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OBTAINING EVIDENCE FROM

THE UNITED STATES OF AMERICA*

BY

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I. INTRODUCTION

A. There is a strong United States policy favoring cooperation with other governments in the investigation and prosecution of criminal activity. This policy has been implemented by the enactment of various laws in the United States designed to facilitate international cooperation. The United States is also a party to numerous bilateral and multilateral agreements dealing with international cooperation in criminal matters. The United States has created a special unit in the Department of Justice to facilitate international cooperation. However, in view of the overlapping jurisdiction of the numerous government units and law enforcement agencies in the United States, the task of obtaining evidence from the United States can seem daunting indeed. The purpose of this paper is to provide a practical guide to assist in this process.[i]

B. The primary government organization in the United States responsible for handling international requests for evidence and other assistance in criminal matters is the Office of International Affairs ("OIA") in the Criminal Division of the Department of Justice. OIA is located in Washington, DC.. It also maintains offices in Brussels, Geneva, London, Manila, Mexico City, Paris, Rome, and San Salvador, which are staffed with OIA attorneys known as " Department of Justice attachés."

C. OIA plays a critical role in virtually all formal requests to the United States for international assistance in criminal investigations and proceedings.

1. Generally, letters rogatory relating to criminal matters sent to the United States through diplomatic channels are initially submitted to the Department of State which forwards them to OIA. OIA reviews the requests and facilitates their execution, working closely with U.S. prosecutors or law enforcement officials, as appropriate.

2. OIA, pursuant to a delegation order from the Attorney General of the United States, serves as the Central Authority for the United States for the administration of bilateral Mutual Legal Assistance Treaties between the United States and other countries. In this capacity, OIA receives requests under the treaty and initiates and coordinates the appropriate response. It serves in a similar capacity in multilateral agreements to which the United States is a party.

3. In addition to its responsibilities for responding to international requests for evidence, extradition of fugitives, and other assistance, OIA has numerous other duties relating to international law enforcement, including:

   a) Seeking on behalf of U.S. prosecutors and their foreign counterparts, the extradition of international fugitives for prosecution or punishment.

   b) Supporting the Criminal Division in the formulation and execution of international criminal justice policies.

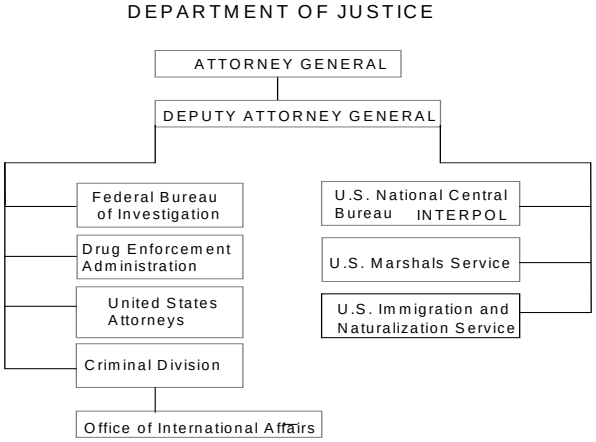
   c) Participating in the negotiation of international agreements and treaties relating to criminal law enforcement such as extradition, mutual assistance in criminal matters, and prisoner transfer.

   d) Implementing and overseeing the implementation of extradition and mutual legal assistance treaties.

   e) Providing advice to prosecutors at all levels on foreign procedures and investigations.

   f) Proposing legislation concerning international criminal matters.

4. The principal organizational components of the Department of Justice dealing with international legal assistance are shown on the following chart.



II. UNITED STATES LAWS REGULATING ASSISTANCE TO FOREIGN AUTHORITIES

A. The United States has enacted a number of statutes designed to facilitate the furnishing of information to foreign law enforcement authorities and prosecutors for use in investigating and prosecuting crime.[ii] These statutes are codified in the United States Code and are frequently cited in this paper. For example, a citation, 18 U.S.C. § 371, refers to Title 18, Section 371 of the United States Code. The ability of United States law enforcement authorities to obtain evidence, both for domestic and foreign use, is also regulated and restricted by numerous constitutional and other restrictions. United States law also requires that the United States authorities be formally notified of law enforcement investigations being conducted in the United States by foreign officials. This paper also discusses these provisions.

B. Statute Authorizing Police Level Assistance

1. Assistance through INTERPOL

a) 22 U.S.C. § 263a provides: "The Attorney General is authorized to accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization, and to designate any departments and agencies which may participate in the United States representation with that organization. All dues and expenses to be paid for the membership of the United States shall be paid out of sums authorized and appropriated for the Department of Justice."

(1) Pursuant to this authority, the Attorney General has promulgated a regulation, 28 CFR § 0.34, which authorizes the furnishing of law enforcement assistance through INTERPOL.

C. Letters Rogatory

1. The most common mechanism to obtain evidence from the United States in the absence of a treaty or executive agreement is through the use of letters rogatory. In the United States, the responsibility for responding to letters rogatory has been assigned to the United States District Courts. Under the United States Constitution, these are courts of limited jurisdiction, that is, they only have the powers conferred upon them by statute. To enable United States District Courts to respond to letters rogatory from foreign jurisdictions, and to provide the procedural framework for executing MLAT requests, Congress enacted 28 U.S.C. § 1782, which provides:

"Assistance to foreign and international tribunals and to litigants before such tribunals.

(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 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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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.

