Federal Judicial Center
International Litigation Guide

Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges

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T. Markus Funk
Partner, Perkins Coie

Federal Judicial Center
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I. Introduction

The investigation of transnational criminal conduct, like the discovery process for transnational civil proceedings, often involves gathering evidence located in foreign countries. However, national sovereignty, international treaties, and international law preclude U.S. law enforcement officials from simply flying to a foreign country to conduct searches, question suspects, obtain documents, and proceed with arresting individuals for trial in the United States. In the absence of a foreign country's agreement to cooperate in a criminal investigation or civil litigation, U.S. prosecutors or civil litigation counsel have limited options. For this reason, transnational cooperation and collaboration is an integral component of contemporary justice systems.[1]

For criminal proceedings, there are two primary means of obtaining evidence: a Mutual Legal Assistance Treaty (MLAT) and a letter rogatory. For civil proceedings, there is only a letter rogatory. Evidence obtained from abroad through these tools may be presented as part of court proceedings, requiring U.S. judges to be familiar with the legal issues implicated by transnational requests for assistance.[2] In addition, judges should be aware that diplomacy, executive agreements, and information exchange through informal communications also play an important role in transnational criminal investigations and civil litigation.[3]

Requests for transnational assistance requiring judicial oversight most commonly involve activities necessary for proceeding with a criminal investigation or prosecution or a transnational civil proceeding, such as serving subpoenas, locating evidence and individuals, and taking testimony. The court's role in reviewing these requests will vary depending upon the applicable treaties and foreign law.[4]

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1. *See generally* Lita M. Grace, *The United States and Canadian Border: An Attempt to Increase Bi-Lateral Cooperation for the Prevention of Transnational Crime,* Colum. J. Int'l Aff. (2012), *available at* http://jia.sipa.columbia.edu/united-states-and-canadian-border (last visited Jan. 13, 2014) ("[M]ultiple federal law enforcement agencies have begun to observe a statistical increase in the committing of transnational crime. The United States understands that it will take cooperation with more than one country in order to deter transnational crime . . . .").

2. This guide focuses on obtaining evidence and assistance in criminal matters. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [hereinafter the Hague Evidence Convention]—codified at 28 U.S.C. § 1781 under the auspices of the Hague Conference on Private International Law, and enforced since 1972—sets forth the procedures for obtaining evidence and assistance in civil cases by its over fifty signatory countries (including the United States).

3. *See generally* Virginia M. Kendall & T. Markus Funk, Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses 231–34 (2012) ("Although formal MLATs, letters rogatory, and conventions may be the 'public face' of the world's cooperative law enforcement community, a comparable amount of exchange of information occurs through tried-and-tested informal [channels]."); Dan Webb et al., Corporate Internal Investigations § 13.08 (2010) (noting the various informal channels of foreign-based evidence gathering in light of the "past two decades [of exploding] international trade and commerce").

4. For example, 28 U.S.C. § 1782 expressly states that "a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any applicable privilege," which may include foreign privilege (*see In re* Commissioner's Subpoenas, 325 F.3d 1287, 1292 (11th Cir. 2003)).

The MLAT is a treaty-based mechanism for seeking foreign law enforcement cooperation and assistance in support of an ongoing criminal investigation or proceeding.[5] The MLAT process, and its benefits, are available only to government officials, typically prosecutors.[6] MLATs do not apply to civil litigants or proceedings. Supervising the execution of *incoming* MLATs—requests for assistance from foreign jurisdictions—requires direct federal district court oversight and involvement.[7] In contrast, the courts play no part in initiating or processing *outgoing* MLAT requests. That is the province of the executive branch.

Letters rogatory, in contrast, have a considerably broader reach than MLATs: they can be issued by U.S. federal and state courts as part of criminal, civil, and administrative proceedings, and they can be sent to U.S. federal and state courts by any foreign or international tribunal or "interested person."[8]

Letters rogatory (also known as "letters of request" when presented by a non-party "interested person"[9]) were first used to facilitate cooperation among the courts of the several states of the Union. Today, the letter rogatory process is used internationally and is codified at 28 U.S.C. §§ 1781[10] and 1782 (the "Judicial Assistance Statute").[11]

Letters rogatory are available to prosecutors, defendants, and civil litigants once formal proceedings have commenced; they typically cannot issue during the

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5. *See generally* U.S. Department of State, 7 Foreign Affairs Manual [hereinafter FAM] § 962.1, www.state.gov/m/a/dir/regs/fam/ ("MLATs have become increasingly important. They seek to improve the effectiveness of judicial assistance and to regularize and facilitate its procedures.").

6. *See id.* § 962.5.

7. However, state courts do not help in the processing of incoming MLAT requests. If evidence located abroad is needed as part of a prosecution in state courts, local prosecutors may enlist the MLAT process and work with the foreign judicial system. *See* Morgenthau v. Avion Res. Ltd., 49 A.D.3d 50, 59, 849 N.Y.S.2d 223, 230 (2007).

8. *See* 28 U.S.C. § 1782(a) ("The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.").

9. *See generally In re* Letter of Request from Crown Prosecution Serv. of United Kingdom, 870 F.2d 686, 687 (D.C. Cir. 1989) (involving a request by foreign government for information for use in underlying criminal investigation).

10. Title 28 U.S.C. § 1781(a) provides that the U.S. State Department is "empowered" to (1) use formal channels to transmit letters rogatory from foreign or international tribunals to the appropriate U.S. court, and receive and return them after execution; and (2) transmit letters rogatory from U.S. courts to the applicable foreign or international tribunal, officer, or agency, and receive and return them after execution. Notably, section 1781(b) also expressly states that U.S. courts or foreign or international tribunals may skip the middleman (to wit, the U.S. State Department) and send their requests directly to the foreign tribunal, officer, or agency.

11. Title 28 U.S.C. § 1782(a) allows any litigant involved in a "proceeding in a foreign or international tribunal" to apply to a U.S. court to obtain evidence for use in the non-U.S. civil or criminal proceeding. This avenue for obtaining evidence from inside the United States is, thus, unrestricted in terms of (1) the type of proceeding, and (2) the foreign countries from which such requests can issue, and, therefore, overlaps—and, indeed, exceeds—the subject matter of the Hague Evidence Convention. What is more, unlike the Hague Evidence Convention, section 1782 does not require the foreign litigant to first request the discovery from the non-U.S. tribunal.

investigative stage of criminal proceedings.[12] The process for letters rogatory is more time-consuming and unpredictable than that for MLATs. This is in large part because the enforcement of letters rogatory is a matter of comity between courts, rather than treaty-based.

For these reasons, prosecutors typically consider letters rogatory an option of last resort for accessing evidence abroad, to be exercised only when MLATs are not available. In contrast, because MLATs are never available to private parties, defense counsel and civil litigants must rely on letters rogatory to gather evidence located abroad. This disparity in access to evidence may result in delayed proceedings and cause the defense to raise access to justice issues.

Requests from abroad ("incoming requests") for legal assistance are directed to a country's designated "central authority," usually the Department (or Ministry) of Justice. The central authority, in turn, transmits the MLAT or letter-rogatory-related communication to the appropriate court or government entity.

When a federal prosecutor appears before a U.S. district court requesting assistance on behalf of a foreign state or provides notice that the U.S. government will seek assistance from a foreign state, the prosecutor acts at the direction of the U.S. Department of Justice's Office of International Affairs (OIA). OIA is the United States' central authority and de facto functional hub for all outgoing and incoming requests for transnational investigation and litigation assistance. Its attorneys process the paperwork for incoming and outgoing requests for assistance, issue guidance, and draft the form motions used by federal prosecutors. If the court has questions or concerns about the request, the judge may address them directly to OIA, typically through the local United States Attorney's Office.

This guide provides an overview of the statutory schemes and procedural matters that distinguish MLATs and letters rogatory, and it discusses legal issues that arise when the prosecution, the defense, or a civil litigant seeks to obtain evidence from abroad as part of a criminal or civil proceeding. Figure 1 is a chart that compares the two processes. The guide also discusses informal channels for information exchange in Part IV.

