

Chapter 7

International legal assistance in the prosecution of corruption

Globalization has brought countries closer, strengthened economic relations across borders, and rendered cross-border travel easier. Offenders have profited from this ease and it is no longer uncommon for corrupt individuals to hide or launder bribes and embezzled funds in foreign jurisdictions. Bribers may keep secret slush funds in bank accounts abroad, or they may launder the proceeds of their crimes internationally. Governments are increasingly faced with the need to gather evidence abroad in corruption investigations through international legal assistance. As those who engage in corruption may also seek safe haven in a foreign country, extradition might be necessary to ensure effective prosecution of crimes. Yet, benefits of globalization in the form of closer relations in criminal justice and law enforcement are yet to be seen on a large scale, and criminals continue to exploit weaknesses in mutual legal assistance to disguise corrupt funds abroad and escape prosecution. Many practitioners decry the fact that international cooperation is sometimes not possible because of legal obstacles, such as the absence of legal bases for cooperation, strict interpretation of legal principles, or differences in legal systems. Other cases suffer from inordinate delay, inadequate legislation, or insufficient institutional support. Despite these difficulties, experience shows that mutual legal assistance procedures ultimately produce results—provided that the agencies involved adopt a holistic

approach. To identify recurrent problems and weaknesses and ways to overcome them, this chapter assembles countries' experience in requesting and granting mutual legal assistance in corruption cases.

Australia attaches high priority to prosecuting transnational corruption, as Ian McCartney of the Australian Federal Police (AFP), Australia's international law enforcement and policing representative, explains. Australia has put in place a comprehensive legal framework and has furthermore established particular institutional measures to render their enforcement more effective. Relevant legislation covers corruption by Commonwealth officials and the bribery of foreign public officials by Australian citizens or companies, as required under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). The AFP has categorized the offence of foreign bribery as an essential priority. To render law enforcement in this and other areas effective, the AFP has established a vast international network that extends to 25 countries. It is used in the investigation of a range of crimes that fall within the jurisdiction of the AFP, including corruption offences. It is also used in the recovery of proceeds of crime and serves for networking, investigation, collection of criminal evidence, and capacity building. Supporting legislation on mutual legal assistance in criminal matters and on the recovery of proceeds of crime complements Australia's legal and institutional framework to fight and sanction transnational corruption.

Switzerland has had ample experience with mutual legal assistance and transnational corruption. Being one of the major financial centers through which the booty of grand corruption is funnelled, it is requested to grant assistance regarding information on funds deposited or passed through the country's banks. Jean Bernard Schmid, investigating magistrate in the financial section in one of the country's banking centers, Geneva, shares Switzerland's experience in the matter. He has observed significant changes in attitude towards transnational crime and international cooperation over the past decades. Until the late '80s, countries were concerned solely with crime within their own territory. Since then, growing ethical costs and risks to reputation have made countries and companies more aware of crimes committed abroad. Harboring embezzled assets has become costly. These trends have brought about the OECD Anti-Bribery Convention, as well as the creation and extension of jurisdiction over corruption cases. Switzerland has also made important achievements in improving mutual legal assistance procedures. Requests for assistance from foreign jurisdictions are nowadays handled routinely—

despite the remaining particularities and challenges inherent in mutual legal assistance procedures.

The Philippines has also had a good share of experience in transnational legal cooperation—not the least of this in cooperation with Swiss authorities. The country faces the particular challenge of recovering assets worth millions of dollars, embezzled as bribes, kickbacks, and “facilitation fees” and stashed in foreign jurisdictions like the United States or Switzerland by some of the country’s highest-ranking individuals. As asset recovery has in the past been achieved mainly through bilateral treaties, the Philippines has been actively seeking partnerships with other countries to prevent corrupt individuals from using these countries as financial havens. The recently signed ASEAN Treaty on Mutual Legal Assistance in Criminal Matters is expected to boost these efforts in the near future. The Philippines has also had a fairly positive experience with international cooperation in recovering assets without bilateral or multilateral agreements: the country successfully recovered ill-gotten assets worth hundreds of millions of dollars deposited in Switzerland—but only after 17 years.

Australia's approach to prosecuting transnational corruption

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Introduction: The role of the Australian Federal Police

The Australian Federal Police (AFP) enforces Commonwealth criminal law and protects the national and Commonwealth interests from crime in Australia and overseas. The AFP is Australia's international law enforcement and policing representative, and the chief source of advice to the Australian Government on policing issues.

The investigation of corruption in certain circumstances (not State/Territory-level corruption allegations) is the responsibility of the AFP. Commonwealth legislation exists for the investigation by Commonwealth officials of corruption including bribery, perjury, and unauthorized disclosure of information. However, there is also legislation that deals with the bribery of foreign officials by Australian citizens or companies, which carries a maximum penalty of imprisonment of 10 years.

