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41.00 OBTAINING FOREIGN EVIDENCE AND OTHER TYPES OF ASSISTANCE FOR CRIMINAL TAX CASES

41.01 INTRODUCTION

This section provides a detailed analysis of the various means available to federal prosecutors for obtaining foreign evidence and other types of international assistance in criminal tax cases. The means analyzed here include mutual legal assistance treaties (MLATs) and similar processes, tax information exchange agreements (TIEAs) and tax treaties, court-sponsored procedures for taking foreign depositions, including letters rogatory, and the use of unilateral compulsory measures, such as subpoenas.

Obtaining foreign evidence and other types of international assistance under the various processes described here usually requires considerable amounts of time and can cause significant delays in an investigation or trial proceeding. Thus, a prosecutor should initiate seeking such evidence or assistance through the appropriate process as soon as possible.

It is extremely important to remember that no United States investigator or prosecutor should contact foreign authorities or witnesses, whether by telephone or other means, or undertake foreign travel, without obtaining the proper clearances or authorizations. For example, the Assistant Attorney General, Tax Division, must approve all authorizations for foreign travel by Tax Division attorneys and country clearance must be obtained from the Department of State before traveling abroad on official business. For further details regarding foreign travel and foreign assistance in tax cases, contact Frank P. Cihlar, Senior Counsel for International Tax Matters, Tax Division, at (202) 514-2839.

41.02 OBTAINING FOREIGN EVIDENCE OR OTHER TYPES OF ASSISTANCE UNDER MUTUAL LEGAL ASSISTANCE TREATIES

41.02[1] Background

Mutual Legal Assistance Treaties (MLATs) create a routine channel for obtaining a broad range of legal assistance for criminal matters generally, including, *inter alia*, taking testimony or statements of persons, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures. These treaties are concluded by the United States Department of Justice (primarily the Criminal Division) in conjunction with the United States Department of State. An MLAT creates a contractual obligation between the treaty partners to render to each other assistance in criminal matters in accordance with the terms of the treaty. It is designed to facilitate the exchange of information and evidence for use in criminal investigations

and prosecutions. Unfortunately, while many of the MLATs currently in force cover most U.S. tax felonies, several others have only limited coverage at best, for tax offenses.

41.02[2] MLATs Currently in Force

As of August 1, 2008, the United States has MLATs in force 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, India, Isle of Man, Israel, Italy, Jamaica, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, the Netherlands, Nigeria, Panama, the Philippines, Poland, Romania, Russia, St. Christopher and Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, South Korea, Spain, Switzerland, Thailand, Trinidad & Tobago, Turkey, the Turks and Caicos Islands, Ukraine, the United Kingdom, and Uruguay.

In addition, the United States has Mutual Legal Assistance Agreements (MLAAs) in force with China, Hong Kong, and Taiwan. The MLAAs are executive agreements, not treaties, but are similar to MLATs in scope and operation.

The United States also has signed MLATs with Colombia, the European Union (EU), Germany, Ireland, Malaysia, Sweden, and Venezuela. The MLATs with the EU, Malaysia, and Sweden are pending in the Senate and may be ratified in the near future.

41.02[3] The Extent of Tax Coverage in MLATs

The MLATs with Antigua & Barbuda, Argentina, Australia, Austria, Barbados, Belgium, Belize, Brazil, Canada, Cyprus, the Czech Republic, Dominica, Egypt, Estonia, France, Greece, Grenada, Hong Kong, Hungary, India, Israel, Italy, Jamaica, Latvia, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, Nigeria, the Philippines, Poland, Romania, Russia, St. Christopher and Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, South Korea, Spain, Thailand, Trinidad & Tobago, Turkey, Ukraine, and the United Kingdom cover all criminal tax felonies under the Internal Revenue Code. The remaining MLATs contain a variety of restrictions regarding assistance for tax offenses. Thus, the Swiss MLAT excludes tax and similar fiscal offenses from its scope except in cases involving organized crime. However, assistance is available from the Swiss under one of their domestic international mutual assistance in criminal matters (IMAC) statutes in any tax matter where a foreign tax authority can establish “tax fraud” as the term is used under Swiss law.¹ Historically, the Swiss had considered the conduct underlying most

¹ Indeed, the Swiss authorities and legal scholars are accustomed to referring to the term “tax evasion” as a civil matter, even if the conduct involved would constitute a felony under our law, such as the act of filing a false federal income tax return where there are no other badges of fraud involved. Thus, when the Swiss refer to fiscal crimes, they use the term

U.S. criminal tax felonies as civil in nature, and establishing “tax fraud” as the term is used under Swiss law had been a considerably difficult task. But with the advent of the new income tax treaty with Switzerland, the concept of tax fraud has been expanded, and this expansion applies to requests made for mutual legal assistance under an IMAC. See [Note 1](#), *supra*. The Liechtenstein MLAT is likewise restricted to cases of “tax fraud.”²

The Cayman and Bahamian MLATs generally exclude offenses relating to tax laws except for tax matters arising from unlawful activities otherwise covered by the MLATs.³ Furthermore, these MLATs, as well as the Swiss MLAT, contain specific limitations on the use of evidence obtained for covered offenses; thus, evidence obtained for some other offense is generally not available for tax purposes in civil or criminal investigations or proceedings which are subsequently conducted.⁴ However, there are tax information exchange agreements (TIEAs), discussed below, now in force with both the Cayman Islands and the Bahamas that do not contain such restrictions. For years to which they apply, these TIEAs offer a way to secure useful evidence in all civil and criminal tax cases.

41.02[4] Designation of a Central Authority to Administer the MLAT for Each Treaty Partner

Every MLAT specifies Central Authorities to act on behalf of each treaty partner to make requests, to receive and execute requests, and to generally administer the treaty relationship. Under all of the MLATs to which the United States is a party, the Central Authority designated for the United States is the Director, Office of International Affairs (OIA), Criminal Division, U.S. Department of Justice. 28 C.F.R. § 0.64-1. The Central Authority for the treaty partner is generally an entity located within the ministry of justice or its equivalent agency.

“tax fraud,” which, until the new tax treaty with Switzerland was negotiated, had a much more restricted meaning under Swiss law than under U.S. law. See, e.g., Swiss MLAT, Art. 1, § 1(a); *id.*, Art. 2, §§ 1 & 2; James I. K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 Case W. Res. J. Int’l L. 405, 405-08, 418-20 (1988); James P. Springer, *An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases*, 22 Geo. Wash. J. Int’l L. & Econ. 277, 303-08 (1988); Maurice Aubert, *The Limits of Swiss Banking Secrecy under Domestic and International Law*, 2 Int’l Tax & Bus. Law. 273, 286-288 (1984). However, the Protocol to the new Income Tax Treaty with Switzerland expands the concept of tax fraud to include many of the badges of fraud set forth in *Spies v. United States*, 317 U.S. 492, 499 (1943), and the Memorandum of Understanding for the new Income Tax Treaty with Switzerland makes this expanded concept of tax fraud applicable to requests for mutual legal assistance made under an IMAC.

