

20 January 2017

*Practice Group:**Government
Enforcement*

Lifting the Veil on the MLAT Process: A Guide to Understanding and Responding to MLA Requests

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Prosecutors seeking information located in a foreign country are increasingly turning to a little known but very powerful tool: the Mutual Legal Assistance Treaty (“MLAT”). MLATs are bilateral agreements that effectively allow prosecutors to enlist the investigatory authority of another nation to secure evidence — physical, documentary, and testimonial — for use in criminal proceedings by requesting mutual legal assistance (“MLA requests”). Using MLA requests, U.S. attorneys can subpoena testimony from individuals in Japan, obtain documentary evidence from India, access electronic records in the United Kingdom, and acquire an executive’s hard drive from Brazil. On the flipside, every one of those nations (and 61 others) has the same ability to request testimony, data, documents, and items inside the United States.

Perhaps because MLATs are unabashedly one-sided, offering no assistance to defendants involved in cross-border investigations, many attorneys are unfamiliar with the MLAT process. Nevertheless, for prosecutors in a world that is increasingly connected across international boundaries, MLA requests are steadily becoming more important as the number of international criminal prosecutions increases. In-house counsel facing the possibility of international investigations should, therefore, become knowledgeable about — and seek outside counsel familiar with — MLA requests. This article explains the MLAT process, identifies key provisions in MLATs, and suggests that, where possible, the best strategy for handling an MLA request may be cooperation.

MLATs and the MLAT Process

The United States has entered into MLATs with 65 individual countries¹ and joined an agreement with the European Union (“EU”) that enhances or creates mutual legal assistance mechanisms with each of the EU member states.² These treaties, although independently negotiated, generally maintain a similar framework and, in the United States, are administered by a central authority, the U.S. Department of Justice’s (“DOJ’s”) Office of

¹ Antigua and Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Bermuda, Brazil, Canada, Cyprus, Czech Republic, Denmark, Dominica, Egypt, Estonia, Finland, France (including St. Martin, French Guiana, French Polynesia, Guadeloupe, and Martinique), Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Morocco, the Kingdom of the Netherlands (including Aruba, Bonaire, Curacao, Saba, St. Eustatius, and Saint Maarten), Nigeria, Panama, the Philippines, Poland, Portugal, Romania, Russia, Slovak Republic, Slovenia, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, South Africa, South Korea, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, United Kingdom (including Anguilla, British Virgin Islands, Cayman Islands, the Isle of Man, Montserrat, and Turks and Caicos), Uruguay, and Venezuela.

² Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report (INCSR): Treaties, <http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253357.htm>.

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International Affairs (“OIA”).³ OIA orchestrates the MLAT process, processing all incoming and outgoing requests made pursuant to MLATs and other transnational legal assistance programs.⁴

Statistical information about MLATs, such as the number of requests filed by various countries or how long a request usually takes, is often difficult or impossible to locate.⁵ DOJ’s budget request for FY 2016 indicates that in 2000, the United States sent over 500 MLA requests and received over 1,500.⁶ Since then, the numbers have steadily grown; the recent budget request indicates that in 2014, the United States sent over 1,000 requests and received around 3,250.⁷ It further reflects that OIA had over 4,800 pending requests in 2014, even after instituting an internal policy for “refusing cases on *de minimis* grounds.”⁸ But there is little other information regarding MLAT requests made available to the public. In particular, there is markedly less publicly available data regarding the effect of MLAT requests or the average time it takes for requests to be processed. Indeed, DOJ itself has acknowledged this lack of a means of monitoring MLATs. OIA recently noted that it lacks transparency for monitoring “the progress of each request at each iterative step,” and there is no “public-facing system” for MLAT partners to monitor the status of requests.⁹

In December 2013, a group called “Access Now” submitted a Freedom of Information Act (“FOIA”) request to DOJ’s criminal division seeking “the list of countries that have requested information through an MLAT and the type of information that was sought.”¹⁰ When DOJ responded that there were no responsive records, the group appealed the determination, won, and the request was remanded, but there is still no indication that DOJ ever produced documents pursuant to the request.¹¹

In May 2016, Representative Tom Marino introduced H.R. 5323,¹² which includes provisions to reform the MLAT process, including a requirement that DOJ publish MLAT statistics, including the number of requests and average processing time. To date, however, the bill remains in the House Judiciary Committee.