Combating Bribery of Foreign Public Officials

This legislation is found under Division 70 of the Criminal Code Act 1995 and is as follows:

70.2 Bribing a foreign public official

- (1) A person is guilty of an offence if:
 - (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

- (b) the benefit is not legitimately due to the other person; and
- (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
 - (i) obtain or retain business; or
 - (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

The AFP is investigating allegations of bribery of foreign officials. There are defences in relation to this offence in the legislation. Some examples of these defences relate to culture and documentation of details of the incident.

Australian authorities participate in the Organisation for Economic Co-operation and Development (OECD) Working Group in International Business Transactions on Bribery of Foreign Public Officials. The AFP works closely with other Australian and international law enforcement bodies to enhance safety and security in Australia and to provide a secure regional and global environment.

The offence of foreign bribery falls within the category of corruption within the AFP Case Categorisation and Prioritisation Model (CCPM) and is rated as having high impact and high importance to the AFP. Further, it is categorized as an essential priority, which means that if there is sufficient information to support the suspicion that an offence of this nature has occurred, the AFP will investigate the allegations.

The AFP's International Network

The International Network of the AFP is used in investigating a range of crimes that fall within the jurisdiction of the AFP, including corruption offences and recovery of the proceeds of crime. The AFP's International Network has gradually expanded in response to the growth in transnational crime. AFP posts are currently found in 30 cities in 25 countries and are staffed by 63 officers (including seven advisers). The International Network is integral to the AFP's operations and functions. Further, it provides a platform for promoting the whole-of-government approach, i.e., Commonwealth agencies working together to combat crime.

The functions of the International Network include:

- **Networking.** Establishing relationships of confidence with international law enforcement and other agencies.
- **Investigations.** Brokering collaboration with international law enforcement agencies for multi-agency investigations.
- **Criminal intelligence collection.** Gathering and sharing intelligence on criminal activities and groups in support of international law enforcement efforts.
- **Capacity building.** Providing advice and coordination, where appropriate, on training and technical measures for international law enforcement to combat transnational crime.

Interpol operates on behalf of all Australian law enforcement agencies in coordinating international inquiries through the Interpol network and also acts as the central relay point for all Asian and South Pacific countries.

The AFP International Network and Interpol provide a similar function in relation to the flow of information across agencies; however, the AFP International Network provides another avenue for the dissemination of information to other law enforcement agencies. The International Network does not have an investigative function—it is a facilitator of information, forwarding inquiries and receiving information on behalf of other agencies.

Supporting Legislation

The Mutual Assistance in Criminal Matters Act 1987 facilitates international cooperation between law enforcement agencies. It provides legislative underpinning for obtaining evidence for prosecutions in Australia in an admissible format from other countries. Multilateral and bilateral treaties exist with Argentina; Austria; Canada; Finland; France; Greece; Hong Kong, China; Hungary; Indonesia; Israel; Italy; Luxembourg; Mexico; Monaco; Netherlands; Portugal; Philippines; Spain; Sweden; Switzerland; United Kingdom, and United States of America. The law also enables the proceeds of crime orders relating to restraint, forfeiture, and repatriation of illegally obtain funds to be registered in countries with similar legislation. The aim is to pursue the financial benefit obtained by criminal activity without being constrained by geographical boundaries. This legislation also provides for extradition applications and processes.

The Proceeds of Crime Act 2002 applies to certain offences committed outside Australia's jurisdiction and includes provisions to recover proceeds of crime from foreign indictable offences. A foreign indictable offence is

an offence against a law of a foreign country that, had it occurred in Australia, would have constituted an offence against Australian law punishable by at least 12 months' imprisonment. For example, if monies are the proceeds of a corruption offence committed in another country and the same crime would have been a serious offence in Australia, the Australian Government can move to restrain and seize the funds or assets derived from those monies. The Criminal Code Act 1995 has been amended to include new money laundering legislation with penalties of up to 25 years' imprisonment. Proceeds of crime action can also be taken against the monies laundered as those funds are an instrument of the money laundering offence.

Conclusion

In summary, organized crime will not decline in the Asia-Pacific region. It is therefore incumbent on governments and law enforcement agencies in this region to work together to combat criminal offences such as corruption and the laundering of the proceeds of crime. Corruption offences are effectively an enabling offence insofar as this illegal activity may be the means of facilitating another type of offence. For example, bribery may be necessary to commit a major fraud. The increased prevalence of legislation with extraterritorial application is an indication of countries working together to combat transnational crime like corruption and proceeds of crime.