12. *See In re* Letter of Request from Crown Prosecution Serv. of United Kingdom, 870 F.2d at 692 (suggesting that letters rogatory are available unless there is a reliable indication that there is a likelihood that proceedings will be instituted within a reasonable time); *see also* 28 U.S.C. § 1782(a) (providing that, with the exception of criminal investigations, the section only covers "testimony or statement or . . . documents or other things for use in a *proceeding* in a foreign or international tribunal . . . .") (emphasis added).

Figure 1. Comparison of an MLAT and a Letter Rogatory

Issue	MLAT	Letter Rogatory
Nature of instrument?	Bilateral cooperation treaty	Issued by state and federal courts as a matter of comity (and with the expectation of reciprocity)
Scope of use?	The primary method of obtaining foreign evidence and other assistance	Available to all parties in criminal and civil matters
Nature of judicial involvement?	U.S. district courts supervise issuance and execution only of incoming requests	Federal and state judiciaries supervise issuance and execution of outgoing and incoming requests
Available to criminal defendants?	No (except pursuant to the first three MLATS the United States signed)	Yes; in fact, is the primary formal means for defendants to obtain foreign evidence
Available to civil litigants?	No	Yes
Available to prosecutors?	Yes	Yes
Must a case have been filed for assistance to be available?	No	Yes
Available pre-indictment (during investigative phase)?	Yes	No
Efficient method of obtaining evidence?	Relatively speaking, yes	No, generally slow and cumbersome
Processed through diplomatic channels?	Always	Almost always

II. Mutual Legal Assistance Treaties

A. Overview

MLATs are the principal vehicle through which law enforcement officials make transnational requests for assistance relating to evidence gathering and other law enforcement activities. They are available for use by law enforcement officials involved in criminal investigations and proceedings (or in some civil matters where the case is related to a criminal matter).[13] MLATs are legally binding negotiated commitments. Nonetheless, courts review specific requests for assistance and may deny them if they fail to comply with applicable domestic law or procedure.[14]

1. Scope

MLATs provide for mutual cooperation between nations in the investigation and prosecution of transnational crime, and they do so through explicitly enumerated categories of law enforcement assistance unique to each treaty.[15] The types of assistance MLATs usually provide for include the following:

- serving judicial or other documents;
- locating or identifying persons or things;
- taking testimony;
- examining objects and sites;
- requesting searches and seizures;
- obtaining documents or electronic evidence;
- identifying, tracing, and freezing or confiscating proceeds or instrumentalities of crime and/or other assets;
- transferring persons in custody for testimonial purposes or to face charges, as in extradition cases;
- freezing assets; and

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13. *See generally* 7 FAM § 962.5, *supra* note 5.

14. *See generally* United States v. Rommy, 506 F.3d 108 (2d Cir. 2007) (holding that "when securing evidence without MLAT authorization, foreign government officials lacking diplomatic immunity must conduct themselves in accordance with applicable 'domestic laws.'"); *see also* Kimberly Prost, Breaking Down the Barriers: International Cooperation in Combating Transnational Crime, http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html (last visited Jan. 13, 2014) ("For mutual assistance to succeed, the operative principle must be that requests will be executed in accordance with the law of the requested state and to the extent not prohibited by that law, will be provided in the manner sought by the requesting state. In other words, while authorities in a requested state must always meet the standards prescribed by domestic law, unless the rendering of assistance in the form sought would constitute a violation of that law, it should be provided.").

15. *See In re* Commissioner's Subpoenas, 325 F.3d 1287, 1291 (11th Cir. 2003) ("Despite the apparent versatility of 28 U.S.C. § 1782, law enforcement authorities found the statute to be an unattractive option in practice because it provided wide discretion in the district court to refuse the request and did not obligate other nations to return the favor that it grants. MLATs, on the other hand, have the desired quality of compulsion, as they contractually obligate the two countries to provide to each other evidence and other forms of assistance needed in criminal cases while streamlining and enhancing the effectiveness of the process for obtaining needed evidence.").

- any other assistance permitted by the foreign law and specified in the applicable treaty.[16]

Most MLATs also include a catchall provision authorizing the transfer of any evidence not prohibited by the requested nation's law.[17]

The United States has bilateral MLATs in force with every European Union member state, many of the Organization of American States member states, and many other countries around the world. An MLAT is negotiated by the U.S. Department of Justice in cooperation with the U.S. Department of State. The Secretary of State formally submits the proposed MLAT, typically together with a report detailing the function and purposes of the MLAT's key provisions,[18] to the President of the United States for transmittal to the U.S. Senate. Following the advice and consent of the Senate, the President signs the treaty and directs the Secretary of State to take the actions necessary for the treaty to enter into force. Once signatory countries have complied with entry-into-force provisions, the MLAT becomes binding under international law.[19]

In February 2010, the United States and the European Union (through its fifty-six member countries) entered into a historic MLAT. This multiparty MLAT seeks to enhance and modernize cross-border law enforcement and judicial cooperation. The terms of the E.U.–U.S. agreement include standard areas of assistance, such as identifying financial account information, finding and seizing evidence, and taking testimony. This MLAT also includes provisions addressing bank secrecy, joint criminal investigations, use of videoconferencing for taking testimony, and assistance to administrative agencies, such as the Securities and Exchange Commission and the Federal Trade Commission.[20]

2. Procedure

When a foreign country requests assistance pursuant to an MLAT, the U.S. court must determine whether (1) the terms of the MLAT prescribe practices or procedures for the taking of testimony and production of evidence, (2) the Federal Rules of Procedure and Evidence apply, or (3) the MLAT requires some sort of a hybrid approach. It is also acceptable to follow specified practices and procedures of the requesting country—*provided* they are consistent with U.S. law, including the rules relating to privilege. MLATs executed in the United States must follow U.S. constitutional requirements, including the protection of Fourth Amendment[21]

16. *See generally* Hon. Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence,* 40 A.B.A. Litig. J. 1, 1–3 (2014) (listing standard types of assistance).

17. David Luban et al., International and Transnational Criminal Law 376 (2009).

18. *See, e.g.,* S. Exec. Doc. No. 109-14 (2006); S. Treaty Doc. No. 111-6 (2010).

19. *See, e.g.,* S. Exec. Doc. No. 110-14 (2008); *see also* U.S. Gov't Accountability Office, GAO-11-730, Tax Administration: IRS's Information Exchanges with Other Countries Could Be Improved Through Better Performance Information (2011).

20. Luban et al., *supra* note 17, at 386.

21. U.S. Const. amend. IV (providing freedom from "unreasonable searches and seizures").

and Fifth Amendment[22] rights. That said, U.S. legal standards do not apply to the seizure of evidence overseas when the foreign country is conducting the investigation independently and seizes evidence later introduced in a U.S. court,[23] nor does the Sixth Amendment right to counsel attach to civil depositions.[24]

3. Contents

To assist the U.S. court in reviewing an incoming MLAT request, the following information is usually included (or should be made available by the assistant U.S. attorney handling the matter):

Basic information

- the name of the authority conducting the investigation, prosecution, or other proceeding to which the request relates;
- a description of the subject matter and the nature of the investigation, prosecution, or proceeding, including the specific criminal offenses that relate to the matter;
- a description of the evidence, information, or other assistance sought; and
- a statement of the purpose for which the evidence, information, or other assistance is sought.