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.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

A United States Court may render judicial assistance in response to a letter rogatory as long as the request meets the requirements of the preceding statute.

2. Parties subject to the foreign proceeding frequently challenge foreign requests to U.S. courts for judicial assistance. Challenges are particularly common in criminal cases where a successful challenge may prevent the foreign tribunal from obtaining the evidence necessary to prosecute or punish the defendant. In order for a U.S. court to render judicial assistance, the request must be (a) for evidence intended for use in a foreign or international tribunal and (b) the request must be made by either the tribunal or an "interested person." Most of the challenges to letters rogatory involve an allegation of a failure to meet one or both of these requirements.

3. The most common ground for challenging the authority of a court to render judicial assistance is that the evidence is not intended for use before a "foreign or international tribunal." Prior to 1964, U.S. District Courts were only authorized to render assistance in a "judicial proceeding pending in any court in a foreign country." In 1964, Congress amended the statute and authorized courts to furnish judicial assistance to foreign and international tribunals. The principal reason for the change to the word "tribunal" was the belief that the requirement that assistance be limited to judicial proceedings was too restrictive. Judicial assistance should be available, in the court's discretion, in connection with criminal proceedings before investigating magistrates and in connection with administrative and quasi-judicial proceedings. The legislative history of the amendment states:

> ***"The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts.***

> ***For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. (See Lelievre [sic] in Letters Rogatory 13 (Grossman Ed. 1956)). In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United states may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) [of the statute] provides the possibility of U.S. judicial assistance in connection with all such proceedings." House Report, 1052, 88th Congress, First session, (1963) at p.9.***

The definition of tribunal" in 28 U.S.C.A. § 1782 is broad. One commentator has stated that the term embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts. Smit, International Litigation under the United States Code, 65 Columbia L. Rev. 1014, June 1965.

4. While this amendment broadened the types of foreign entities to whom a United States District Court could respond, to qualify as a tribunal within the meaning of the statute the body before whom the evidence is to be used must have some type of adjudicative function. Persons seeking to prevent United States Courts from rendering judicial assistance have frequently raised this issue in the United States.

   One of the earliest challenges arose, in the mid-1970s, when the United States and a number of foreign countries, including Japan, were investigating bribes allegedly paid by the Lockheed Aircraft Corporation in connection with the sale of aircraft. In order to complete the investigation into this matter, the Tokyo District Court, pursuant to a request by the Tokyo District Public Prosecutor's Office issued a letter rogatory to the United States District Court. The letter requested that depositions be taken of certain individuals in the United States. The depositions were to be used in criminal investigations and, upon completion of the investigation, in trials. After receiving the letters rogatory, the court appointed three commissioners to subpoena the witnesses and take the requested depositions. The witnesses moved to quash the subpoenas on numerous grounds. The major argument of the witnesses was that 28 U.S.C. § 1782 did not authorize a United States District

Court to order depositions to assist a foreign investigation since an investigation was not a “tribunal” within the meaning of the statute. The court rejected the witnesses’ position holding that the investigation by Tokyo District Public Prosecutor was quasi-judicial in nature. The court noted that the Public Prosecutor was performing a function similar to that of an investigating magistrate and that the Public Prosecutor was empowered to make the decision to institute a criminal prosecution. For a similar court decision, see In re Request for Judicial Assistance from Seoul Dist. Criminal Court, 555 F.2d 720 (9th Cir. 1977). The Court noted that the only restrictions on honoring requests for judicial assistance are that the request be made by a foreign or international tribunal, and that the testimony or material requested be for use in a proceeding in such tribunal. The court further noted that it had previously held that the investigation in connection with which the request is made must relate to a judicial or quasi-judicial controversy.

The court ruled that judicial proceedings implicated by request from juge d'instruction of Court of Higher Instance of Paris for appointment of commissioner to, among other things, issue subpoenas, constituted proceeding in "foreign or international tribunal" within the meaning of 28 U.S.C.A. § 1782. The 50 pages of documentation contained accounts of court proceedings and evidence of crimes that would constitute common law felonies in American jurisdictions. The documentation indicated that Central Bureau of Criminal Investigation in Paris was in the process of gathering evidence in response to complaint already filed with Senior juge d'instruction, numerous court orders had already issued in the matter, international rogatory commission concerning matter had already been executed in Belgium, and where police were proceeding with furnishing reports to supervising judge. In re Letter of Request from Government of France, 139 FRD 588 (SDNY 1991) .

5. Despite the broad construction given to the term “tribunal” by United States Courts, it does not cover all foreign investigations. If the person or entity conducting the investigation does not have some type of adjudicative function, such as deciding whether to institute a criminal prosecution or otherwise make a decision affecting the rights of individuals, it will not be deemed a “tribunal” under the statute. For example, an income tax official from India was held not to be a "tribunal” within the meaning of the statute, in In re Letters Rogatory, etc., 385 F.2d 1017 (2d Cir.1967).