A view of the future is the move *from cooperation to collaboration* by international law enforcement: multinational task forces operating in a global environment with a clear focus and mandate to disrupt and dismantle transnational organized crime syndicates

Switzerland's experience with transnational judicial cooperation

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Modern Switzerland has not been faced with serious problems of corruption among its own public servants. Corruption does exist, but is certainly not widespread and definitely not socially nor culturally accepted.

If the rationale for prosecuting bribery of national public officials has, consequently, always seemed obvious, such has not been the case for bribery related to foreign public officials. Commercial considerations have led to not worrying much about the integrity of other countries' public sector, and practical necessities have not been conducive to interfering with their problems, structures, or internal organization. This perception is gradually changing as the consequences of corruption, on today's global market, are becoming clearer in economic, political, and even moral terms. The Swiss legal framework has evolved accordingly.

In 2000, Switzerland ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business. Various consequences derived thereof, directly or indirectly.

- To incorporate the provisions of the Convention into internal legislation, the Swiss Penal Code (Code pénal [CP]) had previously been updated on bribery.

A new section of the Penal Code (Title 17 "Bribery" – art. 322^{ter} to 322^{octies} CP) came into force in May 2000. Active and passive bribery of public officials has been upgraded to a criminal offence. A special provision (art. 322^{octies} CP – active bribery of a public official) made it punishable to bribe a person acting on behalf of a foreign state or an international organization. There is practically no more difference, on active bribery, between Swiss and foreign public officials.

The offence of bribery is defined along the lines of the OECD Convention. It covers intentionally offering, promising, or giving, spontaneously or on request, any undue advantage, material or immaterial, to a public official, understood as any person carrying out a public function in a state body or enterprise, or in an international organization, to obtain from that person the commission or omission of an act in relation to his official functions that is contrary

to his duties or that depends on the exercise of his discretionary powers.

An exception is made for advantages authorized by internal regulations and so-called “facilitation payments” of minor value.

The exception made for advantages “in conformity with socially accepted practices”. In Switzerland there is practically no accepted practice to make a gift of any value to a public person. Paying for a round of coffee or beer is about as much as would be considered socially acceptable. Inviting one’s tax controller to even a simple meal would most definitely not be accepted at all.

This raises the question of how to interpret other countries’ “socially accepted practices”. The point could be made that bribery, even if practiced by and large, is not recognized as correct behavior by most citizens of any country.

- The penalties incurred for bribery, of national or foreign officials alike, are imprisonment for up to five years in ordinary cases, to seven-and-a-half years in the case of a plurality of offences (art. 68 C), and theoretically to 20 years in case of special recidivism (art. 67 CP). An unlimited fine can be inflicted if the offender has acted “out of greed” (art. 48 and 50 CP), which is presumably usually the case.

The proceeds of the offence are confiscated, even if no one is condemned or even identified as corruptor (art. 58–59 CP).

A range of ancillary sanctions can be inflicted, such as disqualification from holding a public office (art. 51) or from exercising a business subject to official authorization (art. 54); expulsion from the country for foreigners (art. 55 CP).

- Defining bribery as a criminal offence allows notably, under Swiss law’s provisions of money laundering (art. 305^{bis} CP), the prosecution of the laundering of its proceeds.
- Swiss jurisdiction is given, as a rule, for offences committed in Switzerland, or in a foreign country by or against a Swiss national (territorial jurisdiction: art. 3 CP; nationality jurisdiction: art. 5 and 6 CP).

When Switzerland is bound by an international treaty (like the OECD Convention), jurisdiction is usually given for offences committed in a foreign country by non-national perpetrators who find themselves in Switzerland and are not extradited (Extraterritorial jurisdiction: art. 6^{bis} CP).

- Immunity of political heads of state has, in recent times, tended to be denied for “private activities” such as hiding the proceeds of corruption in the Swiss accounts of offshore companies.

- Provisions on the liability of legal persons have been introduced in the Swiss Penal Code in October 2003 (Art. 100^{quater} et 100^{quinquies} CP). A company can, as such, be held accountable for criminal behavior linked to the conduct of its business, insofar as the perpetrator cannot be identified because of organizational flaws (subsidiary liability); for certain offences, including bribery of public officials, both the company and the actual perpetrator can be held responsible (dual or primary liability) (art. 100^{quater} al. 2 CP).
The sanctions are essentially pecuniary. The company can be sentenced to a fine of up to CHF 5 million (about USD 4.2 million).
- “Private corruption” is not as such considered an offence under Swiss law. It can be indirectly incriminated under various provisions (art. 158 CP: Disloyal management; art. 168 CP: Subornation; art. 273 CP: Economic intelligence; LCD: Disloyal competition).
A 1999 Convention of the Council of Europe addresses the matter. Its implementation is being discussed by the federal legislature.

