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C. Discovery and Other Procedures

The rules of discovery and other procedures vary greatly between jurisdictions. This is especially true in the context of international courts as compared to U.S. courts. Some unified international standards for discovery and other procedures are codified in the Hague Conventions, prepared and monitored by the Hague Conference on Private International Law. Often referred to by the acronym HCCH,² the Hague Conference is an international, intergovernmental organization that works to develop and service multilateral legal instruments in the areas of civil and commercial law. For more information, *see* http://www.hcch.net/index_en.php?act=text.display&tid=1 (last visited Dec. 9, 2013).

This chapter first outlines the common methods of service of process abroad for U.S. proceedings and service of process in the United States for foreign proceedings, and then examines ways to conduct discovery abroad, and comply with discovery requests from foreign courts.

1. Service of Process Abroad

Service of process abroad in cases before U.S. courts is governed by federal law, including the Federal Rules of Civil Procedure and numerous statutes. Many foreign jurisdictions, however, restrict the methods of service of judicial documents. Moreover, in some countries, service of judicial documents is considered a judicial or governmental function, and private parties attempting personal service will violate local law.

The U.S. Department of State maintains a helpful website about service of process abroad at http://travel.state.gov/law/judicial/judicial_680.html (last visited Dec. 9, 2013). Country-specific information on service of process is available at http://travel.state.gov/law/judicial/judicial_2510.html (last visited Dec. 9, 2013).

a. Methods of Service

The appropriate method of service depends on the individual or entity being served. No statute or rule permits service upon a foreign embassy or consulate in the United States as a means of serving individuals, corporations, or foreign states. Nor are U.S. Foreign Service officers normally permitted to serve process overseas on behalf of private litigants. *See* 22 C.F.R. § 92.85 (2012) (prohibiting officers of the Foreign Service from serving process or legal papers

¹ For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

² The acronym derivation from a combination of the English and French versions of the organization’s name, “Hague Conference/Conférence de La Haye.”

or appointing others to do so except when directed by the Department of State).

Litigants sometimes may use mechanisms set forth in two treaties to which the United States is a party:

- The 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters.³ Known as the Hague Service Convention, this treaty requires its sixty-plus member states to designate a Central Authority to receive requests for service of process via forms available at <http://www.usmarshals.gov/forms/usm94.pdf> (last visited Dec. 9, 2013). The treaty also allows member states to object to certain other means of service.
- The 1975 Inter-American Convention on Letters Rogatory.⁴ Applicable between the United States and a dozen Latin American countries, this treaty likewise requires member states to designate a Central Authority to receive requests for service of process via forms available at <http://www.hagueservice.net/forms/USM-272-frm.pdf> (last visited Dec. 9, 2013).

Specific methods of service, on individuals, corporations, and foreign states or state agencies, are discussed below.

i. Individuals

Service of process upon an individual in a foreign country is permitted in Fed. R. Civ. P. 4(f) by, among other methods:

- Registered or certified mail (return receipt requested), unless prohibited by the law of the foreign country;⁵ or
- Means authorized by an international treaty.

³ Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=17 [hereinafter Hague Service Convention]. This treaty has 68 states parties, among them the United States, for which the treaty entered into force on Feb. 10, 1969. *See* Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Dec. 9, 2013). The Permanent Bureau of the HCCH has published a useful *Practical Handbook on the Operation of the Hague Service Convention* (2006); it is available at http://www.hcch.net/index_en.php?act=publications.details&pid=2728.

⁴ Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. 98-27, O.A.S.T.S. No. 43 (reprinted in 28 U.S.C. § 1781 (2006)) (entered into force Jan. 16, 1976), *available at* <http://www.oas.org/juridico/english/treaties/b-36.html> [hereinafter Inter-American Service Convention]. This treaty has 18 states parties, among them the United States, which deposited its instruments of ratification on July 28, 1988. *See* Dep't Int'l L., Org. of Am. States, *B-36: Inter-American Convention on Letters Rogatory*, <http://www.oas.org/juridico/english/sigs/B-36.html> (last visited Dec. 9, 2013).