MLAT treaties refer to the parties as the “requesting” and “requested” nations, ensuring that both nations maintain the same rights and responsibilities under the treaty,¹³ but OIA maintains separate processes for outgoing and incoming MLA requests. Outgoing requests

³ See DOJ, *Office of International Affairs Homepage*, <https://www.justice.gov/criminal-oia>.

⁴ The United States also maintains a Mutual Legal Assistance Agreements (MLAA) with China and between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States. Certain executive agreements can also be cast into this category, but these pertain primarily to asset forfeiture and narcotics investigations.

⁵ Although some companies, like Google, publish “Transparency Reports” that contain data on the number of requests for information, sorted by country, requests pursuant to MLATs are made by the U.S. government and are lumped in with other requests coming from the U.S. government. Accordingly, it is impossible to discern the number or origin of MLA requests from these documents.

⁶ DOJ, *Criminal Division FY 2016 President’s Budget* at 22.

⁷ *Id.*

⁸ *Id.* at 25–26.

⁹ *Id.* at 23.

¹⁰ <https://www.accessnow.org/cms/assets/uploads/archive/docs/foia/MLAT%20original%20-%20DOJ.pdf?redirected>.

¹¹ <https://www.accessnow.org/cms/assets/uploads/archive/docs/foia/MLAT%20-%20Appeal%20response.pdf?redirected>

¹² <https://www.congress.gov/bill/114th-congress/house-bill/5323/text>.

¹³ See, e.g., Mutual Legal Assistance Treaty Between the United States of America & Brazil (October 14, 1997) (“U.S.-Brazil MLAT”).

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are handled entirely within the executive branch, while incoming requests are supervised, in part, by the judiciary.¹⁴

Outgoing MLA requests

Outgoing MLA requests (requests that other countries furnish evidence to the United States) are handled exclusively by the executive branch. The U.S. Attorney's Manual instructs prosecutors to follow four steps to obtain assistance pursuant to an MLAT:

- Obtain a model request for the relevant MLAT Agreement from OIA.
- Prepare a draft request and submit to OIA for approval.
- Revise as directed by OIA and submit to DOJ for authorizing signature.
- Obtain a translation of the request, if necessary, and submit to OIA.

Once the request and translation are submitted, OIA files the request directly with the foreign authority specified in the treaty.¹⁵ At this point, the request is formally complete and the foreign authority is bound, under the MLAT, to assist the investigation.

Note that because MLATs are investigatory, no judges are involved in the process of submitting an *outgoing* MLA request. Nor is there any requirement for providing notice to the target of the investigation or any opportunity for the target to challenge or attempt to limit a request. A U.S. attorney investigating the activities of a German auto manufacturer, for example, can prepare a request, submit it to OIA, receive approval, have the request submitted to German authorities, have evidence seized and delivered to the United States, and review that evidence all without a U.S. judge even being notified. And while Germany has civil liberties protections comparable to those found in the United States, the same cannot be said for all MLAT partners — a list that includes countries like South Africa, Nigeria, Turkey, and Russia. The absence of any opportunity to challenge the action makes MLATs an extremely powerful tool for U.S. prosecutors when it comes to gathering information. It is important to remember, however, that evidentiary protections remain in place; that is, to be admissible in court, the evidence must still meet all of the relevant requirements of the Federal Rules of Evidence.

Tolling the Statute of Limitations

Notably, a prosecutor who files an outgoing MLA request is likely to petition the court to toll the statute of limitations under 18 U.S.C. § 3292. Under Section 3292, if the court finds by a preponderance of the evidence that it “reasonably appears” that the requested evidence is located in the country where the prosecutor has filed the MLA request, the statute of limitations is tolled from the date of the MLA request. Although obtaining a tolling order requires judicial approval, the hearing will be *ex parte* and the potential defendant has no right to notice. Tolling will continue for up to three years or until the foreign government takes its final action on the request. While courts are unlikely to allow prosecutors to abuse the tolling function of Section 3292, the relatively low burden and lack of any opportunity to respond practically means that in almost any instance where a prosecutor is willing to go through the process of filing an MLAT, the statute will be tolled.

¹⁴ See T. Markus Funk, *Federal Judicial Center International Litigation Guide: Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* (2014).

¹⁵ See U.S. Attorney's Manual, Criminal Resource Manual 276, *Treaty Requests*.

