of certainty what items of information or evidence its future investigations might uncover, or how a domestic court would treat a letter rogatory submitted by the judicial authorities of the

other state. The exigencies of the situation simply dictated the use of the best efforts standard.

The remaining criteria were also satisfied. Clearly, there were two parties to each of the agreements. The agreements were incorporated in formal instruments (some of them executed in two languages)³⁵ and were signed by high-ranking government officials (on behalf of the United States by sub-cabinet officers; on behalf of foreign states either by sub-cabinet officers or by ambassadors). Furthermore, as a matter of United States domestic law, the agreements were reported to the Senate and published in the United States Treaties Series, a requirement imposed by the Case Act³⁶ on all binding international agreements.

In this writer's view, the suggestion that the Lockheed Agreements were not binding international agreements is without substance.³⁷

Reciprocal Obligations Assumed by the Parties

The Japanese agreement obligated the parties to exchange relevant and material information (statements, depositions, documents, business records and correspondence) relating to the sales activities in Japan of the Lockheed company and its subsidiaries and affiliates.³⁸ The parties could use this information only for investigations conducted by law enforcement agencies in the requesting country, or for evidence in any ensuing legal proceedings.³⁹

All information exchanged—and correspondence between the parties relating to it—was to be confidential. The agreements prohibited the disclosure of the information to third parties or to government agencies having no law enforcement responsibilities.⁴⁰ Should any information provided to investigative agencies be needed as evidence in court, the parties were obligated to provide authentication, certifications or any assistance necessary to render the evidence admissible in court.⁴¹

Confidentiality and Limitations on Assistance

In the event of a breach of confidentiality by one party, the other party could discontinue the evidence-exchange and cooperation under the agreement.⁴² Yet, information exchanged by investigative agencies could be used as evidence in any ensuing criminal, civil or administrative court proceedings, and once such court proceedings were initiated the confidentiality requirement ceased.⁴³ The parties would render assistance subject to all the limitations imposed by the domestic law of their states. Moreover, assistance could be delayed or denied if execution would interfere with, or prejudice, a pending investigation in the requested state.⁴⁴ Assistance to be rendered in a requested state did not include such acts as might

result in the immunization of any person from prosecution in that state.⁴⁵ In addition, assistance rendered under the agreements would be solely for the benefit of the investigative agencies of the parties and not for the benefit of third parties (other states or private entities).⁴⁶

The agreements further postulated the evident proposition that the agreements did not limit in any way the right to utilize information obtained by the parties independent of the agreements.⁴⁷ There was generally no specific provision for the entry into force and the termination of the agreements. The negotiators intended that the agreements would enter into force once they were signed, unless the domestic law of a party required implementing legislation. The agreements would lapse once the investigation of the target company was completed here and abroad. If, prior to its termination, an agreement was expressly extended to another target company, the termination of the investigation of that company would control the termination of the agreement.⁴⁸

IMPLEMENTATION OF THE AGREEMENTS

Following the signing or the entry into force of the agreements, the Department of Justice turned over thousands of documents, business records and items of correspondence to its opposite parties under the various agreements. At the request of foreign law enforcement authorities, agents of the Federal Bureau of Investigation assisted on numerous occasions in locating and interviewing potential witnesses in the United States. When requested, the agents approached potential witnesses and inquired whether they would be willing to be interviewed in this country by representatives of foreign investigative agencies. When the answer was in the affirmative, federal agents and U.S. attorneys arranged for interviews of witnesses by foreign law enforcement officers (and in the case of the Dutch investigation by members of the Commission of Three).

In accordance with its obligations under the agreements the Department of Justice frequently assisted foreign countries in the execution of letters rogatory. In one case, the Tokyo District Court requested the depositions of three former officials of Lockheed who had declined interview by Japanese officials. The Japanese court transmitted the letters rogatory, dated May 28, 1976, to the U.S. Department of Justice. One week later, the department presented the letters to the United States District Court for the Central District of California (in Los Angeles). The court entered an order appointing as chief commissioner a retired California state judge and two co-commissioners (representatives of the Department of Justice) with the power to subpoena the witnesses and to examine them.⁴⁹ The witnesses challenged the designation of the commissioners and their procedure.