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22. *Id.* amend. V. Witnesses deposed in the United States or in a foreign country retain the Fifth Amendment privilege against self-incrimination, regardless of whether they are U.S. citizens or foreign nationals. *See generally In re* Terrorist Bombings of South Africa, 552 F.3d 177, 199 (2d Cir. 2008) ("[R]egardless of the origin—i.e., domestic or foreign—of a statement, it cannot be admitted at trial in the United States if the statement was 'compelled.' Similarly, it does not matter whether the defendant is a U.S. citizen or a foreign national: 'no person' tried in the civilian courts of the United States can be compelled 'to be a witness against himself.'") (citation omitted). *See also* United States v. Jefferson, 594 F. Supp. 2d 655, 670 n.25 (E.D. Va. 2009); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 Jefferson L. Rev. 367, 388 (2003) (analyzing the issue and finding that U.S. and foreign citizens enjoy the same general privileges and protections under the U.S. Constitution).

23. United States v. Behety, 32 F.3d 503 (11th Cir. 1994) (holding that U.S. authorities' presence during Guatemalan officials' search of a U.S. vessel and action of tipping Guatemalan authorities that the vessel may contain cocaine insufficient to constitute "substantial participation," which would have triggered the Fourth Amendment reasonableness standard for evaluating the search); *In re* Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago, 848 F.2d 1151, 1156 n.12 (11th Cir. 1988) (abrogated on other grounds) (refusing to quash a subpoena the court issued pursuant to a request for legal assistance from a foreign government; the court "must decide whether the evidence would be discoverable in the foreign country before granting assistance"); United States v. Callaway, 446 F.2d 753 (3d Cir. 1971) (ruling that U.S. courts may exclude evidence gathered by foreign governments only (1) where there is joint action by both the U.S. and foreign governments, and (2) where solo actions by the foreign government "shock the conscience" of the U.S. court).

24. Civil depositions do not trigger the Sixth Amendment. *See generally* United States v. Hayes, 231 F.3d 663, 674 (9th Cir. 2000) (holding that the right to counsel had not attached, even after the government had sought to obtain material witness depositions for use at the defendant's trial).

Assistance-specific details

- information concerning the identity and location of any person from whom evidence is sought;
- information concerning 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;
- information on the identity and whereabouts of a person to be located;
- a precise description of the place or person to be searched and items to be seized;
- a description of the manner in which any testimony or statement is to be taken and recorded;
- a list of questions to be asked of a witness; and
- a description of any particular procedure to be followed in executing the request.

An MLAT request containing this information provides the district court with a general basis for evaluating the request for assistance. If necessary, the court may ask the assigned prosecutor to provide additional information (typically through OIA).

B. Statutory Scheme

1. 28 U.S.C. § 1782

Originally enacted in the mid-nineteenth century to encourage reciprocal assistance with transnational litigation, the statute now codified at 28 U.S.C. § 1782 permits federal courts to provide cross-border assistance via MLATs.[25] It sets forth specific procedures courts and prosecutors must follow:

> a) The district court of the district in which a person resides or is found *may* order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. 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.[26]

Section 1782 allows any "interested person" from any country who is involved in a "proceeding in a foreign or international tribunal" to apply—whether through an MLAT or letter rogatory—to a U.S. court to obtain evidence for use in that non-U.S. civil or criminal proceeding. Section 1782 is broader than the Hague Evidence Convention and does not require the foreign litigant to first re-

25. *See, e.g.,* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247–49 (2004) (detailing the history of section 1782).

26. 28 U.S.C. § 1782(a).

quest the discovery from the non-U.S. tribunal.[27] Section 1782 gives courts discretion as to "whether, and to what extent, to honor a request for assistance."[28]

2. 18 U.S.C. § 3512

The Foreign Evidence Efficiency Act, codified at 18 U.S.C. § 3512, was enacted to help streamline the MLAT process, making it "easier for the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system."[29]

The assistance contemplated by section 3512 includes, but is not limited to

> (A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;[30]
>
> (B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title;
>
> (C) an order for a pen register or trap and trace device, as provided under section 3123 of this title; or
>
> (D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.[31]

To process the foreign request for assistance, the assistant U.S. attorney will review and approve the request, and then, pursuant to 18 U.S.C. § 3512, will file it with the U.S. district court

> (1) in the district where the person who may be required to appear resides or is located or in which the documents or things to be produced are located;
>
> (2) in cases in which the request seeks the appearance of persons or production of documents or things that may be located in multiple districts, in any one of the districts in which such a person, documents, or things may be located; or
>
> (3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.[32]

As it does under 28 U.S.C. § 1782, under 18 U.S.C. § 3512, the court has discretion over whether to issue the requested order.[33]

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27. *See In re* Premises Located at 840 140th Ave., NE, Bellevue, Wash., 634 F.3d 557, 571 (9th Cir. 2011) ("We hold that requests for assistance via the U.S.–Russia MLAT utilize the procedural mechanisms of § 1782 without importing the substantive limitations of § 1782. In particular, the parties to the treaty intended that the district courts would not possess the normal 'broad discretion,' conferred by § 1782, to deny requests for assistance.").

28. *See id.* at 563.

29. 155 Cong. Rec. S6810 (daily ed. June 18, 2009) (statement of Sen. Whitehouse).

30. Note, however, that a district court's authorization to issue search warrants under this section is subject to certain restrictions, namely, that the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under federal or state law. 18 U.S.C. § 3512(e) (2009).

31. 18 U.S.C. § 3512(a)(2) (2009).

32. *Id.* § 3512(a) & (c).

33. *Id.* § 3512(a)(1) (providing that "a Federal judge *may* issue such orders as may be necessary to execute a request from a foreign authority . . . .") (emphasis added); § 3512(a)(2) ("Any order issued by a Federal judge pursuant to paragraph (1) *may* include the issuance of [non-exhaustive list of orders].") (emphasis added).

The application to provide the requested assistance, like all such filings, may be submitted ex parte and under seal.[34] Section 3512 also permits the appointment of an outside individual—sometimes referred to as a "commissioner"[35]—"to direct the taking of testimony or statements or of the production of documents or other things, or both."[36] A commissioner may pursue requests in multiple judicial districts, eliminating the need for judges in different districts to appoint separate commissioners and otherwise duplicate their efforts.[37] Section 3512 also permits judges to oversee and approve subpoenas and other orders (but not search warrants) outside of their district.

Under section 3512, federal judges continue to serve as gatekeepers for search warrants, wiretaps, and other methods of obtaining evidence, ensuring that the collection of requested foreign evidence meets the same standards as those required in U.S. cases (such as, for example, the probable cause standard, specificity in warrants, and protection of attorney–client, physician–patient, and other recognized privileges).[38]

C. Judicial Review of Requests for Mutual Legal Assistance

Although there is a presumption in favor of honoring MLAT requests,[39] the district court must still review the terms of each request, checking that they comply with the terms of the underlying treaty and comport with U.S. law.[40] For example, in *United Kingdom v. United States,*[41] appellants awaiting trial in England requested disclosure of law enforcement documents they claimed were requested by

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34. *See generally* Robert Timothy Reagan, Federal Judicial Center, Sealing Court Records and Proceedings: A Pocket Guide (2010) (noting the court's wide discretion in whether to grant an ex parte motion to seal).

35. While the statute does not require the commissioner to be a lawyer or prosecutor, courts routinely appoint an assistant United States attorney to be the commissioner. *See* 18 U.S.C. § 3512(b)(1) ("In response to an application for execution of a request from a foreign authority as described under subsection (a), a Federal judge may also issue an order appointing *a person* to direct the taking of testimony or statements or of the production of documents or other things, or both") (emphasis added). *See, e.g.,* United States v. Trustees of Boston College, 831 F. Supp. 2d 435 (D. Mass. 2011) (appointing an assistant United States attorney as the commissioner); *In re* Request from United Kingdom Pursuant to Treaty, No. 11-2511, 685 F.3d 1 (1st Cir. 2012) (same).

36. 18 U.S.C. § 3512(b)(1), (2).

37. *See id.* § 3512(b)(2), (f).

38. *See, e.g.,* 28 U.S.C. § 1782(a) ("A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."). *In re* Request from United Kingdom Pursuant to Treaty Between Gov't of U.S. & Gov't of United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price, 718 F.3d 13 (1st Cir. 2013) (conducting a relevancy analysis of subpoenaed materials).

