



A GUIDE

Using U.S. Courts to Obtain Information for Foreign Legal Cases

FOREIGN LEGAL ASSISTANCE ACTIONS UNDER 28 U.S.C. § 1782



EARTHRIGHTS INTERNATIONAL

CORPORATE
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LAB

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EarthRights International is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.”

We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, we seek to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where we work. We have offices in Southeast Asia, the United States and Peru.

Corporate Accountability Lab brings together legal design and human rights expertise to protect people and the planet from corporate abuse.

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Foreign Legal Assistance Actions

Corporations or individuals in the United States sometimes have information that is useful or necessary to a case in a court or tribunal outside the United States. The U.S. Foreign Legal Assistance (FLA) Statute, 28 U.S.C. § 1782 (also known as “Section 1782”), may offer a way for those with an interest in the case to obtain that information.

A FLA action is a request to a federal court in the United States. It asks the court to help a foreign court, or a party with a relevant interest in a foreign legal case, obtain information which can be used in that legal case. The process of obtaining such information is known as “discovery.” The discovery can be in the form of testimony, documents, or physical evidence.

The request can be made while the foreign legal case is active, or under preparation.

While this assistance is often granted, this is a discretionary application and the U.S. court is not required to grant FLA requests. This means that even if all the legal requirements for the request are met, the judge may still reject it.



How a FLA action may be used

Section 1782, the Foreign Legal Assistance Statute (the FLA), allows an “**INTERESTED PERSON**” to request information belonging to a U.S. person or company if the information will be helpful in a **PROCEEDING** in a foreign or international tribunal.

The FLA can be an especially powerful tool because although most countries have some form of discovery or information disclosure in lawsuits, the procedures vary from country to country and it can often be difficult to obtain information from a person or company located in the United States. The FLA makes this discovery much easier as the information requests are made directly through U.S. courts.

Courts granting FLA requests usually follow the same rules and procedures for discovery as they do for U.S. domestic cases, which allow a broad range of discovery of information. Applicants can ask for documents or evidence that is likely to be relevant to their legal action. They can request information even if they do not know exactly the content, and even if they do not know whether or not the evidence exists.

An **INTERESTED PERSON** only needs to have a “reasonable interest in obtaining the assistance.” They do not need to be a party to the foreign proceeding.

To learn more, see [PAGE 7](#).

There is no clear rule on what a “**PROCEEDING**” in a foreign or international tribunal” can be, but examples include “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies.”

To learn more, see [PAGE 6](#).

LIMITATIONS

While FLA actions are potentially very useful tools for obtaining information, there are some limitations on their availability.

Even if you meet all of the legal requirements, a judge may still decide not to grant the application for foreign legal assistance. If the judge denies a FLA request, the person making the request may appeal. However, the appellate court will only reverse the previous decision if it finds that the judge made an error, such as applying the wrong legal standard to evaluate the request.

Also, U.S. federal courts are divided up into regions, and courts in different regions may have different interpretations of the statute, so the rules that apply in a FLA action are not always the same throughout the United States. This means that the same question or issue might get a different answer, depending on where the request was made.

Some questions and issues related to obtaining information in this way have not yet been considered by any U.S. court, or have only been considered in a few cases. So there may not be a lot of legal rulings, or “precedent,” and not every question will have a clear answer.



THE STATUTORY TEXT

THE FULL TEXT OF THE FLA STATUTE, FROM THE U.S. FEDERAL CODE.

28 U.S.C. § 1782

Assistance to foreign and international tribunals and to litigants before such tribunals

- (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

- (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Frequently Asked Questions

WHAT KIND OF INFORMATION CAN I OBTAIN THROUGH A FLA ACTION?

The statute itself mentions discovery of testimony and documents – this includes **DEPOSITIONS** and **DOCUMENT REQUESTS**. In a few cases, courts have ordered other forms of evidence. These include **INTERROGATORIES** (written questions), as well as **PHYSICAL EVIDENCE** such as blood samples. Most courts have only allowed testimony and documents however, and one court recently rejected interrogatories.