After the district court rejected their arguments, the prospective witnesses appealed. The Ninth Circuit heard the appeal on the record below, and affirmed the district court's order in less than four weeks.⁵⁰

Thereafter, the court-appointed commissioners examined the witnesses. The district court directed that the transcript of their testimony be sealed and not be transmitted to the Tokyo District Court. Before releasing the testimony, the U.S. court required assurances from the Japanese authorities that the witnesses would not be prosecuted in Japan based on their testimony given in response to the Japanese letters rogatory.⁵¹

Although Japanese prosecutors do not have the power to immunize witnesses (as is probably the case in most civil law jurisdictions), resourceful Japanese lawyers prevailed upon the Attorney General of Japan to present a "Letter of Declaration" to the Supreme Court of Japan. The Attorney General's declaration stated in pertinent part:

prosecution against these witnesses in connection with their testimony would not be instituted in accordance with Article 248 of the Code of Criminal Procedure of Japan, even if any matter contained in their testimony or in any other information which might be obtained as the result of their testimony might constitute a violation of Japanese law.⁵²

The Court accepted the letter as binding by issuing its own "Declaration."⁵³ Based on this official Japanese declaration, the district court in Los Angeles released the witnesses' testimony and directed that it be transmitted to the Tokyo trial court.

To this writer's knowledge, the United States invoked Article 4 sanctions—termination of cooperation—only twice. In one instance, two members of the Italian Parliament discussed, in a sensational radio interview, the contents of certain materials obtained from the Department of Justice, which had been released by the Italian Ministry of Justice to a parliamentary investigating committee.⁵⁴ The Department of Justice temporarily suspended the transmission of further materials until the Italian Ministry of Justice and the chairman of the parliamentary investigating committee assured the U.S. government they would take all possible steps to ensure the confidentiality of the investigative files furnished by the Department of Justice.⁵⁵

In the other instance, the United States terminated the agreement with Nigeria because Nigerian authorities had released materials obtained from the American government to the local press. The Nigerian agreement, however, was reinstated two years later and extended to an investigation of another company.⁵⁶

CONCLUSION

In the Netherlands, the "Committee of Three" investigated the connection of Prince Bernhard with certain Lockheed sales activities in the Netherlands. In due course, the Prince was officially censured for his conduct.⁵⁷ In Italy, prosecutors charged former Premier Mariano Rumor with corruption as a result of the investigations conducted by the Italian Parliament.⁵⁸ Former Japanese Prime Minister Kakuei Tanaka was also indicted as a result of the investigation conducted by the Tokyo public prosecutor.⁵⁹ Public records do not disclose how much the information and material furnished by the Department of Justice aided the foreign investigations. Yet, the probative value of the American material appears to have been substantial.

In the course of the Lockheed investigations, the Department of Justice provided much more material to foreign investigative agencies than it obtained in return from foreign law enforcement agencies. The Department also furnished more assistance to foreign agencies than it received. This was to be expected, considering the different scopes of the investigations conducted abroad. Moreover, the Lockheed Agreements surely yielded important benefits for the United States: they averted grave consequences for U.S. foreign relations.