Mutual Legal Assistance (MLA)

International cooperation is key to combating international corruption. It has been getting more efficient in recent years, but serious difficulties remain.

Switzerland has signed a number of treaties with individual countries to regulate MLA procedures. It is bound to its European partners by the European Convention on Mutual Assistance in Criminal Matters¹ and the so-called Convention 141.² The matters not addressed by these acts are regulated by internal legislation, essentially the Federal Law on Mutual Legal Assistance in Criminal Matters (Loi fédérale sur l’Entraide Internationale en Matière Pénale [EIMP] (RS 351.1)).

The legal framework tends to get quite dense. It is far from being perfect, but even farther from being the sole culprit for many shortcomings.

MLA remains characterized by national conceit and international suspicion. Politicians and judges do remain uneasy with the concept that a foreign country’s authorities are to be trusted when they ask for cooperation in investigating a criminal matter.

Certain abuses have done little to help promote an open approach to international cooperation. But it would be fair to admit that economical and political reasons, rather than worries about “fair justice”, still play an all-but-negligible role in cooling enthusiasm for cooperation-friendly law-making and practices.

Swiss legislation on international cooperation has, in its own right, put up a set of hurdles aimed at guaranteeing that we do not cooperate too blindly with anybody. This fine reasoning leads to benchmark foreign legal systems to the standards of our own. And, quite logically, to grant the persons implied a right to challenge, in Swiss courts, the legality of the criminal proceedings directed against them abroad.

The unavoidable consequences of this are the time-consuming procedures that slow down the execution of too many MLA requests.

The Swiss legal authorities can act very quickly on a foreign request. A bank account can be frozen within hours, and detailed information about the account can be obtained from the bank within days. But then the holder of the account can oppose the transmission of such information to the foreign judge who needs it for his enquiry.

Overriding such opposition can take up to a good year, simply counting the time needed to go through two court procedures to invalidate the opposition, first on the cantonal and then on the federal level.

“Fair trial”

Another serious hindrance derives from the fact that MLA implies the coordination of two legal systems that might be of a very different nature.

Concepts, laws, and practices can vary significantly in, among others, police action, the rights granted to an accused person, and the independence of courts.

Universal standards in that field have not grown much beyond declarations of good intentions.

The United Nations Universal Declaration of Human Rights, adopted in December 1948, devotes a fourth of its provisions (art. 5 to 11) to the rule of law and basic legal rights, still a long way from being universally implemented.

The Universal Declaration has been codified into two Covenants, adopted by the General Assembly on 16 December 1966, notably the International Covenant on Civil and Political Rights II, art. 14 of which details essential procedural rights for the accused (like the right to be notified the charges held against him, to refuse to speak, to be assisted by a lawyer, to challenge in court an arrest order, to be granted legal aid if needed, to be tried without undue delay)—see the UN Pact II; in force in Switzerland since September 1992.

The European Council's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, which explicitly refers to the Universal Declaration, guarantees a similar range of procedural rights to any accused person (art. 5 and 6). Not respecting these guarantees can lead to invalidating a whole criminal procedure. The ECHR was signed in Rome, 14 November 1950; it entered into force in Switzerland in 1974.

As a general rule, Switzerland denies international cooperation to countries that do not guarantee these minimal rights to the accused and, consequently, do not respect the basic requirements of a "fair trial" as defined in the corresponding international legal instruments (see art. 2 EIMP).

Other material conditions

Legal assistance must not jeopardize the "essential interests" of Switzerland. It is denied if the request is based on motives linked to race, religion, nationality, or political opinions. The political exception does not cover cases involving acts of genocide or terrorism or violations of the Geneva Conventions on humanitarian law.

The "specialty" or "double criminality" condition requires that the facts on which an MLA request is based are defined as an offence in both the Swiss and the requesting country's legislation. This condition is fulfilled in our internal law since the ratification of the OECD Convention and the coming into force of the new legislation on bribery of public foreign officials. MLA can thus be granted more easily in international bribery cases.

If the offence is of a fiscal nature, Swiss lawmakers become quite sensitive; MLA is granted for fiscal fraud but not for "simple" evasion; the difference is not obvious to everybody, and may be used as a cover for laundering proceeds of corruption.

Ordinary cooperation

It includes exchanging information, seizing documents, freezing assets, conducting searches, and hearing witnesses. Swiss authorities act according to their own procedural rules.

