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Representing Individuals in International Investigations

Americans have long been great exporters of ideas, and the ideas about criminal justice have in recent years been no exception.

The U.S. Department of Justice (DOJ) sees its beat as worldwide, focusing in the recent words of one assistant attorney general on "transnational criminal enterprises and global corporate misconduct."[1] Indeed, it is now standard for companies to respond to the DOJ's demands for cooperation[2] by launching internal investigations worldwide.[3]

There are three simple reasons that this is so.

First, the DOJ and internal investigators have become very familiar with international investigations in the context of the always burgeoning Foreign Corrupt Practices Act (FCPA). Those cases have been a template for other kinds of investigations, including recent ones concerning LIBOR-benchmark (London Interbank Offered Rate) manipulation, foreign exchange trading, money laundering, and automobile emissions.

Second, international law enforcement cooperation has become more robust, meaning that it is no longer the prevailing (if unspoken) view of American prosecutors that proceeding by foreign diplomatic channels to get evidence abroad is more trouble than it is worth. There are more staffers than ever in the DOJ's Office of International Affairs, assisting prosecutors in obtaining evidence via mutual legal assistance treaties (MLATs). The DOJ has placed attachés in eight countries and has 60 resident legal advisors and 45 intermittent legal advisors stationed around the globe. There are DOJ Criminal Division prosecutors within Eurojust in The Hague and at INTERPOL in France.[4]

Third, and most important, English has become a lingua franca. Via the internet, people all over the world look to English-language media for entertainment and information. English predominates in newspaper publishing, book publishing, international telecommunications, scientific publishing, international trade, mass entertainment, and diplomacy.[5] It is the language most often taught as a foreign language.[6] And it is increasingly the language in which businesspeople are expected to do their work. All over the world, white collar workers are writing emails and giving PowerPoint presentations to each other in English, even when they are communicating with people with whom they share a common first language other than English.

The result of this is clear. It is much, much easier for American prosecutors to penetrate companies' inner workings and to make cases. Federal criminal defense work can mean representing individuals all over the world and, along the way, bringing word to non-Americans about wire and mail fraud, internal investigations, the Yates memo, and all of the rest.

Much of what an American lawyer does to protect the interest of individual clients abroad will be well familiar to any experienced practitioner. But some key

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considerations come up over and over again. These include:

- ❖ the domestic and extraterritorial applications of U.S. law;
- ❖ the legal framework for — and likelihood of — extradition to the United States;
- ❖ the legal issues that may arise when foreign authorities are conducting a parallel investigation, including how this may affect the client's right against self-incrimination;
- ❖ the practical issues that arise from various data privacy and protection laws; and
- ❖ the procedures for an MLAT interview.

While these issues are common across investigations, the specifics will, of course, vary depending on what statutes and what nations' laws, including treaties, are implicated in the analysis.

Domestic and Extraterritorial Applications of US Law

The first discussion that always comes up with any client abroad embroiled in a DOJ investigation is how that could be: How can *I*, a proud citizen of, say, a European nation, be subject to American law for things I did not do on American soil? A first step in getting the representation off the ground is to help the clients understand how, if at all, they are exposed to American law enforcement.

First, defense counsel will want to consider whether the U.S. government could prosecute the client for a *domestic* criminal violation. Pursuant to *Morrison v. National Australia Band Ltd.*,[7] and the Supreme Court's recent decision in *RJR Nabisco, Inc. v. European Community*,[8] when determining whether a statute may be applied domestically to a given case, a court must ask "whether conduct relevant to the statute's 'focus' occurred in the United States or abroad."[9] If that conduct did occur in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad.[10]

Prosecutors have found some classic "hooks" under this framework. The first of these is the federal wire fraud statute, which by its very terms sweeps in schemes furthered by "wire, radio, or television communication in interstate or foreign commerce."[11] Federal courts have concluded that individuals abroad who use U.S. wires to further a fraudulent scheme — whether it be to communicate via e-mail or chat online with someone in the United States or to obtain or move proceeds — may be subject to prosecution for domestic criminal violations.[12] Second, these violations can be located in the conspiracy statutes, the well-known "darling of the modern prosecutor's nursery."[13] An individual can be guilty of conspiracy to violate an American law without ever setting foot on U.S. soil when a co-conspirator in the United States commits a "reasonably foreseeable" offense or when a communication reaches from abroad into the United States.[14]

The anti-bribery provisions of the Foreign Corrupt Practices Act likewise can apply to fact patterns that seem remote from the United States. By its terms, issuers (i.e., companies with a registered class of securities or required to file periodic and other reports with the SEC) and domestic concerns (i.e., any individual who is a citizen, national, or resident of the United States, or any company that is organized under the laws of the United States or that has its principal place of business in the United States) — as well as their officers, directors, employees, agents, or stockholders — may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official.[15] Furthermore, "[t]hose who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce."[16] For example, "a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting."[17] Even fleeting contact with the United States may serve as a sufficient nexus to assert territorial jurisdiction over foreign individuals for conduct that primarily occurs abroad.

