



Federal Judges Association

FEDERAL JUDGES ASSOCIATION

UNITED STATES OF AMERICA

Third Study Commission Questionnaire 2023

Taiwan

- 1. Does your country have any legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year—mutual cooperation in the investigation of criminal cases and in the presentation of evidence in criminal proceeding at court. Please explain.**

The United States provides mutual cooperation in the investigation of criminal cases through the enactment of Mutual Legal Assistance Treaties in Criminal Matters (MLATs).¹ MLATs are treaties that allow law enforcement authorities and prosecutors to obtain evidence, information, and testimony abroad in a form that respect, the sovereignty of the courts of both nations.² Since 1993, the United States has enacted over 90 MLATs.³

The Office of International Affairs, an office in the Criminal Division of the U.S. Department of Justice, is the implementing body of the MLATs.⁴ The Office assists state and federal prosecutors and other law enforcement authorities in making requests for information and evidence abroad.⁵

Moreover, MLATs require the Requested State to provide the Requesting State with assistance or evidence such as documents, records, and testimony, given the requirements of the treaty are satisfied.⁶ The process requires a “Central Authority” within each country to facilitate the execution of requests for evidence intended for use in criminal investigations, prosecutions, and related proceedings.⁷

Separately, the United States also participates in the following programs: International Trade of Prisoners, extraditions, and Interpol red notices.⁸ 18 U.S. Code §§ 4100-4115 governs the International Trade of Prisoners.⁹ The United States transfers prisoners between countries through treaties.¹⁰ Transfers are negotiated by the U.S. Department of State; the program is administered by the U.S. Department of Justice.¹¹

Additionally, the Secretary of State is the U.S. official responsible for initially determining whether to entertain an extradition.¹² Pursuant to 18 U.S. Code §§ 3186 and 3188, the Secretary makes this determination after a **U.S. Magistrate or District Court Judge** issues a certification of extradition finding that the fugitive's extradition would be lawful under the extradition treaty and is in accordance with applicable U.S. law.¹³

Moreover, the United States recognizes the Interpol Red Notice system, an international "lookout" and arrest warrant system.¹⁴ In the event of an arrest of a fugitive, pursuant to a Red Notice, the United States Attorney's office is obligated to issue documentation in compliance with the arresting country's domestic law and/or existing extradition treaty.¹⁵

Finally, the United States abides by the following multilateral conventions providing for mutual legal assistance to which the United States is a party¹⁶:

- Council of Europe
 - o The Council of Europe Convention on Cybercrime (the Budapest Convention), entered in force for the United States on January 1, 2007.
- Organization of American States
 - o The Inter-American Convention on Mutual Assistance in Criminal Matters (the OAS MLAT) entered in force for the United States on June 24, 2001.

- Organization for Economic Cooperation and Development
 - o The Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions, entered in force for the United States on February 15, 1999.

- United Nations
 - o The Convention Against Corruption (UNCAC) entered in force for the United States on November 29, 2006.
 - o The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Vienna Convention) entered in force for the United States on November 11, 1990.
 - o The Convention Against Transnational Organized Crime (UNTOC) entered in force for the United States on December 3, 2005.
 - o The International Convention for the Suppression of the Financing of Terrorism entered in force for the United States on July 26, 2002.

2. In your country, when a crime is being investigated does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

The United States Judiciary does not play a significant role in the request for information from a foreign state or in providing information to a foreign state during a criminal investigation. International relations such as mutual cooperation or information sharing are within the duties of the Department of Justice and Department of State.¹⁷ Foreign nations' requests for information may be achieved by seeking a Letter Rogatory or through existing treaties.¹⁸ As a signee of the *Hague Evidence Convention*, the United States accepts Hague Evidence requests from participating nations.¹⁹

Letters rogatory and Hague evidence requests are very similar. They are requests from courts in one country to the courts of another country.²⁰ Requests may include performances of acts such as obtaining evidence, testimony, or other relevant documentation.²¹ These requests are subject to review and must only be granted in accordance with the laws of the country where the evidence is located.

Finally, the United States Securities and Exchange Commission (“SEC”), a regulatory agency founded to ensure fair economic practices, utilizes bilateral and multilateral cooperation agreements in evidence sharing.²² The SEC, along with more than 100 global securities regulators, signed the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding, which streamlines information-sharing among securities regulators.²³

3. If your answer to either 2 (a) or 2 (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?

As stated in question number two, the United States Federal Judiciary does not play a significant role in the initial request for information for an investigation in a criminal matter.

