

Cross-Border Discovery in International Tax Disputes: Tools, Tips, and Strategies

District of Columbia Bar

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Formal vs. Informal Methods

- Voluntary witness interview can frequently be the fastest and cheapest method to obtain evidence
- But, it is not always permitted in every jurisdiction
 - Be mindful of forum (check State Department country flyers)
 - Voluntary discovery may be ILLEGAL and subject you to prosecution
 - Voluntary discovery may require express authority from foreign government
 - Certain forms of voluntary discovery may be precluded



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State Dept. – Switzerland page

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Obtaining Evidence in Civil and Commercial Matters: Switzerland is a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. See [Switzerland's response to the 2003 Questionnaire on the Practical Operation of the Hague Evidence Convention](#). See also [Switzerland's formal declarations and reservations regarding the Convention made when Switzerland became a party to the treaty](#).

Taking Depositions of Willing Witnesses : The [Swiss Office of Federal Justice – Conditions for a Commissioner or Diplomatic or Consular Official to Obtain Evidence in Switzerland](#) explains that the taking of a voluntary deposition in Switzerland is subject to prior authorization by the Federal Department of Justice and Police. Foreign requests must be addressed to the central authority of the canton where the evidence is to be taken or where the person to be deposed is located. To speed up the process, Swiss authorities recommend that you send a copy to the Federal Office of Justice, International Private Law Unit, 3003 Bern, Switzerland. Review carefully the [Swiss Office of Federal Justice – Conditions for a Commissioner or Diplomatic or Consular Official to Obtain Evidence in Switzerland](#) regarding the information that must be submitted before a request will be considered.

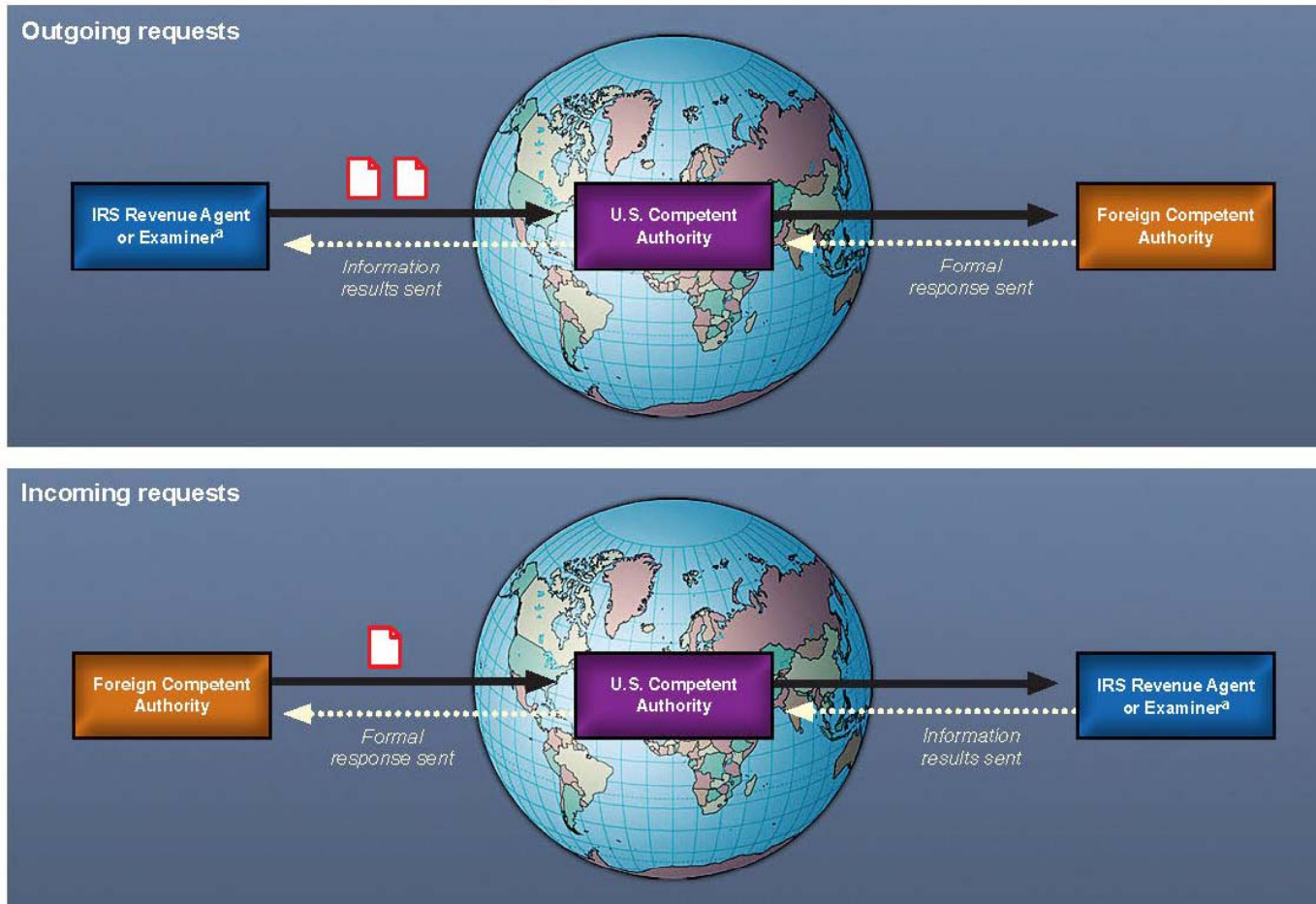
Section 271 of the Swiss penal code provides that attorneys attempting to take a deposition or serve process in Switzerland outside of these authorized methods are subject to arrest on criminal charges.

