GIR INSIGHT

AMERICAS INVESTIGATIONS REVIEW 2020

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Preface

Welcome to the *Americas Investigations Review 2020*, a *Global Investigations Review* special report. *Global Investigations Review* is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing, telling them all they need to know about everything that matters.

Throughout the year, the *GIR* editorial team delivers daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Americas Investigations Review 2020*, which you are reading, is part of that series. It contains insight and thought leadership, from 34 pre-eminent practitioners from the region. Across 13 chapters, spanning around 160 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic. This edition covers Argentina, Brazil, Mexico and the United States, as well as multi-jurisdictional deals in Latin America; has overviews on data privacy, economic sanctions, extraterritoriality and privilege; covers how enforcements authorities interact and how to move forward after an investigation; and enforcer insight from the World Bank and the CGU.

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you.

Please write to insight@globalarbitrationreview.com.

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How Enforcement Authorities Interact

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Overview

Cross-border investigations continue to grow in both number and complexity. The US Department of Justice (DOJ) last year revealed that bribery cases now typically involve four or five countries.[1] Indeed, in 2017 and 2018, four of the largest bribery settlements concerned a foreign company, an investigation that was conducted in cooperation with foreign authorities and a settlement that credited amounts paid to foreign authorities.[2]

As cross-border investigations have grown, the mechanisms for international cooperation are maturing and in some cases undergoing transformation. The United States has long had a range of bilateral and multilateral agreements in place to facilitate international cooperation. Increasingly, however, US enforcement authorities are also using new types of agreements and even informal mechanisms to foster cooperation with enforcement partners abroad.

The first section of the article describes the key mechanisms for international cooperation. It begins with a general discussion of requests made pursuant to mutual legal assistance treaty (MLAT) and then moves to more specific discussions of non-MLAT-based requests for records and other types of assistance, requests for freezing and seizing assets, and requests for arrest and extradition. The second and final section addresses recent developments that relate to these mechanisms in various ways.

1 Michael Griffiths, 'Cooperate with everyone simultaneously to avoid piling on, says FCPA chief', *Global Investigations Review* (GIR) (14 June 2018). See also US Department of Justice, Acting Assistant Attorney General Kenneth A Blanco Speaks at the American Bar Association National Institute on White Collar Crime (10 March 2017), ('[J]ust as we receive significant assistance from our foreign partners . . . so too do we provide significant assistance to them.').

2 US Department of Justice, 'Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan' (21 September 2017); US Department of Justice, 'Keppel Offshore & Marine Ltd and US Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case' (22 December 2017); US Department of Justice, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate' (4 June 2018); US Department of Justice, 'Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than $850 Million for FCPA Violations' (27 September 2018).

The mechanisms for international cooperation

MLAT requests

The most common method US authorities use to enlist cooperation from partners abroad in criminal matters is through requests made pursuant to bilateral MLAT. Such requests are made for a variety of purposes, including the following:

- obtaining evidence;
- taking testimony abroad;
- executing search warrants; and
- executing asset freezes and seizures.[3]

The United States has signed over 70 MLATs with countries across the globe. Each treaty defines the obligation to provide assistance, the scope of the obligation and the requirements for submitting a request.[4] The Office of International Affairs (OIA), an office within DOJ staffed with over 50 attorneys that is designated as the US central authority for all incoming and outgoing MLAT requests, provides guidance and country-specific model forms to prosecutors seeking to use MLAT requests.[5] Although MLATs primarily facilitate cross-border criminal investigations and prosecutions, the DOJ's various domestic partners, including the US Securities and Exchange Commission (SEC), may use the MLAT process to obtain cross-border assistance in certain cases and in certain jurisdictions.[6]

In the typical criminal case, an assistant US attorney from one of the 94 federal judicial districts will send an MLAT request, with an accompanying translation, to the OIA for approval. Once it is finalised, the OIA will send the request and accompanying translation through diplomatic channels to the foreign central authority, which will review the request for sufficiency and, assuming it is deemed sufficient, thereafter oversee the execution of the MLAT request.[7] As discussed further below, the OIA has parallel procedures in place to handle incoming MLAT requests.

3 Charles Doyle, 'Extraterritorial Application of American Criminal Law', Congressional Research Service 29 (31 October 2016); Hon. Virginia M Kendall and T Markus Funk, 'The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence', The American Bar Association (2014).