39. *In re* Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557, 571 (9th Cir. 2011) ("When a request for assistance under the MLAT arrives before a district court . . . almost all the factors already would point to the conclusion that the district court should grant the request.").

40. *See* Kendall & Funk, *supra* note 16, at 2 (discussing the role of district courts as gatekeepers).

41. 238 F.3d 1312, 1315 (11th Cir. 2001), *cert. denied sub nom.* Raji v. United States, 122 S. Ct. 206 (2001).

British law enforcement officials pursuant to the U.S.–U.K. MLAT. The Eleventh Circuit denied the motion, finding that the underlying U.K. request for evidence did not conform to the specific protocol set forth in the treaty and, accordingly, no valid MLAT request had been made.[42]

U.S. courts will also consider constitutional challenges to a request for legal assistance. Although such cases are rare, "a district court may not enforce a subpoena that would offend a constitutional guarantee," such as a subpoena that would result in an "egregious violation of human rights."[43]

D. Legal Issues

While the majority of requests for assistance pursuant to an MLAT proceed uneventfully, courts sometimes are called upon to resolve related legal issues, such as dual criminality, defense access to evidence located abroad, delay, and statute of limitations.

1. Dual Criminality

Unlike extradition treaties enforced in U.S. courts, MLATs do not require dual criminality—that the offense for which the foreign state seeks assistance also constitutes a crime in the requested state. The utilitarian reason for this deviation from the norm is to facilitate responsiveness.

MLATs, after all, are intended to improve law enforcement cooperation between countries, and the United States' law enforcement objectives often depend upon timely assistance from treaty signatories. The United States has committed to responding to requests under MLATs even if the doctrine of dual criminality exists as part of the requesting country's domestic law.[44] This approach establishes a high standard of responsiveness, enabling the United States to "urge that foreign authorities respond to our requests for evidence with comparable speed."[45] Most MLATs expressly state that the dual criminality principle does not apply.[46]

Some MLATS, however, are drafted to include limitations that are triggered if the requested assistance requires a court warrant or other compulsion and the underlying offense is not a crime in the requested country. In jurisdictions where domestic law requires dual criminality for international treaties, the MLAT is often drafted to include a nonexclusive list of covered offenses that allow for mutual legal assistance.

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42. *Id.* at 1317.

43. *In re* Premises, 634 F.3d at 572.

44. United States v. Trustees of Boston College, 831 F. Supp. 2d 435, 450 (D. Mass. 2011) (*aff'd in part sub nom.*); *In re* Request from United Kingdom Pursuant to Treaty, No. 11-2511, 685 F.3d 1 (1st Cir. 2012).

45. *In re* Request from United Kingdom Pursuant to Treaty, No. 11-2511, 685 F.3d 1 (1st Cir. 2012).

46. *In re* Commissioner's Subpoenas, 325 F.3d 1287, 1299 (11th Cir. 2003). *See also* sources cited at *supra* note 3.

2. Defense Access to Evidence Located Abroad

The MLAT process was created to facilitate international cooperation in the investigation and prosecution of criminal cases. Each treaty's terms apply only to the contracting nations' parties, and the benefits conferred are available only to the governmental officials of those nations.

The first three MLATs signed by the United States—those with Switzerland,[47] Turkey, and the Netherlands—include provisions granting defense counsel permission to access evidence pursuant to an MLAT. Subsequent MLATs do not include comparable provisions.[48]

Thus, access to evidence through an MLAT is restricted to prosecutors, government agencies that investigate criminal conduct, and government agencies that are responsible for matters ancillary to criminal conduct, including civil forfeiture. In fact, the vast majority of MLATs signed by the United States explicitly *exclude* non-government access to U.S. processes.[49] Criminal defendants, like civil litigants, must use letters rogatory to secure evidence located abroad, a process that is less efficient and less reliable.[50]

Federal prosecutors increasingly rely on extraterritoriality provisions in federal law, such as those incorporated into the Foreign Corrupt Practices Act,[51] to bring cases in which much of the physical evidence and most potential witnesses are located overseas. Because the MLAT process is only available to the prosecution, the defendant's ability to collect and present evidence is limited.

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47. In a case involving the MLAT between the United States and Switzerland, defense counsel requested the government's assistance with securing witness testimony via the MLAT process. Agreeing with the defense argument that the proffered evidence was important to its case, the court ordered the Department of Justice to provide the requested assistance. United States v. Sindona, 636 F.2d 792 (2d Cir. 1980). The reasoning of this case is limited to MLATs that provide for defense access to evidence abroad, such as those with Switzerland, Turkey, and the Netherlands. All other MLATs include language explicitly restricting defense access. *See also* L. Song Richardson, *Convicting the Innocent,* 26 Berkeley J. Int'l L. 62, 84 (2008); United States v. Chitron Electronics Co., 668 F. Supp. 2d 298, 306 (D. Mass. 2009) (discussing U.S.–China MLAT).

48. United Kingdom v. United States, 238 F.3d 1312, 1317 (11th Cir. 2001), *cert. denied sub nom.* Raji v. United States, 122 S. Ct. 206 (2001).

49. *See* United States v. Duboc, 694 F.3d 1223, 1229 (11th Cir. 2012) ("[T]here is a presumption that international agreements do not create private rights or private causes of action in domestic courts, even when the agreement directly benefits private persons. This presumption and the plain terms of the MLAT show that Duboc, as a private party, may not use the MLAT as a defense to the forfeiture of the Thailand condos.") (citing United States v. Valencia-Trujillo, 573 F.3d 1171, 1180–81 (11th Cir. 2009)).

50. *See generally United Kingdom,* 238 F.3d at 1314 (explaining that there is no provision for private parties, such as individual criminal defendants in the English (or American) courts, to request the production of information).

51. 15 U.S.C. §§ 78dd-1, *et seq*. *See generally* T. Markus Funk & Bo Dul, *Regrouping and Refocusing: 2013 FCPA Year-In-Review and Enforcement Trends for 2014*, Bloomberg BNA Sec. Reg. & L. Rep., 46 SRLR 121 (Jan. 20, 2014).

Commentators have noted that the lack of compulsion parity between prosecutors and the defense in obtaining foreign evidence has due process implications.[52] Counsel for the defense may argue that a vital piece of exculpatory evidence is located overseas and the MLAT process is the only realistic way of obtaining it. Counsel may request that the government provide assistance with accessing this evidence through the MLAT process, and if the prosecution refuses, counsel may petition the court for relief.[53] However, few, if any, courts have been receptive to such petitions in the absence of language in the MLAT that provides for defense access to evidence abroad.

In *United States v. Mejia,* the defendants were involved in a cross-border drug trafficking organization run out of Costa Rica. A grand jury in the District of Columbia indicted the Colombian nationals, charging them with conspiracy to distribute cocaine.[54] Panamanian authorities arrested two of the defendants, turning the men over to the custody of the United States. During pretrial proceedings, the two defendants petitioned the trial court to require that the government produce tape recordings made during the Costa Rican trial of one of their alleged (non-testifying) coconspirators. The defendants conceded that the tapes were not within the U.S. government's "possession, custody, or control" within the meaning of Rule 16, but argued that the prosecution had "the power" to secure the trial tapes or transcripts from the Costa Rican government via the U.S.–Costa Rican MLAT.[55] The trial court rejected the defendants' request, ruling that the government had no obligation to use its "best efforts" through the MLAT to obtain the tapes.[56]

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52. *See* Daniel Huff, *Witness for the Defense: The Compulsory Process Clause As a Limit on Extraterritorial Criminal Jurisdiction,* 15 Tex. Rev. L. & Pol. 129, 160–61 (2010); Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties,* 47 Va. J. Int'l L. 261, 273 (2006); Richardson, *supra* note 47, at 84–85; Ian R. Conner, *Peoples Divided: The Application of United States Constitutional Protections in International Criminal Law Enforcement,* 11 Wm. & Mary Bill Rts. J. 495, 503–04 (2002); Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?,* 39 Hous. L. Rev. 307, 357–73 (2002). *See also* United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990) (implicating the Due Process Clause by not requesting Special Interest Parole from the INS).