Formal Methods

- Tax treaties (exchange of information article)
- MLATs (Mutual Legal Assistance Treaties)
- TIEAs (Tax Information Exchange Agreements)
- Hague Evidence Convention
- Letters Rogatory
- Directly in foreign court as permitted by local law:
Motion filed by OFL-hired lawyer on your behalf.
 - Example: UK Evidence Act

Treaties

Competent /Central Authorities



Tax Treaties



Sources: GAO analysis of data from Thomson Reuters, Government Printing Office (GPO), LexisNexis, and the Department of State; Map Resources (map).

Australia	Czech Republic	India	Luxembourg	Portugal	Switzerland
Austria	Denmark	Indonesia	Malta	Republic of Korea	Thailand
Bangladesh	Egypt	Ireland	Mexico	Romania	Trinidad and Tobago
Barbados	Estonia	Israel	Morocco	Russia	Tunisia
Belgium	Finland	Italy	Netherlands	Slovak Republic	Turkey
Bermuda	France	Jamaica	New Zealand	Slovenia	Ukraine
Bulgaria	Germany	Japan	Norway	South Africa	United Kingdom
Canada	Greece	Kazakhstan	Pakistan	Spain	Venezuela
China	Hungary	Latvia	Philippines	Sri Lanka	
Cyprus	Iceland	Lithuania	Poland	Sweden	

Tax Information Exchange Agreements



Sources: GAO analysis of data from Thomson Reuters, Government Printing Office (GPO), LexisNexis, and the Department of State; Map Resources (map).

Antigua and Barbuda
Aruba
Bahamas
Barbados
Bermuda

British Virgin Islands
Cayman Islands
Curacao
Costa Rica
Dominica

Dominican Republic
Gibraltar
Grenada
Guernsey
Guyana

Honduras
Isle of Man
Jamaica
Jersey
Liechtenstein

Marshall Islands
Mexico
Monaco
Panama
Peru

St. Lucia
St. Maarten
Trinidad and Tobago

Regions Covered

Beijing	Southeast Asia, Pacific Rim, South Pacific (excluding Australia and New Zealand for EOI matters)
Frankfurt	Central Europe, Eastern Europe, former Soviet Union
Paris	Southern Europe (excluding France for EOI matters), Northern Africa
Plantation, FL	Western Hemisphere (excluding Canada)
Deputy Commissioner International in Washington, DC	EOI matters relating to Australia, New Zealand, and France and all matters relating to Canada

The EOI Process

- EOI employees act as intermediaries between the United States and other countries for information gathering purposes.
- Types of exchanges:
 - Specific Request
 - Spontaneous Exchanges of Information
 - Automatic Exchanges of Information
 - Simultaneous Tax Examinations
 - Industry Wide Exchanges