The FLA allows the U.S. court to either follow the rules of the foreign court in determining what information to order and how it will be produced, or to follow the ordinary rules that apply in federal court cases – the Federal Rules of Civil Procedure.

WHO CAN I SEEK INFORMATION FROM?

Under U.S. procedures, FLA requests may be made to any corporation or person, and possibly a governmental official – but not a government agency – that may have relevant information. There are, however, some special considerations.

First, a U.S. court may be less willing to grant a request against a person or corporation that is already a participant in the foreign legal case, because the foreign court itself could order that person to disclose the information. In the Chevron case mentioned in this guide, the foreign legal action was against Chevron Nigeria, but the request was directed to Chevron Corporation, the parent company in the United States, which was not subject to the authority of the Nigerian courts.

Second, courts will generally require corporations to produce information that is in the hands of another corporation that it owns – a subsidiary – if the parent corporation effectively controls the subsidiary. But as discussed below, some courts may place limits on providing information

In a **DEPOSITION**, a person gives testimony, under oath, in a recorded proceeding outside of court.

DOCUMENT REQUESTS can be used to get particular documents or other records (including digital files and audio and video recordings).

INTERROGATORIES are written questions that must be answered under oath.

PHYSICAL EVIDENCE is any physical object used as evidence, such as blood, fingerprints, or footprints.



located outside the United States.

Courts have also disagreed on whether information may be obtained from attorneys in the United States who hold documents relevant to foreign cases.

Additionally, foreign diplomats and embassies in the United States, and international organizations such as the United Nations, may have immunity from FLA actions.

WHAT KINDS OF FOREIGN LEGAL CASES ARE COVERED BY SECTION 1782?

There is no clear rule on what kinds of foreign legal cases may be supported through a FLA action, and some courts disagree.

However, all U.S. courts should agree that the statute covers:

- › ordinary court cases;
- › criminal investigations by magistrates, before a criminal case has been filed (in legal systems where judges investigate and arrange for prosecutions of crimes);
- › **ADMINISTRATIVE TRIBUNALS**, and
- › cases in international courts, such as the International Court of Justice or regional court systems.

Some U.S. courts may disagree on whether the statute covers:

- › **ARBITRATION TRIBUNALS**;
- › governmental proceedings that do not result in adjudication of cases (such as an investigating commission of a foreign legislature or executive agency), and
- › other methods of alternative dispute resolution, such as conciliation and mediation.

Courts generally have not yet considered whether the statute covers:

- › cases in national or regional human rights commissions, and
- › other cases that may result in a decision, but where the decision is not legally binding.

ADMINISTRATIVE TRIBUNALS are courts run by government agencies, and typically consider government actions and benefits (such as immigration, patent, or social security proceedings).

In **ARBITRATION TRIBUNALS**, participants agree to have their case decided by private arbitrators rather than a court. There are different types of arbitration proceedings, and courts are not in agreement about which, if any, can be supported through a FLA action.

WHO CAN FILE A FLA REQUEST?

The FLA allows requests from foreign courts themselves as well as foreign prosecutors and anyone who is an “interested person” in a foreign case.

Some foreign courts themselves have filed FLA petitions. Foreign governments may use an international agreement known as the Hague Evidence Convention.

Many countries also have Mutual Legal Assistance Treaties (MLATs) with the United States that address obtaining discovery. Unless the MLAT specifically says that its procedures are the exclusive way for the other country to obtain evidence from the United States, prosecutors can typically use the FLA directly instead of, or in addition to, the procedures of the treaty.

WHO IS AN “INTERESTED PERSON”?

There is no single definition for an **“interested person.”** It definitely includes parties in the foreign legal case, such as a plaintiff, defendant, or prosecutor.