But there are clearly limits. In *Morrison*, for example, the Supreme Court concluded that the focus of Section 10(b) of the Securities Exchange Act of 1934 is on *domestic* securities transactions. The statute, therefore, does not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations.[18]

The government may also look to apply a U.S. statute extraterritorially. "[T]he question of the extent to which a particular [criminal] statute applies outside the United States has generally been considered a matter of statutory, rather than constitutional, construction."[19] One obviously relevant canon of statutory construction is the presumption against extraterritoriality: "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[20]

Several statutes expressly provide for extraterritorial application. While most of these statutes relate to blue collar crimes that occur within the special maritime and territorial jurisdiction of the United States or to misconduct committed by U.S. military or federal employees overseas, some statutes cover white collar crimes. For example, the Foreign Trade Antitrust Improvements Act of 1982 and the Money Laundering Control Act of 1986 have provisions addressing when the Sherman Act and money laundering statutes can be applied extraterritorially.[21]

A number of other federal crimes have also been found to operate overseas by virtue of the implicit intent of Congress. For example, courts have found extraterritorial jurisdiction appropriate in "(1) cases where aliens have attempted to defraud the United States in order to gain admission into the United States; (2) false statements made by Americans overseas; (3) the theft of federal property abroad; [and] (4) counterfeiting, forging or otherwise misusing federal documents or checks overseas by either Americans or aliens. …"[22]

Just recently, in *RJR Nabisco*, the Supreme Court addressed the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act (RICO). The Court concluded that, while the RICO statute itself did not expressly provide for extraterritorial application, the statute could be applied extraterritorially to the extent that the predicate offenses alleged in a particular case themselves apply *extraterritorially*. The Court found that, by incorporating certain extrater-

ritorial predicate offenses, Congress had given a "clear, affirmative indication" that RICO could apply to *some* foreign racketeering activity.[23] The Court also confirmed that the government can bring RICO charges against even foreign criminal enterprises, as long as the enterprise "engage[s] in, or affect[s] in some significant way, commerce directly involving the United States."[24]

It should also be noted that, though the analysis of the extraterritorial application of a statute is principally statutory, "[a] handful, but growing number," of courts have also considered potential due process issues.[25] Some describe a requirement that there be a "nexus" between the United States and the circumstances of the offense — that is, some past, present, or anticipated locus or effect within the United States — before a defendant can fairly be held criminally liable.[26] Others describe a requirement that the defendant be given sufficient notice that his conduct was criminal.[27] While several courts have accepted these arguments, they have generally been greeted with some diffidence by commentators and some courts have rejected them outright.[28]

Extradition

Even if, as is likely, the analysis as to the applicability of U.S. law results in an indeterminate answer, practical and legal complications or even diplomatic considerations may affect defense counsel's thinking about whether the U.S. government is likely to bring a case. These, too, are worth weighing in up front. The most obvious of these is extradition. The United States currently has extradition treaties with over 100 nations. While these treaties vary, certain common provisions will likely be relevant.

First is the treaty's applicability to the alleged criminal conduct. Many extradition treaties list the specific types of extraditable offenses, while others have a dual criminality clause, making extraditable only those offenses that are punishable under both the U.S. and the requested nation's laws for a period exceeding one year. For extradition to proceed under a dual criminality clause, the laws of the two countries need not be identical; substantially similar or analogous offenses generally will suffice.[29] This requirement, however, can still prove a substantial impediment. For instance, in past cases, the United States was unable to extradite individuals from Switzerland for certain alleged tax offenses because that conduct was not a criminal offense under Swiss law.[30] In other circumstances, the conduct might be criminal abroad but not punishable as a felony, meaning that there can be no extradition.