Information That Can Be Requested

- Information that may be relevant to the assessment or collection of or the enforcement or prosecution in relation to United States federal taxes.
- Such as –
 - Tax Returns and Return Information
 - Bank Statements and Business Records
 - Interviews with Taxpayers and Third Parties
 - Public Records (i.e. Company and Land Registry Documents)

JITSIC

- Joint International Tax Shelter Information Centre
 - Formed in 2004 by 4 countries (United States, Canada, UK & Australia)
 - Expansion to 2 offices in 2007
 - Growth to 9 member countries
 - Basis for interaction is bi-lateral Tax Treaty

OECD Treaty Provisions

- Information obtained via treaty requests is confidential and for official uses only.
- EOI provisions shall not be construed to permit measures at variance with local laws and administrative practices.
- Protection of information which would disclose trade, business, industrial, commercial or professional secret or trade process.

Mutual Legal Assistance Treaties



Sources: GAO analysis of data from Thomson Reuters, Government Printing Office (GPO), LexisNexis, and the Department of State, Map Resources (map).

Antigua and Barbuda
 Argentina
 Australia
 Austria
 Barbados
 Belgium
 Belize
 Brazil
 Bulgaria
 Canada
 China

Cyprus
 Czech Republic
 Denmark
 Dominica
 Egypt
 Estonia
 Finland
 France
 Germany
 Greece
 Grenada

Hong Kong
 Hungary
 India
 Ireland
 Isle of Man
 Israel
 Italy
 Jamaica
 Japan
 Latvia
 Liechtenstein

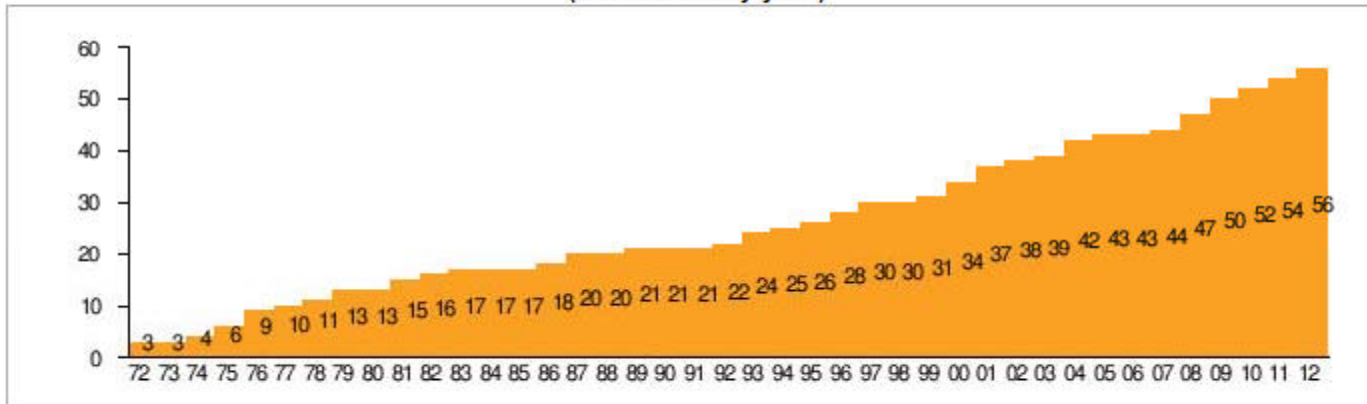
Lithuania
 Luxembourg
 Malaysia
 Malta
 Mexico
 Morocco
 Netherlands
 Nigeria
 Philippines
 Poland
 Portugal

Republic of Korea
 Romania
 Russia
 Slovak Republic
 Slovenia
 South Africa
 Spain
 St. Kitts and Nevis
 St. Lucia
 St. Vincent and Grenadines
 Sweden

Taiwan
 Thailand
 Trinidad and Tobago
 Turkey
 Ukraine
 United Kingdom
 Venezuela

Hague Evidence Convention

Countries that ratified
(cumulative by year)



**Convention on the Taking of Evidence Abroad
in Civil or Commercial Matters**

States parties to the convention by year of ratifications: green: '70, light blue: '80, blue '90, pink '00, red '10

Signed	18 March 1970
Location	The Netherlands
Effective	7 October 1972
Condition	ratification by 3 states ^[1]
Parties	56

