Criminal Law & Procedure

International Criminal Discovery

*By Andrew C. Hruska & Kyle Sheahen**

I. Introduction

While money moves at the speed of light across national boundaries, law enforcement has historically followed at a distance, with the interests of sovereigns slowing and, sometimes, completely stopping criminal investigations seeking evidence about international financial transactions. Slowly over the course of decades, U.S. prosecutors have eroded those protections—sometimes informally out of the public eye, sometimes aggressively in the crucible of adversary court proceedings.

The increasingly complex and inter-connected world of international financial transactions becomes ever more transparent to U.S. law enforcement as the panoply of discovery devices grows to complement the assertions of U.S. criminal jurisdiction over foreign business conduct. But that transparency has come with a significant cost in uncertainty for multi-national businesses caught between two sovereigns' dictates and fractured legal-political relationships with U.S. trading partners.

In the classic scenario, U.S. prosecutors seek access to information about a financial transaction outside the country. While there must be some connection to the U.S., however tenuous, for prosecutors to assert an interest in the first place, other nations have presented a range of reactions—some obliging, some hostile—to U.S. criminal discovery techniques designed to pursue that interest into foreign territory. This article surveys the discovery tools available to U.S. prosecutors, the recent history of their application as well as some legal and diplomatic problems that this effort has engendered.

II. Formal and Informal Means of International Criminal Discovery

The powers of U.S. prosecutors[1] are at their strongest when they seek evidence from a U.S. company about transactions in which it engaged at least partially in the U.S. In these situations, prosecutors can often proceed much as they would with wholly domestic evidence: sending subpoenas, summoning witnesses to the grand jury, and arranging informal opportunities to learn about the underlying business context.[2] Conversely, those powers operate at or beyond their limit when seeking information about wholly foreign transactions by non-U.S. actors. Then, U.S. prosecutors repeatedly encounter a variety of obstacles that range from complex procedures for mutual legal assistance, diplomatic resistance to U.S. encroachment in certain areas of business conduct, and the unavailability of witnesses abroad.[3]

A great deal of international criminal discovery occurs informally, as prosecutors make requests on multi-national companies and even on foreign enforcement agencies that do not, for whatever reason, become part of the more formal state-to-state treaty driven process.[4] These informal, cooperative processes work when no clear legal rule prevents conveying information from one jurisdiction to another or between coordinated regulators, such as the banking supervisors of multinational financial institutions which traditionally cooperate across national boundaries and often have themselves signed memoranda of understanding governing these less formal exchanges of information.[5]

When informal means are not available, prosecutors must decide on a formal tactic: whether they want (a) to *push*—through a request that relies on a foreign government to compel the production of information, or (b) to *pull*—on the U.S. business presence of a company that holds information abroad to seek to compel its production in the U.S. They may elect to both push and pull, although that strategy creates tension between U.S. diplomatic and domestic legal prerogatives.

III. Mutual Legal Assistance

The formal route to criminal discovery for evidence from abroad can be complex and many prosecutors see it as unduly burdensome. Generally, the U.S. relies on a web of treaties, each with its own quirks and private interpretations, that connect U.S. law enforcement with coordinate agencies abroad.[6] Moreover, the efficacy of formal requests for obtaining evidence from abroad can depend heavily on the country and, even within a country, the agency to which the request is directed.[7] A full review of the various treaty mechanisms is well beyond the scope of a brief article, but some examples will illustrate the point.

Mutual Legal Assistance Treaties ("MLATs") are legally binding commitments of two states to assist each other through their own domestic legal mechanisms to obtain evidence to support criminal investigations or prosecutions in the requesting country. MLATs are designed to "improve law enforcement cooperation between two nations."[8] Such treaties can be very broad and grant wide-ranging assistance[9] or narrowly targeted.[10] All depend on some degree of executive discretion in deciding whether to consent to the request under the treaty, and often judicial discretion if the production of information is challenged in court. Foreign countries may also impose limitations on the use of evidence obtained through a treaty, such as limiting the prosecutor's ability to use the information only subject to certain conditions[11] (such as, for instance, not sharing it with certain agencies) or restricting the crimes that the evidence may be used to charge.[12]

While it seems fairly clear that the existence of a treaty will not preempt the use of other mechanisms for obtaining evidence absent an express intent to do so,[13] the failure to use an available treaty route may complicate the use of other, more direct means.