The tax official's sole function was to develop and evaluate the government's case and not to fairly adjudicate the matter. The court said that the concept of "tribunal" was not so broad as to include all of the administrators whose decisions affect private parties, and who are not entitled to act arbitrarily. The court pointed out that one useful guideline to determine whether an official was a tribunal was the presence or absence of any degree of separation between the prosecutorial and adjudicative functions. Similarly, a Canadian commission of inquiry was held not to be a tribunal within the meaning of 28 U.S.C.A. § 1782, because it did not appear that the commissioners were authorized to exercise the power to adjudicate rights. In In re Letters of Request to Examine Witnesses, etc., 488 F.2d 511(9th Cir. 1973). The court said that in its 1964 amendments to § 1782, Congress intended to ignore any distinctions between purely judicial bodies and quasi-judicial administrative bodies, and between conventional courts and adjudicative institutions or individuals, and intended for all to be included in the term "tribunal." However, the court said there was no indication of a congressional intent to include institutions whose purpose was to investigate and report to the executive or legislative branches of government; rather, the crucial requirement was that the foreign body exercise adjudicative power and have an adjudicative purpose. Although noting that the powers of commissions of inquiry are extremely broad, the court said that conspicuous by its absence from these powers was the power to make a binding adjudication of facts or law as related to the rights of litigants in concrete cases. The court stated that it was this power which determined whether an institution was a tribunal within the meaning of § 1782.

Similarly, in Fonseca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980), the court held that the Superintendent of Exchange Control of the Republic of Colombia was not a tribunal within the meaning of the statute because his function was similar to that of a law enforcement agency who acted solely in the governments interest. His duties did not include the hallmark of a tribunal, impartial adjudication. "Tribunal," as used in § 1782, requires impartial adjudication and no "institutionalized interest in a particular result." In re Application of Sumar, 123 FRD 467 (SDNY 1988)

6. Requirement that Request Be Made by Tribunal or upon Application of Interested Party.

a) Requests to United States courts for judicial assistance are sometimes challenged on the grounds that the request does not meet the statutory requirements because it did not come from a tribunal or an interested party. This challenge almost always arises when the person making the request is not the tribunal. In order to respond to the request, the court must find that the person is an "interested party." The term "interested party" is not defined in the statute. The legislative history of the statute states that an "interested person" can be a person designated by or under a foreign law, or a party to the foreign or international litigation." S. Rep. 1580, 88th Cong. 2d Sess. (1964).

b) The issue of whether a letter rogatory was issued by a tribunal or interested party arose in the case of In re Letters Rogatory from the Tokyo Dist. Prosecutor's Office, 16 F.3d 1016 (9th Cir. 1994). In that case, a Japanese woman was murdered while vacationing in Los Angeles, California. The Tokyo District Prosecutor's Office began an investigation of the murder, and the victim's husband and an associate came under suspicion. The prosecutors believed the victim was killed to enable her husband to collect life insurance proceeds. The Tokyo District Prosecutor's Office requested assistance from the U.S. in the investigation.

The request for assistance was forwarded to the U.S. court in California. The court entered an order authorizing Commissioners to gather the requested physical evidence and take depositions of witnesses. When the defendants learned of the order, they filed a motion challenging the authority of the court to issue the order. The defendants claimed that the Tokyo District Prosecutor's Office was not a tribunal or interested person under the statute.

The court held that the Tokyo District Prosecutor's Office was not a tribunal within the meaning of the statute but was an interested person. The court found that the governmental authority responsible for the prosecution of a case before a tribunal was an "interested person."

c) The question of who is an "interested person" has arisen in other cases. In In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988) cert. denied, 488 U.S. 1005 (1989), the court held that Trinidad's Minister of Legal Affairs, who was responsible for enforcement of Trinidad's Exchange Control Laws was an "interested person" but not a tribunal. In In re Letter of

Request from the Crown Prosecution Service, 870 F.2d 686 (DC Cir. 1989), the court stated that a "foreign legal affairs minister, attorney general, or other prosecutor" fits squarely within the definition of "interested person."

d) The law on who is an "interested person" within the meaning of the statute is still developing in the United States and remains somewhat unsettled. As a general guideline, a person who plays an active role in the adjudicative process, such as a party, prosecutor or defense counsel will most likely be deemed an "interested person." On the other hand, a person who is an investigator or witness in the proceeding will generally not be deemed an "interested person."

e) **Practice Tip**: A letter rogatory addressed to a United States Court should clearly identify the tribunal that is hearing the matter. If the tribunal is anything other than a judicial authority, the exact adjudicative functions of the tribunal should be described. If the letter rogatory is not coming from the tribunal, it should specifically identify the person making the request and describe that person's role in the adjudicative process. This will minimize the likelihood of a successful challenge to the letter rogatory.

7. Procedure for Complying with Requests for Judicial Assistance.

a) The statute authorizing courts to render judicial assistance states: "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." The Federal Rules of Civil Procedure are the rules that govern the conduct of civil litigation in the United States District Courts. Their use in criminal investigations is problematic.

b) The most common procedure used to obtain testimony or witness statements is for the Court to appoint one or more individuals as Commissioners to obtain the requested evidence. When the letter rogatory involves a criminal matter, the Court will normally appoint prosecutors or other government officials as Commissioners. The Commissioners will have the power to order the appearance of witnesses and the production of documents and other tangible evidence.

(1) It is possible to appoint a representative of the foreign requesting authority as one of the Commissioners. This permits the foreign authorities to directly question witness in the United States. This procedure also facilitates communications between the foreign requesting authority and the United States officials responding to the request.

c) The most common way testimony and witness statements are taken under the Federal Rules of Civil Procedure is by deposition under Rules 27 or 30. These rules require that notice of the deposition be given to expected adverse parties. Under the rules, the witness is examined by the person taking the deposition and then cross-examined by counsel for the adverse party. In criminal investigations, this procedure may prematurely notify potential defendants of the investigation thereby enabling them to flee or otherwise obstruct the investigation.

d) The statute gives the Court broad discretion to order a procedure different than that prescribed by the Federal Rules of Criminal Procedure when complying with a letter rogatory. For example, the Court may order that no notice be given to other parties of the deposition of a witness. The Court may also instruct witnesses not to disclose the existence of the proceeding to others involved in the case. If there is a need for special procedures to be employed in order to protect the integrity of the investigation, the reason for the special procedures and the specific procedures to be followed should be stated so the Court can fashion an appropriate order.