The unique experience in international law enforcement assistance gained by the Department of Justice as a result of the Lockheed scandals should not merely grace a new chapter in the Department's official history. The government should seek to avoid the hectic negotiation of technical cooperation procedures with foreign law enforcement authorities to establish a basis for reciprocal transnational assistance. The Department should propose, and the Congress should pass, a federal statute conferring upon the Attorney General permanent authority to render assistance to foreign law enforcement agencies in the investigation and prosecution of offenses.⁶⁰

A statute covering international assistance in criminal investigations should grant the Attorney General delegable authority to conduct—at the request of foreign law enforcement agencies—investigations in the United States of offenses committed abroad (excluding political offenses or offenses which are offensive to the public policy of the United States). The Attorney General should also have the power to exempt from the coverage of the Freedom of Information Act files, records, materials and information received from foreign law enforcement authorities in support of requests for assistance. Finally, the federal courts should have jurisdiction to issue subpoenas and search warrants in aid of foreign criminal investigations, after foreign authorities have shown probable cause to the Attorney General without qualifications; or its exercise could be dependent upon the

Attorney General finding that it is in the national interest to render the assistance requested. U.S. assistance could also be made subject to reciprocity.⁶¹

Although one can only speculate as to the reception which such a legislative proposal might receive in the Congress, the nation's chief law-enforcement official clearly lacks express statutory authority to render effective assistance to his counterparts abroad in the fight against international crime. Congress should welcome the opportunity to shape the nation's policy in this area, and not leave it to *ad hoc* and unilateral action by the executive branch through executive agreements.

NOTES

¹ See *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations, United States Senate, 94th Cong., 2d Sess. 343-390 (1976)* (testimony of A. Carl Kotchian, president of Lockheed Aircraft Corporation); see also *Washington Post*, March 6, 1976, at A14, col. 2.

² See *N.Y. Times*, March 9, 1976, at 3, col. 1.

³ See *Washington Post*, Feb. 20, 1976, at A12, col. 2; see also *N.Y. Times*, March 9, 1976, at 3, col. 1.

⁴ See *N.Y. Times*, March 9, 1976, at 3, col. 1; see also *Washington Post*, March 6, 1976, at A14, col. 2.

⁵ See *Abuses of Corporate Power: Hearings Before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, 94th Congress, 1st and 2d Sess. 152-186 (1976)* (statement and testimony of Robert S. Ingersoll, Deputy Secretary of State); see also *Washington Post*, March 6, 1976, at A1, col. 8.

⁶ 18 U.S.C. § 1001 (1976).

⁷ See *N.Y. Times*, March 4, 1976, at 48, col. 2.

⁸ *Securities and Exchange Commission v. Lockheed Aircraft Corporation*, 404 F.Supp. 651 (D.D.C. 1975).

⁹ A letter from Secretary of State Kissinger to Attorney General Levi, dated November 28, 1975, which was appended to the government's suggestion of interest, stated in pertinent part:

[O]fficers of the Department [of State] have examined some of the documents under subpoena which contain the names of officials of friendly foreign governments alleged to have received covert payments from Lockheed. As the Department has stated on many occasions, the making of any such payments and their disclosure can have grave consequences for significant foreign relations interests of the United States abroad. We reiterate our strong condemnation of any such payments, but we must note that premature disclosure to third parties of certain of the names and nationalities of foreign officials at this preliminary stage of the proceedings in the present case would cause damage to United States foreign relations. . . . Our interest in having certain documents in this case protected grows simply out of our desire that documents which contain uncorroborated, sensational and potentially damaging information not be made public as long as that is not necessary for purposes of effective law enforcement.

Suggestion of Interest of the United States at Appendix A, *Securities and Exchange Commission v. Lockheed Aircraft Corporation*, 404 F.Supp. 651 (D.D.C. 1975).

¹⁰ 404 F.Supp. at 651.

¹¹ "Kleine Rechtshilfe" (locating and interviewing witnesses; conducting searches and seizures; obtaining copies of official records and excerpts from penal registers; service of documents) is distinguished from extradition.

¹² 28 U.S.C. §§ 1696, 1781-1782 (1976).