Extradition

Extradition is the most drastic form of international cooperation. It is regulated by the same body of laws and treaties, and the same basic principles than regular MLA (art. 32–62 EIMP; Council of Europe’s Convention on Extradition.)

The offence must be punishable in Switzerland and in the requesting state by a penalty of at least one year of imprisonment. It can be granted for bribery of national or foreign public officials.

It is denied if based on a sanction inflicted on a defaulting defendant whose minimal procedural rights have not been respected (“Fair trial”: ECHR art. 6.) It is further denied if the requesting state does not guarantee that the death penalty will not be inflicted, or at least carried out. Also, as a rule, it is denied if Switzerland itself has jurisdiction over the person for the offences considered. Subsidiary clauses permit the granting or denial of extradition in “special circumstances” like the “social rehabilitation” of the person.

Swiss nationals are not extradited; they are prosecuted in Switzerland if jurisdiction is given over them for the offences they might have committed abroad.

A recent extradition case towards Chinese Taipei might interest this Conference. It illustrates many of the above points. The decision, rendered by the Swiss Tribunal Federal in May 2004, is published in French (ATF 130 II 217; www.admin.ch). The Tribunal Federal has notably remarked that judging another country’s judicial system implies a “value judgment” about its internal affairs, its political regime, its institutions, its concept of and respect for fundamental rights, and the independence and impartiality of its judiciary, all of which require “particular caution”.

Caution is fine. A strong argument can nevertheless be made that respecting the basic rights imposed by the international legal framework in criminal procedures helps legitimize the state’s repressive action, and does not seriously handicap police and judicial action.

Corruption, of all offences, will not be curbed through judicial practices contrary to international rules.

Open and “fair trial” procedures will prove as essential to international cooperation as open and fair markets to global business. Today’s legal environment needs as much a “level playing field” as global business does—that is, if we want to rest assured that international cooperation, essential to the fight against corruption, does work effectively.

Annex: Relevant legislation

United Nations: The Universal Declaration of Human Rights (10 December 1948)

Article 5 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6 - Everyone has the right to recognition everywhere as a person before the law.

Article 7 - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8 - Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9 - No one shall be subjected to arbitrary arrest, detention or exile.

Article 10 - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

- (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

International Covenant on Civil and Political Rights (16 December 1966)

Article 14 - General comment on its implementation

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial

tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - b. To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - f. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - g. Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction

shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Council of Europe: Convention for the Protection of Human Rights and Fundamental Freedoms (Rome: November 4, 1950) also called Convention on Human Rights

Article 5 - Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge

or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defense;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Switzerland: Federal Law on International Cooperation in Criminal Matters (EIMP/351.1)

Article 1a - Cooperation limits

The present law must be applied taking into consideration the sovereignty, security, public order or other essential interests of Switzerland.

Article 2 - Foreign Proceeding

A request for cooperation in criminal matters will be dismissed if their are grounds to admit that the foreign proceeding

- a. does not meet the procedural requirements of the European Convention of Human Rights and Fundamental Freedoms of November 4, 1950, or the International Covenant on Civil and Political Rights of December 16, 1966;
- b. tends to prosecute or punish a person on account of his political opinions, his belonging to a specific social group, his race, his religion or his nationality;
- c. could aggravate the situation of the person prosecuted for any of the reasons mentioned under letter b, or
- d. is seriously flawed in any other way.

Penal Code (CP / 311.0)

Corruption

Corruption of Swiss Public Officials

Article 322^{ter} - Active Corruption

Any person who offers, promises or gives any undue advantage to a member of a judicial or other authority, a state employee, an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces, for the benefit of such person or any third party, for the commission or omission of an act in relation to his official functions that is contrary to his duties or depends on the exercise of his discretionary powers, shall be liable to reclusion for a maximum term of five years' or imprisonment.

Article 322^{quater} - Passive Corruption

Any person who, as a member of a judicial or other authority, a state employee, an expert, translator or interpreter employed by any authority or an arbitrator solicits, elicits a promise of or accepts an undue advantage, for his benefit or that of any third party, for the commission or omission of

an act in relation to his official function that is contrary to his duties or depends on the exercise of his discretionary powers, shall be liable to a maximum term of five years' imprisonment.

Article 322^{quinquies} - Giving of an Advantage

Any person who offers, promises or gives any undue advantage to a member of a judicial or other authority, a state employee, an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces so that he accomplishes the duties of his position shall be liable to imprisonment or a fine.

Article 322^{sexies} - Acceptance of an Advantage

Any person who, as a member of a judicial or other authority, a state employee, an expert, translator or interpreter employed by any authority, or an arbitrator solicits, elicits a promise of or accepts an undue advantage so that he accomplishes the duties of his position shall be liable to imprisonment or a fine.