53. If the Department of Justice refuses to use an MLAT to execute a Federal Rule of Criminal Procedure 15 court order authorizing a criminal defendant to take a deposition abroad (instead telling the defendant to seek enforcement of the order through a letter rogatory), the defendant may contend that the refusal violates the defendant's rights under the Compulsory Process Clause of the Sixth Amendment. Defendants may also cite the International Covenant on Civil and Political Rights, to which the United States became a party in 1992. The Covenant provides, in part: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality . . . . To examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (referring to art.14, sec. 3).

54. United States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006).

55. *Id.* at 444.

56. *Id.*

On appeal, the D.C. Circuit found that the government satisfied its sole obligation, compliance with Rule 16. The court did note that, pursuant to 28 U.S.C. § 1781(b)(2), the defendants "could have asked the district court to issue letters rogatory to the Costa Rican court to obtain any tapes or transcripts that may have existed, [but did] not do so."[57] This language may leave open the argument that had the defendants first sought the requested evidence using the letter rogatory process, the outcome (or at least the analysis) might have been different.[58]

Courts have consistently held that MLATs create no private rights permitting an individual defendant to force the government to request evidence pursuant to an MLAT, even when the defendant invokes constitutional concerns.[59] In *United States v. Jefferson*, Jefferson argued that the Sixth Amendment required the government to utilize the MLAT process to obtain depositions for the defense.[60] The district court disagreed, stating that "it is clear that defendant is not entitled to make use of the MLAT and that this result does not violate defendant's constitutional right to compulsory process."[61]

Likewise, the Eleventh Circuit rejected a challenge to a forfeiture order by a defendant who asserted that the government did not follow the provisions of the MLAT between Thailand and the United States.[62] The court noted the "presumption that international agreements do not create private rights" and held that the defendant, as a private party, could not use the MLAT as a defense to the forfeiture.[63] The First Circuit similarly rejected an argument that an MLAT allowed for a private right of action, citing both the language of the U.S.–U.K. MLAT itself and the fact that other courts have "uniformly" ruled that no such private right exists under the language of similar MLATs.[64]

3. Delay

Obtaining evidence through the use of formal MLATs between nations can be time-consuming and may result in government requests for additional time. The main difficulties are the required level of legal formality and the availability of resources, such as staff and funding. In more complex cases, as well as those involving technology, another potential cause of delay is the limited capacity of

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57. *Id.* at 445.

58. *See id.* (citing United States v. Sensi, 879 F.2d 888, 899 (D.C. Cir. 1989)). *But see* Euromepa v. R. Esmerian, Inc., 51 F.3d 1095, 1098 (2d Cir. 1995) (declining to engraft a "quasi-exhaustion requirement" into section 1782 that would force litigants to seek "information through the foreign or international tribunal" before requesting discovery from the district court); *In re* Veiga, 746 F. Supp. 2d 8, 24 (D.D.C. 2010) (same).

59. *See, e.g.,* United States v. Jefferson, 594 F. Supp. 2d 655, 674 (E.D. Va. 2009).

60. *Id.* at 673.

61. *Id.*

62. United States v. Duboc, 694 F.3d 1223, 1229 (11th Cir. 2012), *cert. denied,* 133 S. Ct. 1278, 185 L. Ed. 2d 214 (U.S. 2013), *reh'g denied,* 133 S. Ct. 2051, 185 L. Ed. 2d 908 (U.S. 2013).

63. *Id.* at 1229–30.

64. *In re* Request from United Kingdom Pursuant to Treaty, No. 11-2511, 685 F.3d 1 (1st Cir. 2012), *cert. denied,* 133 S. Ct. 1796, 185 L. Ed. 2d 856 (U.S. 2013).

some foreign law enforcement agencies to conduct the sophisticated forensic analysis needed to comply with an MLAT request.[65]

In other cases, the foreign country may simply have more limited experience with the evidence-gathering process. *United States v. $93,110.00 in U.S. Currency,*[66] for example, involved an action for civil forfeiture with evidence located in Mexico. Although the case had been pending for almost three years, the U.S. government requested additional time to gather evidence, citing the "significant challenges" in obtaining formal discovery from Mexico despite numerous inquiries. Noting the government's due diligence, the court granted the request, but also stated that it would rely on its inherent authority to control the scheduling of pretrial proceedings and deny any future MLAT-based extension requests.[67]

Although district courts are involved in overseeing incoming MLAT requests, they have no direct oversight over requests sent *from* the United States to a foreign country. A court may sometimes become indirectly involved in an outgoing MLAT process, however, such as when delays in processing have an impact on the management of a domestic case or present speedy trial issues. If an MLAT request issued by the Department of Justice threatens to result in unacceptable delays in or burdens on a court proceeding, the court may suggest that the government either (1) forgo obtaining certain evidence, or (2) limit its request to essential evidence, thereby ensuring that requests are processed expeditiously.

4. Statute of Limitations

When the government seeks evidence from abroad prior to the return of an indictment, it files an ex parte application with the court to toll the statute of limitations pursuant to 18 U.S.C. § 3292. The court must find by a preponderance of the evidence that "it reasonably appears" the evidence is located in the foreign country,[68] and the tolling of the statute may not exceed three years.[69] The suspension of the statute of limitations begins on the date that the MLAT request is made; it ends when the foreign government takes its final action on the request.[70] Section 3292

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65. *See generally* Kendall & Funk, *supra* note 3, at 215 (suggesting that, because of these challenges, it is often preferable to request that the foreign authorities "simply ship the entire seized hard drive to the United States").

66. No. CV-08-1499-PHX-LOA, 2010 WL 2745065 (D. Ariz. July 12, 2010).

67. *Id.*

68. *See* United States v. Trainor, 376 F.3d 1325, 1336 (11th Cir. 2004) ("[T]he Government must present some evidence—something of evidentiary value—that it reasonably appears the requested evidence is in a foreign country.").

69. *See, e.g.,* United States v. Lyttle, 667 F.3d 220, 224 (2d Cir. 2012) (holding that section 3292 "requires a district court to suspend the running of a statute of limitations upon an appropriate application showing: (1) that evidence of an offense being investigated by a grand jury is in a foreign country; and (2) that such evidence has been officially requested. According to the statute, the preponderance-of-the-evidence standard applies when determining whether the United States has made an official request. When deciding whether the evidence is in a foreign country, however, a lower standard applies: a court must find by a preponderance of the evidence . . . that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in a foreign country.").

70. 18 U.S.C. § 3292(b).

does not provide the defendant with a right to notice that the statute of limitations is being suspended or a hearing on the issue.[71]

In *United States v. Lyttle*, the court rejected the defendant's claim that tolling the statute of limitations was improper, because the documents in question could have been obtained through the U.S. branch of a Hungarian bank via domestic subpoena duces tecum, rather than the more time-consuming MLAT process.[72] Looking at the "plain text" of section 3292, the court found no requirement that the foreign evidence be obtainable *only* through diplomatic channels in order for the statute of limitations to be tolled.[73]

Although section 3292 incorporates a low evidentiary threshold, the court must nevertheless scrutinize government requests to have the statute of limitations tolled. In *United States v. Wilson,*[74] the defendant was indicted in 1998 for an international money laundering conspiracy involving the Bahamas. The defendant filed a motion to dismiss, arguing that the prosecution was time-barred. Contesting this motion, the government pointed to a 1994 court order suspending the limitations period beginning in 1993, when OIA made an official request for Wilson's financial records from a Nassau bank, pursuant to the U.S.–Bahamas MLAT. Wilson challenged the government's assertion, arguing that the proffered copy of the letter of request and the government's "representation" that the letter was sent were inadequate.[75] The Fifth Circuit ruled that the evidence raised a factual issue concerning whether the government actually sent the discovery request to the Bahamas, and it remanded the case for an evidentiary hearing.[76]

On remand, the government failed to produce any documentary evidence that the letter of request was sent; nor did it offer testimony of individuals who issued or received the letter.[77] The district court, nevertheless, again denied Wilson's motion to dismiss. The court of appeals, in turn, for a second time reversed the district court's decision, pointing to the absence of "consistent procedures or practices at OIA during the time in question," and concluding that the district court improperly tolled the statute of limitations.[78]

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71. *See* DeGeorge v. U.S. Dist. Court for Cent. Dist. Cal., 219 F.3d 930, 937 (9th Cir. 2000). *See also* United States v. Hoffecker, 530 F.3d 137, 168 (3d Cir. 2008) ("We find that there was nothing improper about the ex parte nature of the proceeding before the grand jury judge."); United States v. Wilson, 249 F.3d 366, 371 (5th Cir. 2001) ("An application to toll the statute of limitations under § 3292 is a preindictment, ex parte proceeding."), *abrogated by* Whitfield v. United States, 543 U.S. 209 (2005).