⁵ Some foreign countries restrict or prohibit personal service within their territory by foreign litigants, and some restrict or prohibit service by certain methods, such as postal mail or e-mail.

ii. Corporations

Service of process upon a foreign corporation, association, or partnership is governed as follows:

- If the foreign corporation or other entity is in the United States, by Fed. R. Civ. P. 4(h)(1); and
- If the foreign corporation or other entity is abroad, by Fed. R. Civ. P. 4(h)(2). This subsection of the rule also governs domestic corporations, associations, or partnerships abroad. Essentially, for entities located abroad, Rule 4(h)(2) allows service by all methods permitted for personal delivery under Rule 4(f), with the exception of personal delivery on an individual under Rule 4(f)(2)(C)(i).

iii. Foreign States or State Agencies

Service of process upon a foreign state or the agency or instrumentality of a foreign state is governed by Fed. R. Civ. P. 4(j)(1), which states:

A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

Part of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1608 (2006), sets out different paths for serving the state, as opposed to its agencies and instrumentalities:

- For a foreign state, serve, as set out in 28 U.S.C. § 1608(a), by:
 - Registered or certified mail (return receipt requested) to the head of the ministry of foreign affairs;
 - Diplomatic (State Department) channels; or
 - Means set out in an applicable treaty.
- For an agency or instrumentality of a foreign state, serve, as set out in 28 U.S.C. § 1608(b), by:
 - Registered or certified mail (return receipt requested);
 - Delivery to an officer or agent authorized to receive service in the United States; or
 - Means authorized in an applicable international treaty.

b. Service in the United States for Foreign Proceedings

If a foreign plaintiff or court seeks to serve a person in the United States, 28 U.S.C. § 1696(a) permits the district court of the district in which the person resides to “order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal.” Service may also be accomplished by methods other than court order. *Id.* § 1696(b).

2. Taking of Evidence Abroad

The globalization of business and increased travel has increased transnational litigation – and with it, the need for litigants to obtain information, evidence, and records from foreign jurisdictions. Foreign judicial systems often differ from those of the United States with regard to the appropriate scope of discovery; moreover, other countries often have very different rules on privacy and data protection. This is particularly true with regard to the civil law systems that prevail in many countries of continental Europe and in many of their former colonies. For example, a number of foreign jurisdictions restrict or forbid pretrial discovery, and many require judicial approval for all discovery. This section explores the extent to which discovery may be sought from parties and nonparties abroad in civil proceedings, and the mechanisms used to obtain discovery located abroad.

a. Scope of Discovery in Civil Proceedings

A district court may order “discovery of any matter relevant to the subject matter involved in the action.” Fed. R. Civ. P. 26(b)(1). As this rule contains no geographic limitation, it encompasses evidence located abroad. Discovery may be sought from parties and nonparties alike, as follows:

- *Party to transnational litigation:* Parties are subject to the discovery requests available generally under the Federal Rules of Civil Procedure. Requests may cover, for example, depositions, interrogatories, requests for documents, inspections, physical and mental examinations, and requests for admission. Failure to comply with discovery orders is subject to the usual range of sanctions under Fed. R. Civ. P. 37.
- *Nonparty who is a U.S. national or resident, located in a foreign country:* Such nonparties may be compelled to testify or to produce documents pursuant to two federal subpoena provisions: 28 U.S.C. § 1783(a) and Fed. R. Civ. P. 45(b).
- *Nonparty located abroad and not a U.S. national or resident:* Discovery may be sought from such nonparties via letters of request or via letters rogatory, which are judicial requests for assistance to courts in independent jurisdictions, as discussed *infra* § II.C.2.b.iv. Alternatively, the production of documents and testimony may be compelled if the court has jurisdiction over the foreign nonparty.

b. Mechanisms for Discovery

U.S. courts and litigants may use four types of mechanisms to obtain discovery located

abroad:

- Federal courts may act unilaterally, employing their usual statutory and inherent authority to compel discovery in cases before them;
- Letters of request pursuant to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters;⁶
- Letters rogatory transmitted via diplomatic channels; or
- Requests for assistance pursuant to Mutual Legal Assistance Treaties, typically called MLATs, which are available only in criminal cases, as detailed *infra* § II.C.2.v.