² Liechtenstein MLAT, Art. 1, § 4.

³ Cayman MLAT, Art. 19; Bahamian MLAT, Art. 2.

⁴ Swiss MLAT, Art. 5; Cayman MLAT, Art. 7; Bahamian MLAT, Art. 8.

41.02[5] Public Law Enforcement Purpose of MLATs

The Central Authorities make requests under MLATs on behalf of law enforcement and judicial authorities in their respective countries who are legally responsible for investigating and prosecuting criminal conduct. For the United States, such authorities include federal and state prosecutors, as well as governmental agencies responsible for investigating criminal conduct, or government agencies responsible for matters ancillary to criminal conduct, such as civil forfeiture. Private parties are not permitted to make requests under MLATs.

41.02[6] Matters for Which Assistance Is Available under MLATs

Assistance is available under the MLAT once an investigation or prosecution has been initiated by an appropriate law enforcement or judicial authority in the requesting state. Thus, the United States may initiate a request for assistance under an MLAT when a criminal matter is at the trial stage, or is under investigation by (1) a prosecutor, (2) a grand jury, (3) an agency with criminal law enforcement responsibilities, such as Internal Revenue Service Criminal Investigation, or (4) an agency with regulatory responsibilities, such as the Securities and Exchange Commission.

41.02[7] Types of Assistance Available under MLATs

Generally, MLATs provide for the following types of assistance:

- a. serving documents in the requested state;
- b. locating or identifying persons or items in the requested state;
- c. taking testimony or statements from persons in the requested state;
- d. transferring persons in custody in either state to the other for testimony or other purposes deemed necessary or useful by the requesting state;
- e. providing documents, records, and articles of evidence located in the requested state;
- f. executing requests for searches and seizures in the requested state;
- g. immobilizing assets located in the requested state;

- h. assisting in proceedings related to forfeiture and restitution; and
- i. any other form of assistance not prohibited by the laws of the requested state.

MLATs are specifically designed to override local laws in the requested states pertaining to bank secrecy and to ensure the admissibility in proceedings in the requesting state of the evidence obtained. Thus, for example, MLATs typically contain provisions which, in conjunction with certain statutes, are directed at securing the admissibility of business records, or establishing chain of custody over an evidentiary item, without having to adduce the in-court testimony of a foreign witness.

41.02[8] Procedures for Making Requests for Assistance

To make a request for assistance under a particular MLAT, a prosecutor or investigator should contact OIA at (202) 514-0000, request to speak to the attorney in charge of the country from which assistance will be requested, and collaborate on the preparation of the request. But do not hesitate to contact Frank Cihlar, Senior Counsel for International Tax Matters, at (202) 514-2839, for assistance with and guidance on the specifics of your case. Once the Director of OIA signs a request, it must be translated into the official language of the requested state, unless the particular MLAT provides otherwise. The request will then be submitted in both language versions (English and the official language of the requested state) to the Central Authority of the requested state.

41.02[9] Contents of a Request

Generally, MLATs require that a request contain the following information:

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

In addition, MLATs require that the following information be provided to the extent that such information is available:

- e. information on the identity and location of any person from whom evidence is sought;
- f. information on the identity and location of a person to be served, that person's relationship to the proceeding, and the manner in which service is to be made;
- g. information on the identity and whereabouts of a person to be located;
- h. a precise description of the place or person to be searched and of the items to be seized;
- i. a description of the manner in which any testimony or statement is to be taken and recorded;
- j. a list of questions to be asked of a witness;
- k. a description of any particular procedure to be followed in executing the request;
- l. information as to the allowances and expenses to which a person asked to appear in the requesting state will be entitled; and any other information that may be brought to the attention of the requested state to facilitate execution of the request.

41.02[10] Limitations on Use of Evidence or Information Obtained

Generally, MLATs have provisions restricting the use of information or evidence furnished under their provisions, including conditions of confidentiality. Accordingly, the law enforcement authorities of the requesting state must comply with these restrictions in using the information or evidence in the course of an investigation or prosecution. Although some MLATs are more restrictive, generally, once the information or evidence properly used in the investigation or prosecution becomes a matter of public record in the requesting state, it may be used for any purpose.

41.02[11] Obligation to Return the Items Provided

Generally, MLATs provide that all original documents, records, or articles of evidence provided pursuant to an MLAT request must be returned as soon as possible to the state providing such items unless that state waives the right to have the items returned. Items are typically returned by the prosecutor through the Central Authority. Generally, copies of documents provided under an MLAT need not be returned unless the state which provides such copies specifically requests their return.

41.03 MUTUAL LEGAL ASSISTANCE UNDER FOREIGN STATUTES WHERE NO FORMAL TREATY RELATIONSHIP EXISTS

New, effective approaches have recently been developed for obtaining assistance from countries with which the U.S. has no MLAT relationship. As a result, letters rogatory issued by a court are no longer the exclusive means of securing formal legal assistance from a country with which the United States has no MLAT. Thus, there are a number of non-MLAT countries with which OIA has established a practice of making and receiving formal legal assistance requests, dealing directly with its counterpart office in the foreign ministry of justice. Such requests typically follow a format similar to that employed under MLATs, and are sometimes referred to as “MLAT-type” requests. Legal assistance in these circumstances is provided to the extent permitted by relevant domestic legislation. Countries in this category include Ireland, Japan, and New Zealand. Contact the appropriate OIA Team at (202) 514-0000 for further details.

41.04 OBTAINING FOREIGN EVIDENCE UNDER TAX INFORMATION EXCHANGE AGREEMENTS AND TAX TREATIES

41.04[1] Background

Tax information exchange agreements (TIEAs) and income tax treaties constitute bases for obtaining foreign-based documents and testimony, often in admissible form, for criminal and civil tax cases and investigations. These pacts are concluded by the United States Department of Treasury, with the assistance of the Internal Revenue Service and the Tax Division of the Department of Justice, and are administered by the Deputy Commissioner (International) of the

Large & Mid-Size Business Division of the IRS. For the purposes of obtaining foreign evidence, TIEAs are more specialized and effective than tax treaties.