Art. 322^{septies} - Active Corruption of Foreign Public Officials

Any person who offers, promises or gives an undue advantage to any person acting for a foreign State or an international organization either as a member of a judicial or other authority, a state employee, an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces, for the benefit of such person or any third party, for the commission or omission of an act in relation to his official functions that is contrary to his duties or depends on the exercise of his discretionary powers, shall be liable to reclusion for a maximum term of five years' or imprisonment.

General disposition

Article 322^{octies}

1. If the offender's guilt and the consequences of his act are so insignificant that a penalty would be inappropriate, the competent authority shall waive prosecution, judicial proceedings or the imposition of a penalty.
2. Advantages authorized by department regulations and advantages of minor value in conformity with socially accepted practices shall not be considered undue advantages.
3. Individuals who carry out public functions are deemed to be public officials.

Money laundering

Article 305^{bis}

1. Any person who commits an act such as to impede identification of the origin or the discovery or confiscation of assets which he knew or must have presumed to have originated in a criminal offence shall be liable to imprisonment or a fine.
2. In serious cases, the penalty shall be reclusion for a maximum term of five years or imprisonment. The custodial sentence shall be consecutive with a maximum fine of one million francs. A case is serious when the offender:
 - a) acts as a member of criminal organization;
 - b) acts as a member of a gang formed to systematically launder money;
 - c) generates substantial revenues or profit from money laundering.
3. Offenders are also liable when the principal offence has been committed in another country and is punishable in the State where it was committed.

Notes:

- ¹ Council of Europe, Strasbourg, April 20, 1959 (<http://conventions.coe.int>).
- ² Council of Europe, Strasbourg, November 8, 1990 : Convention no. 141 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Chapter III art. 7–12.

Denying safe havens through judicial cooperation: The experience of the Philippines

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Introduction

The first quarter of 2003 saw the institutionalization of a new thrust in the Office of the Ombudsman: the conduct of lifestyle checks on suspected corrupt public officials aimed at uncovering and recovering their illicit assets. In this lifestyle check, the private sector—private citizens, church and community-based non-governmental organizations (NGOs), and people's organizations—has been tapped to assist the Office in gathering data and information. Indeed, citizen empowerment can effectively assist in the accurate identification of suspected corrupt public officials and their ill-gotten assets.

In the implementation of the lifestyle check, the Office, because of its limited resources, has decided to engage in strategic agency targeting. The Office has focused on the three agencies consistently perceived by the public as the most corrupt, namely: the Bureau of Internal Revenue (BIR); the Bureau of Customs (BoC); and, the Department of Public Works and Highways (DPWH). A year later, the Office also investigated officers of the military who were suspected of accumulating ill-gotten wealth.

Corruption may be possibly transformed into a transnational crime, considering that unlawfully obtained assets can be stashed in foreign jurisdictions. When this happens, the recovery of such ill-gotten monies and properties becomes a game of hide-and-seek. Only in rare instances do corrupt public officials slip. In one particular instance, a two-star general of the Armed Forces of the Philippines (AFP) was discovered to have amassed ill-gotten wealth in the amount of at least USD 5.5 million, a substantial portion of which has been dollars transported into the United States or remitted through its banking system, as well as a condominium unit at Trump Park, New York, worth USD 765,000.

The investigation was prompted by the discovery by US Immigration and Customs Enforcement (ICE) agents of undeclared dollars brought into the US by the general's son from the Philippines. The admissions by the general's wife of receipt of bribes, kickbacks, and facilitation fees, among others, were brought last year to the attention of the Office of the Ombudsman, which then investigated the same. This was complemented

by the parallel money-laundering investigation conducted by the Anti-Money Laundering Council (AMLC), at the request of the Office of the Ombudsman. Pending the collation of all data on the properties and monies traceable to the general, the AMLC, through the Office of the Solicitor General (OSG), secured a temporary freeze order from the Court of Appeals. Meanwhile, in a separate move, the Office of the Ombudsman filed a forfeiture proceeding with the Sandiganbayan, the Philippines' anti-graft court, which thereafter issued a writ of preliminary attachment on the properties and monies of said general and his family. This served as legal basis for continuing the seizure and freezing of the properties and monies of the general. Considering that some of the assets were located in the US, the Mutual Legal Assistance Treaty (MLAT) between the Philippines and the US was availed of, ensuring an effective coordination between Philippine and US officials.

Defining the Philippine Challenge: Asset Recovery of Ill-Gotten Wealth Through International Cooperation

Historically, the most effective legal approach for the recovery of illicit wealth concealed in foreign jurisdictions is through the execution of bilateral treaties with countries in which the ill-gotten assets or the offenders are probably found. Thus, the Philippines has been actively seeking partnerships with other countries for the main purpose of preventing corrupt Philippine public officials from using these countries as their own financial havens.