*Andrew C. Hruska is a partner at King & Spalding LLP and Kyle Sheahen is an associate attorney at King & Spalding LLP.

IV. *Bank of Nova Scotia* Grand Jury Subpoena Enforcement

The direct and most controversial means of international criminal discovery is the issuance of *Bank of Nova Scotia*-type grand jury subpoenas ("*BNS* subpoenas"), so named for the case where the government sought to compel a foreign bank to produce information by serving a subpoena on its U.S. representative office when the production of the information violated the foreign country's laws.[14] This tactic puts the recipient in the middle of a tug-of-war between U.S. prosecutors seeking the information and foreign governments enforcing their own laws controlling access to that information. Courts' reactions to this predicament are mixed, with some compelling production where the control over the foreign information resides in the U.S.[15] while others have modified the subpoena to limit its reach to records already located in the U.S.[16]

The issuance of *BNS* subpoenas is an aggressive tactic which threatens international comity because it forces the subpoena recipient to choose between violating the laws of the U.S. compelling production or violating the laws of another country preventing production. DOJ has established an internal process involving the Criminal Division's Office of International Affairs ("OIA") to regulate any applications for subpoenas to persons or entities in the U.S. for records located abroad.[17] But that internal process is opaque to both the courts and subpoena recipients and may not adequately address the concerns that this tactic raises. This is not to argue that *BNS* subpoenas are *never* appropriate, rather that they constitute an extreme measure whose in terrorem effect cannot be sufficiently balanced by the prospect of eventual judicial intervention. Merely being served with a *BNS* subpoena places severe pressures on most international businesses, whether or not the subpoena ultimately is enforced.

The U.S. legal system would be better served by statutory direction over the use of *BNS* subpoenas, rather than executive discretion. For instance, an amendment to Federal Rule of Criminal Procedure 6 could specify that in seeking evidence located in a country with whom the U.S. maintains an MLAT, the government must first demonstrate to a court that the MLAT process has been tried and failed to produce appropriately requested information.

V. Application of Privileges in International Criminal Discovery

Some of the protections that Americans take for granted in the criminal system are unusual, or even unique, viewed in international perspective. For example, U.S. citizens enjoy very robust protections against unregulated searches and seizures, against compelled statements that may incriminate the speaker, and against the compelled production of communications subject to attorney-client privilege, accompanied by allied state protections.

These fundamental protections can be diminished with respect to foreign evidence obtained by prosecutors as part of an international criminal investigation. The Fourth Amendment, which bars unreasonable searches and seizures, does not apply to the introduction of evidence obtained from foreign governments unless the means used were so aggressive that they "shock the conscience" or the U.S. investigation was so intertwined with the foreign one so as to effectively create a joint venture.[18] Similarly, a confession obtained by a foreign law enforcement officer in breach of what would have—had the interrogation taken place in the U.S. —been a suspect's *Miranda* rights does not violate the Fifth Amendment absent substantial participation by U.S. officials.[19] Further, in some circumstances foreign law may afford significantly fewer protections than U.S. law concerning claims of attorney-client privilege involving foreign evidence.[20] Given the limited application of these important protections to foreign evidence, the U.S. legal system would benefit from clear rules strengthening U.S. privilege protections with respect to the use of evidence obtained by U.S. prosecutors from foreign jurisdictions. For example, while it is unrealistic to expect foreign law enforcement officers to Mirandize criminal suspects in their own investigations, since the giving of *Miranda* warnings is unique to U.S. law, admission into evidence of a confession obtained in a foreign investigation should be tempered with an explanation of how that evidence was obtained and conditioned on jury instructions explaining the essence of Fifth Amendment concerns at issue. To the extent that the U.S. exports its criminal jurisdiction without exporting the corresponding protections afforded to criminal defendants in the U.S., prosecutorial decision-making—and, ultimately, jury deliberations—should reflect the understanding that defendants will not be disadvantaged by the conflict between jurisdictions' procedures.