4 US Department of Justice, Justice Manual, Criminal Resource Manual, CRM § 276.

5 US Department of Justice, General Legal Activities, Criminal Division (CRM) 2 (2 February 2018); Justice Manual, CRM § 276. The Justice Manual also provides general drafting guidelines. Justice Manual, Criminal Resource Manual, CRM § 281.

6 SEC, International Cooperation in Securities Law Enforcement 60 (2004). Generally, the SEC will seek to obtain evidence and testimony through multilateral or bilateral memoranda of understanding (MOU), as well as other methods. The MLAT process may be a useful alternative where a multilateral or bilateral MOU with a particular country is not in place or does not permit obtaining the type of evidence required. See also SEC Division of Enforcement, Enforcement Manual Section 3.3.6.2 (28 November 2017); US SEC, International Enforcement Assistance (31 May 2018); US SEC, Cooperative Arrangements with Foreign Regulators (14 March 2017).

7 Justice Manual, Criminal Resource Manual, CRM Section 276.

The number of incoming and outgoing MLAT requests appears to have increased in recent years.[8] Annual DOJ budget submissions indicate that in financial year 2017, the OIA granted 2,868 incoming mutual legal assistance requests and 987 outgoing requests.[9] In financial year 2015, the OIA opened 3,119 foreign requests for assistance and granted assistance in 1,373 cases, or 44 per cent of the requests.[10] Overall, however, there is relatively scarce information in the public domain about the number and, certainly, content of MLAT requests.[11]

The MLAT process has its limitations. First, courts and prosecutors in the United States and abroad,[12] including the previous US attorney general,[13] have criticised the process as too slow and unsuitable for modern-day law enforcement.[14] Second, the requested country may refuse to cooperate on any number of grounds. For instance, the requested country may refuse to cooperate if the offence is not a crime in the requested country or if compliance with the request would, in the view of the requested country, contribute to the commission of a violation of human rights by the requesting country. At times, geopolitics can also play a role: the US State Department has recently described MLAT requests to Russia relating to anti-money laundering as 'often ineffective' partly due to measures Russia has taken 'intended to hinder sanctions enforcement'.[15] Third, strategic reasons from the perspective of the requesting state – such as a concern that the requested state may initiate its own investigation on the basis of provided information or that making a request may jeopardise an ongoing proactive investigation – may militate against using an MLAT request. Fourth, the MLAT process is limited by local laws.[16]

8 See, eg, DOJ Criminal Division, Performance Budget: FY 2017 President's Budget 24-26. See also DOJ Criminal Division, Performance Budget: FY 2016 President's Budget 22-25.

9 DOJ Criminal Division, Performance Budget FY 2019 Congressional Submission 22.

10 DOJ Criminal Division, Performance Budget: FY 2017 President's Budget 24-26. See also DOJ Criminal Division, Performance Budget: FY 2016 President's Budget 22-23, 25.

11 For comparison, see, eg, the Office of the Attorney General of Switzerland, Annual Report (January 2018). See also, for France, En 4 ans d'existence, le PNF a infligé 1,2 milliard d'euros de sanctions, Challenges (22 January 2018).

12 For SFO, see Waithera Junghae, John Gibson: 'We may be obliged to challenge overly ambitious privilege claims', *GIR* (24 April 2018). For Switzerland, see Waithera Junghae, 'Claudio Mascotto: Panama Papers, Beny Steinmetz and returning assets stolen by dictators', *GIR* (18 January 2017). For Brazil, see Clara Hudson, 'GIR Live: Brazilian prosecutor says WhatsApp chat group drove investigation forward', *GIR* (27 October 2017).

13 US Department of Justice, 'Attorney General Sessions Delivers Remarks at the Global Forum on Asset Recovery Hosted by the United States and the United Kingdom' (4 December 2017).

14 See RA Clarke, MJ Morell, GR Stone, CR Sunstein and P Swire, 'Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies' 227 (12 December 2013).

15 US Department of State, International Narcotics Control Strategy Report, Volume II (March 2018).

16 Bank secrecy laws, as well as strict state secrets laws in countries such as China, may hinder the ability of governments to respond to MLAT requests. Local blocking statutes (or those with similar effect, such as article 1bis of the French Blocking Statute and article 271 of the Swiss Penal Code) may also impede legal process abroad. The former requires the screening by the Parquet National Financier of all documents sent to the US pursuant to MLAT requests, which reportedly caused delays in the trial of an Alstom executive. For bank secrecy and state secrets laws, see Vincent Pitaro, 'ACR Program Examines FCPA Enforcement and Local Anti-Corruption Efforts in China and Singapore', *Anti-Corruption Report* (18 April 2018); Hector Gonzales et al, 'Production of Information to the Authorities', *GIR* (2 February 2018).