¹³ However, several of the so-called Double Taxation Agreements with foreign states provide for the exchange of information relating to income taxes between the Internal Revenue Service and foreign tax authorities. *See, e.g.*, Convention for the Avoidance of Double Taxation, March 4, 1942, United States-Canada, arts XIX-XXI, 58 Stat. 1399, T.S. No. 983. This treaty is interpreted and applied in *United States v. A. L. Burbank and Co., Ltd.*, 525 F.2d 9 (2d Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

For an agreement on exchange of customs information, see Agreement Regarding Mutual Assistance between Customs Services, Aug. 23, 1973, United States-Federal Republic of Germany, 26 U.S.T. 1092, T.I.A.S. No. 8098. *See also* Agreement Relating to Reciprocal Assistance in Penal Matters, brought about by an exchange of notes at Bonn, Nov. 7, 1960, Dec. 28, 1960, and Jan. 3, 1961, United States-Federal Republic of Germany, 12 U.S.T. 1156, T.I.A.S. No. 4826.

¹⁴ For an opposing view, see Cohen, *Lockheed Cover Up?*, N.Y. Times, Mar. 29, 1976, at 29, col. 3. The article states in part:

[M]any have asked, should the United States try to tell the Japanese people how they ought to use information essential to the cleansing of their own political process? Is it for us to determine how Japan should weigh the conflicting claims, on the one hand, of the need for Parliament and the people to avoid a cover-up and, on the other, the need to protect Japanese officials from unfair publicity?

¹⁵ Indeed, in one instance a foreign commission agent conceded that although he reported to the American company the expenditure of certain sums to bribe a government official, in truth he kept the money for himself.

¹⁶ U.N. CHARTER, arts. 55, 56.

¹⁷ The Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948), *reprinted in* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 237-242 (1965).

¹⁸ 28 U.S.C. §§ 509, 533 (1976).

¹⁹ *Cf.* 28 U.S.C. § 534 (1976). This section authorizes the Attorney General to exchange investigative information with "and for the official use of authorized officials of the Federal Government, the States, cities, and penal and other institutions." The practice under this statute is to require the recipient to treat the investigative files as confidential. Because of the nature of criminal investigations the government cannot permit investigative files to be disseminated to unauthorized parties. Paragraph (b) of section 534 permits the immediate cancellation of the exchange of information if the recipient disseminates the information to unauthorized parties. The policy underlying section 534 applies *mutatis mutandis* to the exchange of investigative files with foreign agencies.

²⁰ *See Lockheed Aircraft Corporation*, 404 F.Supp. at 653-654, which states in part:

[N]othing contained in the Order shall affect the ability of the Securities and Exchange Commission to . . . (ii) refer documents or information to an agency of the government with law enforcement responsibilities . . . or (iii) . . . [refer] information to the Department of Justice, or report of investigation, provided for under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Trust Indenture Act of 1939, or the Utility Holding Company Act of 1935. . . .

²¹ Letter from President Gerald R. Ford to Prime Minister Takeo Miki (March 11, 1976) (on file with the MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES).

²² These agreements are commonly but somewhat inaccurately called "Lockheed Agree-

ments," as a number of other multinational companies have become the targets of investigations and the subjects of later agreements.