Because many of these mechanisms can be employed in both civil and criminal matters, this section discusses them in general below, with references to civil and criminal sources as relevant.

i. Unilateral Means of Evidence Gathering

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure generally govern a federal court's ability to compel discovery, and as discussed *supra* § II.C.2.a, federal courts can use standard methods of compelling discovery in some cases with international aspects.

Specific statutes also govern a federal court's power to order discovery of evidence located abroad. Federal law authorizes at least nine methods by which a U.S. court may order the production of evidence located abroad, testimony from witnesses abroad, or the transfer to the United States of private assets located abroad. The applicability of the various methods depends on the type of case at hand, although most methods are available in both civil and criminal proceedings.

In particular, a U.S. court may:

1. Compel testimony of U.S. nationals or residents located abroad through subpoenas issued pursuant to 28 U.S.C. § 1783, Fed. R. Civ. P. 45(b), as discussed *supra* § II.C.2.a., or Fed. R. Crim. P. 15. *See also* § II.C.2.b. (discussing blocking statutes).
2. Compel production of documents located abroad, provided that: the court has personal jurisdiction over the alleged wrongdoer; the documents or other tangible evidence are in the possession, custody, or control of the alleged wrongdoer or a related entity; and the production of the evidence is not protected by an evidentiary

⁶ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 255, 847 U.N.T.S. 231, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=82 [hereinafter Hague Evidence Convention]. This treaty, which entered into force on Oct. 7, 1972, has 57 states parties; among them is the United States, for which the treaty entered into force on Oct. 7, 1972. *See* Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited Dec. 9, 2013).

- privilege. *See* Fed. R. Civ. P. 34; Fed. R. Crim. P. 15. *See also* *In re Marc Rich & Co.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).
3. Compel production – even from a person or entity not party to the lawsuit, a target of the investigation, or a defendant in the prosecution – of documents located abroad. Production may include documents of foreign banks or corporations, or documents of foreign branches of U.S. banks or corporations with which the target or defendant conducted business. *See* Fed. R. Civ. P. 34(c), 45; Fed. R. Crim. P. 15, 17.
 4. Compel, through a subpoena, testimony from a foreign witness present in the United States. *See* Fed. R. Civ. P. 45; Fed. R. Crim. P. 15, 17. *See also* *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).
 5. Compel production of documents from foreign entities by a subpoena *duces tecum* of a foreign entity over whom the U.S. court has personal jurisdiction. *See* Fed. R. Civ. P. 45; Fed. R. Crim. P. 17.
 6. Compel consent to disclose third-party records, as a means to overcome bank secrecy. *See* *Doe v. United States*, 487 U.S. 201 (1988).
 7. Compel both targets of U.S. criminal investigations and defendants not to engage in attempts to block prosecutors’ efforts to obtain evidence by bringing an action before a foreign court. *See* *United States v. Davis*, 767 F.2d 1025, 1036-40 (2d Cir. 1985).
 8. Compel repatriation of assets to pay a fine or taxes or to effect a forfeiture. *See* 26 U.S.C. § 7402(a) (2012). *See also* *United States v. McNulty*, 446 F. Supp. 90 (N.D. Cal. 1978).
 9. Impose a tax levy on a bank in the United States for funds of a taxpayer located in a foreign branch. *See* 26 U.S.C. § 7402(a) (2006). *See also* *United States v. First Nat’l City Bank*, 379 U.S. 378 (1965).

ii. Challenges to Such Requests

Among the most difficult circumstances for obtaining evidence abroad are those that involve third parties abroad, by means of subpoenas directing either witness testimony from foreign persons or the production of documents from foreign entities. The person whose testimony or assistance is sought may challenge the use of coercive methods by, *inter alia*:

- Alleging breach of constitutional rights, such as the privilege against self-incrimination, the guarantee of due process, or the ban on improper search and seizures;
- Questioning assertions of jurisdiction;
- Raising conflicts of law defenses; and/or

- Contesting foreign sovereign compulsion.