A second thing to look at is whether a client's nationality precludes or limits the likelihood he or she will be extradited. Some countries have blanket rules[31] or policies[32] that their own citizens may not be extradited for any reason. Under other extradition treaties, the requested nation has discretion to decide whether to extradite its own nationals.[33]

Finally, extradition treaties often provide the requested nation with the ability to refuse extradition if the requested nation intends to prosecute the individual for the offense. In light of this, another decision — albeit one that comes up only in relatively dire situations — may be whether it makes sense for the client to submit to (presumably more lenient) local law enforcement so as to preempt (as a diplomatic or even a legal matter) a U.S. prosecution. But this is a difficult and sometimes unsuccessful calculus. The case of Hernan Arbizu provides an interesting illustration.

Arbizu, an Argentine who was a star private banker in New York in the 1990s and 2000s, was indicted in 2008 in the United States for taking millions of dollars from his clients at both UBS and JP Morgan Chase. Just shortly before a 12-count indictment was returned in the United States, Arbizu fled to his homeland, went straight to Argentinean authorities, and admitted his crimes.[34] Rather than allow Arbizu to be extradited to the United States, Argentine authorities looked for his assistance in their investigation of potential tax evasion and money laundering by his former banks' customers.[35] His long-running role as an Argentine cooperator recently came to an abrupt end, however. A change in political administrations in Argentina — toward one with a greater focus on international cooperation — resulted in Arbizu's arrest and extradition to the United States.[36]

Parallel Local Investigations and the Right Against Self-Incrimination

Prosecutors and regulators in a client's home country are often investigating in tandem — or at least in parallel — with American law enforcement. Assessing whether that is so, to the extent possible, is another threshold consideration. Where there is or is likely a local investigation in addition to an American one, having a local lawyer on the team can be beneficial.

One issue that can arise when the United States and foreign law enforcement or regulators are investigating along parallel tracks is a client's compelled testimony. To give a prominent example, under the U.K. Financial Services and Markets Act, individuals may face criminal penalties if they refuse to answer questions posed by the U.K.'s Financial Conduct Authority (FCA) in an FCA investigation. Canadian securities regulators can likewise compel testimony.[37]

Providing compelled testimony can have implications, as played out in *United States v. Allen*,[38] one of the few alleged LIBOR manipulation prosecutions brought in the United States. Defendants Anthony Allen and Anthony Conti were traders in Rabobank's London office. The matter started with questioning by the FCA in 2013 in connection with that agency's investigation into LIBOR manipulation. Allen and Conti faced criminal penalties in the U.K. if they refused to answer questions. The FCA interviewed several other Rabobank employees, including trader Paul Robson. In late 2013, the FCA informed Robson of its intention to take further action against him, and "[c]onsistent with U.K. law, the FCA provided Robson with transcripts of [Allen's and Conti's] compelled testimony."[39] Over the next few days, Robson apparently reviewed the testimony, annotated it, and authored several pages of notes.[40]

Meanwhile, the DOJ — with the assistance of the FCA and other authorities — was also investigating LIBOR manipulation. The DOJ brought charges against Robson and two other Rabobank traders in April 2014, but Allen and Conti were not named. Robson decided to cooperate with the U.S. prosecutors and plead guilty. Just two months later, the DOJ brought wire fraud and conspiracy charges against Allen and Conti.[41]

The defense sought dismissal, arguing that the Fifth Amendment "barred the use, however indirect, … of a defendant's involuntary statement to a foreign official, because a violation of the Fifth Amendment occurs when the involuntary statements are used in a U.S. prosecution, not when they are elicited."[42] Here, Allen and

Conti argued that the prosecution indirectly used their compelled statements because (1) they were reviewed by and likely influenced a key witness, Robson, both in deciding to cooperate and in crafting his testimony; and (2) Robson's tainted testimony influenced the grand jury determination to indict. In response, the government argued that (1) the evidence it presented was wholly independent of the compelled testimony, as required under *Kastigar v. United States*;[43] and (2) even if it were not, it would be irrelevant because the Fifth Amendment offers no protection when a foreign sovereign elicits the compelled testimony without U.S. government involvement.[44]

The district court held a two-day *Kastigar* hearing post-trial and ultimately did not reach the legal issue of whether the Fifth Amendment applies to foreign-compelled testimony.[45] It instead determined that the government — which had implemented a so-called taint team to shield prosecutors from being exposed to any product of the FCA's investigation, had interviewed witnesses before the FCA did and had warned the FCA and witnesses not to provide any information stemming from the foreign investigation — had satisfied its burden under *Kastigar* of proving that its evidence derived from legitimate, independent sources.[46]

As one commentator observed, the decision in *Allen* "all but ensures that Fifth Amendment challenges based on foreign-compelled testimony will continue to be an issue in prosecutions stemming from cross-border investigations."[47] Counsel will want to investigate fully whether the procedures abroad might mean that testimony has been compelled.[48]

Counsel should also keep in mind that "several … nations restrict in total the ability of [corporate] counsel conducting an international investigation to interview witnesses if there are parallel proceedings."[49] For instance, in France, a company may not interview a witness if he or she is also a witness in a French criminal investigation absent permission of the French authorities.[50] Several other European countries have similar "blocking statutes" that may prevent an interview from proceeding.