4. What is the legislation or court rules that relate to the taking of evidence from a witness in a foreign state, or the giving of evidence from a witness in your country to a court in a foreign country? Please explain these including the role played by a judge in both scenarios.

The United States federal judiciary is instrumental in the taking of evidence from a witness in the United States to a court in a foreign country. The District Court may order a person who either “resides” or “is found” in the court’s district to “give testimony or statement or to produce a document or other thing found in a proceeding in a foreign or international tribunal.”²⁴ The sending of information to foreign states from the United States judiciary is governed by 28 U.S. Code §1782- Assistance to foreign and international tribunals And to litigants before such tribunals.²⁵

Additionally, the United States Federal Rules of Civil Procedure apply to obtaining evidence to provide to foreign states.²⁶ The Rules allow the District Courts to receive testimony and other evidence from a person who resides or is found in their District to assist foreign courts.

District court Judges also consider four other factors in § 1782 petitions: “(1) whether the evidence sought is within the foreign tribunal’s jurisdictional reach, and thus accessible absent section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; (4) and whether the subpoena contains unduly intrusive or burdensome requests.”²⁷

Numerous international agreements also inform the United States processes for taking evidence from witnesses including: Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 as well as the Inter-American Convention on Letters Rogatory and Additional Protocol.²⁸ These treaties supplement existing MLATs and aid in accelerating the information exchange process.

- 5. As a judge, if you receive a request for assistance from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), is it relevant to your determination of whether and how to assist that the basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected? Please explain.**

When acting in any capacity as a United States Federal Judge, it is paramount to uphold the principles founded in the United States Constitution. The federal judiciary is established in Article III of the U.S. Constitution and serves as defender of the Constitution. The federal judiciary garnered this name as, “their rulings protect rights and liberties guaranteed by the Constitution.”²⁹ Thus, in assisting another nation, evidence that exists from a prosecution in the

United States, is only provided when the evidence was produced in accordance with the laws of the United States and protections afforded by the United States Constitution. As noted above, the United States honors these civil rights and liberties through the adoption of numerous multilateral treaties regarding human rights.³⁰

- 6. Describe your own personal experiences as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.**

Although I have been a United States District Judge (trial court) for over 21 years and a state trial judge for 8.5 years prior, rarely have I been assigned a foreign request for documents, evidence, or witness testimony. I have, however, presided over a Hague Convention Custody case. And later, I presided over a series of related trade secrets cases filed in the United States federal courts seeking discovery originally sought in the same parties' German litigation. Several actions pursuant to 28 U.S. Code § 1782 were filed in my court as well as two other district courts against third parties. It was clear that the parties were engaged in forum shopping, but it was true that the German litigation was based on the same claims and evidence as my original case. As the parties engaged in several years worth of discovery (document requests, witness depositions, and expert evidence), including interlocutory appeals, the German litigation proceeded. The German Judge made it clear to the parties that evidence adduced in the United States' related litigation would be welcome in its own case. My direct contact with the German Judge was brief, pleasant, and appropriate. Discovery here can be helpful for foreign litigation.

¹ U.S. Department of Justice, Off. of International Affairs, “Mutual Legal Assistance Treaties of The United States (MLATs)” (2022), <https://www.justice.gov/criminal-oia/file/1498806/download>, (last accessed 13 July 2023).

² *Id.*

³ *Id.*

⁴ See Federal Judicial Center International Litigation Guide, “Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges” (last accessed 12 July 2023); Criminal Resource Manual, § 274, <https://www.justice.gov/archives/jm/criminal-resource-manual-274-methods> (last accessed 12 July, 2023).

⁵ U.S. Department of Justice, Off. of International Affairs, ‘Frequently Asked Questions Regarding Evidence Located Abroad’, <https://www.justice.gov/criminal-oia/frequently-asked-questions-regarding-evidence-located-abroad>, (last accessed 12 July, 2023).