72. 667 F.3d at 224–25.

73. *Id.* at 225.

74. 249 F.3d 366 (5th Cir. 2001). *See also* United States v. Torres, 318 F.3d 1058, 1061 (11th Cir. 2003) ("Under § 3292, the government may apply, ex parte, for suspension of the statute of limitations when it seeks evidence located in a foreign country.").

75. *Wilson*, 249 F.3d at 372.

76 *Id*. at 373.

77. The government introduced the testimony of a paralegal who did not work on the Wilson case but "claimed familiarity with the office policies and procedures in place in 1993 when OIA allegedly sent the MLAT request." United States v. Wilson, 322 F.3d 353 (5th Cir. 2003).

78. *Id.* at 362**.**

III. Letters Rogatory

Letters rogatory are formal requests for judicial assistance made by a court in one country to a court in another country.[79] Once issued, they may be conveyed through diplomatic channels, or they may be sent directly from court to court.[80] Letters rogatory are often used to obtain evidence, such as compelled testimony, that may not be accessible to a foreign criminal or civil litigant without judicial authorization. They are used primarily by non-government litigants who do not have access to the MLAT process. "While it has been held that federal courts have inherent power to issue and respond to letters rogatory, such jurisdiction has largely been regulated by congressional legislation."[81]

A. Outgoing

The letter rogatory process is less formal than pursuing evidence through an MLAT, but its execution can be more time-consuming. Outgoing letters rogatory—requests for assistance with obtaining evidence abroad, made by counsel through the U.S. court—are issued by the U.S. State Department pursuant to 28 U.S.C. § 1781, and provided for under Federal Rules of Civil Procedure 28(b) and 4(f)(2)(B). Section 1781(b), however, also allows for a district court (and, for that matter, a foreign court) to bypass the State Department and transmit the outgoing letter rogatory directly to the "foreign tribunal, officer, or agency."[82]

In most cases, foreign courts honor requests issued pursuant to letters rogatory. However, international judicial assistance is discretionary, based upon principles of comity rather than treaty, and is also subject to legal procedures in the requested country. Compliance with a letter rogatory request is left to the discretion of the court or tribunal in the "requested" jurisdiction (that is, the court or tribunal to which the letter rogatory is addressed). For example, if a request for compelled

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79. The rules for enforcement of letters rogatory were promulgated as part of the Hague Convention Relating to Civil Procedure, which was ratified by more than sixty countries, including the United States. *See* Hague Convention Relating to Civil Procedure, http://www.jus.uio.no/english/services/library/treaties/11/11-02/civil-procedure.xml (last visited April 9, 2014). *See also* Eileen P. McCarthy, *A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance,* 15 Fordham Int'l L.J. 772, 778 (1991) ("Letters rogatory can be more effective than commissions because the executing courts have recourse to their own procedures to compel recalcitrant or reluctant witnesses to comply with their judicial decrees.").

80. 28 U.S.C. § 1781. Letters rogatory and accompanying documents may be submitted to the Office of American Services, U.S. Department of State, SA-29 4th Floor, 2201 C Street N.W., Washington, DC 20520-0001. Phone: 1-888-407-4747. *See generally* U.S. Department of State, Preparation of Letters Rogatory, http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html (last visited April 10, 2014).

81. *In re* Letters Rogatory from the Justice Court, District of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975).

82. Title 28 U.S.C. § 1781(a) provides that the U.S. State Department is "empowered" to (1) use formal channels to transmit letters rogatory from foreign or international tribunals to the appropriate U.S. court and receive and return them after execution, and (2) transmit letters rogatory from U.S. courts to the applicable foreign or international tribunal, officer, or agency and receive and return them after execution.

testimony is granted by a foreign court, the taking of that testimony may not necessarily follow procedures similar to those of the United States, such as through depositions.

Because the letter rogatory process is time-consuming and may involve unique issues of foreign procedural law, parties seeking evidence can arrange for local counsel in the foreign country to file the letter rogatory on their behalf, a strategy that may facilitate the process. The U.S. trial proceedings may be impacted by delays flowing from the foregoing procedural and practical hurdles.[83]

B. Incoming

Incoming letters rogatory—requests for judicial assistance originating in a foreign or international tribunal—are also covered by 28 U.S.C. §§ 1781 and 1782. OIA receives incoming letters rogatory from foreign or international tribunals and transmits each request to the federal court in the district where the evidence is located or witness resides.[84] After reviewing the request, the district court may order the taking of testimony or production of evidence for use in the foreign proceeding.[85] The evidence is then provided to the requesting foreign party by OIA.

The U.S. court may "prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing."[86] Or, if nothing in the request prescribes otherwise, the court may follow the Federal Rules of Civil Procedure. Legal privileges are respected, and privileged testimony cannot be compelled. The process typically takes place ex parte, though a court has the authority to require notification of other parties in the foreign litigation prior to the issuance of an order.[87]

U.S. courts have considerable discretion when reviewing incoming letters rogatory from foreign courts.[88] The U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*[89] involved a request to a U.S. district court for the production of documents to be used in a proceeding before a European administrative tribunal. The Supreme Court clarified the parameters of U.S. court assis-

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83. The following statutory provisions also govern the issuance and processing of letters rogatory: the All Writs Act, 28 U.S.C. § 1651; 28 U.S.C. §§ 1781 and 1782 (describing the transmittal of letters rogatory through the Department of State and through the district courts); 28 U.S.C. § 1696 (providing for the use of letters rogatory for service of process pursuant to a request by a foreign tribunal); and 22 C.F.R. 92.66 (detailing the consular procedures for transmittal of letters rogatory).

84. 28 U.S.C. § 1782.

85. *Id.*

86. *Id.*

87. *See, e.g., In re* Merck & Co., 197 F.R.D. 267, 271 (M.D.N.C. 2000).

88. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004) ("As earlier emphasized, a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so."); Four Pillars Enters. Co. v. Avery Dennison Corp., 308 F.3d 1075, 1078 (9th Cir. 2002) ("Congress gave the federal district courts broad discretion to determine whether, and to what extent, to honor a request for assistance under 28 U.S.C. § 1782.").

89. 542 U.S. at 241.

tance to foreign tribunals pursuant to section 1782 and reiterated that district courts have broad discretion in allowing discovery that aids foreign proceedings.