41.04[2] Tax Information Exchange Agreements (TIEAs)

TIEAs are agreements that specifically provide for mutual assistance in criminal and civil tax investigations and proceedings. This assistance comprises obtaining foreign-based documents, including bank records, and testimony in admissible form. TIEAs are statutory creatures of the Internal Revenue Code. *See* 26 U.S.C. § 274(h)(6)(C). This statutory framework initially authorized the Secretary of Treasury to conclude agreements with countries in the Caribbean Basin (thereby qualifying such countries for certain benefits under the Caribbean Basin Initiative), but later expanded this authority to permit the Secretary to conclude TIEAs with any country.

41.04[3] TIEAs Currently in Force

As of July 15, 2008, the United States has TIEAs in force with the following countries: Antigua & Barbuda, Aruba, Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Costa Rica, Dominica, the Dominican Republic, Grenada, Guernsey, Guyana, Honduras, Isle of Man, Jamaica, Jersey, the Marshall Islands, Mexico, the Netherlands Antilles, Peru, St. Lucia, and Trinidad & Tobago.⁵

41.04[4] Information Exchange under Tax Treaties

The United States has income tax treaties with many countries. There are two principal purposes of these treaties: (1) to reduce or eliminate double taxation of income earned by residents of either country from sources within the other country and (2) to prevent avoidance and evasion of the income taxes of the two countries party to the treaty. To address the latter purpose, almost all U.S. income tax treaties contain a provision for exchanging information, similar in concept to TIEAs. The Treasury Department places great importance on information exchange in these tax treaties and will not enter into a treaty relationship with any country that cannot meet the minimum standards of information exchange.

⁵ On March 31, 2001, and on March 20, 2007, the United States signed TIEAs with, respectively, Colombia and Brazil that are not yet in force.

41.04[5] Tax Treaties Currently in Force

The United States has income tax treaties in force -- including exchange of information provisions -- with the following countries: Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Bermuda, Canada, China, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, Russia, the Slovak Republic, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, the United Kingdom, and Venezuela. The Treasury Department is very active in the negotiation of new income tax treaties, as well as the renegotiation of income tax treaties currently in force. Thus, new treaty partners should be added to this list regularly.

41.04[6] Scope of TIEAs and Income Tax Treaties

Under most of the TIEAs and tax treaties to which the United States is a party, requests for assistance may be made for any civil or criminal tax investigation or proceeding regarding any tax year not barred by the statute of limitations of the state seeking the information.

41.04[7] Designation of a Competent Authority to Administer TIEAs and Tax Treaties for Each Party

Every TIEA and tax treaty specifies Competent Authorities to act on behalf of each party to make requests, to receive and execute requests, and to administer generally the treaty or TIEA relationship. The Deputy Commissioner (International) of the Large & Mid-Size Business Division, Internal Revenue Service, has been designated to act as the Competent Authority (CA) for exchanging information under TIEAs and Tax Treaties, under the authority of the Secretary of Treasury. The CA for the other party is generally an entity located within the ministry of finance or its equivalent agency.

41.04[8] Procedures for Making Requests For Information

If you wish to explore making a request for evidence or information under a TIEA or tax treaty, contact Frank Cihlar, Senior Counsel for International Tax Matters, at (202) 514-2839, for assistance with and guidance on the specifics of your case. He will put you in touch with the appropriate IRS representative or attaché responsible for the country where the information is located who, in turn, will specify the applicable procedures for making a request for information.⁶ Usually, the investigator or prosecutor in charge of the case will draft the initial version of the request and forward this draft to the appropriate IRS representative or attaché for review. Subsequently, the request is formalized and sent to the foreign Competent Authority for execution.

41.04[9] Contents of a Request

A request under a TIEA or income tax treaty should contain, *inter alia*, the following:

- a. The taxpayer's (defendant's) name and address, and, if applicable, social security number, place and date of birth, and whether the taxpayer is a citizen of the United States;
- b. The names and addresses of pertinent entities affiliated with the taxpayer and the nature of such affiliations;
- c. A brief resume of the case with particular reference to the tax issues;
- d. A detailed statement of the information sought and why it is needed;
- e. A statement of the efforts made to secure the desired information prior to the request and why the efforts were not successful (including comment on any relevant data supplied by the taxpayer and the reasons for considering such data inadequate);
- f. If the records of a foreign affiliate of the taxpayer are to be examined, the name and address of the custodian of the records and a document authorizing the custodian to permit the examination or an explanation as to why the authorization was not obtained;
- g. All pertinent names, addresses, leads, and other information that may be helpful in complying with the request (requests for bank account information should specify the particular branch).

To the extent known, the following information should also be transmitted with the request:

⁶ The IRS has personnel in Washington, DC, and Plantation, Florida, as well as attachés at a number of U.S. embassies abroad, who act on behalf of the U.S. Competent Authority vis-à-vis the countries for which they have been given responsibility.

- i. Date upon which a response is required (*e.g.*, for statute of limitations purposes) or any other facts indicating the urgency of the information;
- j. Information concerning the importance of the case and any other facts which make the case unusual or worthy of preferential treatment; and
- k. The taxable years and approximate tax liability or additional income involved.

41.04[10] Confidentiality of Information Obtained

All of our TIEAs, and virtually all of our tax treaties, contain language requiring that information obtained under such agreements be used only for tax purposes. Obviously, such language can raise troublesome issues for a prosecutor conducting a grand jury investigation directed at both tax and non-tax offenses. Indeed, certain treaty partners recently have resisted executing requests for information made in such cases based on their view that the obligation of confidentiality forbids use of the information by a grand jury considering non-tax crimes. To address this situation, the Treasury Department and the Justice Department jointly decided to undertake using cautionary instructions to the grand and petit juries in such cases. Under this approach, the prosecutor would caution the grand jury, as would the trial judge the petit jury, that the evidence obtained under the tax agreement could not be used to draw inferences of guilt regarding the non-tax offenses. This approach would also require the trial judge to ignore the evidence for the purposes of a defendant's motion to dismiss under Rule 29 of the Federal Rules of Criminal Procedure.

41.04[11] Possible Problems with Exchanging Information under TIEAs and Tax Treaties

Although exchanging information under TIEAs and tax treaties has been relatively successful, there are a variety of problems that can arise. For example, officials of some countries having civil law systems balk at executing tax treaty requests in criminal tax cases, especially those arising from grand jury investigations. This hesitancy arises from the belief that tax treaties, which they consider to be part of an *administrative* governmental process, should not be used for *judicial* matters. This problem can be aggravated where non-tax offenses are also under investigation, given the ever-present provision in these agreements dealing with confidentiality. See [§ 41.04\[10\]](#), *supra*. Also, certain countries will provide treaty partners only with information that currently exists in their tax files regarding a given taxpayer, and will not undertake to gather information from other

sources, including third parties. Finally, some treaty partners, even if they will undertake to gather information from sources other than their tax files, will not obtain and provide financial information such as bank records because of bank secrecy laws.