8. Constitutional and Statutory Restrictions on Evidence Gathering.

The statute authorizing U.S. Courts to respond to letters rogatory states: “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.” Under U.S. law, a privilege is the right of a witness to refuse to disclose information. The most common privileges recognized under U.S. laws are the privilege against self-incrimination set forth in the U.S. Constitution and privileges protecting certain confidential relationships. Absent a privilege, a witness can be compelled to furnish evidence. The law relating to privileges is very complex and the following discussion can only serve to identify the more

significant privileges that may be raised in the context of a letter rogatory.

a) Privilege against self-incrimination.

(1) The Fifth Amendment to the United States Constitution provides in part: “No person … shall be compelled in any criminal case to be a witness against himself . . ..” This provision is commonly referred to as the privilege against self-incrimination. In criminal matters, this is the most frequently invoked privilege.

(2) The United States Supreme Court held in United States v. Balsys, 524 U.S. 666 (1998), that the privilege against self-incrimination cannot be invoked by a witness in the United States based on a fear of foreign criminal prosecution. Balsys was subpoenaed to appear and testify before a special panel of the U.S. Department of Justice. The panel was investigating his alleged participation in Nazi persecutions during World War II. Balsys refused to testify on the grounds that his testimony could incriminate him in criminal prosecutions in Lithuania and Israel. The Court held that Balsys could not properly invoke his privilege against self-incrimination because the privilege protects only against United States prosecutions.

b) Other privileges.

Most of the other privileges that are likely to arise in letter rogatory matters are privileges designed to protect confidential communications that arise in relationships deemed significant and worthy of protection. Confidential communications in the following relationships are generally privileged:

(1) Attorney and Client;

(2) Husband and Wife;

(3) Priest and Penitent, and

(4) Mental Health Professional and Patient.

(5) Each of the above privileges is subject to numerous restrictions and exceptions. These are

beyond the scope of this article and U.S. counsel should be consulted if privilege issues arise in the context of a letter rogatory proceeding.

c) Search and seizure.

(1) An important limitation on the ability of U.S. Courts to respond to letters rogatory is the U.S. Constitution's restriction on searches. The Fourth Amendment to the United States Constitution states: " no [search] Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) The phrase "probable cause" has traditionally been interpreted to mean evidence of a probable violation of U.S. law.

D. Service of Foreign Process in the United States

1. Some countries require that service of process in international litigation be done pursuant to a letter rogatory addressed to a court in the country where service is to be made. In 1964, legislation was enacted specifically authorizing U.S. courts to serve foreign process.

2. The statute authorizing U.S. courts to serve process from foreign tribunals is 28 U.S.C. § 1696. This statute states:

Service in foreign and international litigation

(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

(b) This section does not preclude service of such a document without an order of court.

3. Subsection (b) of the statute makes it clear that service of foreign process does not require a court order. Unless the foreign request specifically states that service should be done pursuant to a court order, U.S. authorities generally do

not obtain a court order. Instead, the papers are given to the U.S. Marshal Service for delivery to the person to be served.

E. Restrictions on Investigations by Agents of Foreign Governments

1. United States law requires that agents of foreign governments operating in the United States register with the Attorney General prior to conducting operations in the United States. Activities that require registration include interviews of witnesses, evidence gathering pursuant to a treaty or letter rogatory and service of papers. The statute, 18 U.S.C § 951 provides for severe criminal penalties for failure to comply with its requirements. Because of the importance of this statute to foreign police officers, prosecutors and other officials gathering evidence in the United States, the full text of this statute and implementing regulations is set forth in full in the end notes.[iii]

III. USE OF TREATIES TO OBTAIN EVIDENCE

A. Mutual Legal Assistance Treaties (“MLATs”)

1. In the late 1970s, the United States began negotiations with a number of countries with a view towards entering treaties to facilitate the exchange of evidence in criminal cases. These mutual legal assistance treaties are commonly referred to by the acronym "MLAT." The first treaty entered into force in 1977 between the United States and Switzerland. Currently, there are 55 such treaties in force between the United States and other countries, as well as several other MLATs that have been negotiated and are awaiting ratification.

2. As of June 3, 2005, the United States has MLATs with the following jurisdictions: Anguilla, Antigua & Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Brazil, the British Virgin Islands, Canada, the Cayman Islands, Cyprus, the Czech Republic, Dominica, Egypt, Estonia, France, Greece, Grenada, Hong Kong, Hungary, Israel, Italy, Jamaica, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, the Netherlands (including the Netherlands Antilles & Aruba), OAS Convention, Panama, the Philippines, Poland, Romania, Russia, South Africa, South Korea, Spain, St. Christopher & Nevis, St. Lucia, St. Vincent & the Grenadines, Switzerland, Thailand, Trinidad & Tobago, Turkey, the Turks & Caicos Islands, Ukraine, the United

Kingdom, and Uruguay. Additionally, the United States has a Mutual Legal Assistance Agreement (i.e, not a treaty) with the People's Republic of China.