Data Protection

Many countries have enacted data privacy and transfer laws that cover the handling of personal information, "the kind of information likely to be resident in the e-mails and other electronic communications of a company's employees":[51]

> In practice, these laws impose conditions on a company's ability to access and disclose an employee's e-mail without giving notice and/or obtaining consent from the employee[s] [named in the e-mail]. In fact, many data privacy laws allow for the collection of personal data only on a limited number of bases, defined expressly in the statutes. … Data privacy laws, such as those adopted by the European Union, also have substantial restrictions on the ability to transfer documents outside the European Union, including to American law offices …, even if the information was otherwise gathered and accessed appropriately. Violations of these data privacy laws typically carry criminal and civil penalties.[52]

As a consequence, counsel may be required to review the data only overseas. Even then, documents may be heavily redacted in order to protect other employees' personal information. Counsel for the corporations typically make data protection determinations, but counsel for the individuals should be mindful to follow that lead and not expose themselves to criminal sanctions that can apply to the removal of data from its home country.[53]

Counsel must also be prepared to encounter additional difficulties and restrictions when independently gathering information for a client's defense. Because U.S. courts have no subpoena power over evidence located abroad, the defense has to use other means to obtain foreign evidence located beyond the borders of the United States. Unfortunately, in so doing, counsel will not have access to the same resources as the U.S. government.

Of note, "many MLATs explicitly exclude an individual's access to its processes."[54] Further, counsel will "typically"[55] not be able to resort to letters rogatory — "formal request[s] from a [U.S.] court … to the appropriate judicial authorities in another country requesting compulsion of testimony, documentary, or other evidence or service of process"[56] — until litigation commences. Regardless, letters rogatory have historically been "a time consuming, cumbersome process."[57] Counsel must obtain approval from a U.S. district court, have the letter rogatory transmitted from the State Department's Bureau of Consular Affairs to the foreign nation via diplomatic channels, and then await approved by a judge in that country.[58] Counsel should anticipate that the process could take up to a year.[59] And, as a practical matter, there is less international cooperation than there may be when the U.S. government is making the request. Counsel cannot be certain that the foreign government will execute the request.[60]

The Attorney-Client Privilege

Another critical question that may arise during international investigations is whether the U.S. attorney-client privilege applies when people are communicating with lawyers abroad.

When it is an American investigation, it might seem fair that whatever protections that cover attorney-client communications in the United States should apply equally to such communications overseas. But, then again, at the time of the communications those communicating might reasonably have anticipated that the rules in their home countries would apply.

Reviewing courts typically resolve this tension by engaging in a relatively traditional comity or "touching base" analysis. They ask which country has the "predominant" or "most direct and compelling interest" in whether the communications should remain confidential.[61] In determining whether the communications touch base with the United States, courts consider a variety of factors, and the analysis is highly fact-specific. The location of the author and recipient of the communication is important (including, in particular, whether lawyers in the United States were involved and whether the client was a U.S. resident seeking to protect a U.S. right). Also relevant are the subject matter of the communications and which country's laws the legal advice rendered implicates.

For example, in *Astra Aktiebolag v. Andrx Pharms.*,[62] communications between a Swedish company's in-house counsel and Korean counsel relating to a patent application pending in the United States were found to touch base with the United States, warranting application of U.S. law.[63] In contrast, in *Golden Trade, S.r.L. v. Lee Apparel Company*,[64] communications between an Italian corporation and its Norwegian, German, and Israeli patent attorneys that did *not* relate to U.S.

patents did not touch base with the United States and were therefore subject to the laws of each of those countries.

When non-U.S. law governs, the consequences can be meaningful. There is, for example, no doctrine of legal privilege in China. In Austria (and several other European countries), the "legal professional privilege" (which is the equivalent of the attorney-client privilege) principally applies only to lawyers registered with the Austrian Bar and to European lawyers. At least in theory, depending on how the touch-base analysis comes out under U.S. law, "there is no guarantee that the client's communication with … [a lawyer from the United States will be] protected" even in the United States.[65] Communication with clients in those countries will benefit from the inclusion of a local lawyer as well as an American one.