⁶ *Id.*

⁷ *Id.*

⁸ See Interpol, “Notices”, <https://www.interpol.int/How-we-work/Notices>, (last accessed 13 July 2023); U.S. Department of Justice, Justice Manual, Title 9: Criminal, 9-15.635, Interpol Red Notices, <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.650> (last accessed 13 July 2023); U.S. Department of Justice, Justice Manual, Title 9: Criminal, 9-15.000, International Extradition and Related Matters, <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.650>, (last accessed 13 July, 2023); U.S. Department of Justice, International Prisoner Transfer Program, <https://www.justice.gov/criminal-oia/iptu> (last accessed 13 July 2023).

⁹ 18 U.S. Code §§ 4100-4115; See U.S. Department of Justice, International Prisoner Transfer Program, <https://www.justice.gov/criminal-oia/iptu> (last accessed 13 July 2023).

¹⁰ See U.S. Department of Justice, International Prisoner Transfer Program, <https://www.justice.gov/criminal-oia/iptu> (last accessed 13 July 2023).

¹¹ See *Id.*

¹² See U.S. Department of Justice, Off. of International Affairs, “Frequently Asked Questions Regarding Evidence Located Abroad”, <https://www.justice.gov/criminal-oia/frequently-asked-questions-regarding-evidence-located-abroad>, (last accessed 12 July 2023); See also U.S. Department of Justice, Justice Manual, Title 9: Criminal, 9-

15.000, International Extradition and Related Matters, <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.650>, (last accessed 13 July 2023).

¹³ See 18 U.S. code §§ 3186 and 3188.

¹⁴ See Interpol, “Notices”, <https://www.interpol.int/How-we-work/Notices>, (last accessed 13 July 2023);

Department of Justice, Justice Manual, Title 9: Criminal, 9-15.635, Interpol Red Notices, <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.650> (last accessed 13 July 2023).

¹⁵ U.S. Department of Justice, Justice Manual, Title 9: Criminal, 9-15.635, Interpol Red Notices, <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.650> (last accessed 13 July 2023).

¹⁶ U.S. Department of Justice, Off. of International Affairs, “Mutual Legal Assistance Treaties of The United States (MLATs)” (2022), <https://www.justice.gov/criminal-oia/file/1498806/download>, (last accessed 13 July 2023).

¹⁷ See U.S. Department of Justice, Off. of International Affairs, “Frequently Asked Questions Regarding Evidence Located Abroad”, <https://www.justice.gov/criminal-oia/frequently-asked-questions-regarding-evidence-located-abroad>, (last accessed 12 July 2023); See also U.S. Department of Justice, Off. of International Affairs, “Mutual Legal Assistance Treaties of The United States (MLATs)” (2022), <https://www.justice.gov/criminal-oia/file/1498806/download>, (last accessed 13 July 2023).

¹⁸ See 22 CFR §§ 92.54; see also 28 U.S. Code § 1782.

¹⁹ See Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>, (last accessed 13 July 2023).

²⁰ U.S. Department of Justice, Off. of International Affairs, “Mutual Legal Assistance Treaties of The United States (MLATs)” (2022), <https://www.justice.gov/criminal-oia/file/1498806/download>, (last accessed 13 July 2023).

²¹ *Id.*

²² U.S. Securities and Exchange Commission, About the Office of International Affairs, <https://www.sec.gov/oia/Article/oia-about.html> (last accessed 12 July 2023).

²³ U.S. Securities and Exchange Commission, “SEC’s Cooperative Arrangements with Foreign Regulators”, https://www.sec.gov/about/offices/oia/oia_coopfactsheet.htm (last accessed 13 July 2023).

²⁴ See 28 U.S. Code § 1782.

²⁵ *See id.*

²⁶ *See id.*

²⁷ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004)

(creating the *Intel* factors that give district court judges broad discretion to release discover evidence to foreign entities).

²⁸ *See* Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,

<https://www.hcch.net/en/instruments/conventions/full-text/?cid=82>, (last accessed 13 July 2023); *see also* Inter-

American Convention on Letters Rogatory, <http://www.oas.org/juridico/english/treaties/b-36.html>, (last accessed 12 July 2023).

²⁹ U.S. Courts, ‘Understanding the Federal Courts’ at 1, <https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf>, (last accessed 13 July 2023).

³⁰ *See* UN Treaty Collection, Chapter IV: “Human Rights”

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en (last accessed 13 July 2023); United Nations, Signature and Ratification Status: UNCAC,

<https://www.unodc.org/unodc/en/corruption/ratification-status.html>, (last accessed 13 July 2023).