Non-MLAT-based requests for assistance

While an MLAT request is the foremost mechanism to obtain documents and other forms of cooperation, alternative mechanisms do exist. This section examines some of these alternative mechanisms.

First, the DOJ may submit requests for assistance via an executive agreement and a memorandum of understanding (MOU) on mutual assistance in criminal matters with particular countries.[17] Such interim executive agreements usually concern illegal narcotics trafficking and are limited to criminal conduct covered by the agreement. The SEC has both multilateral and bilateral MOUs in place.[18] Since it was created in 2002, the International Organization of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMOU) has been the SEC's primary tool for obtaining evidence from foreign securities regulators.[19] It currently has more than 100 signatories.[20] The SEC also may use bilateral information sharing MOUs that existed prior to the establishment of the MMOU regime.[21] The US has signed bilateral MOUs with over 30 foreign regulators.[22] Bilateral MOUs are now useful primarily where a foreign regulator may provide assistance beyond the MMOU requirements, such as compelling testimony or obtaining phone records.[23]

Second, a request can be made under a multilateral convention. Two of the most commonly used are the UN Convention Against Corruption[24] for corruption and related money laundering offences,[25] and the UN Convention Against Transnational Organized Crime[26] for 'organised crime' offences and related money laundering offences.[27] Requests can also be made under separate treaties as well as under subject-specific conventions.[28]

17 Justice Manual, Criminal Resource Manual, CRM Section 277.

18 US SEC, Cooperative Arrangements with Foreign Regulators (14 March 2017). See also US SEC, International Enforcement Assistance (31 May 2018).

19 US SEC, International Enforcement Assistance (31 May 2018).

20 US SEC, International Enforcement Assistance (31 May 2018). See also International Organization of Securities Commissions, IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) (2018). See also Mary Jo White, 'Securities Regulation in the Interconnected, Global Marketplace' (21 September 2016).

21 US SEC, International Enforcement Assistance (31 May 2018).

22 SEC Division of Enforcement, Enforcement Manual section 3.3.6.2 (28 November 2017).

23 US SEC, International Enforcement Assistance (31 May 2018). See also SEC Division of Enforcement, Enforcement Manual Section 3.3.6.2 (28 November 2017).

24 United Nations Office on Drugs and Crime, United Nations Convention Against Corruption (2004).

25 Article 48(1); see also Article 46 (MLATs), 44 (Extradition), and articles 43, 44-50.

26 United Nations Office on Drugs and Crime, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2004).

27 US Department of State, US Asset Recovery Tools & Procedure: A Practical Guide for International Cooperation 7–8.

28 United Nations Office on Drugs and Crime, Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention); United Nations, International Convention for the Suppression of the Financing of Terrorism (December 1999); Department of International Law, OAS, Inter-American Convention on Mutual Legal Assistance of the Organization of American States; US Customs and Border Protection, Customs Mutual Assistance Agreements (CMAA) (September 2016).

Third, enforcement authorities may present a letter rogatory under section 1782 of Title 28 of the US Code. This is the 'customary method' of obtaining evidence located abroad, absent an MLAT or executive agreement.[29] Under this method, a prosecutor will request that a US judge submit a letter rogatory to the judiciary of a foreign country. The SEC may also use a letter rogatory during litigation to compel testimony or other evidence, or serve process on a foreign-located person.[30] But this process is of limited utility where the case is still in an investigative stage.[31] The process of using letters rogatory is generally viewed as time-consuming and unpredictable as considerable discretion rests with the court.[32]

Fourth, enforcement authorities may share information, particularly financial intelligence, with foreign governments that are members of the Egmont Group. Currently, the Egmont Group has 158 members.[33] The US Financial Intelligence Unit (FIU), under the auspices of the Egmont Group, is the centralised US office that exchanges information with FIUs around the globe in order to combat money laundering, terrorism financing and other financial crimes.[34] The US may share information under the Egmont Group's 'Principles for Information Exchange' or the secure encrypted internet system – the Egmont Secure Web system – that allows countries, among each other, to request and share information via secure email.[35] While strict limits are placed on the use of information Egmont Group members receive – such intelligence may not be used as evidence in court —it can help identify evidence that can be subsequently obtained through other means or help locate assets for confiscation.[36]