This last avenue, contesting foreign sovereign compulsion, arises when a party contends that compliance with the laws of the United States would cause the party to violate the laws of a foreign state to which the party is also subject. The Supreme Court has not addressed whether foreign sovereign compulsion is a defense to noncompliance with U.S. law; indeed, in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986), it declined to reach a foreign sovereign compulsion defense question on which certiorari had been granted. A number of lower courts, however, have recognized the existence of the defense. *E.g.*, *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297-98 (D. Del. 1970).

iii. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The United States is party, along with more than fifty other countries, to a multilateral treaty that governs foreign evidence gathering; specifically, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, also known as the Hague Evidence Convention.⁷

Use of this treaty is not mandatory. Rather, as the Supreme Court explained in *Société Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 536 (1987):

[T]he Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad.

Discovery may be sought either directly, because the court has personal jurisdiction over the entity in possession of the relevant information, or indirectly, by way of a request for assistance to a foreign court embodied by a letter rogatory. In either instance, the district court should determine on a case-by-case basis whether comity – by which courts, out of concern for friendly relations among countries, exercise discretion to conform to an international legal norm – militates in favor of resorting to the Convention’s procedures rather than U.S. discovery rules. *See id.* at 533; *supra* § II.B.7 (discussing comity).

Articles 1 through 14 of the Hague Evidence Convention permit discovery by letter of request, which is a request from the court in one state to the “Central Authority” of the foreign state, asking the receiving state to assist in obtaining the evidence requested. If the receiving state honors the request, it becomes the “executing state.” Article 11 provides that a person requested to give evidence may claim a privilege under the law of either the requesting or the

⁷ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 255, 847 U.N.T.S. 231, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=82 [hereinafter Hague Evidence Convention]. This treaty, which entered into force on Oct. 7, 1972, has 57 states parties; among them is the United States, for which the treaty entered into force on Oct. 7, 1972. *See* Hague Conference on Private International Law, *Status Table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last visited Dec. 9, 2013).

executing state.

Discovery of documents is often more limited under the Hague Evidence Convention than under U.S. discovery rules. This is because many member states have declared, pursuant to Article 23 of the Convention, that they will not execute letters of request “for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”

iv. Letters Rogatory

A letter rogatory is a request by which a court in one jurisdiction asks court in another, foreign jurisdiction to employ the latter court’s procedures in order to aid the administration of justice in the former court’s country. For example, a foreign court may be asked to examine witnesses based on interrogatories drafted in the United States, typically by counsel for the party seeking the discovery. *See* 28 U.S.C § 1782(a) (2006).

Unlike the letters of request discussed *supra* § II.C.2.b., which travel through the “Central Authorities” of governments, letters rogatory frequently are transmitted through diplomatic channels. In the United States, the Department of State has authority to transmit letters rogatory and to return responses to such letters via diplomatic channels. 28 U.S.C. § 1781 (2006). In some countries, a letter rogatory is signed by a judge, but may be transmitted by local legal counsel to the court in the country to which the letter is directed.

The letter rogatory is one of the most commonly used methods by litigants in the United States to obtain evidence abroad through compulsory process. Details on preparing a letter rogatory may be found on the State Department’s website, at http://travel.state.gov/law/judicial/judicial_683.html (last visited Dec. 9, 2013).

v. Mutual Legal Assistance Treaties, or MLATs

Mutual Legal Assistance Treaties, commonly known as MLATs, are treaties by which member states establish mechanisms for securing evidence. They occur most often in criminal and tax matters; MLATs cannot be used in civil litigation. The United States has entered both bilateral and multilateral MLATs.

Among the multilateral treaties to which the United States is a party and which have mutual legal assistance provisions include:

- 2000 U.N. Convention Against Transnational Organized Crime,⁸ also known as the Palermo Convention;

⁸ U.N. Convention Against Transnational Organized Crime, art. 18, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, U.N. Doc. A/55/49 (2001), *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Sept. 29, 2003, has 179 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Dec. 9, 2013).