41.05 USING LETTERS ROGATORY AND OTHER JUDICIAL PROCEDURES TO OBTAIN EVIDENCE IN CRIMINAL TAX CASES

41.05[1] Background

Before the advent of tax treaties, MLATs, TIEAs, and other types of mutual assistance agreements, law enforcement authorities, just as private litigants, primarily relied upon deposition by stipulation, deposition by notice, deposition by commission, and letters rogatory, all judicially sponsored procedures, to obtain evidence abroad in both civil and criminal cases. *See* Fed. R. Crim. P. 15. This section briefly explores the basics of these various procedures and their limitations, especially in criminal tax cases.

41.05[2] Deposition by Stipulation, Notice, or Commission

Federal Rule of Criminal Procedure 15 governs the taking of depositions in criminal cases. In general, a deposition is to be taken and filed in the same manner as a deposition in a civil action. Fed. R. Crim. P. 15(e). In contrast to the practice in civil cases, however, where depositions may be taken as a matter of right by notice without permission of the court (*see* Fed. R. Civ. P. 26-32), Rule 15 provides that depositions in criminal cases can only be taken by order of the court. Moreover, unless the criminal rules or a court order provides otherwise, (1) a defendant may not be deposed without that defendant's consent, (2) the scope and manner of the deposition examination and cross-examination must be the same as allowed during trial, and (3) the government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial. Fed. R. Crim. P. 15(e). By virtue of this interplay between the criminal and the civil rules, there are three ways in which a U.S. prosecutor can obtain foreign source testimony without the assistance of foreign authorities, assuming the witness is willing to testify voluntarily and the foreign country's laws permit taking testimony without the involvement of the foreign authorities.

First, the parties to the litigation may agree to take testimony abroad by stipulation. *See* Fed. R. Crim. P. 15(h); Fed. R. Civ. P. 29. Under this procedure, the parties simply agree as to the necessary circumstances of the deposition, *i.e.*, the official before whom the testimony will be taken, the time and place of the deposition, the type of notice to be given, the manner in which the deposition is to be conducted. If the parties can so agree, the stipulation procedure is the most expeditious method of taking foreign testimony.

Second, a litigant may take a foreign deposition by notice. Under this procedure, the moving party may arrange a deposition “on notice, before a person authorized to administer oaths either by federal law or by the law in the place of the examination” *See* Fed. R. Civ. P. 28(b)(1)(C). The moving party must make the necessary arrangements for the deposition, such as assuring the presence of the witness, scheduling the services of an appropriate foreign official, a reporter for the transcript, and, if necessary, an interpreter.

Third, a litigant may take a foreign deposition by commission. Under this procedure, the moving party may arrange a deposition “before a person commissioned by the court to administer any necessary oath and take testimony.” Fed R. Civ. P. 28(b)(1)(D). This procedure is similar to the notice procedure except that the court appoints the person, *i.e.*, the commissioner, before whom the deposition is to be taken.

Each of these procedures is available to United States prosecutors handling criminal tax cases, but, as mentioned above, only where the foreign-based witness voluntarily submits to the deposition and the particular country permits the taking of evidence within its borders in a manner consistent with the three methods outlined above. The latter condition may become prohibitive if the state in question is a civil law country. Such jurisdictions are inclined to regard evidence taking by any person other than their own legal authorities as violative of their judicial sovereignty. Where such circumstances bar any of these three approaches and no treaties or agreements for assistance are available, the last resort is usually to letters rogatory transmitted via diplomatic channels to obtain evidence abroad in a manner consistent with the law and regulations of the jurisdiction.

41.05[3] Depositions by Letters Rogatory

The traditional method used by United States litigants to enlist the assistance of foreign authorities to obtain evidence abroad, in both civil and criminal cases, is a letter rogatory, also known as a letter of request.

Basically, a letter rogatory is a formal request from one court in which an action is pending, to a foreign court to perform some judicial act. If the foreign court honors the request, it does so based on comity rather than any sort of strict obligation. As this definition suggests, a letter rogatory can usually only be used in a proceeding that has actually commenced, such as in the post-indictment stages of a criminal case or the post-complaint stages of a civil case, but this is not an iron-clad rule.⁷ The route of a letter rogatory is quite circuitous and involves many diverse entities in an uncoordinated process. Typically, a litigant initiates the process by applying to the court before which the particular action is pending for the issuance of a letter rogatory, supporting the application with a set of complicated and formalistic pleadings.

Upon signature by the court, the letter rogatory must be transmitted through diplomatic channels, which involves not only the U.S. State Department but also the foreign ministry of the country involved. The foreign ministry delivers the request to the country's ministry of justice, which in turn delivers it to the foreign court originally contemplated to execute the letter request. If the request is successfully executed, the evidence must retrace the path of the request.

41.05[4] Procedures for Obtaining Assistance by Letters Rogatory

The procedures for utilizing the letters rogatory process, once a prosecutor has secured the court's leave to do so under Federal Rule of Criminal Procedure 15, are not as well defined or standardized as those for obtaining assistance under MLATs, TIEAs, and tax treaties. For example, the channel for sending a "letter request" (the term often employed for a letter rogatory request,

⁷ See, e.g., United Kingdom Evidence (Proceedings in Other Jurisdictions) Act 1975, §§ 1 & 5 (allowing for compulsory process to obtain evidence in the United Kingdom for judicial requests of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted); Evidence Ordinance of Hong Kong, CAP. 8, Part VIII, §§ 75 & 77B (allowing for compulsory process to obtain evidence in Hong Kong for judicial requests of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted or are likely to be instituted if the evidence is obtained); *United States v. Reagan*, 453 F.2d 165, 171-74 (6th Cir. 1971) (affirming district court's issuance of a letter rogatory to court in West Germany even though criminal case was in pre-indictment stage, but noting some contrary authority).

especially for the countries following the common law system) to certain countries is the State Department, as generally described above. However, for certain countries, such as the United Kingdom and Hong Kong, OIA has developed an expedited channel for transmitting letter requests, eliminating certain stopping points along the way of the traditional channel, thereby speeding up the overall process. Also, the form of the letter request can vary according to the country of destination. Thus, the best approach for initiating a letter request is to contact OIA (202-514-0000) and request to speak to the attorney in charge of the country from which assistance is sought.

41.05[5] Problems with the Letters Rogatory Process Generally

While the letter rogatory procedure is the traditional method of obtaining assistance abroad, it is certainly not without its flaws. For example, there is no obligation that the foreign country honor the request; the foreign country's enabling legislation, if any, may not provide any exceptions to that country's bank secrecy laws; there are no mutually agreed upon procedures to ensure that any evidence obtained will be in admissible form; the multiple stages of the process, involving diverse entities, generate serious time delays; and the procedure may not be available at all crucial stages of a proceeding when it may be needed most, *e.g.*, the investigation of a criminal offense. To address these critical problems, law enforcement authorities developed new methods to gather foreign evidence, such as the MLAT.