VI. Conclusion

As companies expand across borders and global financial transactions multiply, U.S. prosecutors will continue to assert U.S. criminal jurisdiction over foreign business conduct and seek access to evidence located in the farthest reaches of the globe. Prosecutors press the use of both informal and formal discovery devices in their quest for extraterritorial information, even if these devices threaten international comity by seeking to compel the production of information in violation of a foreign country's laws. Further, many of the hallmark privileges of the U.S. criminal system have limited application to foreign evidence. These developments have created an imbalance in favor of prosecutors in international criminal investigations, and DOJ should promulgate a more transparent system of institutional safeguards regulating prosecutorial conduct related to obtaining and using foreign evidence. If DOJ does not take such measures on their own, then Congress should do it for them.

Endnotes

[1] We refer generally to prosecutors, although many of the same challenges confront civil enforcement agencies such as the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") or regulatory agencies, such as the Federal Reserve Bank. Likewise, state and local prosecutors—especially the New York County District Attorney's Office—also seek foreign criminal discovery both formally through the assistance of the U.S. Department of Justice ("DOJ") and informally on their own.

[2] *See, e.g.,* United States v. First Nat'l City Bank, 396 F.2d 897, 900–01 (2d Cir. 1968) (ordering New York bank to produce records possessed by bank's German branch in an antitrust investigation of its customers and stating that "[i]t is no longer open to doubt that a federal court has the power to require

the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person in possession or control of the material.").

[3] The U.S. Attorney's Criminal Resource Manual recognizes the difficulties facing prosecutors seeking evidence outside the U.S., stating that a foreign nation "may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty. Even such seemingly innocuous acts as a telephone call, a letter, or an unauthorized visit to a witness overseas may fall within this stricture. A violation of sovereignty can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant United States Attorney who acts overseas." *See* U.S. Attorney's Criminal Resource Manual Section 276.

[4] Prosecutors may also make requests through Interpol for information that can be obtained by foreign law enforcement without an official request. *See* U.S. Attorney's Criminal Resource Manual Section 278.

[5] *See, e.g.*, Memorandum of Understanding Between the U.S. Financial Industry Regulatory Authority, Inc. and the U.K. Financial Services Authority, Sept. 15, 2010.

[6] Prosecutors may also seek evidence from abroad using letters rogatory in the absence of a treaty or other agreement, although the treaty request procedure is "generally faster and more reliable." *See* U.S. Attorney's Criminal Resource Manual Sections 275 and 276. Letters rogatory are requests "from a judge in the United States to the judiciary of a foreign country requesting the performance of an act which, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty." U.S. Attorney's Criminal Resource Manual Section 275; *see also In re* Urethane Antitrust Litig., 267 F.R.D. 361, 364 (D. Kan. 2010) ("United States courts have inherent authority to issue letters of request to foreign tribunals.").

[7] The U.S. Attorney's Criminal Resource Manual states that "[b]ecause treaties are negotiated separately, each one differs from the next. Experience with one should not be considered universally applicable." *See* U.S. Attorney's Criminal Resource Manual Section 276.

[8] United States v. Trustees of Boston College, 831 F. Supp. 2d 435, 442 (D. Mass. 2011).

[9] *See, e.g.*, Treaty with the United Kingdom on Mutual Legal Assistance in Criminal Matters, U.S.-U.K., Jan. 6, 1994, S. Treaty Doc. No. 104-2.

[10] *See, e.g.*, Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Oct. 2, 1996, S. Treaty Doc. No. 105-8.

[11] *See, e.g.*, Treaty on Mutual Assistance in Criminal Matters, U.S.-Neth., art. 11(2), June 12, 1981, S. Treaty Doc. No. 97-16 ("The Requesting State shall not use any evidence obtained under this Treaty, nor any information derived therefrom, for purposes other than those stated in the request, without the prior consent of the Requested State.").