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Incoming MLA requests

Incoming MLA requests (requests that the United States furnish evidence to an MLAT partner) are processed by OIA and supervised by the federal judiciary. If, for example, a U.S. corporation was implicated in making bribe payments to a corporation in Brazil, Brazil might request banking data from the company's U.S. accounts. Brazil's request would be sent to the DOJ and directed to OIA. OIA processes the request to ensure it complies with the form set forth in the relevant treaty. If OIA determines the request meets the relevant treaty's requirements, it is assigned to a federal prosecutor who presents the request to the appropriate district court.

District courts review the request for validity and execution. Review for validity is primarily governed by the U.S. Constitution and the text of the relevant MLAT, while execution is statutorily prescribed. This hearing, too, will be *ex parte*. If the request is both valid and executable, the information, documents, or items will be collected by the relevant U.S. attorney and provided to Brazilian law enforcement through OIA and appropriate diplomatic channels.¹⁶

Validity

Before granting an MLA request, district courts are responsible for ensuring the request is "valid," meaning that it conforms to both the requirements of the treaty and the guarantees of the U.S. constitution.¹⁷

Analyzing whether the request meets the requirements of the treaty is always dependent on both the particular treaty at issue and the request itself. Because MLATs generally contain a "catch-all" provision,¹⁸ courts often focus primarily on form and process, rather than type of assistance requested. That is not to say the analysis of compliance with the treaty is unimportant; indeed, a request that does not conform to treaty requirements is not a valid request and cannot be enforced.¹⁹ The 3rd Circuit, for example, has specifically held that an informal "follow up" request to a valid MLA request does not fall under the "umbrella" of the initial request and is therefore not subject to the treaty.²⁰ This approach of requiring strict adherence to the stated process combined with the technical nature of MLATs creates one of the few openings where subjects of MLA requests can attempt to defeat or narrow the request.

In addition, the request must not violate the guarantees of the U.S. Constitution. Issues such as probable cause, specificity in warrants, privilege against self-incrimination, and other recognized privileges (e.g., attorney-client) may be particularly significant and shape the obligations of the recipient. In rare cases, courts have also refused MLA requests where they would cause "egregious violation of human rights."²¹ At least one court, however, has held that "the Constitution does not require [courts] to ensure that a foreign government

¹⁶ Most U.S. MLATs state that the "central authorities" of the parties will communicate directly with one another. The United States generally designates the "Attorney General" or their designee as the central authority.

¹⁷ *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 572 (9th Cir. 2011).

¹⁸ See, e.g., Treaty Between the Government of the United States of America and the Government of the Republic of India on Mutual Legal Assistance in Criminal Matters ("U.S.-India MLAT") Article I, Section 2(h).

¹⁹ *United Kingdom v. United States*, 238 F.3d 1312, 1315 (11th Cir. 2001).

²⁰ *Id.*

²¹ *In re Premises*, 634 F.3d at 572.

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offers the same protections [to the target of the investigation] as does our Constitution before assisting that government.”²²

Ultimately, there is a presumption in favor of honoring an MLA request, both in existing caselaw and from a policy perspective, as the United States seeks to conduct itself in a way that encourages counterparties to cooperate with outgoing MLA requests.²³

Execution

Once the court has determined the request is valid, it will look to 28 U.S.C. § 1782 (regarding reciprocal assistance with transnational litigation) and 18 U.S.C. § 3512 (“The Foreign Evidence Efficiency Act”) for determining how the request should be executed.

The older statute, 28 U.S.C. § 1782 — which dates back to the 1850s — gives the federal courts broad, discretionary authority to order testimony and production of documents and items “for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.”²⁴ Notably, the statute authorizes the court to issue these orders on behalf of any interested persons, not just prosecutors.²⁵

In the mid-2000s, Congress enacted 18 U.S.C. § 3512 to provide courts “clear statutory authority” to execute MLA requests.²⁶ Accordingly, in addition to the ability to subpoena testimony, documents, or items, Section 3512 permits courts to issue search warrants, warrants for the collection of electronically stored records, and orders relating to surveillance.²⁷ At the same time, Section 3512 is limited in two important ways. First, courts may only issue orders under Section 3512 at the request of an attorney for the U.S. government. Second, search warrants may issue only “if the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered” a felony offense.²⁸

As noted above, because MLA requests are investigatory in nature, the target of the investigation does not have a right to receive notice that the request has been filed. Indeed, many MLATs have provisions requiring (or permitting the requesting nation to require) that MLA requests remain secret to the extent possible. Clearly, in some cases, such as where the request seeks testimony, the witness will ultimately become aware of the request, but even then there is no right to know the scope of the request.