Source: Wikipedia

Hague Evidence Convention

Article 23

- A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Hague Evidence Convention

- General Issues:
 - Trial testimony v. U.S. style discovery
 - Questions must be
 - Narrowly crafted
 - No open-ended questions
- Issues in U.S. tax cases:
 - “Civil or Commercial” - Public law v. private law and applicability of the Hague Evidence Convention
- Retain local lawyer to assist in preparing Letter of Request

Non-exclusivity of Hague Evidence Convention

- *Societe Nationale Industrielle Aerospatiale v. U.S., District Court for the Southern District of Iowa* 482 U.S. 522 (1987)
 - Exclusivity
 - U.S. courts supervise discovery
 - U.S. respect for foreign state

Letters Rogatory

- In general: If there is no treaty, agreement, or multilateral convention that requires assistance, your only formal avenue may be a Letter Rogatory.
- Letters Rogatory are the traditional procedure in which a court in one country requests a court in another country for assistance.
- 28 USC 1783(a) – Subpoena of person in foreign country

Standards for Enforcement of Summons Supporting Non-US Request for Information

- Summons must relate to an investigation that will be conducted pursuant to a legitimate purpose;
- Inquiry must be relevant to the purpose;
- Information sought is not already with the IRS' possession; and
- Administrative steps required of U.S. tax laws have been followed
- *United States v. Powell*, 379 U.S. 48 (1964)

Questions?

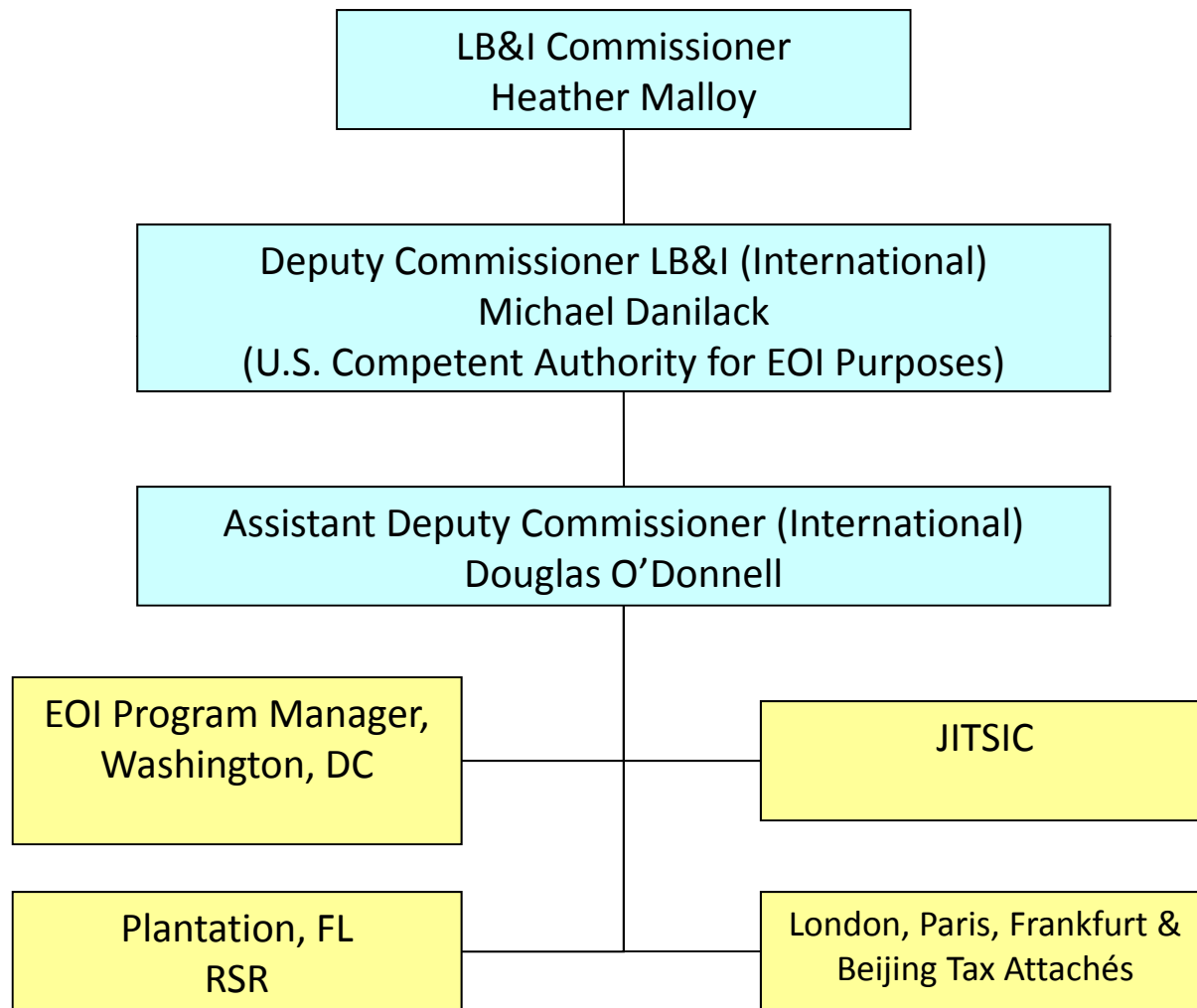
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Backup Slides