3. MLATs have several advantages over the letters rogatory process for foreign authorities seeking to obtain evidence in the United States. These include:

a) Reduction of delays.

(1) The letters rogatory process is frequently a lengthy process. Letters rogatory require court action in two countries. Letters rogatory are transmitted through diplomatic channels. The responses to the letter rogatory are also returned through diplomatic channels. The delays in the letters rogatory process frequently limit their usefulness in criminal matters. MLATs seek to avoid many of the delays by permitting direct requests from the foreign authority to the U.S. Department of Justice.

b) Assistance in the investigative phase of the case.

(1) MLATs expand the ability of the United States to furnish information for investigative purposes even if no proceeding is pending.

c) Confidentiality.

(1) It is frequently difficult or impossible to maintain confidentiality in responding to letters rogatory. MLATs do permit assistance to be rendered on a confidential basis.

d) An affirmative obligation to provide assistance.

(1) The statute authorizing U. S. courts to respond to letters rogatory gives the court broad discretion as to both whether assistance will be granted and the nature of the assistance. MLATs mandate that the contracting parties furnish the assistance requested so long as the request meets the requirements of the treaty.

e) A requirement that the assistance comply with the requested procedures.

(1) MLATs contain provisions designed to ensure that the evidence furnished to the requesting country is obtained in a manner that will comply with the procedural and evidentiary requirements of the requesting country.

f) Search and seizure provisions.

(1) Because of U.S. Constitutional limitations on search and seizure, U.S. courts may not be able to respond to requests from foreign tribunals to search for and seize evidence. Most MLATs contain provisions that permit searches and seizures in the United States if such action is justified under the laws of the United States. However, the provisions authorizing the United States to conduct searches on behalf of foreign countries have not yet been litigated in the U.S. courts and considerable doubt exists whether they will be found valid.

g) Direct communications between law enforcement authorities.

(1) There is no procedure in the letter rogatory process permitting direct communications between law enforcement officials in the two countries. MLATs establish procedures for direct communications between law enforcement authorities of the two countries. In the investigatory stage of the case, direct communications are often essential to bring the investigation to a successful conclusion.

h) Bank secrecy.

(1) Bank secrecy laws in both the U.S. and foreign jurisdictions often frustrate efforts to obtain evidence through letters rogatory. MLATs permit the exchange of evidence that would otherwise be precluded by bank secrecy laws.

B. Typical Provisions in MLATs

1. The following discusses the major provisions commonly found in MLATs. This discussion is general in nature and if question arises, the specific treaty should be consulted. It should be noted that MLATs are <u>not</u> available for use by private parties.

2. Administrative Provisions – Each MLAT designates a Central Authority in the contracting country responsible for the administration of the treaty, including the prompt rendering of the assistance requested or transmission of the request to the appropriate authority. In the United States, the Central Authority is either the Attorney General or the United States Department of Justice. The Office of International Affairs in the Criminal Division of the Department of Justice is the specific component responsible for acting as Central Authority. The Central Authority is also responsible for:

   a) Receiving and screening all requests originating from law enforcement agencies and prosecutors in its country;

   b) Making requests to the Central Authority of the other country;

   c) Communicating with the Central Authority of the other country in connection with the implementation of the treaty; and,

   d) Consulting with the Central Authority of the other country for the purposes of improving the effectiveness of the treaty in resolving any problems that may arise under the treaty.

3. Offenses Covered.

   a) MLATs generally do not specifically identify the criminal offenses to which they are applicable. Instead, MLATs usually exclude certain offenses. In a few cases, the MLATs require the offenses to be a crime in both jurisdictions (quasi-“dual criminality”). The most common exclusions are for “political” offenses, military offenses, offenses relating to military obligations, anti-trust offenses, tax and customs offenses, and export control violations.

4. Grounds for Refusing Assistance.

   a) Most MLATs contain provisions specifying the grounds on which the requested country can refuse to provide assistance. The most common grounds include:

      (1) The request is prejudicial to the security or public interest of the requested country.

      (2) Law in the requested country prohibits the requested procedure.

(3) The request does not comply with the provisions of the treaty.

(4) Reasonable grounds or suspicion does not support the request.

(5) The subject of the request has been tried in the requested country for the same offense.

5. Locating Persons.

a) All MLATs contain a provision requiring a requested country to use its best efforts to locate persons believed to be in its territory.

6. Service of Documents.

a) All MLATs contain provisions requiring the requested country to serve documents upon persons located in the requested country.

b) While MLATs require that foreign documents, such as subpoenas, be served in the U.S., MLATs do not require that a witness travel from the U.S. to a foreign jurisdiction to testify.

7. Production of Government Records.

a) All MLATs require the requested country to furnish publicly available government documents to the requesting country. Most also require the documents be authenticated in a manner that will permit their use by the requesting country. Many MLATs permit the requested country to refuse to furnish non-public government documents.

8. Production of Business Records and other Private Documents.

a) Most MLATs, as part of the provisions dealing with the testimony of witnesses require the requested country to compel the appearance of the witness in the requested country and the production of documents by the witness.

9. Conducting Searches and Seizure of Evidence.

a) All MLATs contain provisions requiring the requested country to conduct a search and seizure on behalf of the requesting country if the domestic laws of the requested

country permit such a search and seizure. The efficacy of these provisions remains in doubt because of the restrictions on search and seizure that exist in most jurisdictions.