When reviewing an application made under section 1782, a court should examine the nature of the foreign tribunal, the character of the proceedings, and the foreign government's receptivity to U.S. judicial assistance. It should also consider the following:

- Is the person from whom discovery is sought a participant in the foreign proceeding? "'[T]he need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant.'"[90]
- Does the request conceal "an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States?"[91]
- Is the request unduly intrusive or burdensome or made for the purpose of harassment?[92]

The *Intel* decision also noted that in some cases a court may modify a discovery request to make it less burdensome.[93]

C. Case Management

In contrast to MLATs, letters rogatory are not treaty-based; there is no guarantee that the requested country or tribunal will act on a request for assistance, or if it acts, how it will act. When evaluating a defendant's request for letters rogatory to secure evidence located abroad, courts consider the following factors:

- Is the proffered evidence exculpatory?
- Is it cumulative of evidence more readily available in the United States?
- Was the request for evidence made in a timely manner?[94]

If the evidence in question is necessary to ensure a fair trial, obtaining it will most likely warrant the delay inherent in the letter rogatory process.[95]

In *United States v. Jefferson*,[96] for example, Jefferson made a pretrial motion to depose witnesses located in Nigeria, arguing that their testimony would be exculpatory.[97] The witnesses would not consent to be deposed, and Jefferson sought an order requiring the government to invoke the MLAT between the United States and Nigeria, or, in the alternative, requested that the court issue a letter rogatory.[98] The court found the proffered witness testimony to be material,

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90. *In re* Clerici, 481 F.3d 1324, 1334 (11th Cir. 2007) (quoting *Intel*, 542 U.S. at 264–65).

91. *Intel,* 542 U.S. at 241.

92. *See generally id.* at 264–65; *In re* Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988).

93. *Intel,* 542 U.S. at 245 ("[I]ntrusive or burdensome requests may be rejected or trimmed.").

94. United States v. Dearden, 546 F.2d 622, 625 (5th Cir. 1977); United States v. Rosen, 240 F.R.D. 204, 213 (E.D. Va. 2007); United States v. Jefferson, 594 F. Supp. 2d 655, 673 (E.D. Va. 2009).

95. *See* Progressive Minerals, LLC v. Rashid, No. 5:07-CV-108, 2009 WL 1789083, at *2 (N.D. W. Va. June 23, 2009); *Rosen,* 240 F.R.D. at 213.

96. 594 F. Supp. 2d at 661.

97. *Id.*

98. *Id.*

noncumulative, and potentially exculpatory.[99] The government argued that Jefferson's motion should be denied because he waited nearly a year after indictment before seeking the evidence and the trial would be delayed.

Noting that the MLAT process was not available to the defense, the court agreed to issue a letter rogatory. The court found that the material nature of the evidence requested excused the delay required to obtain it. The court issued a letter rogatory to the appropriate Nigerian judicial authority, requesting that it ascertain the witnesses' willingness to waive their Fifth Amendment rights and answer questions fully in a later deposition—a compromise ruling tailored to the case.[100]

The letter rogatory process may take as long as a year, presenting courts with case management challenges. Although delays may be mitigated by transmitting a copy of the request through INTERPOL or some other more direct route, even in urgent cases, such requests often take at least a month to execute. To minimize unnecessary delay, the court may choose to review outgoing letters rogatory or inquire of counsel whether steps were taken to ensure as expeditious a response as possible.

1. Preliminary Information

Courts may consider the following issues when reviewing an outgoing letter rogatory:

- Did the party requesting the assistance review the country-specific judicial assistance information on the Department of State website and U.S. state and federal law relating to the subject to determine whether the requested assistance can, in fact, be rendered?
- Does the letter include unnecessary information that may confuse a court in the receiving foreign country?
- Is the request for assistance sufficiently specific so as not to resemble a fishing expedition?
- If the party making the request believes it is preferable for foreign courts to follow particular procedures, does the letter include specific instructions in this regard (for example, a verbatim transcript, witness testimony under oath, or permission for U.S. or foreign counsel to attend or participate in proceedings)?
- Has the party requesting the letter consulted the country-specific information for guidance about authentication procedures for the particular country (that is, are a judicial signature and seal sufficient)?

99. *Id.* at 667–73.
100. *Id.* at 675–76.

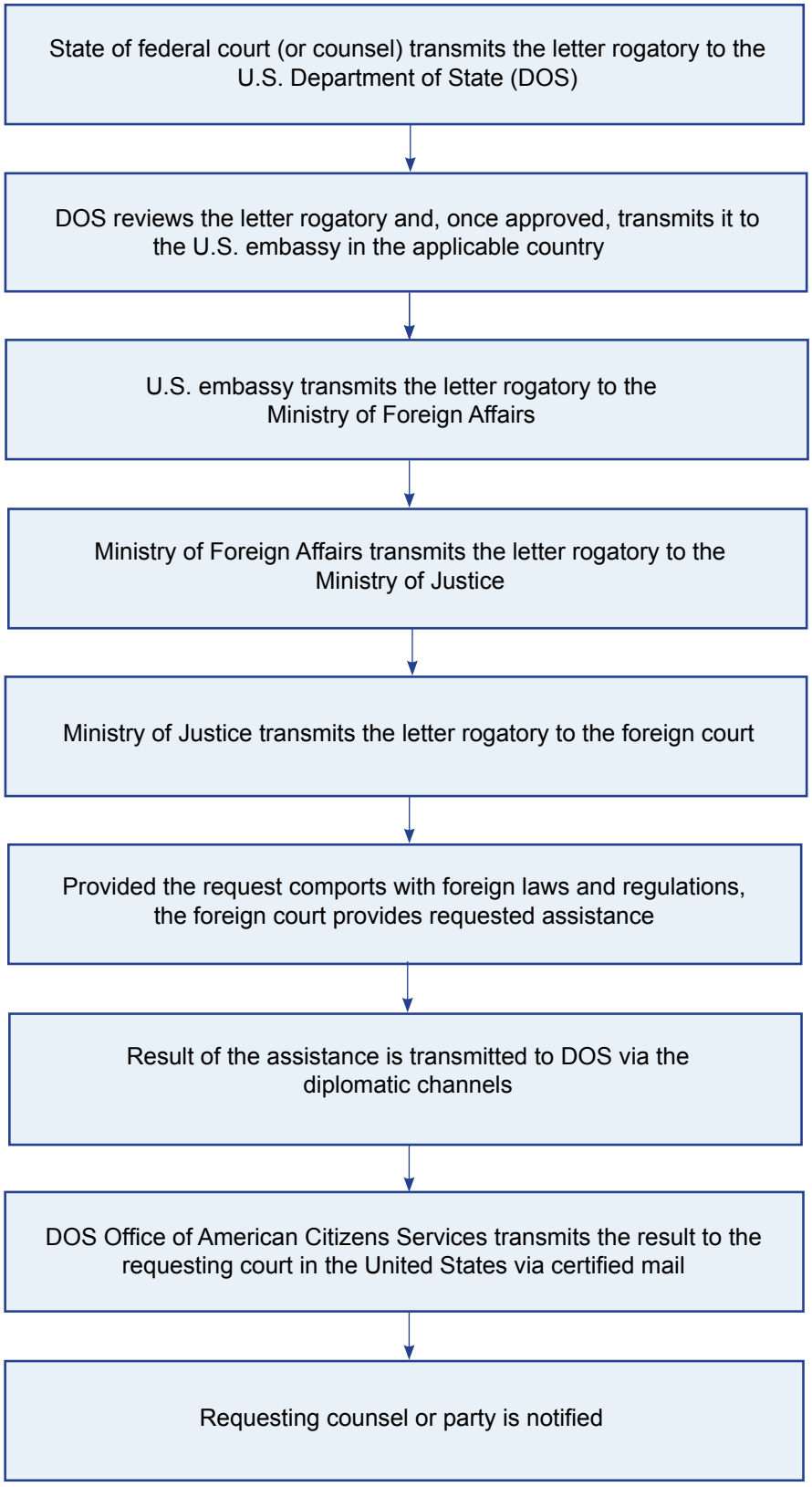
2. Essential Elements of a Letter Rogatory

In addition, to facilitate the process, courts should ensure that the letter includes the following:

- a statement that the request for international judicial assistance is being made in the interests of justice;
- a brief synopsis of the case, including identification of the parties and the nature of the claim and relief sought, to enable the foreign court to understand the issues involved;
- the type of case (e.g., civil, criminal, or administrative);
- the nature of the assistance required (e.g., compel testimony or production of evidence, serve process);
- the name, address, and other identifiers, such as corporate title, of the person abroad to be served or from whom evidence is to be compelled, and a description of any documents to be served;
- a list of questions to be asked, where applicable (generally in the form of written interrogatories);
- a statement from the requesting court expressing a willingness to provide similar reciprocal assistance to judicial authorities of the receiving state; and
- a statement that the requesting court or counsel is willing to reimburse the judicial authorities of the receiving state for any costs incurred in executing the requesting court's letter rogatory.