The other significant wrinkle is that, in many countries, communications with in-house lawyers are not ordinarily protected. Unlike in the United States, most countries within the European Union tend not to recognize privilege for a client's communication with in-house counsel.[66] The general rule states that attorney-client communications are privileged if (1) they are "made for the purposes and in the interest of the client's rights of defense" and (2) they "emanate from the *independent* lawyers … who are not bound to the client by a relationship of employment."[67]

Testimony Pursuant to MLAT

In the context of international investigations, U.S. officials may request interviews with clients located outside of the United States, including through an MLAT. The United States has now entered into MLATs with more than 60 foreign nations, using these treaties for, among other things: service of judicial or other documents; locating or identifying persons or things, examining objects and sites; requesting searches and seizures; obtaining documents; identifying and freezing or confiscating proceeds or instrumentalities of crime or other assets; and, of course, taking testimony.[68]

When the U.S. government requests testimony through an MLAT, it is requesting that the law enforcement officials of the foreign jurisdiction interview the defense attorney's client. Generally, when the interview takes place, the procedures of the foreign jurisdiction apply. That means, oftentimes, the protections and privileges available in the United States are not applicable. The individual may not be permitted to bring U.S. counsel to the interview, to give an extreme example. (Certain MLATs between the United States and other countries provide that the requesting nation may request that certain procedures or protections, e.g., presence of the witness's counsel, apply that might not ordinarily apply under the rules of procedures of the requested state.[69]) Similarly, when an individual claims, for instance, the attorney-client privilege or the privilege against self-incrimination, the witness's testimony could end up being taken, with the privilege to be resolved at a later date — hardly a satisfactory approach.[70]

The logistics and process for the MLAT interview may be very different from what one expects for a U.S.-based proffer or grand jury testimony. Procedures can be formal and cumbersome, with some surprising limitations. The interview may proceed with questioning by the foreign official without any follow-up or divergence from the scripted questions prepared and submitted by the U.S. government. Indeed, though the DOJ lawyers may be in the room, they may not be permitted to ask questions.[71] A stenographer may be in the room or the interview may be tape recorded. The DOJ may also ask the witness to sign a written statement summarizing his or her testimony. All of this may proceed in a foreign language, without the beneficial presence of an interpreter hired by U.S. counsel. Often, however, the local official will permit translation of the interview into English to allow DOJ lawyers or U.S. law enforcement agents to suggest follow-up questions.

Here, local counsel can be indispensable. Counsel should also, to the extent possible, keep the lines of communications with both U.S. and foreign officials open and work to negotiate terms agreeable to all parties. For its own strategic reasons, the DOJ will want to see to it that appropriate procedures and protections are in place; if they are not, the testimony could be said to be compelled. Indeed, counsel will likely review all of the terms of the MLAT to determine whether there may be an argument that statements elicited in the MLAT interview or testimony were compelled and therefore inadmissible under the Fifth Amendment. If counsel believes that under all of the circumstances of the MLAT interview or testimony the client may have an argument that the statements were compelled, counsel should take care to consider whether entering into the standard DOJ proffer agreement would vitiate a compulsion argument.

Conclusion

International investigations promise to become more and more common. It will be interesting to see how procedures and the law will evolve to meet that reality. In the meantime, counsel should be prepared to encounter a plethora of issues, including those identified in this article.

Notes

1. Justice News, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Securities Enforcement Forum West Conference, *at* https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-securities-enforcement (May 12, 2016).

2. *See* William McDonald, Michael Williams & Megan Evans, *Protecting the Corporation's Interests*, IN-HOUSE DEFENSE QUARTERLY, at 16-17 (Winter 2016) (discussing the evolution of the DOJ's policies relating to corporate internal investigations, including the Holder, Thompson, McNulty, and Filip memos and the Principles of Federal Prosecution of Business Organizations (USAM § 9-28.000)).

3. *See* Donald C. Dowling, Jr., *Conducting Internal Employee Investigation Outside the US,* 239 EMPL. L. COUNS. 2 (July 2010).

4. *See* Caldwell, *supra* note 1.

5. DAVID NORTHRUP, HOW ENGLISH BECAME THE GLOBAL LANGUAGE (2013).

6. David Graddol, *English Next: Why Global English May Mean the End of 'English' as a Foreign Language (*2006), *available at* http://englishagenda.britishcouncil.org/sites/ec/files/books-english-next.pdf.

7. *Morrison v. National Australia Band Ltd.,* 561 U.S. 247 (2010).