10. Obtaining Testimony.

a) All MLATs contain provisions requiring the requested country to compel the appearance of a witness located in its territory and require the witness to testify and produce documents and records. Generally, witnesses will testify in accordance with the procedure of the requested country. Witnesses are permitted to assert any privilege that may be available in the requested country.

(1) There are numerous unresolved issues surrounding the question of privilege. For example, some MLATs are silent on the question of whether a witness may invoke a privilege applicable in the requesting country but not in the requested country.

11. Transfers of Prisoners to Give Evidence.

a) Most MLATs permit the transfer of a prisoner to the requesting country for the purpose of testifying. Some MLATs also permit the transfer of a prisoner if the prisoner's presence is required in the requesting country to assist in the investigation, contingent upon the consent of all parties, including the prisoner.

12. Safe Conduct of Witnesses.

a) Most MLATs contain provisions that permit authorities in the requesting country to grant a person appearing in that country under a treaty request safe conduct while that person is in the requesting country to comply with the treaty request. These provisions are designed to encourage witnesses who cannot be compelled to travel to the requesting country to appear and testify voluntarily. The safe conduct provisions protect the person appearing in the requesting country from prosecution and other restrictions of liberty in the requesting country with respect to conduct occurring prior to his departure from the requested country. The provisions also protect the person appearing in the requesting country from civil suit in the requesting country with respect to conduct occurring prior to his departure from the requested country.

13. Immobilization of Property Subject to Forfeiture.

a) Forfeiture of criminally derived property and property used in the commission of crimes has proven to be an effective law enforcement tool. Many countries throughout the world have enacted forfeiture laws particularly in the area of drug and money laundering offenses. Most MLATs negotiated since the mid-1980s contain provisions relating to the immobilization and seizure of property subject to forfeiture. Because of the wide variety of forfeiture laws, these provisions differ significantly among the treaties.

14. Assistance in Collection of Fines.

a) The more recent MLATs contain provisions designed to facilitate the collection of both fines and restitution to crime victims. These provisions are intended to overcome the ease with which funds may be moved across national borders.

C. Other International Agreements Dealing with Law Enforcement Assistance

1. Executive Agreements.

a) Executive agreements generally are agreements between United States law enforcement authorities and foreign law enforcement authorities concerning cooperation in specific types of criminal matters. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step towards agreement on a more expansive mutual assistance treaty.

b) Entered into by the Executive Branch, executive agreements do not require Senate ratification. More limited than conventional treaties, executive agreements are similar to MLAT requests in procedures and contents, but more limited in scope. For example, the U.S.-Singapore Drug Agreement might be considered a “mini-MLAT.”

2. Securities and Exchange Commission Arrangements.

a) The Securities and Exchange Commission (“SEC”) is the agency responsible for policing securities markets in the United States. Its responsibilities include investigating securities offenses involving market manipulation and insider trading.

b) Because the security markets are now global, the SEC has developed informal, case-by-case understandings that

facilitate the production of information from other countries. These range from Memoranda of Understanding to frameworks for cooperation to less specific exchanges and undertakings. These agreements have been made with Switzerland, Japan, Canada, Brazil, Netherlands, France, Mexico, Norway, Argentina, Spain, Italy, Chile, Australia, United Kingdom, Sweden, South Africa, Germany, Luxembourg, and Hungary, as well as Joint Statements of Cooperation with the European Union (EU). See Mann, Mari & Lavdas, International Agreements and Understandings for the Production of Information and Other Mutual Assistance, The Int'l Law Reporter, Vol. 29, No. 4, 780, 838 (1995).

3. Narcotics Agreements.

a) The United States is a signatory to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This agreement entered into force November 11, 1990. Article 7 of this Convention permits the parties to obtain evidence from other country party without the need to use the cumbersome, time-consuming letters rogatory process.

4. Tax Information Exchange Agreements (“TIEAs”) and Tax Treaties.

a) TIEAs specifically provide for mutual assistance in obtaining records and testimony for use in criminal and civil tax investigations and proceedings. TIEAs are administered by the Director, International, of the Internal Revenue Service (IRS), and currently are in effect with Aruba, Antigua & Barbuda, the Bahamas, Barbados, Bermuda, Costa Rica, Dominica, the Dominican Republic, Grenada, Guyana, Honduras, Jamaica, Marshall Islands, Mexico, Peru, St. Lucia, and Trinidad & Tobago. TIEAs with the British Virgin Islands, the Cayman Islands, Colombia, Guernsey, the Isle of Man, Jersey, and the Netherland Antilles had been signed but were not in effect as of June 8, 2005.

b) Tax treaties, while similar in concept to TIEAs, are more general and less effective with regard to the exchange of information. The United States currently is party to tax treaties with more than 50 nations.

5. EU-USA Agreements on Extradition and Mutual Legal Assistance.

a) Signed between the U.S. and the EU in June 2003, but not yet in effect, these agreements must undergo bilateral implementing protocols prior to submission to the Senate for ratification, probably not before 2006. These agreements supplement rather than supplant the bilateral treaties between the U.S. and EU member states, with the stated intent of streamlining the procedures for extradition and mutual legal assistance by alleviating legalization and certification requirements, simplifying pertinent documentation, and providing for the designation of administrative authorities for making and executing requests.

b) The Agreements broaden the range of extraditable offenses by allowing extradition for every offense punishable by more than one year imprisonment. Grounds of refusal to extradite or provide mutual assistance by EU member states may still be asserted based upon bilateral treaties or principles of domestic law. Additionally, the Agreements provide for the formation of joint investigative teams, the use of video-technology for taking testimony, and, importantly, the exchange of information regarding suspect bank accounts.