An interested person can also be anyone with a reasonable interest in obtaining the information, and may include people who initiate an investigation, or anyone who has a right to submit information in a legal case – for example, in many countries, victims of crimes can submit evidence in criminal cases.

It may be more difficult to show that the person requesting the information is an “interested person” if they are not a party in the foreign proceeding.

Some courts have said that the requester must have an “active role” that goes beyond “monitoring the progress of litigation and receiving updates from parties to the litigation.” Others have noted that the requestor must have access to a process or mechanism that will allow them to submit the evidence.

CASE I -----

Plaintiffs in a Nigerian lawsuit against Chevron's Nigerian subsidiary used a FLA petition to request evidence from Chevron Corp. in the United States, including environmental impact assessments and other evidence of the harmful environmental and health effects of gas flaring.

Gas flaring destroys crops by contaminating the surrounding air and soil. Health impacts include skin rashes and respiratory infections, as well as increased risk for asthma and cancer.

The villagers dismissed the FLA request after reaching a confidential settlement. While the terms of the settlement are confidential, the plaintiffs are pleased with the outcome. The villagers later submitted documents from Chevron Corp. to the court in Nigeria.

EarthRights believes that this may be the first case in which a public interest group has used a Foreign Legal Assistance request to assist communities in obtaining information from an American multinational.

PHOTO CC BY KEN DOERR

More information about this case is available at
WWW.EARTHRIGHTS.ORG/LEGAL/FOREIGN-LEGAL-ASSISTANCE

AT WHAT STAGE OF THE CASE CAN I REQUEST ASSISTANCE?

The foreign legal case can be at any stage, as long as the person requesting the information will be able to use it in the case. The case does not even need to be filed yet.

The FLA statute mentions “criminal investigations conducted before formal accusation,” and the Supreme Court has also stated that the case does not need to have been filed already, only that it is within “reasonable contemplation.” So it may be possible to get information through the FLA before the legal action is filed, for example when doing a fact-finding investigation that may lead to a legal case.

Although courts have generally interpreted “reasonable contemplation” broadly, some courts have said that the requestor must demonstrate that they are actually contemplating using the information in a legal action.

Courts have also granted requests for information to use in proceedings to enforce judgments after trial, as well as in active investigations, trials and appeals.

DO I NEED TO TRY TO OBTAIN THE INFORMATION IN THE FOREIGN COURT FIRST?

There is no requirement to ask for the information in the foreign court before applying to a U.S. court. That said, if the information would be easy to obtain through the foreign court, the U.S. court may be less likely to grant the FLA request.

U.S. courts have often allowed discovery of information that cannot be obtained through the discovery procedures in the foreign court. It may be a problem however, if the foreign tribunal is likely to reject the information, and not allow it to be used in the case.



DOES IT MATTER WHERE I FILE?

Yes. Under Section 1782, a court only has jurisdiction to consider a FLA action if it is filed where the person from whom information is sought “**RESIDES**” or is “**FOUND**.”

Since multiple courts may be able to grant a request over the same person or company, applicants may need to consider which is the best court for filing a request. A court may reject a request if the party has already filed a similar request in a different court.

Where you file does not necessarily need to be where the evidence is. For example, a person or company may be “found” somewhere, but have access to relevant documents which are located elsewhere.

DOES IT MATTER WHERE THE DOCUMENTS OR TESTIMONY MAY BE LOCATED?

There may be geographical limitations on obtaining information, but the rules depend on whether you are seeking documents and other physical evidence or if you are seeking oral testimony. It may also depend on where you file the request.

For documents, courts have disagreed about whether you can use a FLA request to obtain information located outside the United States – for example, documents maintained by a foreign office or subsidiary. Some courts have required companies to provide documents located outside the U.S., especially if the documents are controlled by someone in the U.S., but others have not.

If you are seeking testimony from a specific person however, you should file the request in the district where the person lives. You can only require the person to travel 100 miles to take a deposition, but the deposition can be arranged at any location; it does not need to be in the same city as the courthouse.