- 1996 Organization of American States Inter-American Convention against Corruption;⁹ and
- 2000 U.N. Convention Against Corruption.¹⁰

See Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases* 276-90 (2010).

v.1. MLATs and Letters Rogatory Compared

MLATs have many benefits compared to letters rogatory. In particular, MLATs create a binding legal obligation to respond; moreover, MLAT procedures are more expeditious, partly because there is a direct link to process requests, through the “Central Authority” in each country. Yet on account of limitations on use, MLATs do not displace other methods: generally, MLATs apply only in criminal and tax cases, and as discussed below, even in these types of cases private litigants’ use of MLATs is limited.

Unlike requests for assistance under letters rogatory, the execution of which is discretionary, execution of an MLAT request is required by treaty and can be refused only for one of the few grounds specified in the pertinent treaty. For instance, the U.S.-Russia MLAT states that the receiving state may deny legal assistance if one of three situations is present; that is, if the:

- “[R]equest relates to a crime under military law that is not a crime under general criminal law”;
- “[E]xecution of the request would prejudice the security or other essential interests of the Requested Party”; or
- “[R]equest does not conform to the requirements of this Treaty.”

Treaty between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters, U.S.-Russia, art. 1, June 17, 1999, T.I.A.S. 1304, *available at* <http://www.state.gov/documents/organization/123676.pdf> [hereinafter U.S.-Russia MLAT].

⁹ Inter-American Convention against Corruption, art. XIV, Mar. 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M. 724, *available at* <http://www.oas.org/juridico/english/treaties/b-58.html>. This treaty, which entered into force on Mar. 6, 1997, has 33 states parties, among them the United States, which deposited its instrument of ratification on Sept. 29, 2000. Org. Am. States, Dept. Int’l L., B-58: *Inter-American Convention on Corruption*, <http://www.oas.org/juridico/english/Sigs/b-58.html> (last visited Dec. 9, 2013).

¹⁰ U.N. Convention Against Corruption, art. 46, opened for signature Dec. 9, 2003, S. Treaty Doc. No. 109-6 (2005), 2349 U.N.T.S. 41, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. This treaty, which entered into force on Dec. 14, 2005, has 169 states parties, among them the United States, which ratified on Oct. 30, 2006. U.N. Treaty Collection, *United Nations Convention Against Corruption*, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-14&chapter=18&lang=en (last visited Dec. 9, 2013).

v.2. Scope of Assistance

MLATs provide for a variety of assistance; for example:

- Serving or producing documents;
- Providing records;
- Locating persons;
- Taking testimony or statements of persons;
- Executing requests for search and seizure;
- Forfeiting criminally obtained assets; and
- Transferring persons in custody for testimonial purposes.

MLATs require evidence to be transmitted in a form admissible in the courts of the requesting state. As a result, evidence transmitted pursuant to an MLAT request is more likely to be admissible than if it is obtained by letters rogatory.

v.3. Individuals' Efforts to Use MLATs

At times defendants and other persons, as opposed to governments, will seek to make requests under an MLAT. As discussed below, such efforts posed difficulties. Authorities are divided with regard to such requests. Some MLATs specifically exclude such requests.

v.3.a. Treaties

Newer MLATs to which the United States is a party provide explicitly that the mechanisms are for the use of the contracting governments, not individual defendants. For example, Article 1 of the 1999 U.S.-Russia MLAT, *supra*, states:

This Treaty is intended solely for cooperation and legal assistance between the Parties. The provision of this Treaty shall not give rise to a right on the part of any other persons to obtain evidence, to have evidence excluded, or to impede the execution of a request.