IV. SOME PRACTICAL SUGGESTIONS FOR OBTAINING EVIDENCE FROM THE UNITED STATES

A. Make Maximum Use of Police Level Assistance

1. Letters rogatory and Mutual Legal Assistance Treaties supplement and do not replace police level assistance. Consequently, police level assistance should be used to the maximum extent possible.

2. A considerable amount of information can be obtained through police level assistance. Much information concerning persons and events is available to the public in the United States. Some examples of publicly available records include:

a) Judicial records, both civil and criminal;

b) Real estate records;

c) Reports of public companies filed with the Securities Exchange Commission and other regulatory agencies;

d) Information concerning corporations and other business entities filed with governmental authorities; and

e) Information concerning individuals published in city directories, and similar publications.

Information of this nature can be invaluable, particularly during the investigatory stages of a case. This type of information can be quickly and efficiently obtained through police level assistance.

3. Police level assistance can be used to identify specific types of evidence that must be obtained through more formal processes such as letters rogatory or MLATs.

4. Police level assistance can be obtained through INTERPOL, through established liaisons between law enforcement organizations or through the Federal Bureau of Investigation's legal attaches who are assigned to most major United States Embassies.

B. Initiate Formal Requests for Assistance as Early as Possible.

1. It is critical that a formal request for legal assistance be initiated as soon as possible. As previously discussed, the letters rogatory process is inherently slow. Requests for assistance in both letters rogatory and MLATs may be subject to legal challenges in the United States that may delay the rendering of assistance. Consequently, the earlier the request is made, the more likely the chances of obtaining the evidence requested.

C. Make Certain Request Contains All Essential Information in Clear English

1. The formal request should contain at a minimum the following information:

a) the facts and procedural history of the case;

b) the offenses involved;

c) the specific assistance requested and a statement of how the assistance relates to the case.

d) if the request is in the form of a letter rogatory, a description of the tribunal making the request;

e) if the request is made pursuant to a MLAT, the specific requirements set forth in the MLAT should be met;

f) if the requesting country desires that special procedures be employed in executing the request, these should be specifically described;

g) if the requesting country desires that confidentiality be maintained, this should be specifically requested and the reason for it stated.

2. The request for assistance and supporting information will, in many cases, be presented to a U.S. Court. The official language of the U.S. Courts is English. Therefore, it is imperative that material be written in clear English.

3. In most cases, prosecutors in jurisdictions outside the U.S. should consult with their countries Ministry of Justice or similar official for assistance in drafting formal requests for assistance. These officials have established liaisons with their counterparts in the United States and are in a position to obtain assistance on difficult issues.

D. Additional Resources

1. Ellis & Pisani, The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 Int'l Law. 189 (1985).

2. Knapp, Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy, 20 J. of Int'l L. 405, 434 (1988).

3. Nadelmann, Negotiations on Criminal Law Assistance Treaties, 33 Am. J. Comp. L. 467 (1985).

4. Nash, Cumulative Digest of United States Practice in International Law, 1981-1988, Department of State, Vol. II, 1449, 1488 (1994).

5. Ristau & Abbell, Vol. 3, International Judicial Assistance (Criminal), Sec. 12-4-1 – 12-4-8 (1995).

6. Springer, An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases, 22 Geo. Wash. J. Int'l & Econ. 277 (1988).

7. Springer, Obtaining Foreign Evidence and Other Assistance for Money Laundering Cases, Volume 5, No. 1, US Department of Justice Money Laundering Monitor (1999).

8. U.S. Attorney's Manual 9-15.000, International Extradition and Related Matters, September 1997, available from the U.S. Department of Justice web site at www.usdoj.gov.

ENDNOTES

[i] The authors, Bernie Bailor and Justin Thornton, are former federal prosecutors now in private practice and specializing in white collar criminal defense. They wish to express their gratitude to Lisa Cacheris Burnett, Esquire, Deputy Director of the Office of International Affairs, Criminal Division, United States Department of Justice, and James P. Springer, Senior Counsel for International Tax Matters, Tax Division, United States Department of Justice, for their assistance in preparing this paper.

[ii] Unlike most countries, the United States does not have a single national police force. Various federal agencies are assigned specific law enforcement functions. These agencies include: the Federal Bureau of Investigation (FBI); the Drug Enforcement Administration (DEA); the Internal Revenue Service (IRS); the Immigration and Naturalization Service (INS); the Securities and Exchange Commission (SEC); the Bureau of Alcohol, Tobacco and Firearms (ATF); the Secret Service; the United States Customs Service; the United States Postal Service; various agencies in the Department of Defense; and other agencies. Determining which law enforcement agency has jurisdiction over a particular matter can be a daunting task.

[iii] The statute, 18 U.S.C § 951, which requires agents of foreign governments to register with the Department of Justice**,** provides:

> (a) Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.
>
> (b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.
>
> (c) The Attorney General shall, upon receipt, promptly transmit one copy of each notification statement filed under this section to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States. Failure of the Attorney General to do so shall not be a bar to prosecution under this section.
>
> (d) For purposes of this section, the term ''agent of a foreign government'' means an individual who agrees to operate within the

United States subject to the direction or control of a foreign government or official, except that such term does not include -

(1) a duly accredited diplomatic or consular officer of a foreign government, who is so recognized by the Department of State;

(2) any officially and publicly acknowledged and sponsored official or representative of a foreign government;

(3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen; or (4) any person engaged in a legal commercial transaction.