41.05[6] *Specific Problems with the Letters Rogatory Process When Used in Criminal Tax Cases*

In addition to the problems which afflict the letters rogatory process generally, prosecutors seeking to obtain foreign evidence through this process for tax cases may face a unique roadblock in jurisdictions following the common law tradition of England and Wales.⁸ This possible obstacle is the international rule of comity, the so-called “revenue rule,” that one nation will not directly or indirectly enforce the revenue laws of another nation.⁹

In its most basic form, the revenue rule is that the courts of one country will not enforce a judgment for taxes issued by the court of another country.¹⁰ The rule seems to have originated in two opinions of Lord Mansfield in 1775 and 1779¹¹ However, the modern bedrock of the rule seems to be the House of Lords’ decision in *Government of India v. Taylor* [1955] A.C. 491 (H.L.) (hereinafter *India v. Taylor*),¹² where the tax authorities of India sued to collect moneys in the United Kingdom based on a tax judgment issued by an Indian court. While most common law jurisdictions, including the United States, seem to accept this basic form of the rule as elementary and without dispute,¹³ its application beyond this realm has varied.¹⁴ In one of its broader forms,

⁸ The number of countries that follow the English common law tradition is quite large, since both the present and former dependencies of the United Kingdom generally fall into this category. For example, the judiciaries of the Bahamas, Singapore, the Cayman Islands, and Hong Kong continue to regard English judicial precedents as highly persuasive.

⁹ What constitutes “indirect” enforcement of another nation’s revenue laws was addressed in *Pasquantino v. United States*, 544 U.S. 349, 359-70 (2005). The Supreme Court reviewed the history of the revenue rule in the course of concluding that the rule did not bar the United States from prosecuting the defendants for wire fraud in connection with a scheme to evade Canadian liquor importation taxes. *Id.*

¹⁰ *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1162-63 (9th Cir. 1979) (hereinafter *Gilbertson*).

¹¹ See *Gilbertson*, 597 F.2d at 1164.

¹² For authorities relying primarily on *India v. Taylor*, see, e.g., *State of Norway’s Application* [1987] 1 Q.B. 433, 445-46 (C.A.); *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Home Secretary* [1988] 1 W.L.R. 1204, 1207, 1214-15; see also *United States v. First Nat’l City Bank*, 379 U.S. 378, 395-96 & n.16 (1965) (Harlan, J., dissenting on other grounds).

¹³ See, e.g., *First Nat’l City Bank*, 379 U.S. at 396; *Gilbertson*, 597 F.2d at 1163-66.

¹⁴ See, e.g., *R. v. Chief Metropolitan Stipendiary Magistrate* [1988] 1 W.L.R. at 1207, 1214-15 (distinguishing permissible extradition of a Norwegian national for tax-related charges from impermissible assistance in the recovery of taxes for a foreign state). Also compare dicta in *State of Norway’s Application* [1987] 1 Q.B. at 448 (stating that simply providing evidence to another state for its civil determination of a tax liability is the enforcement, albeit indirect, of another state’s revenue laws) with *Re Request for International Judicial Assistance*, 102 D.L.R.3d 18, 38 (Can. 1979) (rejecting broader application of rule and stating that granting assistance to United States in criminal tax case is not tantamount to the collection of taxes for that state).

the rule prohibits one country from granting another country's request for information or evidence for any tax-related proceeding in the requesting country, in either a civil¹⁵ or criminal¹⁶ matter.

Until the decision was overturned, there had been serious fallout from the decision of the Court of Appeal of England and Wales in *In re State of Norway's Application* [1987] 1Q.B. 433 (C.A.), where that court construed the rule to operate in the broader sense. Thus, England and Wales and the common law countries that follow English and Welsh legal precedent were rejecting the letter rogatory requests of tax authorities based on the *dicta* in that decision. Fortunately for United States prosecutors seeking foreign evidence in tax cases, the House of Lords, the highest court of the United Kingdom, reversed the Court of Appeal in *In re State of Norway's Application* [1989] 1A.C. 723 (H.L.) (consolidated appeals and cross appeals), holding that simply providing evidence to another state for that state to use to enforce its revenue laws does not constitute the direct or indirect enforcement of another state's revenue laws. This decision should dramatically enhance mutual assistance from countries following English Common Law in civil and criminal tax cases, especially between governmental authorities.

41.06 USING COMPULSORY MEASURES TO OBTAIN FOREIGN EVIDENCE

41.06[1] Background

The United States tax authorities do not always have an effective mutual assistance means available to them for obtaining evidence abroad. Even if an MLAT or income tax treaty is in force, it may be so restricted in coverage as to be of little or no use.¹⁷ Thus, the United States may have to resort to unilateral action, such as a subpoena, to obtain the needed evidence. This Section explores the various types of unilateral compulsory process that can be directed at obtaining foreign-based evidence.

¹⁵ *State of Norway's Application* [1987] 1 Q.B. at 445-46.

¹⁶ *In re the Criminal Proceedings before the U.S. District Court for the District of Kansas Concerning Marcel Samuel Lambert and Arloho Mae Pinto*, No. 962 (Bahamas Sup. Ct. 1986).

¹⁷ TIEAs are a different matter. The United States will not enter into a TIEA that does not provide for the exchange of information in all civil and criminal tax cases, a policy that it has now extended to new tax treaties.

41.06[2] The Use of Subpoenas or Summonses to Obtain Foreign Evidence Directly

One form of process used by government attorneys to obtain evidence abroad is the subpoena power applied directly to a domestically based entity having some relationship to the foreign-based entity holding the records.¹⁸ If a Department of Justice attorney or an Assistant United States Attorney wants to use a grand jury or criminal trial subpoena to obtain evidence located in a foreign country, the prosecutor must obtain the concurrence of the OIA, Criminal Division, before both issuing and enforcing the subpoena.¹⁹ In determining whether to concur in such actions, OIA considers the following factors: (1) the availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory; (2) the indispensability of the records to the success of the investigation or prosecution; and (3) the need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.²⁰ Once the concurrence of OIA to issue and enforce a subpoena for foreign records has been obtained, the prosecutor will then be required to plead a so-called comity analysis, and the enforcement court will be required to balance the comity factors in favor of the government before the subpoena can be properly enforced.²¹

¹⁸ See, e.g., *In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817, 821, 832-33 (11th Cir. 1984); *In re Marc Rich & Co., A.G.*, 736 F.2d 864, 867 (2d Cir. 1984); *Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667-68 (2d Cir. 1983); *In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384, 1385-86 (11th Cir. 1982); *In Re Grand Jury 81-2*, 550 F. Supp. 24, 27 (W.D. Mich. 1982); cf. *United States v. First Nat'l Bank*, 699 F.2d 341, 342-43 (7th Cir. 1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1285-86 (9th Cir. 1981); *Garpeg, Ltd. v. United States*, 588 F. Supp. 1240, 1242-43 (S.D.N.Y. 1984); *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080, 1083-87 (S.D.N.Y. 1984); *Garpeg, Ltd. v. United States*, 583 F. Supp. 789, 791 (S.D.N.Y. 1984); *United States v. Toyota Motor Corp.*, 561 F. Supp. 354, 355-56, 358 (C.D. Cal. 1983); *S.E.C. v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 112 (S.D.N.Y. 1981); but see *In Re Sealed Case*, 825 F.2d 494, 497-99 (D.C. Cir. 1987).