The present Philippine legal configuration offers a glimmer of hope in addressing the problem of recovery of ill-gotten assets, including the arrest of the perpetrators. The countries with which the Philippines entered MLATs are Australia; P.R. China; Hong Kong, China; Republic of Korea, Switzerland; and United States of America. (The MLATs with P.R. China, the Republic of Korea, and Switzerland are still awaiting ratification.) The main objective of these MLATs is to improve the cooperative efforts of the Philippines and the other states to effectively prevent, investigate, and prosecute crimes, including those relating to corruption in the public sector.

Bilateral treaties

The MLATs entered into by the Philippines contain many common provisions, among them are:

- gathering evidence, records, or documents;
- taking the testimonies or statements of persons;
- executing requests for searches and seizures;
- facilitating the personal appearance of witnesses;
- transferring persons in custody for testimony or other purposes;
- obtaining and producing judicial or official records;
- tracing, restraining, forfeiting, and confiscating the proceeds and instrumentalities of criminal activities, including assisting in proceedings related to forfeiture of assets, restitution, and collection of fines; and
- providing and exchanging information on law, documents, and records.

To stress, a common provision of the various MLATs is the obligation of the requested state to take measures in tracing, freezing, seizing, and forfeiting the proceeds of any criminal activity, including corruption, that may be found in that state. In the case of our MLAT with the US, Article 16 provides that “[t]he Party that has custody over proceeds or instrumentalities of offenses shall dispose of them in accordance with its laws. Either Party may transfer all or part of such assets, or the proceeds of their sale, to the other Party, to the extent not prohibited by the transferring Party’s laws and upon such terms as it deems appropriate”.

On the one hand, complementing these MLATs are bilateral arrangements for the extradition of the corrupt public officials who have become fugitives from justice. The countries with which the Philippines has entered into extradition treaties are Australia; Canada; Hong Kong, China; Indonesia; Republic of Korea; Switzerland; Thailand; and United States of America.

Regional treaty

Lately, the Association of Southeast Asian Nations (ASEAN), composed of Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Philippines, Singapore, and Vietnam, signed the Treaty on Mutual Legal Assistance in Criminal Matters. The treaty still has to be ratified by the respective states. Article 1 specifies that mutual assistance may include:

- taking evidence or obtaining voluntary statements from persons;
- making arrangements for persons to give evidence or to assist in criminal matters;

- serving judicial documents;
- executing searches and seizures;
- examining objects and sites;
- providing original or certified copies of relevant documents, records, and items of evidence;
- identifying or tracing property derived from the commission of an offence and instrumentalities of crime;
- restraining dealings in, or freezing of property, derived from the commission of an offence that may be recovered, forfeited, or confiscated;
- recovering, forfeiting, or confiscating property derived from the commission of an offence;
- locating and identifying witnesses and suspects; and
- other assistance as may be agreed upon consistent with the treaty and the laws of the requested state.

The proposed ASEAN Treaty provides that accrual of forfeited or confiscated property to the requesting party is subject to the domestic laws of the requested state, unless otherwise agreed by the proper authorities on a case-to-case basis. Further, it stipulates that the transfer of the recovered property is subject to the costs and expenses incurred by the requested state in enforcing the forfeiture order.

IMAC

The Philippines was able to recover millions of dollars in ill-gotten wealth from Switzerland despite the absence of a mutual legal assistance treaty. This was made possible through Switzerland's International Mutual Assistance in Criminal Matters (IMAC).

Anti-Money Laundering Law

Recent laws have allowed Philippine anti-corruption investigators to actively use anti-money laundering investigations to initiate the recovery process. The anti-money laundering law of the Philippines, Republic Act (R.A.) No. 9160, was signed into law on 29 September 2001 and took effect on 17 October 2001. It was amended by RA 9194 on 7 March 2003. Apart from criminalizing money-laundering activities, the said law requires financial institutions to report covered and suspicious transactions and to cooperate with the Government in the prosecution of the offenders. The threshold amount for covered transactions is PHP 500,000 (around

USD 9,090). The anti-money laundering law requires banks and other financial institutions to know their own customers; prohibits the opening of anonymous, fictitious, and numbered checking accounts; requires said banks and other financial institutions to keep records; and obligates them to report suspicious activities. The banks and other financial institutions are those regulated by the Bangko Sentral ng Pilipinas (BSP, the central bank of the Philippines), the Securities and Exchange Commission (SEC), and the Insurance Commission.