An individual person “**RESIDES**” where their principal home is, and is “found” wherever they are physically present when officially notified of the request.

Companies generally “reside” or are “**FOUND**” where they are incorporated or where their headquarters are located, and possibly also where they conduct significant business.

ARE THERE ANY LIMITS ON OBTAINING INFORMATION THROUGH A FLA ACTION?

In general, you can try to obtain any information that is relevant to the foreign legal case, but there are limits.

The U.S. court might deny or limit requests that are too burdensome or intrusive – that is, if they ask for too many documents, or information that is too difficult or too expensive to obtain, or information that is personal or sensitive.

The U.S. court will also deny requests for information that is privileged, such as communications between a lawyer and client. This also applies to foreign legal privileges, although the court may require “authoritative proof” that disclosing the information would violate a foreign privilege.

The court will deny requests if the judge thinks they are designed to harass the person who has the information.

The U.S. court may also reject a request if the foreign court is not likely to accept the information requested (for example, due to the stage the litigation is at, or other procedural limits of the foreign court) and might ask the foreign court if it will accept it.

CASE II

The leaders of three Maasai villages in Tanzania filed a FLA request against Thomson Safaris, the American affiliate of a safari company that allegedly participated in land-grabbing and violence against their communities. The Maasai successfully obtained documents and testimony to assist with their lawsuit against the safari company in a Tanzanian court.

PHOTO: MAASAI MEN OF SUKENYA VILLAGE

CREDIT: MINORITY RIGHTS GROUP

More information about this case is available at

WWW.EARTHRIGHTS.ORG/LEGAL/FOREIGN-LEGAL-ASSISTANCE

CAN I USE THE INFORMATION OBTAINED FOR PURPOSES OTHER THAN THE FOREIGN PROCEEDING?

Under the statute, courts may order information to be produced “for use in a proceeding in a foreign or international tribunal,” but the statute does not limit its use to that proceeding.

Unless the parties agree or the court orders that the information can only be used for the foreign case, the information obtained can be used for any purpose.

However, the court may deny a request if it thinks that the information is being sought for another purpose, or it is being sought in bad faith.

The court may also grant the request but place conditions on how the information can be used. For example, the court could require that the information be kept confidential except to submit it to the foreign tribunal.

CAN THE PARTY THAT I AM SEEKING INFORMATION FROM ASK FOR INFORMATION FROM ME?

Maybe. Some courts have ruled that the person requesting the information also has to provide information on a reciprocal basis, but others have rejected this.

A court may be more likely to require “reciprocal” discovery if the other party is participating in the foreign proceeding (and therefore has a similar need for the information), and if the other party could not use the FLA to obtain the information from the requesting party (for example, if the requesting party is not found in the United States). The court may require the other party to meet the same standards in order to grant the reciprocal discovery.



HOW MUCH DOES IT COST TO FILE A FLA REQUEST?

There are three kinds of costs that may be associated with a FLA request.

First, anyone who files a case in federal court must pay a filing fee, which is often around US\$400-500. (Sometimes there are other fees as well.) But if you are unable to pay, you can apply to have the fees waived. This is called **IN FORMA PAUPERIS**.

Second, if you are requesting **DEPOSITIONS**, you will need to pay a small fee to the person giving testimony, and pay to hire an official court reporter to administer the oath and transcribe the deposition. The court reporter can cost more than a thousand U.S. dollars per day, so be careful when requesting depositions.

Third, it is possible that you will need to pay for the costs of searching for, copying, and sending any documents or other forms of evidence. Normally, the person who has the documents would pay for these costs. However, in a few cases, courts have required the requesters to split the costs, or pay all of the costs. Other courts have required the requesters to pay a **BOND** beforehand.

The court will almost always tell you beforehand if it is going to require you to pay these costs, and if you have already established *in forma pauperis* status, then most courts will be less likely to make you pay costs, especially if you are seeking information from a wealthy corporation or individual.