23 Procedures for Mutual Assistance in Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, Mar. 23, 1976, United States-Japan, 27 U.S.T. 946, T.I.A.S. No. 8233, extended to include McDonnell Douglas and Grumman by an agreement effected by exchange of letters, Jan. 20 and 22, 1979, 30 U.S.T. 3473, T.I.A.S. 9400; Procedure for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, March 29, 1976, United States-Italy, 27 U.S.T. 3437, T.I.A.S. No. 8374; Procedures for Mutual Assistance, March 29, 1976, United States-Netherlands, 27 U.S.T. 1064, T.I.A.S. No. 8245; Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, Apr. 20, 1976, United States-Nigeria, 27 U.S.T. 1054, T.I.A.S. No. 8243, extended to include IT&T by exchange of letters, March 8, 26, 1979; Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, Apr. 22, 1976, United States-Colombia, 27 U.S.T. 1059, T.I.A.S. No. 8244, extended to include Textron Inc. by exchange of letters, July 7, 15, 1980, — U.S.T. — , T.I.A.S. No. 9809, extended to include Bethlehem Steel Corp. by exchange of letters, Aug. 29, Sept. 10, 1980, — U.S.T. — , T.I.A.S. No. 9860; Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, May 20, 1976, United States-Greece, 27 U.S.T. 2006, T.I.A.S. No. 8300; Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, May 21, 1976, United States-Belgium, 27 U.S.T. 1966, T.I.A.S. No. 8292; Procedures for the Mutual Assistance in the Administration of Justice in Connection with the General Tire & Rubber Company and the Firestone Tire & Rubber Company Matters, June 23, 1976, United States-Mexico, 28 U.S.T. 2083, T.I.A.S. No. 8533, extended to include McDonnell Douglas Corporation by exchange of letters, Feb. 23, Mar. 6, 1978, 29 U.S.T. 2153 T.I.A.S. No. 8930, extended to include J. Aron & Company and the Israel Coffee Company by exchange of letters, May 31, June 1, 1978, 29 U.S.T. 3200, T.I.A.S. No. 9005, extended to include IT&T by exchange of letters, Nov. 17, Dec. 5, 1978, 30 U.S.T. 2177; T.I.A.S. No. 9322; Agreement on Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation and the McDonnell Douglas Corporation Matters, July 8, 1976, United States-Turkey, 27 U.S.T. 3419, T.I.A.S. No. 8371, extended to include IT&T by exchange of letters, June 18, 26, 1979, 30 U.S.T. 6072, T.I.A.S. No. 9539, extension, July 8, 15, 1980, — U.S.T. — , T.I.A.S. No. 9810; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Chief Prosecutor of the Spanish Supreme Court in Connection with the Lockheed Aircraft Corporation Matter, July 14, 1976, United States-Spain, 27 U.S.T. 3409, T.I.A.S. No. 8370, extended to include the Boeing Corporation by exchange of letters, June 7, July 22, 1977, 28 U.S.T. 7494, T.I.A.S. No. 8725; Procedures for Mutual Assistance in Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, Sept. 13, 1976, United States-Australia, 27 U.S.T. 3424, T.I.A.S. No. 8372; Agreement Between the United States Department of Justice and the Federal Minister of Justice of the Federal Republic of Germany, Sept. 24, 1976, United States-Germany, 27 U.S.T. 3429, T.I.A.S. No. 8373, extended to include the McDonnell Douglas Corporation by exchange of letters, Jan. 10, Feb. 1, 1979, 30 U.S.T. 3533, T.I.A.S. No. 9407; Procedures for Mutual Assistance in the Administration of Justice in Connection with the Boeing Company Matter, Mar. 15, 1977, United States-Canada, 28 U.S.T. 2463, T.I.A.S. No. 8567; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Ministry of Justice of Venezuela in Connection with the Boeing Company Matter, May 31, 1977, United States-Venezuela, 28 U.S.T. 5219, T.I.A.S. No. 8623, extended to include the McDonnell Douglas Corporation by exchange of letters, Dec. 6, 8, 1978, 30 U.S.T. 2254, T.I.A.S. No. 9333; Agreements on Procedures for Mutual Assistance Between the United