Fifth, electronic data may be requested directly from a third-party service provider under the CLOUD Act if the United States has signed an executive agreement with the other state.[37]

Finally, enforcement authorities may rely on their ever-growing network of contacts abroad to obtain information informally for lead generation. Such provision of information, often done between law enforcement agents, is referred to colloquially as 'law enforcement-to-law enforcement' or 'police-to-police'. Canadian authorities have said they use 'police-to-police cooperation' in lieu of an MLAT for 'straightforward' requests such as 'ask[ing] [the United States] to

29 Justice Manual, Criminal Resource Manual, CRM section 275.

30 SEC Division of Enforcement, Enforcement Manual section 3.3.6.2 (28 November 2017).

31 SEC Division of Enforcement, Enforcement Manual section 3.3.6.2 (28 November 2017).

32 See Charles Doyle, Extraterritorial Application of American Criminal Law, Congressional Research Service 25, 25 and n.136 (31 October 2016).

33 Egmont Group, List of Members.

34 US Department of State, The Egmont Group of Financial Intelligence Units (2016).

35 Egmont Group, Membership; see also US Department of the Treasury, FinCen, The Egmont Group of Financial Intelligence Units.

36 US Department of State, US Asset Recovery Tools & Procedure: A Practical Guide for International Cooperation 6.

37 Clarifying Lawful Overseas Use of Data Act, HR 1625, 115th Cong. div. V (2018) (CLOUD Act) section 104. The CLOUD Act significantly erodes the role of MLAT requests for digital data. First, it allows DOJ to seize extraterritorially stored electronic data directly from the third-party service provider solely with a warrant obtained under the Stored Communications Act. See CLOUD Act section 103. The DOJ no longer has to submit an MLAT request to obtain such e-data. Second, as noted in text, a foreign government may now make a direct request to a US government for US-located data, so long as the US has entered into an executive agreement with that foreign state. See CLOUD Act section 105; see also section 104. Again, the foreign government does not need to send an MLAT request to obtain such e-data.

do an interview, or vice versa.'[38] This type of informal exchange also appears to characterise the acknowledged US reliance on foreign legal attaché offices in Brazil and Switzerland in the Odebrecht/Braskem investigation.[39] Agents and prosecutors stationed abroad at US embassies and consulates both help coordinate global investigations as well as build strong relationships with local enforcement agents and prosecutors.[40]

Requests to freeze and seize assets

Requests to freeze and seize illegally obtained assets are usually made under an MLAT.[41] Alternatively, enforcement authorities may also make forfeiture requests under multilateral treaties,[42] letters rogatory and letters of request.[43] Principal US agencies involved in asset recovery are the OIA and DOJ's Money Laundering and Asset Recovery Section (MLARS).[44] Through the OIA, the United States may restrain, seize and forfeit property held in bank accounts located outside the United States.[45] The Asset Forfeiture Policy Manual encourages 'international asset sharing.'[46] The past few years show such cooperation in practice. In 2019, the US announced that it had begun the process of returning to Malaysia US$196 million in funds recovered from asset seizures in connection with the *1MDB* case. A press release accompanying the announcement featured a photograph of a senior DOJ official and the US Ambassador meeting with senior Malaysian officials in Putrajaya and described the funds as merely a 'first installment.'[47] The DOJ's other cases over the past few years make clear that asset freezes and seizures continue to be an important tool in international cases.[48]

38 Dylan Tokar, 'RCMP superintendent Denis Desnoyers: "We don't set out to bankrupt a company"', *GIR* (18 July 2017).

39 Megan Zwiebel, 'Brazilian Enforcers Are MVPs in Odebrecht and Braskem Settlements (Part Two of Two)', *Anti-Corruption Report* (1 February 2017).

40 Megan Zwiebel, 'Brazilian Enforcers Are MVPs in Odebrecht and Braskem Settlements (Part Two of Two)', *Anti-Corruption Report* (1 February 2017). See also US Department of State, 'US Asset Recovery Tools & Procedure: A Practical Guide for International Cooperation' 5.

41 *US Commodity Futures Trading Commission v Cook et al*, 09-cv-332, 09-cv-3333, 11-cv-574, 2017 WL 4162006 (D Minn. 12 January 2017).