WHAT SHOULD THE REQUEST LOOK LIKE? HOW DO I ENSURE THE COURT ACCEPTS IT?

There is no standard form or template for FLA actions, but EarthRights International can provide examples of such requests. You should also have a U.S. lawyer who is familiar with the local rules and procedures in the court where you are filing.

Someone who is granted **IN FORMA PAUPERIS** status does not have to pay court fees.

To seek this status, you need to submit an application that shows that you have little income or property.

In a **DEPOSITION**, a person gives testimony, under oath, in a recorded proceeding outside of court.

A **BOND** is an amount of money to cover the costs of searching and copying.

HOW LONG WILL THE PROCESS TAKE?

This will vary depending on a number of things. If the person with the information does not object to the request, it may take as little as a few months to actually gather the information. If there is a fight in the court however, it may take months or even years before any information is produced.

Since there is no strict timeline for a judge to decide whether or not to grant a request, it could take months for a judge to issue a decision. So it is best to make the request well in advance of when the information will be needed.

IF I FILE THE REQUEST PROPERLY, AM I GUARANTEED TO GET IT?

No. The final decision is left to the discretion of the judge. Even if all the requirements are met, the judge can still deny or limit the request.

As discussed above, you can appeal a denial, but appeals may be difficult because district court judges are given a lot of discretion on FLA requests.

The other party may also appeal if the FLA request is granted, so discovery may later be denied on appeal.

ARE THERE ANY PENALTIES IF THE REQUEST IS DENIED?

Maybe. If a request for assistance is denied, the court may require you to pay the costs of the other side, but we have not seen cases where this has actually happened. (In the U.S. legal system, “costs” are limited and do not include lawyers’ fees.) It is unlikely that a requester who has little money will be required to pay the other side’s costs.

HOW CAN I GUARANTEE THAT THE FOREIGN TRIBUNAL WILL ACCEPT THE EVIDENCE?

Rules on what evidence will be accepted vary in different countries and court systems. You or your lawyer should research what is necessary so that the tribunal will accept evidence obtained through the FLA action. Sometimes the foreign court may also require a certification from the party producing the evidence, which you can request from the U.S. court.



Checklist for Foreign Legal Assistance

This checklist briefly summarizes the key requirements for a Foreign Legal Assistance action.

If your case meets these requirements and would benefit from a FLA request, please contact EarthRights International at INFOUSA@EARTHRIGHTS.ORG for further discussion.

1. PURPOSE

- Does an individual or corporation in the United States have evidence that would help your case? Is the evidence located in the United States?
 - › Evidence can include documents and testimony, and needs to be intended to assist a legal case. Courts may allow discovery of documents located outside the United States, but it is easier to obtain documents within the U.S. Testimony can only be obtained from witnesses in the U.S.
- Could the evidence be used in the foreign case?
 - › A court is more likely to grant the request if you can show that the evidence would be accepted by the foreign court or tribunal.

2. FOREIGN CASE

- Is a legal case ongoing in another country? If not, is there an investigation that may lead to a case?
 - › The evidence must be useful for some foreign legal proceeding – it is simplest if this is an ongoing case, but cases at other stages, including investigation, may also qualify for legal assistance.
- Is the case in a court or a similar tribunal?
 - › U.S. courts will generally provide assistance to cases in foreign courts. Other kinds of tribunals and processes may also qualify, especially if they may result in a binding decision.

3. PARTIES

- Are you a participant in the foreign case, with the ability to introduce evidence?
 - › The request must be made by an “interested person.” This doesn’t need to be a party to the foreign case, but it is easiest to obtain assistance if you have the ability to introduce evidence in the foreign case.

- Is the person who holds the evidence NOT a participant in the foreign case?
 - › U.S. courts can grant legal assistance to obtain evidence from individuals and corporations who are participants in the foreign case, but it may be easiest to obtain evidence from others who are not direct participants.

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