(e) Notwithstanding paragraph (d)(4), any person engaged in a legal commercial transaction shall be considered to be an agent of a foreign government for purposes of this section if -

(1) such person agrees to operate within the United States subject to the direction or control of a foreign government or official; and

(2) such person -

(A) is an agent of Cuba or any other country that the President determines (and so reports to the Congress) poses a threat to the national security interest of the United States for purposes of this section, unless the Attorney General, after consultation with the Secretary of State, determines and so reports to the Congress that the national security or foreign policy interests of the United States require that the provisions of this section do not apply in specific circumstances to agents of such country; or

(B) has been convicted of, or has entered a plea of nolo contendere with respect to, any offense under section 792 through 799, 831, or 2381 of this title or under section 11 of the Export Administration Act of 1979, except that the provisions of this subsection shall not apply to a person described in this clause for a period of more than five years beginning on the date of the conviction or the date of entry of the plea of nolo contendere, as the case may be.

The implementing regulations concerning the registration of agents of foreign governments are promulgated by the Department of Justice in Title 28, Code of Federal Regulations, Part 73. The pertinent regulations state:

Sec. 73.1 Definition of terms.

(a) The term agent means all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction or control of that foreign government or official, and who are not specifically excluded by the terms of the Act or the regulations thereunder.

(b) The term foreign government includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been regarded by the United States as a governing authority.

(c) The term prior notification means the notification letter, telex, or facsimile must be received by the addressee named in Sec. 73.3 prior to commencing the services contemplated by the parties.

(d) When used in 18 U.S.C. 951(d)(1), the term duly accredited means that the sending State has notified the Department of State of the appointment and arrival of the diplomatic or consular officer involved, and the Department of State has not objected.

(e) When used in 18 U.S.C. 951(d) (2) and/or (3), the term officially and publicly acknowledged and sponsored means that the person described therein has filed with the Secretary of State a fully-executed notification of status with a foreign government; or is a visitor, officially sponsored by a foreign government, whose status is known and whose visit is authorized by an agency of the United States Government; or is an official of a foreign government on a temporary visit to the United States, for the purpose of conducting official business internal to the affairs of that foreign government; or where an agent of a foreign government is acting pursuant to the requirements of a Treaty, Executive Agreement, Memorandum of Understanding, or other understanding to which the United States or an agency of the United States is a party and which instrument

specifically establishes another mechanism for notification of visits by agents and the terms of such visits.

(f) The term legal commercial transaction, for the purpose of 18 U.S.C. 951(d)(4), means any exchange, transfer, purchase or sale, of any commodity, service or property of any kind, including information or intellectual property, not prohibited by federal or state legislation or implementing regulations.

Sec. 73.3 Form of notification.

(a) Notification shall be made by the agent in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the Registration Unit of the Criminal Division, except for those agents described in paragraphs (b) and (c) of this section. The document shall state that it is a notification under 18 U.S.C. 951, and provide the name or names of the agent making the notification, the firm name, if any, and the business address or addresses of the agent, the identity of the foreign government or official for whom the agent is acting, and a brief description of the activities to be conducted for the foreign government or official and the anticipated duration of the activities. Each notification shall contain a certification, pursuant to 28 U.S.C. 1746, that the notification is true and correct.

(b) Notification by agents engaged in law enforcement investigations or regulatory agency activity shall be in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of Interpol-United States National Central Bureau. Notification by agents engaged in intelligence, counterintelligence, espionage, counterespionage or counterterrorism assignment or service shall be in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the nearest FBI Legal Attaché. In case of exceptional circumstances, notification shall be provided contemporaneously or as soon as reasonably possible by the agent or the agent's supervisor. The letter, telex, or facsimile shall include the information set forth in paragraph (a) of this section.

(c) Notification made by agents engaged in judicial investigations pursuant to treaties or other mutual assistance requests or letters rogatory, shall be made in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the Office of International Affairs, Criminal Division. The letter, telex, or facsimile shall include the information set forth in paragraph (a) of this section.

(d) Any subsequent change in the information required by paragraph (a) of this section shall require a notification within 10 days of the change.

(e) Notification under 18 U.S.C. 951 shall be effective only if it has been done in compliance with this section, or if the agent has filed a registration under the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611, et seq., which provides the information required by paragraphs (a) and (d) of this section.

Sec. 73.4 Partial compliance not deemed compliance.

The fact that a notification has been filed shall not necessarily be deemed full compliance with 18 U.S.C. 951 or these regulations on the part of the agent; nor shall it indicate that the Attorney General has in any way passed on the merits of such notification or the legality of the agent's activities; nor shall it preclude prosecution, as provided for in 18 U.S.C. 951, for failure to file a notification when due, or for a false statement of a material fact therein, or for an omission of a material fact required to be stated therein.

Sec. 73.5 Termination of notification.

(a) An agent shall, within 30 days after the termination of his agency relationship, advise the Attorney General of such change.

(b) All notifications pursuant to this part will automatically expire five years from the date of the most recent notification.

(c) An agent, whose notification expires pursuant to (b) above, must file a new notification within 10 days if the relationship continues.