To similar effect, Article 2 of the 1992 Inter-American Convention on Mutual Assistance in Criminal Matters¹¹ makes clear:

¹¹ Inter-American Convention on Mutual Assistance in Criminal Matters, May 23, 1992, O.A.S.T.S. No. 75 (entered into force Apr. 14, 1996), *available at* <http://oas.org/juridico/english/Treaties/a-55.html>. This treaty has 27 states parties; among them the United States, for which the treaty entered into force on May 25, 2001. Dep't of Int'l L., Org. of Am. States, *A-55: Inter-American Convention on Mutual Assistance in Criminal Matters*, <http://oas.org/juridico/english/Sigs/a-55.html> (last visited Dec. 9, 2013).

This convention applies solely to the provision of mutual assistance among states parties. Its provisions shall not create any right on the part of any private person to obtain or exclude any evidence or to impede execution of any request for assistance.

No such prohibition appears, however, in other instruments on the subject, including a model treaty approved in 1990 by the U.N. General Assembly.¹²

v.3.b. Case Law

U.S. case law exemplifies the limited reach of MLATs for individual defendants. In one instance, a court allowed the use of the U.S.-Switzerland MLAT to order the United States to make a request on behalf of a defendant. *United States v. Garcia*, 37 F.3d 1359, 1366-67 (9th Cir. 1994) (interpreting Treaty on Mutual Assistance in Criminal Matters with Related Note, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019), *cert. denied*, 514 U.S. 1067 (1995). In that case, Switzerland did not object to the request.

Most efforts to using MLATs to challenge the exclusion of evidence obtained by defendants and third parties have not succeeded. *See United States v. Rommy*, 506 F.3d 108, 128-29 (2d Cir. 2007) (rejecting claim that evidence allegedly obtained in violation of an MLAT should be excluded), *cert. denied*, 552 U.S. 1260 (2008); *United States v. Davis*, 767 F.2d 1025, 1029 (2d Cir. 1985) (ruling that a defendant lacked standing to move to exclude or suppress records on the basis of a purported MLAT violation).

In 2002, the Supreme Court of British Columbia denied a U.S. request for assistance for records under the U.S.-Canada MLAT because it found abuse of process in connection with the U.S. efforts to obtain records regarding alleged tax offenses. *United States v. Schneider*, 2202 B.C.S.C. 1014 (July 5, 2002), *available at* <http://www.uniset.ca/other/cs6/2002BCSC1014.html>. The case illustrates the effort of at least one court to balance the need for assistance with respect for the law. *See* Bruce Zagaris, *British Columbia Court Denies U.S. MLAT Request Due to Abuse of Process*, 18 Int'l Enforcement L. Rep. 422-24 (2002).

3. Discovery Requests from Non-U.S. Courts

Just as U.S. courts may request discovery from a foreign state, a foreign tribunal or interested person may direct a letter rogatory or other request for judicial assistance to the United States. The foreign proceeding need not be pending or imminent; nor does the evidence sought have to be discoverable under foreign law. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-62 (2004).

¹² U.N. Model Treaty on Mutual Assistance in Criminal Matters, G.A. Res. 45/177, 45, U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49 (Dec. 14, 1990), *available at* http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

a. Applicable Law

The statute governing such requests is 28 U.S.C. § 1782 (2006). Entitled “Assistance to foreign and international tribunals and to litigants before such tribunals,” it states in full:

(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.

By its terms the statute permits, but does not require, a district court to order testimony or document production in specified circumstances. Factors a court may consider were enumerated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-66 (2004):

- If the person from whom the party seeks discovery lies beyond the evidence gathering powers of the foreign tribunal;
- “The nature of the foreign tribunal”;
- “The character of the proceedings underway abroad”; and
- “The receptivity of the foreign government or the court or the agency abroad to U.S. federal-court judicial assistance.”

b. Procedure

Normally, if it grants assistance, a U.S. district court will appoint a “commissioner” –

often, an Assistant U.S. Attorney or some other lawyer employed by the Department of Justice – to supervise the taking of testimony in connection with the request.

If the requesting foreign court has not prescribed the procedure to be used to execute its request, 28 U.S.C. § 1782 states that the Federal Rules of Civil Procedure are to be applied.

A person who testifies pursuant to a U.S. court order may assert any pertinent privilege that is permitted either under U.S. law or under the law of the country where the proceeding is pending.