Figure 2 outlines the typical outgoing letter rogatory process, and the Appendix presents a sample letter rogatory from the U.S. Department of Justice.

Figure 2. Submitting a Letter Rogatory for Execution by a Foreign Court



IV. Information Exchange Through Informal Channels

Although formal MLATs, letters rogatory, and other international conventions are the "public face" of transnational legal assistance, a significant amount of criminal investigation-related information is exchanged through informal channels: investigator to investigator, prosecutor to prosecutor, defense counsel to local counterpart. Indeed, personal, cooperative law enforcement relationships can be so informal and "off the grid" that law enforcement agencies, courts, and defendants may only learn of them by accident.

Responding to the challenges of transnational law enforcement, the FBI and other U.S. law enforcement agencies have aggressively sought to develop institutional relationships with their foreign counterparts. Teams of U.S. law enforcement officers regularly coordinate with each other and with their foreign counterparts in a task force approach, often working out of offices in U.S. embassies and missions around the world. This "bricks and mortar" outreach enables U.S. law enforcement officials to cultivate professional relationships and more readily access other sources of information in the host countries.

The U.S. Departments of State, Treasury, and Justice institutionalize cross-border cooperation through memoranda of understanding (MOU) structured to improve the handling and sharing of law enforcement information in foreign jurisdictions. Although the benefits of this cooperation are significant, the process has limitations. Courts should be aware that information gathered in the informal manner described in this section may be incomplete and is not always tendered to prosecutors or, through the discovery process, provided to the defense.

V. Conclusion

Whether through MLATs, letters rogatory, or informal means, the process of obtaining evidence from abroad in criminal and civil cases can be time-consuming and frustrating to all parties involved, including the courts. Prepared with a basic understanding of how these transnational evidence-gathering tools operate, courts can plan for potential delays; evaluate the arguments made by the government, the defense, and civil litigants; and facilitate the evidence-gathering process in a manner that promotes fairness and conserves resources.

Appendix

U.S. DEPARTMENT OF JUSTICE
SAMPLE LETTER ROGATORY

NAME OF COURT IN SENDING STATE REQUESTING JUDICIAL ASSISTANCE

NAME OF PLAINTIFF

V. DOCKET NUMBER

NAME OF DEFENDANT

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE (LETTER ROGATORY)

(Name of the requesting court) presents its compliments to the appropriate judicial authority of (name of receiving state), and requests international judicial assistance to (obtain evidence/effect service of process) to be used in a (civil, criminal, administrative) proceeding before this court in the above captioned matter. A (trial/hearing) on this matter is scheduled at present for (date) in (city, state, country).

This court requests the assistance described herein as necessary in the interests of justice. The assistance requested is that the appropriate judicial authority of (name of receiving state) (compel the appearance of the below named individuals to give evidence/produce documents) (effect service of process upon the below named individuals).

(Names of witnesses/persons to be served)

(Nationality of witnesses/persons to be served)

(Addresses of witnesses/persons to be served)

(Description of documents or other evidence to be produced)

Facts

(The facts of the case pending before the requesting court should be stated briefly here, including a list of those laws of the sending state which govern the matter pending before the court in the receiving state.)

(Questions)

(If the request is for evidence, the questions for the witnesses should be listed here.)

(List any special rights of witnesses pursuant to the laws of the requesting state here.)

(List any special methods or procedures to be followed.)

(Include a request for notification of time and place for examination of witnesses/documents before the court in the receiving state here.)

Reciprocity

(The requesting court should include a statement expressing a willingness to provide similar assistance to judicial authorities of the receiving state.)

Reimbursement for costs

(The requesting court should include a statement expressing a willingness to reimburse the judicial authorities of the receiving state for costs incurred in executing the requesting court's letters rogatory.)

Signature of requesting judge

Typed name of requesting judge

Name of requesting court

City, State, Country

Date

(Seal of court)

Recommended Resources

Internet sites

INTERPOL: www.interpol.int/.

U.S. Attorney's Manual Section on Letters Rogatory: www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00275.htm.

U.S. Department of Justice, Criminal Division contact information: www.justice.gov/criminal/about/contact.html.

U.S. Department of Justice, Office of International Affairs homepage: www.justice.gov/criminal/about/oia.html.

U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, International Center homepage: www.nij.gov/international/.

U.S. Department of Justice, Office of Overseas Prosecutorial Development, Assistance & Training Program homepage: www.justice.gov/criminal/opdat/.

U.S. Department of State, Country-Specific Judicial Assistance Information: http://travel.state.gov/content/travel/english/legal-considerations/judicial/country.html.

U.S. Department of State, Preparation of Letters Rogatory: http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html.

U.S. Department of State, Office of the Legal Adviser, A List of Treaties and Other International Agreements of the United States in Force: www.state.gov/www/global/legal_affairs/tifindex.html.

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American Bar Association, Obtaining Discovery Abroad (2d ed. 2006).

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Virginia M. Kendall & T. Markus Funk, Child Exploitation and Trafficking: Examining Global Challenges and U.S. Responses, ch. 11 (2012).

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Lita M. Grace, *The United States and Canadian Border: An Attempt to Increase Bi-Lateral Cooperation for the Prevention of Transnational Crime,* Colum. J. Int'l Aff. (2012), *available at* http://jia.sipa.columbia.edu/united-states-and-canadian-border (last visited Jan. 13, 2014), 1

Hague Convention Relating to Civil Procedure, http://www.jus.uio.no/english/services/library/treaties/11/11-02/civil-procedure.xml (last visited April 9, 2014), 17

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention) codified at 28 U.S.C. § 1781, 1, 2, 8

Daniel Huff, *Witness for the Defense: The Compulsory Process Clause As a Limit on Extraterritorial Criminal Jurisdiction,* 15 Tex. Rev. L. & Pol. 129 (2010), 13

International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (referring to art. 14, sec. 3), 13

Virginia M. Kendall & T. Markus Funk, Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses (2012), 1, 15

Hon. Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence,* 40 A.B.A. Litig. J. 1 (2014), 6, 10

David Luban et al., International and Transnational Criminal Law (2009), 6

Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties,* 47 Va. J. Int'l L. 261 (2006), 13

Kimberly Prost, Breaking Down the Barriers: International Cooperation in Combating Transnational Crime, http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html (last visited Jan. 13, 2014), 5

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About the Author

T. Markus Funk is a partner at Perkins Coie. Prior to entering private practice, he for ten years served as a federal prosecutor in Chicago, and for two years led the efforts of the U.S. Department of Justice (DOJ) and U.S. State Department to establish the rule of law in post-conflict Kosovo. Both the State Department and DOJ awarded Mr. Funk their highest service distinctions.

Mr. Funk was formerly a law clerk to Chief U.S. District Judge Catherine D. Perry (St. Louis) and the Hon. Morris S. Arnold (U.S. Court of Appeals for the Eighth Circuit). He taught criminal and international law at, among other places, the University of Oxford, University of Chicago Law School, Northwestern University School of Law, and the U.S. Department of Justice's National Advocacy Center.

Mr. Funk has authored numerous books, book chapters, and articles on international law and litigation, including *The Kosovo Trial Skills Manual* (U.S. Department of Justice 2007), *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010), *The Haiti Trial Skills Manual* (American Bar Association 2011), and *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses* (co-authored with the Hon. Virginia M. Kendall; Rowman & Littlefield 2012). He can be reached at MFunk@ perkinscoie.com.

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