Similarly, the target of the investigation has no independent right to be heard regarding an MLA request. The subject of orders issued pursuant to an MLA request, however, can resist those orders through the same mechanisms used to oppose court orders in a domestic investigation. For example, if a MLA request results in a court issuing subpoenas for documents, the subject of the subpoena can file a motion to quash.

²² *Id.*

²³ See U.S. Attorney’s Manual, Criminal Resource Manual 286 *Assisting Foreign Prosecutors* (noting “[J]udicial assistance is a two-way street. To ensure that international cooperation operates smoothly, the United States Attorney (USA) must execute promptly all requests for judicial assistance that are forwarded from the Office of International Affairs (OIA).”).

²⁴ 28 U.S.C. § 1782(a).

²⁵ Letters rogatory, a process by which defendants may request evidence located abroad, are executed under the authority of 28 U.S.C. 1782. Letters rogatory are not addressed in this article.

²⁶ 155 Cong. Rec. H10092 (daily ed. Sept. 30, 2009).

²⁷ 18 U.S.C. § 3512(a) (2).

²⁸ 18 U.S.C. § 3512(e).

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Provision of Information

Once the court has issued orders, a U.S. attorney must collect the information. The U.S. Attorney's Manual provides guidance on how this process should be carried out,²⁹ but generally the process is similar to any other investigation. Once secured, the items, documents, or transcripts of testimony are provided to OIA to be transmitted to the requesting country.³⁰

Key Provisions in MLATs

When facing an MLA request, the initial step will always be to review the language of the relevant treaty. Because each MLAT is independently negotiated, they contain significant variations. "Access Now" has provided a helpful resource that includes full text versions of hundreds of different MLATs from around the world.³¹ In any case, several key provisions warrant special attention.

Requirements for Submission of Requests

As noted above, a request submitted pursuant to an MLAT must be made according to the treaty's specifications in order to be valid. Many MLATs provide specific instructions, including that the request must be submitted in writing and include the name of the investigating authority as well as specific descriptions of the evidence sought, the purpose for which the evidence is sought, and information regarding the subject matter of the investigation and any related criminal offenses.³² Judges reviewing MLA requests have a duty to ensure the treaty's requirements are met, and failure to conform to the requirements of the treaty is grounds for refusing the assistance.

Dual Criminality/Felony Status

One of the most notable differences between MLATs and extradition treaties is that MLATs generally *do not* contain a requirement of dual criminality. If, however, the alleged conduct would not be punishable by at least once year imprisonment in the United States, search warrants may not issue under 18 U.S.C. § 3512 and the request must be executed by subpoena.

The Method of Taking Testimony

All MLATs permit testimonial evidence to be subpoenaed and most permit the requesting nation to have a representative present during the questioning.³³ Many MLATs, however, provide that the requesting nation's representative may "present questions *to be asked* of the person giving the testimony or evidence."³⁴ This construction does not give the investigating representative the right to ask questions directly, and if the relevant MLAT includes this language, counsel should insist that the U.S. attorney, rather than the foreign representative, conduct the questioning.

²⁹ See U.S. Attorney's Manual, Criminal Resource Manual 282–86.

³⁰ See *id.* at 276, *Treaty Requests*.

³¹ See <https://mlat.info/>.

³² See, e.g., U.S.-Brazil MLAT, Article IV, Section 2.

³³ See, e.g., U.S.-Brazil MLAT, Article VIII.

³⁴ U.S.-Brazil MLAT, Article VIII, Section 3 (emphasis added).