8. *See RJR Nabisco, Inc., et al. v. European Community et al.,* No. 15-138, 579 U.S. ___ (June 20, 2016), slip op. *available at* http://www.supremecourt.gov/opinions/15pdf/15-138_5866.pdf.

9. *See id*.

10. *Id.*

11. 18 U.S.C. § 1343.

12. For example, in the LIBOR manipulation cases, district courts have concluded that the use of wires originating or terminating in the United States by foreign nationals based in Europe for purposes of "settl[ing] payments under interest rate swap contracts" and "publish[ing] LIBOR to subscriber" allows for the prosecution of foreign nationals in the United States for domestic criminal violations.

United States v. Allen, 14-CR-272, Doc. 221 — Memorandum and Order (S.D.N.Y. Feb. 16, 2016).

13. *Harrison v. United States* 7 F.2d 259, 263 (2d Cir. 1925).

14. *See, e.g., United States v. MacAllister*, 160 F.3d 1304, 1307-08 (11th Cir. 1998); *United States v. Manuel*, 371 F. Supp. 2d 404, 409 (S.D.N.Y. 2005).

15. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

16. *See* Crim. Div. of the U.S. Dep't of Justice & Enforcement Div. of the U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 11 (2012), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

17. *Id.* at 12.

18. 561 U.S. at 262-65.

19. Charles Doyle, Cong. Research Service, Extraterritorial Application of American Criminal Law 8 (2012).

20. *RJR Nabisco, Inc.*, slip op. at 7.

21. *See* 26 U.S.C. § 6(a) (regarding applicability of Sherman Act to conduct involving trade or commerce with foreign nations); 18 U.S.C. §§ 1956(f) (indicating that there is extraterritorial jurisdiction over money laundering if the conduct is by a U.S. citizen or, in the case of a non-U.S. citizen, the conduct occurs in part in the United States).

22. Doyle, Extraterritorial Application of American Criminal Law, *supra* note 19, at 7.

23. *RJR Nabisco, Inc.*, slip op. at 11.

24. *Id.* at 14-17.

25. Doyle, Extraterritorial Application of American Criminal Law, *supra* note 19, at 5.

26. *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *see* Doyle, Extraterritorial Application of American Criminal Law, *supra* note 19 at 5-6, n.29.

27. *See generally Al Kassar*, 660 F.3d at 119 ("[F]air warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.").

28. *See* Doyle, Extraterritorial Application of American Criminal Law, *supra* note 19 at 6, n.32, 33 (collecting articles and cases).

29. Cadwalader, US DOJ's First Successful Extradition on Antitrust Charges (Apr. 17, 2014) (citing 35 C.J.S. Extradition and Detainers § 44 (2007); 31A Am. Jur. 2d Extradition § 40 (2007)).

30. *See Swiss Banks and Tax Evasion — Arresting Developments*, The Economist (Oct. 23, 2013), *available at* http://www.economist.com/blogs/schumpeter/2013/10/swiss-banks-and-tax-evasion (noting that Switzerland "doesn't consider tax evasion a crime and won't extradite suspects without their consent").

31. *See* Michael John Garcia & Charles Doyle, Cong. Research Service, Extradition to and from the United States: Overview of the Law and Recent Treaties 13-14 (2010).

32. Nicholas M. De Feis & Philip C. Patterson, *Citizenship a Good Defense Against Extradition — but Not in US*, N.Y. L. J. (Dec. 14, 2012) (discussing Germany's historic reluctance to extradite its citizens).

33. *See, e.g.,* Austria International Extradition Treaty art. 3(1).

34. Lynnley Browning & Diana B. Henriques, *Private Banker Moved Funds Undetected*, N.Y. Times (June 29, 2009) *available at* http://www.nytimes.com/2009/06/30/business/30banker.html?_r=1&sq=arbizu&st=cse&scp=2&pagewanted=all; *see* Fermin Koop, *Arbizu: Banks Work Together to Evade Taxes*, Buenos Aires Herald (May 7, 2015), *available at* http://www.buenosairesherald.com/article/188585/arbizu-banks-work-together-to-evade-taxes (Arbizu arrived at Ezeiza International Airport and went to a courthouse to avoid being extradited. He is responsible for his actions, helped tax evasion to grow in the country and cheated in the United States. … He incriminated himself to avoid being extradited. If he hadn't done that, he would be in jail in the United States now.").