States Department of Justice and the Ministry of Justice of Iran in Connection with Matters Relating to the Lockheed Aircraft Corporation, Grumman Corporation and Northrop Corporation, June 14, 1977, United States-Iran, 28 U.S.T. 5205, T.I.A.S. No. 8621; Agreement on Procedure for Mutual Assistance Between the United States Department of Justice and the Ministry of Home Affairs of India in Connection with Matters Relating to the Boeing Company, Aug. 19, 1977, United States-India, 28 U.S.T. 7497, T.I.A.S. No. 8726; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Ministry of Interior, Government of Pakistan, in Connection with Matters Relating to the Lockheed Aircraft Corporation and the Boeing Company, Sept. 9, 1977, United States-Pakistan, 28 U.S.T. 7488, T.I.A.S. No. 8724, extended to include the McDonnell Douglas Corporation by exchange of letters, Jan. 6, 10, 1978, 29 U.S.T. 492, T.I.A.S. No. 8827; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Attorney General's Chambers of the Democratic Republic of the Sudan, in Connection with Matters Relating to the Boeing Company, Sept. 23, 1977, United States-Sudan, 28 U.S.T. 7482, T.I.A.S. No. 8723; Agreement on Procedures for Mutual Assistance in Connection with Matters Relating to the Boeing Company, Oct. 6, 1978, United States-Kuwait, — U.S.T. —, T.I.A.S. No. —, extended to include the McDonnell Douglas Corporation by exchange of letters, Dec. 21, 1978, Jan. 2, 1979, — U.S.T. —, T.I.A.S. No. —; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Ministry of Justice of the United Arab Republic of Egypt in Connection with Matters Relating to the Westinghouse Electric Corporation, Nov. 29, 1978, United States-Egypt, 30 U.S.T. 3996, T.I.A.S. No. 9441 extended to include the Boeing Company by exchange of letters, Dec. 21, 1978, Jan. 3, 1979, 30 U.S.T. 4005, T.I.A.S. No. 9442, extended to include the Beajay Products Corporation by exchange of letters, Mar. 19, Apr. 17, 1979, 30 U.S.T. 4007, T.I.A.S. 9443; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Ministry of Law and Justice of Nepal in Connection with Matters Relating to the Boeing Company, Jan. 5, 1979, United States-Nepal, 30 U.S.T. 2495, T.I.A.S. No. 9347; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Ministry of Justice of the Republic of Togo in Connection with Matters Relating to the Gulfstream American Corporation, Formerly Known as Grumman American Aviation Corporation, Jan. 30, 1979, United States-Togo, 30 U.S.T. 3477, T.I.A.S. No. 9401; Agreement on Procedures for Mutual Assistance Between the United States Department of Justice and the Ministry of Justice and Police of the Republic of Surinam in Connection with Matters Relating to the Reynolds Metals Company, Mar. 14, 1979, United States-Surinam, 30 U.S.T. 3864, T.I.A.S. No. 9429; Procedures for Mutual Assistance in Connection with Matters Relating to the Lockheed Aircraft Corporation, Aug. 8, 1979, United States-Peru, — U.S.T. —, T.I.A.S. No. — [all of these treaties hereinafter cited as U.S.-(name of other country) Agreement].

²⁴ Procedures for Mutual Assistance in the Administration of Justice in Connection with the Lockheed Aircraft Corporation Matter, Mar. 23, 1976, United States-Japan, 27 U.S.T. 946, T.I.A.S. No. 8233 [hereinafter cited as U.S.-Japan Agreement].

²⁵ See U.S.-Japan Agreement, *supra* note 24, preamble.

²⁶ See U.S. CONST., art. II, § 2, cl. 1; United States v. Belmont, 301 U.S. 324, 330 (1937); United States v. Pink, 315 U.S. 203, 229 (1942).

²⁷ See U.S. CONST., art. II, § 3.

²⁸ 28 U.S.C. §§ 509, 533 (1976).

²⁹ Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.

³⁰ See generally L. HENKIN, R. PUGH, O. SCHACHTER, H. SMIT, INTERNATIONAL LAW 149-158 (1980).

³¹ See 28 U.S.C. §§ 1696, 1781-1782 (1976).

32 DiLieto, *The Lockheed Agreement: A Non-Binding Legal Agreement*, 3 ITALIAN Y.B. INT'L L. 243, 244 (1977).

33 Memorandum from Monroe Leigh, Legal Adviser of the Department of State, to key Department of State personnel (March 12, 1976) (entitled *Criteria for Determining What Constitutes an International Agreement*), reprinted in 4 DIG. U.S. PRAC. INT'L L. 263, 265. See generally Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

34 See, e.g., U.S.-Japan Agreement, *supra* note 24, at arts. 2, 3, 4, 6, 7 and 8.

35 See, e.g., the agreements with Japan, the Federal Republic of Germany, and Spain, *supra* note 23.

36 1 U.S.C. § 1126 (1976).