¹⁹ [USAM 9-13.525](#) (September 1997).

²⁰ [USAM 9-13.525](#); [Criminal Resource Manual 279](#).

²¹ To resolve jurisdictional conflicts that may arise from an order for the production of foreign documents, U.S. courts apply the so-called comity analysis under Section 442(1)(c) of the Restatement (Third) of Foreign Relations Law of the United States (1987). See *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 543-44 & n.28 (1987); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474-79 (9th Cir. 1992).

Section 442(1)(c)

of The Restatement (Third) of Foreign Relations Law provides as follows:

41.06[3] The Use of Subpoenas to Obtain Testimony of a Nonresident Temporarily in the United States

Prosecutors assisting federal grand juries in their investigations can subpoena critical witnesses, such as foreign bankers, who are temporarily found in the United States.²² United States courts have held that the principle of comity between nations does not require one state to relinquish its compulsory process on a potential witness temporarily within that state, simply because his testimony may subject him to criminal prosecution in the other state.²³ Furthermore, such a witness must produce documentary evidence notwithstanding claims that the attorney-client relationship of the other state is broader than that of the jurisdiction issuing the subpoena.²⁴

41.06[4] The Use of Compelled Directives to Obtain Disclosure of Financial Matters Covered by Foreign Secrecy Laws

Prosecutors can obtain court orders compelling an account holder to direct a foreign bank or other institution to disclose to the prosecutor matters protected by foreign financial secrecy laws.²⁵ The Supreme Court has ruled that an order directing an account holder to sign a hypothetically-

In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; *the availability of alternative means of securing the information*; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. (Emphasis added.)

The Third Restatement of Foreign Relations Law of the United States introduced “the availability of alternative means of securing the information” as a factor in comity analysis. Accordingly, the courts will now inquire into whether mutual assistance alternatives to subpoenas exist, before ordering enforcement. See *Richmark*, 959 F.2d at 1475-76.

²² See, e.g., *United States v. Bowe*, 694 F.2d 1256, 1258 (11th Cir. 1982); *In Re Grand Jury Proceedings (United States v. Field)*, 532 F.2d 404, 409 (5th Cir. 1976).

²³ *In Re Grand Jury Proceedings (United States v. Field)*, 532 F.2d at 407.

²⁴ *Bowe*, 694 F.2d at 1258.

²⁵ See, e.g., *Doe v. United States*, 487 U.S. 201, 215-18 (1988); *United States v. Lehder-Rivas*, 827 F.2d 682, 683 (11th Cir. 1987); *In Re N.D.N.Y. Grand Jury Subpoena #86-0351-S*, 811 F.2d 114 (2d Cir. 1987); *United States v. Davis*, 767 F.2d 1025, 1039-40 (2d Cir. 1985); *In Re Grand Jury Proceedings, Western District of Louisiana (Juan A. Cid)*, 767 F.2d 1131, 1132-33 (5th Cir. 1985); *United States v. Ghidoni*, 732 F.2d 814, 818-19 (11th Cir. 1984); but see *In Re ABC Ltd.*, 1984 CILR 130 (Grand Court of the Cayman Islands, 1984).

framed disclosure directive does not violate his Fifth Amendment privilege against self-incrimination.²⁶

Foreign courts have had mixed reactions to these directives. A court of the Cayman Islands, a dependency of the United Kingdom, has held that such compelled disclosure directives do not constitute voluntary and freely given consent for disclosure as required under the secrecy laws of that jurisdiction.²⁷ For other countries that do not have such stringent secrecy statutes and that follow the English and Welsh common law, there is authority that such disclosure directives do constitute valid consent under the common law duty of a banker to keep the financial affairs of an account holder confidential.²⁸

Prosecutors have enjoyed widespread success in using *compelled* disclosure directives to obtain financial records from most countries, and, indeed, have used *voluntary* disclosure directives to gather financial records from virtually every country. The use of disclosure directives is preferred over the use of compulsory process directed against U.S.-based branches or offices of financial institutions to obtain financial records located abroad, because using disclosure directives involves no real jurisdictional conflicts (except when seeking evidence in countries like the Cayman Islands) and lessens the inclination of most foreign countries to block production of the evidence.

41.06[5] The Use of Subpoenas Issued to United States Citizens or Residents Abroad

Prosecutors can also use compulsory process to obtain documents or testimony from U.S. citizens or residents located in foreign countries.²⁹ Thus, federal law enforcement attorneys may issue court-ordered subpoenas to any such individuals in any federal proceedings, criminal or civil, under the provisions of 28 U.S.C. § 1783 and seek sanctions under 28 U.S.C. § 1784 if there is any failure to appear or produce documents.

²⁶ *Doe v. United States*, 487 U.S. at 206-218.

²⁷ *In Re ABC Ltd.*, 1984 CILR 130, 134-35 (Grand Court of the Cayman Islands, 1984).

²⁸ *Tournier v. Nat'l Provincial & Union Bank* [1924] 1 K.B. 461 (C.A.).

²⁹ 28 U.S.C. §§ 1783-84.