35. Koop, *supra* note 34.

36. Patricia Hurtado, *Ex-JP Morgan Banker 8 Years on the Run to Land in US Court,* Chi. Trib. (June 23, 2016), *at* http://www.chicagotribune.com/news/sns-wp-blm-jpmorgan-61b40b44-397e-11e6-af02-1df55f0c77ff-20160623-story.html.

37. *See*, *e.g., Beaudette v. Alberta (Securities Commission)*, Docket No. 1501-0033-AC, 2016 ABCA 9 (Jan. 13, 2016) *at* http://www.canlii.org/en/ab/abca/doc/2016/2016abca9/2016abca9.html?autocompleteStr=Beaudette%20v.%20Alberta%20(Securities%20Commission)%20&autocompletePos=1. In *Beaudette*, the Alberta Court of Queen's Bench decided that provisions of the Alberta *Securities Act* authorizing investigators to summon witnesses and compel them to testify under oath, and permitting commission staff to provide such evidence to other regulators and law enforcement agencies in Canada and the United States, do not offend protections against self-incrimination in the *Charter* even if there is a possibility that the evidence so disclosed could be used against the witness in a criminal prosecution in the United States. "The process in a foreign jurisdiction, including the question of what evidence will be admissible, is to be determined by the foreign law," the court held. *See also* Linda Fuerst, *The Privilege Against Self-Incrimination: Disclosure in Cross-Border Investigations*, *at* http://www.litigate.com/files/15286_The%20Privilege%20Against%20Self-Incrimination.pdf.

38. *United States v. Allen*, 2016 WL 555949 (S.D.N.Y. Feb. 11, 2016).

39. Marc P. Berger & Justin Florence, *Questions on Use of Compelled Testimony in LIBOR Convictions*, N.Y. L. J. (Feb. 25, 2016), *available at* http://www.newyorklawjournal.com/id=1202750520801/Questions-on-Use-of-Compelled-Testimony-in-LIBOR-Convictions?slreturn=20160612154633.

40. 2016 WL 555949, at *3.

41. *Id.* at *4.

42. Berger & Florence, *supra* note 39.

43. *Kastigar v. United States*, 406 U.S. 441 (1972).

44. 2016 WL 555949, at *4-10.

45. Judge Rakoff only referred to this issue in a footnote of his decision, writing: "Deeply interesting though this question is, the court has no occasion to resolve it here, because even assuming *Kastigar* applies to testimony compelled by a foreign sovereign, the government has met its *Kastigar* burden on the facts here determined." 2016 WL 555949, at *4, n.8.

46. *Id.* at *7-8.

47. Berger & Florence, *supra* note 39; *see also* Karen Patton Seymour & Allison Caffarone, *Defending Individuals in Government Investigations in* Defending Corp. & Indiv. in Gov. Invest. § 5:42 (2014); David Rundle, *Testing the 5th: Compelled Testimony from Foreign Regulators*, Law360 (Apr. 11, 2016) (noting that several circuit court cases have held that statements obtained involuntarily abroad cannot be admitted in U.S. proceedings).

48. *See* Fuerst, *supra* note 37, at 19, n.17; Glen Jennings & Max Munoz, *Preventing Self-Incrimination in Cross-Border Investigations*, *at* https://gowlingwlg.com/en/global/insights-resources/preventing-self-incrimination-in-cross-border-investigations?lang=en-CA (May 26, 2016).

49. Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 Fordham Urb. L.J. 361, 380 (2011).

50. *Id.* (quoting Christopher J. Clark, The Complexities to International White Collar Enforcement in International White Collar Enforcement: Leading Lawyers on Understanding Cross-Border Regulations, Developing Client Compliance Programs, and Responding to Government Investigations 7, 12 (Michaela Falls ed., 2010), *available at* 2010 WL 271738, at *4).

51. Richard M. Strassberg & Derek A. Cohen, *Foreign Corrupt Practices Act Investigations: Challenges & Strategies for White Collar Attorneys and Their Clients*, Aspatore, 2015 WL 15893, at *4 (Jan. 2015).

52. *Id.*

53. For example, under Article 226-18-

1 of the French Criminal Code, processing data despite the objection of the data subject is a criminal offense subject to five years' imprisonment and/or a fine of 300,000 EUR. Lois Rachel & Soraya Amrani-Mekki, *Data Protection: Redress Mechanisms and Their Use*, at 19-20 (Institut Francais des Droites et Libertes 2012), *available at* https://fra.europa.eu/sites/default/files/access_to_data_protection_remedies_country_fr.pdf.