42 US Department of State, 'US Asset Recovery Tools & Procedure: A Practical Guide for International Cooperation' 7-8.

43 See Justice Manual, Title 9: Criminal, 9-111.700; see also DOJ, Policy Manual: Asset Forfeiture Policy Manual (2016).

44 See US Department of State, 'US Asset Recovery Tools & Procedure: A Practical Guide for International Cooperation' 2.

45 18 USC section 981(k).

46 Policy Manual: Asset Forfeiture Policy Manual 142 (2016).

47 US Embassy in Malaysia, 'United States Returns More than RM800 Million to Malaysia in Recovered 1MDB Funds' (7 May 2019).

48 US Department of Justice, US Attorney's Office, 'Heroin and Cocaine Vendor on AlphaBay Sentenced to 6.5 Years in Prison' (24 July 2017); US Department of Justice, 'United States Returns $1.5 Million in Forfeited Proceeds from Sale of Property Purchased with Alleged Bribes Paid to Family of Former President of Taiwan' (7 July 2016); US Department of Justice, 'Attorney General Loretta E Lynch Announces Return of Forfeited Public Corruption Assets to Korean Minister of Justice Kim Hyun-Woong' (9 November 2015).

Requests for arrest and extradition

Extradition requests are treaty-based. The United States has bilateral extradition treaties with around two-thirds of the world's nations[49] and is also party to two multilateral treaties and several multilateral international conventions.[50] The DOJ's OIA handles incoming and outgoing extradition requests.[51] Every formal request for extradition must be supported by documentation.[52] Extradition requests must contain a prosecutor's affidavit explaining, among other things, the charged offences and facts.[53] In matters of urgency, pending a formal request of extradition, the United States may request that a foreign authority provisionally arrest the fugitive.[54] If the fugitive's location is unknown, prosecutors may instead submit to INTERPOL, the international police organisation, a 'red notice' requesting that any member state apprehend the fugitive wherever he is found, but will still need to produce extradition documents in the event the fugitive is arrested.[55] The US may also issue or receive a 'diffusion' – a request sent directly (rather than through INTERPOL) to the law enforcement of a particular state or states where the fugitive is believed likely to be found. Diffusions, unlike red notices,[56] are not made publicly available and are thus favoured by enforcement authorities in more sensitive matters.

Recent developments

Informal mechanisms

As the MLAT procedure has come under pressure over the past few years (see discussion infra), prosecutors have begun to rely on informal methods to communicate with their foreign counterparts.[57] One such method that has received some attention is the use of texting between prosecutors for tasks ranging from comparing evidence before submitting MLAT requests to coordinating simultaneous raids.[58] A senior DOJ prosecutor has praised meetings in Paris under the auspices of the Organisation for Economic Cooperation and Development as having had a 'pivotal impact' on the DOJ's interactions with foreign enforcement officials. In particular, the meetings reportedly provided an avenue for informal follow-ups on MLAT requests and

49 Charles Doyle, 'Extraterritorial Application of American Criminal Law, Congressional Research Service' 31 (31 October 2016).

50 Department of International Law, OAS, Inter-American Convention on Extradition, 49 Stat. 3111; US Department of State, Agreement on Extradition Between the United States of America and the European Union, S Treaty Doc. No. 109-14.

51 Justice Manual, Title 9: Criminal, Section 9-15.700.

52 Justice Manual, Title 9: Criminal, Section 9-15.230.

53 Justice Manual, Title 9: Criminal, Section 9-15.240.

54 Justice Manual, Title 9: Criminal, Section 9-15.230.

55 Justice Manual, Title 9: Criminal, § 9-15.635.

56 Nina Marino and Reed Grantham, 'Wanted by Interpol: Strategic Thinking about Red Notices, Diffusions, and Extradition', *The American Bar Association*, Criminal Justice, Volume 30, Number 3 (2015).

57 C-SPAN, US Corporations and Foreign Governments (3 November 2016).

58 MPF prosecutors used a WhatsApp Group with French prosecutors to compare evidence before sending MLATs and when executing simultaneous raids in the 2016 Rio Olympic Games investigations. See Clara Hudson, 'GIR Live: Brazilian prosecutor says WhatsApp chat group drove investigation forward', *GIR* (27 October 2017).

obtaining information prior to sending an MLAT to avoid 'send[ing the request] blind'.[59] The DOJ and SEC also hold at least yearly international training sessions for prosecutors worldwide.[60] The participation of enforcement authorities in international conferences is increasingly common. Although such informal mechanisms for interaction and information exchange appear most likely to augment formal cooperation mechanisms, in particular cases they may replace them altogether.