[12] *See, e.g.*, Treaty on Mutual Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019 (entered into force Jan. 23, 1977) (stating that the treaty shall not apply to, *inter alia*, investigations or proceedings "for the purpose of enforcing cartel or antitrust laws").

[13] *See* Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 539 (1987); *see also* United States v. Vetco, 691 F.2d 1281, 1286 (1981) (stating that "[t]here is nothing in the [1951 U.S.-Swiss Convention on Double Taxation of Income] barring the use of summonses by the [Internal Revenue Service] to gather information. The treaty does not state that its procedures for the exchange of information are intended to be exclusive. There is no such indication in the treaty's legislative history.").

[14] *See In Re* Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *In Re* Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

[15] *See In re* Grand Jury Subpoenas Duces Tecum Addressed to Canadian Intern. Paper Co., 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947) (enforcing grand jury subpoena served upon Canadian corporation in New York and stating that "[t]he fact that a corporation's records and documents are physically located beyond the confines of the United States does not excuse it from producing them if they are in its possession and the court has jurisdiction of the corporation. The test is control—not location of the records."); *see also* First Nat'l City Bank, 396 F.2d at 900–01.

[16] *See* Ings v. Ferguson, 282 F.2d 149, 153 (2d Cir. 1960) (holding that the service of subpoenas *duces tecum* upon the New York agencies of two Canadian banks requiring production of records located in Canada could not be enforced and restricting the subpoenas to documents in the possession of the New York agencies).

[17] The request for subpoenas to persons or entities in the U.S. for records located abroad must be in writing and set forth "(1) the subject matter and nature of the grand jury investigation or trial; (2) a description of the records sought including their location and identifying information such as bank account numbers; (3) the purpose for which the records are sought and their importance to the investigation or prosecution; (4) the extent of the possibility that the records might be destroyed if the person or entity maintaining them becomes aware that they are being sought; and (5) any other information relevant to the OIA's determination." U.S. Attorney's Criminal Resource Manual Section 279(B). To determine whether the subpoena will be authorized, the OIA will consider "(1) the availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory; (2) the indispensability of the records to the success of the investigation or prosecution; and (3) the need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction." *Id.*

[18] *See* United States v. Barona, 56 F.3d 1087, 1091–92 (9th Cir. 1995) ("Two very limited exceptions apply [to the inapplicability of the Fourth Amendment to the acts of foreign officials]. One exception … occurs if the circumstances of the foreign search and seizure are so extreme that they shock the [judicial] conscience, [so that] a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence … [and] the second exception to the inapplicability of the exclusionary rule applies when United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials.") (quotations omitted).

[19] *See* United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1985) (stating that "when a law enforcement officer of a foreign country does not follow the requisites of *Miranda* . . . the [F]ifth [A]mendment right against self-incrimination has not been violated and there is no requirement for invocation of the exclusionary rule."); Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 877 (9th Cir. 1980) (stating that "evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States.").

[20] U.S. courts use a choice-of-law "touching base" or "contacts" analysis to determine whether U.S. or foreign law applies to claims of privilege involving foreign evidence. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1169-70 (D. S.C. 1975) (stating that "any communications touching base with the United States will be governed by the federal discovery rules while any communications related to matters solely involving [foreign countries] will be governed by the applicable foreign statute."). The scope of U.S. attorney-client privilege law is greater for certain communications, such as those between in-house counsel and a corporate client, than the scope of attorney-client privilege law in many other jurisdictions. *See, e.g.*, Marcy C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 Emory L.J. 1057, 1103–04 (1997) (stating that "[a]s a matter of domestic law, seven of the fifteen member states of the European Union do not recognize the [attorney-client] privilege for communications between in-house counsel and a corporate client."); Case C-550/07P, Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission (2010) (holding that communications with in-house lawyers are not accorded legal professional privilege under European law).