37 It is manifest that the Italian government regarded the Agreement as a binding international agreement, since it took immediate steps to implement it by domestic legislation. Because of the unusual nature of that legislation, it is reproduced here in full:

Decree-Law No. 76 of April 1, 1976

Provisions for the application of the Agreement concluded on March 29, 1976, between the Ministry of Justice of the Italian Republic and the Department of Justice of the United States of America.

The President of the Republic

In view of Article 77(2) of the Constitution;

Considering the urgent need that provisions be issued for the application of the Agreement, attached to this Decree, concluded on March 29, 1976 between the Ministry of Justice of the Italian Republic and the Department of Justice of the United States of America on mutual assistance to the judicial or police authorities of the two States with respect to alleged illicit commercial activities carried out in Italy by the Lockheed Corporation and by its subsidiaries or affiliates;

Having heard the Council of Ministers;

On the proposal of the Minister of Justice, with the Ministers of Foreign Affairs and of the Interior concurring;

Hereby Decrees

Article 1

In this Decree the term "Agreement" designates the aforesaid Agreement concluded on March 29, 1976, between the Ministry of Justice of the Italian Republic and the Department of Justice of the United States of America for mutual assistance in judicial and police investigations of alleged illegalities in commercial activities in Italy committed by the Lockheed Corporation and some of its subsidiaries or affiliates.

Under this Decree, judicial authorities shall for all purposes be considered to include also the bodies established for indictment proceedings under Article 96 of the Constitution.

Article 2

For the purposes and within the limits stipulated by the Agreement, at the request of the competent judicial and police authorities, the Minister of Justice shall petition the United States Department of Justice for information and documents deemed pertinent for the purposes of the investigations being conducted by the aforesaid authorities in criminal, civil, or administrative proceedings concerning alleged illegalities in commercial activities in which Lockheed Corporation and its subsidiaries or affiliates have engaged in Italy.

The records thus acquired shall be turned over by the Minister of Justice to the requesting authorities after each title page has been stamped to indicate the confidentiality and restricted use stipulated by this Decree.

The authorities who obtain delivery of such documents must safeguard their confidentiality; they may not reveal them to third parties nor use them for purposes

other than the aforesaid proceedings and in compliance with the stipulations of the following Article.

Article 3

The judicial and police authorities may for no purpose in criminal, civil, or administrative proceedings use the documents acquired in accordance with the preceding Article until the Minister of Justice, whom they must notify, has informed them that the United States Department of Justice has been consulted in accordance with paragraph 6 of the Agreement which is applicable to both Parties.

Article 4

Interrogations conducted in the United States of America of persons residing there by the Italian judicial and police authorities shall be admissible for all purposes in the criminal, civil, and administrative proceedings referred to in this Decree provided that they are conducted in accordance with the terms and guarantees stipulated by the Agreement.

Likewise, depositions, statements, and documents acquired in the United States of America in compliance with the rules of procedure prescribed by Italian law shall be admissible for the aforementioned purposes.

Gazetta Ufficiale della Repubblica Italiana [Gaz. Uff.] No. 90, April 6, 1976, translated and reprinted in DEPARTMENT OF STATE DIVISION OF LANGUAGE SERVICES, LS No. 55788 (1976).

³⁸ See, e.g., U.S.-Japan Agreement, *supra* note 24 at art. 2. The agreements did not require governments to substantiate their need for the information which they requested.

³⁹ *Id.* at art. 3.

⁴⁰ *Id.* at art. 4. In the case of the U.S.-Italy Agreement, to ensure that the confidentiality provisions were observed by Italian investigating magistrates (who are members of the judiciary) and by Parliamentary bodies, the Italian Ministry of Justice undertook the obligation to propose immediately the passage of implementing legislation. See *supra* note 37.