MLAT reform

Recent years have seen the shortcomings of the MLAT process prompt calls for reform. In December 2017, the US Attorney General urged the international community to 'expedite' responses to MLATs.[61] In line with this sentiment, the DOJ's budget proposal for financial year 2019 allocated increased resources to the OIA as an 'imperative to avoid further backlogs'.[62] This is the second time that the DOJ dedicated funds to MLAT reform, having made a one-time investment in fiscal year 2015.

The DOJ also recently created two new units dedicated to reviewing and executing foreign requests – a recognition of the importance of reciprocity in the area of mutual legal assistance. Because the vast majority of MLAT requests incoming to DOJ sought digital information, the OIA established a centralised 'cyber unit' to process MLAT requests for electronic evidence.[63] This reform aimed to deal with the backlog resulting from a dramatic increase in the number of requests for computer records – by over 1,000 per cent since fiscal year 2000.[64] What remains unclear, however, is the extent to which the significance of the new cybercrime unit will be diminished by the changes brought about by the 2018 CLOUD Act, discussed above.

Enhanced MMoU

At a signing ceremony in Sydney, Australia in 2019, the chairman of the SEC signed the Enhanced Multilateral MOU Concerning Consultation and Collaboration and the Exchange of Information (Enhanced MMoU).[65] As discussed above, the International Organization of Securities Commissions (IOSCO) created the original MMoU in 2002 to facilitate cross-border

59 Michael Griffiths, 'GIR Live: Prosecutors worldwide are getting to know each other', *GIR* (30 October 2017).

60 Megan Zwiebel, 'Top FCPA Officials Discuss How International Cooperation and Individual Prosecutions Are Reshaping Anti-Corruption Enforcement, the Defense Bar Responds', *Anti-Corruption Report* (13 December 2017).

61 US Department of Justice, 'Attorney General Sessions Delivers Remarks at the Global Forum on Asset Recovery Hosted by the United States and the United Kingdom' (4 December 2017).

62 US Department of Justice, General Legal Activities, Criminal Division (CRM) 2 (2 February 2018).

63 DOJ Criminal Division, Performance Budget: FY 2017 President's Budget 27-28; US Department of Justice, 'Assistant Attorney General Leslie R Caldwell Delivers Remarks at the Securities Enforcement Forum West Conference' (12 May 2016).

64 DOJ Criminal Division, Performance Budget: FY 2017 President's Budget 24.

65 US Securities and Exchange Commission, 'SEC and CFTC Participate in the Signing Ceremony for the IOSCO Enhanced Multilateral Memorandum of Understanding Concerning Cross-Border Enforcement' (20 May 2019). The chairman of the US Commodity Futures Trading Commission (CFTC) joined the SEC chairman in the signing ceremony, but the CFTC was in fact one of the first member agencies to sign the Enhanced MMoU in 2018.

enforcement and information sharing between securities and derivatives regulators. IOSCO established the Enhanced MMoU in 2016 in an effort to broaden the original agreement and expand its information-sharing mechanisms to enable regulators 'to respond to the risks and challenges posed by globalisation and advances in technology since 2002.'[66] Significant new provisions included in article 3 of the Enhanced MMoU include the powers to compel a person's physical attendance for testimony, to obtain and share audit work papers, internet records and phone records, and to freeze assets.[67]

With the addition of the SEC, 11 IOSCO member agencies representing eight jurisdictions – including the United Kingdom, Canada, Singapore and Hong Kong – have signed one of the two Enhanced MMoU appendices.[68] While the original MMoU will remain in effect as long as signatories continue to use it, it will be worth watching to see if and when member agencies increasingly begin to rely on the expanded powers of the Enhanced MMoU.[69]