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Secrecy and Applicability of the Freedom of Information Act

Generally, it is unlikely that MLA requests and information obtained through MLATs will be subject to production under the FOIA. Many MLATs contain particular provisions related to confidentiality and the secrecy of requests. Some treaties require secrecy; others permit the requesting country or requested country to require secrecy. At least one court has ruled that the secrecy provisions of MLATs exempt the MLA requests themselves from FOIA requests.³⁵

For the U.S.-U.K. MLAT, in particular, the executive report on the negotiations specifically noted that “the United Kingdom delegation expressed particular concern that information it supplies in response to [MLA requests] . . . not be disclosed under the Freedom of Information Act. The Parties agreed . . . not [to] use or disclose any information or evidence obtained under the Treaty for any purposes unrelated to the proceedings stated in the request without the prior consent of the Requested Party.”³⁶

Defense Access to Evidence

Although modern MLATs do not contain any provisions that allow defendants to secure evidence — indeed many specifically disclaim any private right to use MLA requests — there are three exceptions: The U.S. MLATs with Switzerland, Turkey, and the Netherlands each provide the defense an opportunity to request evidence. Should any of these nations be implicated, counsel should consider what might be gained from filing defense requests.

Counsel should note, however, that federal prosecutors may always voluntarily request potentially exculpatory evidence on behalf of the defendant, as MLATs merely require that the request come from the government attorney. In other words, if counsel becomes aware that an MLA request will be filed in a case, they should consider asking the relevant prosecutor to include language seeking specific items that may be exculpatory. Where counsel maintains credibility and a strong working relationship with federal prosecutors, there is more opportunity to secure this type of cooperation.

Limits on Use of Evidence

MLATs are generally drafted to be broad and require cooperation, and most include a “catch-all” provision authorizing any assistance not prohibited by the requested nation’s law;³⁷ meaning that it is very likely that a requesting country will secure the type of evidence they seek. Most MLATs, however, contain limitations on how evidence secured through the MLAT process may ultimately be used.³⁸

Common limitations on use include requests that relate to political prosecutions,³⁹ offenses under military law that are not offenses under ordinary criminal law,⁴⁰ and use in prosecutions other than what is described in the request.⁴¹ Violations or anticipated

³⁵ Dongkuk International, Inc. v. U.S. DOJ, Civil No. 16-cv-01584 (District of Columbia).

³⁶ Ex. Rept. 104-23 – Treaty With the United Kingdom on Mutual Legal Assistance in Criminal Matters.

³⁷ See, e.g., Mutual Legal Assistance Treaty Between the United States of America and Japan (“U.S.-Japan MLAT”), Article I, Section 2(8).

³⁸ See, e.g., U.S.-Japan MLAT, Article III.

³⁹ See, e.g., U.S.-India MLAT, Article III, Section 1(c).

⁴⁰ See, e.g., U.S.-Brazil MLAT, Article III, Section 1(a).

⁴¹ See, e.g., U.S.-Japan MLAT, Article VII, Section 1.

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violations of these restrictions may relieve the requested country of its obligation to provide assistance. Notably, evidence is generally only limited to use in the particular prosecution at issue if the requested country insists on such a condition and the requesting country agrees.

On Cooperation

Beyond the benefits described above, counsel should always consider the potential value of cooperation. In the MLAT context, cooperation can help overcome one major hurdle. The MLAT process, for all of the advantages it affords to the U.S. government, is slow. A request for communications data under the U.S.-U.K. MLAT process, an exchange between close allies that share a common language, can reportedly take up to thirteen frustrating months.⁴²

By contrast, voluntary cooperation with a forthcoming MLA request — which is specifically permitted under the relevant statutes⁴³ — is likely to build significant goodwill and may secure additional protections, such as limits on how the evidence will be used, confidentiality agreements, or even immunity. According to 28 U.S.C. § 1782, individuals may voluntarily cooperate “in any manner acceptable to him” or her; such cooperation gives counsel a significant amount of influence in the process.

While this strategy may seem counterintuitive, it is important to remember that with the MLAT process, a proper request will almost always be honored. The U.S. government is bound by the treaty, and even if they were not, DOJ’s explicit policy is to honor requests in order to encourage reciprocal cooperation. Accordingly, cooperating, when possible, will build credibility with the prosecutor and investigating authority and maintain a certain level of control over the process that will likely be lost if a court begins to issue subpoenas and search warrants.

Conclusion

With the growing significance of MLATs, it is increasingly important that counsel for both individuals and corporations be equipped to advise their clients on the process and the likely result. Often, the only chip held by the subject of an MLAT is the delay that is involved. Frequently, it will be advisable to cooperate, trading time for particular conditions on what evidence will be offered or restrictions on the use of that evidence. But in every instance, it is imperative that counsel review the relevant treaty thoroughly and understand how the process works.

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⁴² <http://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained>.

⁴³ 28 U.S. Code § 1782(b).

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