54. Seymour & Caffarone, *supra* note 47 at § 5:40; *see also* Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 626 (Apr. 2016); Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT'L L. 261 (Fall 2006) (discussing the imbalance between the U.S. government and defendants in foreign evidence-gathering).

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55. Federal Judicial Center, International Litigation Guide — Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges (2014), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/mlat-lr-guide-funk-fjc-2014.pdf/$file/mlat-lr-guide-funk-fjc-2014.pdf ("Letters rogatory are available to prosecutors, defendants, and civil litigants once formal proceedings have commenced; they typically cannot issue during the *investigative* stage of criminal proceedings.") (emphasis in original). *But see In re Letter of Request from the Crown Prosecution Service of the United Kingdom, Thomas J. Ward, Appellant*, 870 F.2d 686 (D.C. Cir. 1989) ("The judicial proceeding for which assistance is sought, we further hold, need not be pending at the time of the request for assistance; it suffices that the proceeding in the foreign tribunal and its contours be in reasonable contemplation when the request is made. We remand the case, however, so that the district court may ensure that the evidence is taken in a manner appropriate for use in judicial proceedings in the United Kingdom.").

56. Linda Friedman Ramirez, *Federal Issues in Obtaining Evidence Abroad: Part One*, THE CHAMPION, June 2007 at 28; *see also* 28 U.S.C. § 1781.

57. Ramirez, *supra* note 56, at 28.

58. *See* International Litigation Guide — Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges, *supra* note 55, at 22.

59. *But see* U.S. Attorneys' Manual, Criminal Resource Manual at 275, *available at* https://www.justice.gov/usam/criminal-resource-manual-275-letters-rogatory ("The time involved may be shortened by transmitting a copy of the request through … some … more direct route, but even in urgent cases the request may take over a month to execute.").

60. Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT'L L. 261, 274 (2006).

61. *Astra Aktiebolag v. Andrx Pharms.*, 208 F.R.D. 92, 98-99 (S.D.N.Y. 2002); *In re Philip*, 2005 WL 2482494 at *1-2; *see also* Andrew C. Hruska & Kyle Sheahen, International Criminal Discovery, 14(1) ENGAGE 34, n.20 (Feb. 2013).

62. *Astra Aktiebolag v. Andrx Pharms.*, 208 F.R.D. 92 (S.D.N.Y. 2002).

63. *See Aktiebolag*, 208 F.R.D. at 99; *see also In re Philip*, 2005 WL 2482494 at *1-2 (communications written by U.S. and Canadian attorneys rendering legal advice regarding a public offering in the United States "touched base" with the United States).

64. *Golden Trade, S.r.L. v. Lee Apparel Company*, 143 F.R.D. 514 (S.D.N.Y. 1992).

65. DLA Piper, Legal Professional Privilege Global Guide, at 11-12 (3d ed. 2015).

66. Hruska, et al., International Criminal Discovery, *supra* note 61, at 34, n.20.

67. *AM&S v. Commission*, ECR 1575 (1982).

68. Hon. Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40(2) LITIGATION (Winter 2014).

69. Treaty with Austria on Mutual Legal Assistance in Criminal Matters (Sept. 6, 1995) ("The Requested State shall permit the presence of such persons as specified in the request during the execution of the request and shall allow such persons either to question directly the person whose testimony or evidence is being taken or to have questions posed in accordance with applicable procedures in the Requested State."); *see also supra* note 67 (referencing treaties with similar language).

70. *See, e.g.,* Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters, and Exchange of Notes (Apr. 30, 1997) ("Australia MLAT") ("If the person … asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the evidence shall nonetheless be taken and the claim made known to the Central Authority of the Requesting State for resolution by the authorities of that State."); Treaty Between the Government of the United States of America and the Government of Trinidad and Tobago on Mutual Legal Assistance in Criminal Matters (Mar. 4, 1996) ("Trinidad and Tobago MLAT") (same); *see also* International Criminality Unit, UK Home Office, *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom*, at 20 (12th ed. 2015), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf ("If an individual claims privilege under the law of the Requesting State, and if the requesting authority … [does] not concede[], the evidence may be taken but will not be sent to the requesting authority until a court in the Requesting State rules on the matter.").

71. *But see* Treaty with Ukraine on Mutual Legal Assistance in Criminal Matters, U.S.-Ukr. (Jul. 22, 1998), S. Treaty Doc. No. 106-16, at art. 8 ("The Requested State shall permit the presence of such persons as specified in the request during the execution of the request, and shall allow such persons to question the person giving the testimony or evidence."); Australia MLAT, at art. 8.3 (same); Trinidad and Tobago MLAT (same). ■