41.06[6] Jurisdictional Conflicts Arising from the Use of Certain Unilateral Measures

The use of certain of these unilateral measures, especially the subpoenas on domestic financial institutions for foreign-based records, is controversial and leads to protracted litigation that often fails to secure the intended result. Indeed, these jurisdictional controversies led the Justice Department to adopt [§ 9-13.525 of the United States Attorneys' Manual \(USAM\)](#), which requires the concurrence of OIA for both the issuance and enforcement of such subpoenas in Department criminal matters. When U.S. authorities resort to the enforcement of such subpoenas, they encounter strong opposition from many different quarters. For example, the financial institutions served with process typically resist strenuously and raise every possible issue for resolution, including the bedrock of their position, the jurisdictional conflict between the laws of the two countries involved. Even when these institutions suffer an adverse decision of the U.S. courts, they often choose to be subject to sizeable contempt sanctions rather than produce the subpoenaed or summonsed records. *See, e.g., In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384, 1391 (11th Cir. 1982) (affirming district court's imposition of contempt sanctions on foreign bank where bank failed to comply with subpoena). Officials of foreign jurisdictions also object to the use of these measures by, *inter alia*, instructing their foreign ministries to complain to the U.S. State Department, entering *amicus* appearances in the protracted litigation, and sometimes directing their own law enforcement authorities to take blocking measures, which may include the seizure of the foreign-based records to thwart production.³⁰ Needless to say, production of the evidence sought by the use of certain of these unilateral measures is not a foregone conclusion.

At all events, as mentioned above, before a *Bank of Nova Scotia*-type subpoena can be authorized by the Criminal Division (*see* [USAM., Section 13.525](#) or enforced by a district court, a prosecutor will need to establish that no alternative methods exist for obtaining the foreign records sought.

³⁰ *See, e.g., In re Marc Rich & Co., A.G.*, 736 F.2d 864, 866 (2d Cir. 1984).

**41.07 SUSPENSION OF STATUTE OF LIMITATIONS: OFFICIAL REQUEST FOR
FOREIGN EVIDENCE**

Criminal tax prosecutions increasingly involve the use of evidence obtained from foreign sources. Section 3292 of Title 18 provides for the suspension of the statute of limitations to permit the United States to obtain foreign evidence. This statute provides, in pertinent part:

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

.....

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) the total of all periods of suspension under this section with respect to an offense--

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

18 U.S.C. § 3292.

Letters rogatory, requests under a treaty or convention, or any other request made by a court or law enforcement authority of the United States will qualify as an “official request.” 18 U.S.C. § 3292(d). The statute does not require that the “request expressly list by citation the alleged statutory violations in order for a foreign evidence request to pass muster under 18 U.S.C. § 3292.” *United States v. Neill*, 952 F. Supp. 831, 832 (D.D.C. 1996).

While the maximum period for which the statute of limitations may be suspended for an offense is three years, the period begins to run when the government requests evidence from a

foreign government. “[T]he starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 motion is made or granted.” *United States v. Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995).

Likewise, the period ends when the foreign court or authority takes final action on the request. *See Bischel*, 61 F.3d at 1434 (“[F]inal action’ for purposes of § 3292 means a dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity of those records, as both were identified in the ‘official request.’”). The government’s satisfaction with the evidence provided is not determinative of whether there has been a final action. “[W]hen the foreign government believes it has completed its engagement and communicates that belief to our government, that foreign government has taken a ‘final action’ for the purposes of § 3292(b).” *United States v. Meador*, 138 F.3d 986, 992 (5th Cir. 1998). Such a communication from a foreign government does not preclude further inquiry by the United States. “If dissatisfied with a dispositive response from a foreign authority, the prosecutor need only file another request and seek a further suspension of the limitations period, subject to the ultimate three-year limitation on the suspension period.” *Id.* at 993 (footnote omitted).

Note that the Eleventh Circuit found in *United States v. Trainor*, 376 F.3d 1325, 1327 (11th Cir. 2004), that an unsworn application accompanied by only a copy of the evidentiary request sent to the foreign government does not satisfy § 3292. The statute requires the government to demonstrate, by a preponderance of the evidence, that evidence concerning the charged offense reasonably appears to be located in the foreign country. 376 F.3d at 1327. In essence, the court in *Trainor* found that the statute contemplated the submission of factual information, under oath or otherwise verified, that supported the two findings required to be made by the court -- (1) that an official request has been made to a foreign government for evidence (within the statutory period); and (2) that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, located in the foreign country. (The Solicitor General decided against further review.)³¹ A copy of the *Trainor* Memorandum and a sample declaration in support of the suspension of the running of the statute of limitations, motion to suspend the running of the statute

³¹While we are not aware of any challenges to applications under the Speedy Trial Act, 18 U.S.C. § 3161(h)(9), for the exclusion of time when an official request to obtain foreign evidence has been made, language of this provision is virtually identical to that of § 3292. Accordingly, we would urge that a declaration or sworn affidavit be used with all applications under § 3161(h)(9) as well.

of limitations, and order suspending the statute of limitations can be found in the Appendix to this Chapter.

41.08 CONCLUSION

New law enforcement treaties and agreements are continually being negotiated and concluded by the various responsible authorities. Accordingly, new means for obtaining foreign evidence may appear on the horizon following publication of this analysis. For further details regarding the matters set forth herein, or for developments following publication, contact Thomas Sawyer, Senior Counsel for International Tax Matters, Tax Division, Department of Justice, at (202) 514-8128.

APPENDIX



U.S. Department of Justice

Tax Division

EJO' C:REL

Washington, D.C. 20530

November 17, 2004

MEMORANDUM

To: The Chiefs, Criminal Enforcement Sections, for
Distribution to all Criminal Enforcement Attorneys

From: Robert E. Lindsay
Chief, CATEPS

Re: Final Advice re Tolling the Statute of Limitations
under 18 U.S.C. 3292 and 3161 - The *Trainor* Decision

On September 29, 2004, I issued a memorandum is to give interim advice regarding the Court of Appeals decision in United States v. Trainor, 376 F.3d 1325 (11th Cir. 2004). This decision has significant ramifications, i.e., the dismissal of indictments, for federal prosecutors seeking to toll the statute of limitations (SOL) under 18 U.S.C. 3292 ¹ (and, indeed, 18

¹18 U.S.C. 3292 provides as follows:

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(continued...)

U.S.C. 3161(h)(9)) pending the execution of an official request for evidence located in a foreign country. The purpose of this memorandum is to pass on the final advice on this matter given that the Office of International Affairs (OIA), Criminal Division. As was the case for my interim advice, this final advice should be considered for cases where no application or motion under Section 3292 has yet been filed, as well as cases where, even if such pleadings have been filed, there has not yet been an indictment. OIA's final advice and my interim advice are entirely consistent.