Exchange of Information Process

- The United States has entered into a number of tax treaties and TIEAs with other countries.
- We can use these agreements to obtain documents or to conduct interviews of foreign personnel located in other countries that may be relevant to a tax investigation/audit through the exchange of information (EOI) process.
- Similarly, other countries can come to us to request information located in the United States that may be relevant to a foreign tax investigation/audit.
- The EOI Program is administered by the EOI Program Manager in Washington, DC and IRS Tax Attachés in London, Paris, Frankfurt and Beijing, and the Revenue Service Representative (RSR) in Plantation, Florida.

EOI Organizational Chart



Overview of Hague Evidence Convention

- Purpose of the Convention
 - The Evidence Convention establishes methods of cooperation for the taking of evidence abroad in civil or commercial matters. The Convention, which applies only between States Parties, provides for the taking of evidence (i) by means of letters of request, and (ii) by diplomatic or consular agents and commissioners.
 - The Convention provides effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence.

Hague Evidence Convention

- Chapter I – Letters of Request
- Chapter II – Taking of Evidence by Diplomatic Officers, Consular Agents, and Commissioners
 - Article 18: A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose. If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.
- Chapter III – General Clauses

Hague Evidence Convention

U.K. Reservation to Article 23

3. In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

Hague Evidence Convention

Letter of Request

- Review the requirements of the convention
 - Formal Letter of Request providing the information identified in the convention
 - Translations of all documents as required
 - Two copies
- Note: Declaration of most states: “No U.S. pre-trial discovery.”
- Detailed notes in back-up slides

Hague Evidence Convention

Letter of Request

- Content of the Request:
 - Identify the authority requesting the evidence (typically the district court)
 - Names, addresses and counsel of the parties
 - Describe the nature of the proceeding
 - Name and address of the person with the evidence
 - Provide the questions to be posed or a description of the subject-matter to be examined

Hague Evidence Convention

Letter of Request

- Content of the Request (continued):
 - Identify the documents to be obtained or the property to be inspected
 - Identify any requirement that the evidence is to be provided under oath (provide the form to be used)
 - Identify any special method or procedure to be followed
- The request must be translated as appropriate

Hague Evidence Convention

Letter of Request

- The evidence is obtained directly by the foreign authorities, not by the United States
- Typically, the evidence will be compelled and obtained by a court or judicial authority
- The parties may, or may not, be permitted to attend or to participate
- The evidence may or may not be produced under oath or through transcribed testimony

Special Protection of Foreign Interests

- *Societe Nationale Industrielle*, 482 U.S. 522 (1987)
 - “American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.”
 - “American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.”

Letters Rogatory

- Preparing the Letters Rogatory
 - Many of the same drafting issues as with the Hague Evidence Convention
 - Trial testimony v. discovery
 - Closed ended questions
- May need to establish
 - Basis for assuming witness has the evidence
 - How the evidence is needed to establish your case
- Retain local lawyer to assist in preparing Letter of Request

28 USC 1781 - Transmittal of Letter Rogatory or Request

- (a) The Department of State has power, directly, or through suitable channels—
 - (1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and
 - (2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

- (b) This section does not preclude—
 - (1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or
 - (2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.