Arrest and extradition

There have been notable developments over the past year in connection with requests by the DOJ for the arrest and extradition of foreign nationals located abroad. In July 2018, the High Court of England and Wales denied a US request to extradite a foreign exchange trader from Britain who had been indicted in 2016 as part of the DOJ's long-running effort to investigate and prosecute foreign currency market manipulation. The trader, Stuart Scott, had originally been ordered extradited in the lower court, but the English High Court reversed, citing the 'forum bar' provision inserted into the UK Extradition Act 2003 by the Crime and Courts Act 2013 and, in particular, 'the fact that most of the harm took place in' the UK, Scott's 'strong connection' to the UK and 'absence of any significant connection' with the US.[70] In October 2018, the DOJ advised the US court overseeing the case that its appeal to the Supreme Court of the United Kingdom had not been accepted and that it had no further avenues for appeal.[71] The decision is notable in that it effectively elevates the forum bar over the US–UK extradition treaty, which contains few exceptions to the signatories' mutual obligation to extradite,[72] and because it relies on a decision from earlier in 2018 also denying a DOJ extradition request on forum bar grounds.[73] While it is too early to determine whether these twin decisions represent a broader trend of UK courts pushing back against the DOJ, particularly in cross-border financial

66 IOSCO, About Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (2016).

67 IOSCO, Enhanced Multilateral Memorandum of Understanding Concerning Consultation and the Exchange of Information (2016).

68 IOSCOs, Signatories to EMMoU (2019).

69 IOSCO, About Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (2016).

70 *Scott v USA* [2018] EWHC 2021 (Admin) [60] (Eng.).

71 See Letter from Richard P Donoghue, US Attorney, US Department of Justice, to Nicholas G Garaufis, US District Court, Eastern District of New York, *United States v Scott*, No. 16-457 (EDNY 23 October 2018).

72 Article 1, Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 31 March 2003.

73 *Love v USA* [2018] EWHC 172 (Admin) [22] (Eng.).

crime cases, this is an area worth watching for signs of any impact on the US–UK bilateral treaty relationship.

Another notable development relates to the question of political motivation in criminal investigations and the potential impact on extradition proceedings. The DOJ's requests to Canada for the extradition of the Huawei CFO Meng Wanzhou and to the UK for the extradition of WikiLeaks founder Julian Assange are particularly important to watch in this regard. While proceedings in both cases are at their early stages, it will be interesting to see how the lower courts charged with passing on the extradition requests in the first instance handle any allegations of improper political motivation that may be advanced and whether the cases have any impact on the DOJ's ability to maintain effective cross-border cooperation with other enforcement authorities.

Conclusion

As enforcement authorities continue to pursue cases that cross borders, their methods of interaction are bound to undergo further transformation as they look for practical, efficient ways to gather evidence. Moreover, as private practitioners attain a greater understanding of the tools enforcement authorities use, and challenges to the use of such tools increase in number and sophistication, the methods of interaction may need to evolve to respond to changes in the legal landscape. This remains an important area to watch in the years ahead.

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Evan Norris is counsel in Cravath's litigation department and a former federal prosecutor. His practice focuses on advising US and multinational companies, board members and senior executives with respect to government and internal corporate investigations, criminal defence, regulatory compliance and related civil litigation. An experienced trial and appellate lawyer, Mr Norris represents clients in matters concerning the Foreign Corrupt Practices Act, commercial bribery, antitrust laws, anti-money laundering controls, economic sanctions, data privacy and cybersecurity, with particular emphasis on cross-border, multi-jurisdictional investigations.

Prior to joining Cravath in 2017, Mr Norris served for 10 years as an assistant US attorney in the US Attorney's Office for the Eastern District of New York (EDNY), where he conducted and supervised the prosecution of a range of domestic and cross-border white-collar cases, including corruption, corporate fraud, criminal tax, cybercrime and export control cases. He held a number of leadership positions during his time as a prosecutor, including chief of EDNY's National Security and Cybercrime Unit and director of the Department of Justice's FIFA Task Force, a position to which he was appointed after serving for several years as the lead prosecutor of the ground-breaking *FIFA* case, a global investigation of corruption in international soccer and one of the most significant prosecutions ever brought by the Department. As the Task Force director, Mr Norris led the Department's collaboration with foreign enforcement authorities throughout Europe, Latin America, the Caribbean, Africa and Asia, and he worked closely with the DOJ's Office of International Affairs in overseeing all mutual legal assistance treaty requests, as well as all requests for extradition, the issuance of Interpol red notices and the freezing and seizure of assets.

Mr Norris received his BA from Columbia College and his JD from Harvard Law School. After graduating from law school, he clerked for Judge Richard M Berman of the US District Court for the Southern District of New York.

Cravath, Swaine & Moore LLP

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