OIA has issued the following final advice re Trainor:

Attached are model pleadings to be used when making application to the court to toll the statute of limitations based upon an official U.S. request to obtain foreign evidence (18 U.S.C. § 3292). The application, declaration and order are drafted to conform to the ruling of the Eleventh Circuit in *United States v. Trainor*, 376 F.3d 1325 (11th Cir. 2004), which found that an unsworn application accompanied by only a copy of the evidentiary request sent to the foreign government does not satisfy § 3292 which requires the Government to demonstrate, **by a preponderance of the evidence**, that evidence concerning the charged offense reasonably appears to be located in the foreign country. 376 F. 3d at 1327. In essence, the court in *Trainor* found that the statute contemplated the submission of factual information, **under oath or otherwise verified**, that supported the two findings required to be made by the court: (1) that an official request has been made to a foreign government for evidence (within the statutory period); and (2) that it reasonably appears, or reasonably appeared at the time the

¹(--- continued)

(c) The total of all periods of suspension under this section with respect to an offense--

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

request was made, that such evidence is, or was, located in the foreign country. (The Solicitor General decided against further review.) These pleadings are consistent with the recommendations sent to all Coordinators following the initial district court decision. *United States v. Trainor*, 277 F.Supp2d. 1278 (S.D.Fl. 2003), (Coordinator Update E-004, August 5, 2003). The declaration and any attachments, filed with the application, would clearly constitute evidence for the court's consideration.

While we are not aware of any challenges to applications under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(9), asking for the exclusion of time when an official request to obtain foreign evidence is made, language of this provision is virtually identical to that of § 3292. We would urge that a declaration or sworn affidavit be used with all applications under § 3161 (h)(9) as well.

Please ensure that your office is aware of the ruling in *Trainor*, and that a declaration or sworn affidavit is used when seeking relief under these statutes. Andy Levchuk[(202) 353 3622] in OIA can provide assistance if needed.

UNITED STATES DISTRICT COURT
DISTRICT OF _____

IN RE: GRAND JURY INVESTIGATION

MISC. NO.

**[investigation
number]**

DECLARATION IN SUPPORT OF APPLICATION FOR
SUSPENSION
OF RUNNING OF THE STATUTE OF LIMITATIONS

I, KENNETH JONES, state the following:

1. I am an Assistant United States Attorney for the _____ of _____, and I submit this Declaration in support of the accompanying application pursuant to 18 U.S.C. § 3292 to suspend the running of the statute of limitations for offenses arising out of this district's Grand Jury investigation of **[potential defendant(s)]**.

2. My colleagues _____ and I have been conducting the investigation of the above-mentioned individual(s)/entities for the following offenses: **[list charges with statutory references]**. No

indictment has been returned by the Grand Jury.

3. I believe that evidence of the offenses presently being investigated is located in a foreign jurisdiction, specifically _____. The investigation to date has revealed **[brief account of the facts of the case. The facts should provide a**

reasonable basis for believing that there is evidence in a foreign jurisdiction.]

4. Based on the above, and at the request of my office, on *[date official request was made]*, the United States Department of Justice Office of International Affairs made an official request for legal assistance in obtaining evidence from the Central Authority of *[Requested State]*, *[under the mutual legal assistance treaty between the United States of America and the [Requested State]]*. The request is being incorporated herein by reference and is attached hereto as Attachment #____ *[If you do not wish to attach the entire request, you may simply attach and reference the OIA transmittal letter].*

5. To date, [the Requested State] has not provided a response to the Department of Justice.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____

Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF _____

IN RE: GRAND JURY INVESTIGATION

MISC. NO.

[*investigation name or number*]

EX PARTE MOTION TO SUSPEND THE
RUNNING OF STATUTE OF LIMITATIONS

The United States of America, by and through its undersigned attorneys, applies to this Court pursuant to Title 18, United States Code, Section § 3292, to suspend the running of the statute of limitations for offenses arising out of the Grand Jury's investigation of **[*potential defendant(s)*]**. In support of this application, the government represents the following:

1. A Grand Jury duly impaneled in this District has been

conducting an investigation of **[*potential defendant(s)*]** for the following possible criminal offenses:**[*list charges with statutory references*]**. No indictment has been returned.

2. Title 18, United States Code, Section 3292(a)(1), provides

as follows:

Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

3. Section 3292(d) defines an "official request" to include "a request under a treaty or convention" or a request by "an authority of the United States having criminal law enforcement responsibility" to an "authority of a foreign country."

4. As described in the Declaration of [the undersigned Assistant United States Attorney or Special Agent _____], attached as Exhibit A and incorporated herein, the investigation to date has revealed that *[give brief account of the facts of the case - summary of that contained in the declaration. The facts in the declaration should provide a "reasonable basis" for believing that there is evidence in a foreign jurisdiction.]* Based on the above, it reasonably appears that evidence of the above offenses is located in _____ *[A table may be useful in complex cases involving several foreign jurisdictions].*

5. On *[date official request was made]*, the Office of International Affairs of the United States Department of Justice made an official request for legal assistance in obtaining evidence from the Central Authority of *[Requested State]*, under the Treaty between the United States of America and the *[Requested State]* on Mutual Assistance in Criminal Matters. *[Or by letters rogatory issued by a court or by letter of request. Again, in the case of multiple requests, a table may*

be useful]. A copy of the letter transmitting the request is attached hereto as Exhibit B. [OIA recommends against attaching the request itself. The statute does not require it and the facts set forth in the request may go far beyond the conduct that is ultimately the basis for the indictment.]

WHEREFORE, based on the above, this Court should allow the government's application for a suspension of the statute of limitations in accordance with the time limits set forth in Section 3292(c).

Respectfully

submitted, JANE SMITH
United States Attorney

By: _____
Kenneth Jones
Assistant U.S. Attorney

Dated
:

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

IN RE: GRAND JURY INVESTIGATION

MISC. NO. _____

[investigation name or number]

ORDER GRANTING EX PARTE APPLICATION FOR
SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS

Based on the Application submitted by the United States of America, and the accompanying Declaration of Assistant U.S. Attorney _____, the Court makes the following findings:

1. A duly impaneled Grand Jury in this District is conducting an investigation of ***[potential defendants]*** for the following offenses: ***[list charges with statutory references]***.

2. The United States has filed an *ex parte* Application for an order suspending the statute of limitations in accordance with the provisions of Title 18, United States Code, Section 3292.

3. The Application is accompanied by the Declaration of

Assistant U.S. Attorney _____, sworn to
on _____

which summarizes the relevant facts uncovered during the course
of the investigation.

4. It reasonably appears, based on a preponderance of
evidence presented to the Court, that evidence of the offense(s)
under investigation is located in _____;

5. It further appears, based on a preponderance of evidence
presented to the Court, that an official request, as defined in
18 U.S.C. § 3292(d), was made to the Central Authority of
_____ by the Office of International Affairs, United
States Department of Justice, on _____;

BASED ON THE ABOVE, IT IS HEREBY ORDERED that the
government's *Ex Parte* Application for Suspension of the Running
of the Statute of Limitations is hereby GRANTED; and

IT IS FURTHER ORDERED that the running of the statute of
limitations for the offenses set forth in the government's *ex
parte* application is hereby SUSPENDED for the period indicated in
18 U.S.C. § 3292(c).

U.S. District Judge