The Italian Agreement also contained in Article 4 the unusual provision that "[S]hould a subsequent change in the domestic law impair the ability of the requesting state, or an agency thereof, to carry out the terms set forth herein, the requesting state shall promptly return all materials made available hereunder to the requested state."

⁴¹ See U.S.-Japan Agreement, *supra* note 24, at art. 5.

⁴² *Id.* at art. 4, para. 2.

⁴³ *Id.* at art. 7.

⁴⁴ *Id.* at art. 9.

⁴⁵ *Id.* at art. 8.

⁴⁶ *Id.* at art. 11.

⁴⁷ *Id.* at art. 10.

⁴⁸ See U.S. DEP'T OF STATE, OFFICE OF THE LEGAL ADVISER, TREATIES IN FORCE—A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1981 116, which lists all "Lockheed Agreements" as still being in force. It is probable, however, that a number of them have since lapsed as a result of termination of the investigations of the target companies both in this country and abroad.

⁴⁹ Note, 15 I.L.M. 1010 (1976).

⁵⁰ *In re* Letters Rogatory From the Tokyo District, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976).

⁵¹ Note, *supra* note 49, at 1010.

⁵² *Id.* at 1015.

⁵³ *Id.*

⁵⁴ Washington Post, Apr. 25, 1976, at A13, col. 5.

⁵⁵ The U.S. Department of Justice described these assurances in a press release: Dr. Brancaccio, Director of the Cabinet of the Ministry of Justice of Italy, held meet-

ings for the past three days with Attorney General Levi, Assistant Attorney General Thornburgh, and other Department of Justice officials. Dr. Brancaccio presented the views of the Italian Minister of Justice, Mr. Bonifacio, concerning allegations of improper disclosures of information provided to Italian law enforcement authorities by the United States Department of Justice pursuant to the agreement of March 29, 1976, relating to the Lockheed matter. He also informed the Department of Justice that Minister Bonifacio had met with Chairman Castelli and the two Vice-Chairmen, Spagnoli and Reggiani, of the Parliamentary Investigating Committee in charge of investigating allegations of improper conduct by high-ranking Italian officials, and that the leadership of the Committee had given assurances that the confidentiality requirements of the March 29 agreement would be scrupulously observed by all members of the Committee.

Dr. Brancaccio informed the Department of Justice that the Italian Parliament had passed implementing legislation enacting the provisions of the agreement of March 29 as a matter of Italian domestic law. All political parties voted unanimously in favor of the legislation. He further stated that breach of the confidentiality provisions constitutes a penal offense which is subject to prosecution in Italy.

Dr. Brancaccio informed the Department of Justice of additional steps which will be taken by Minister Bonifacio to safeguard the confidentiality of information supplied by the Department of Justice.

The Department of Justice representatives expressed satisfaction with the assurances and the additional steps which will be taken in Italy. They announced that implementation of the agreement will continue.

The Department of Justice stressed that breach of the confidentiality provisions in the agreement would, pursuant to Article 4, result in a suspension of further exchanges of information.

U.S. Dep't of Justice, Press Release (Apr. 30, 1976).

⁵⁶ See U.S.-Nigeria Agreement, *supra* note 23.

⁵⁷ N.Y. Times, Aug. 27, 1976, at 1, col. 8.

⁵⁸ Washington Post, Dec. 2, 1976, at A37, col. 1.

⁵⁹ N.Y. Times, Aug. 17, 1976, at 1, col. 1.

⁶⁰ For a modern statute dealing comprehensively with international cooperation in criminal investigations and proceedings, see Switzerland's Law on International Judicial Assistance in Criminal Matters, *translated and reprinted* in 20 I.L.M. 1339. It is anticipated that the effective date of the Law will be January 1, 1983.

⁶¹ Cf. *id.* at arts. 8(1), 63(1), 63(2).