The Philippines has its own central financial intelligence unit, the Anti-Money Laundering Council (AMLC), which actively cooperates with the Office of the Ombudsman in anti-corruption investigations. It has entered into a Memorandum of Agreement (MOA) with the Office of the Ombudsman guaranteeing information sharing and close coordination between these agencies. Parallel money-laundering investigations strongly complement anti-corruption probes. Thus, the MOA was but a natural consequence of the symbiotic working relationship between the AMLC and the Office of the Ombudsman.

Under the anti-money laundering law of the Philippines, the AMLC is authorized to issue orders to determine the true identity of the owner of any monetary instrument or property that is the subject of a covered or suspicious transaction report, and if necessary to request the assistance of a foreign country. Concomitantly, it is likewise mandated to receive and take action on any request from foreign countries for assistance in their own anti-money laundering operations.

Application of Legal Concepts

For public corruption cases, especially in the ongoing lifestyle probes, the Philippines extensively utilizes the presumption under its Forfeiture Law (Republic Act No. 1379) that amounts or properties manifestly out of proportion to the public official's lawful income (i.e., salaries, legitimate income, and legitimately acquired properties) are *prima facie* unlawfully acquired. The natural consequence of such investigations is the initiation of forfeiture proceedings over the corrupt official's ill-gotten wealth. Of course, this is separate and distinct from the criminal actions that may be filed under the Revised Penal Code (the general penal law of the Philippines) or other special statutes like the Anti-Graft and Corrupt Practices Act. Under Philippine laws, forfeiture is deemed quasi-criminal and operates *in rem*. Assets of corrupt government officials that are stashed abroad may thus be declared unlawful and forfeited in favor of the State. The *in rem* concept was applied by the Philippine Supreme

Court in the recovery of the ill-gotten wealth of the late Philippine dictator Ferdinand E. Marcos.

The Marcos Wealth: A Case Study

In 1972, then President Ferdinand E. Marcos placed the entire Philippines under military rule. From then until February 1986, he, his family, and his cronies systematically looted the public wealth of the Philippines. It may thus be relevant to present a concise case study on the recovery of a substantial portion of that wealth.

The following is a short chronology of significant events in the seizure and transfer of a sizeable amount of the Marcos wealth:

- 28 February 1986 – The Presidential Commission on Good Government (PCGG), the lead agency of the Philippines tasked to recover the Marcos wealth, was created. The Philippine Government made informal representations to the US and Swiss courts to freeze Marcos assets abroad.
- 25 March 1986 – Swiss authorities imposed a unilateral freeze on Marcos assets in Switzerland.
- April 1986 – PCGG filed a request for mutual assistance with the Swiss Federal Police Department, under the procedures of the International Mutual Assistance in Criminal Proceedings (IMAC).
- 21 December 1990 – The Swiss Federal Supreme Court authorized the transfer of Swiss bank documents to the Philippine Government. It required the Government to file in the Philippines all criminal cases and forfeiture petition within a period of one year.
- 10 August 1995 – The Philippine Government filed with the District Attorney in Zurich a Petition for Additional Request for Mutual Assistance, dated 7 August 1995. The petition was essentially a request for the immediate transfer of the Swiss foundations' deposits to an escrow account.
- 21 August 1995 – Examining Magistrate Peter Cosandey granted the request and ordered the banks to liquidate all Marcos-related securities and accounts and to transfer them to an escrow account with the Philippine National Bank (PNB). However, the Zurich Superior Court of Appeals quashed the order.
- 10 December 1997 – The Swiss Federal Supreme Court upheld Cosandey's order.

- 15 July 2003 – The Philippine Supreme Court declared the forfeiture of the Swiss deposits in escrow at the PNB in the estimated aggregate amount of USD 658 million in favor of the Republic of the Philippines.

In the foregoing events, some significant observations on the processes and inter-governmental cooperation involved for the recovery of the above-mentioned USD 658 million may be noted, to wit:

- Switzerland voluntarily froze the Marcos Swiss deposits, later on invoking the IMAC, as availed of by the Philippine Government, as legal basis for such action.
- The Swiss appellate procedures were extensively used by the Marcoses to delay the transfer of the ill-gotten wealth from Switzerland to the Philippines. When the Marcoses' appeal was denied by the Swiss Federal Supreme Court, the monies were allowed to be transferred and deposited in escrow with the PNB.
- The Swiss Federal Supreme Court required the Philippine Government to institute criminal and forfeiture proceedings with the Philippine courts before the seized Marcos monies were transferred to Philippine jurisdiction.
- It took 17 years for the USD 658 million Marcos wealth to be seized in Switzerland and finally awarded in favor of the Republic of the Philippines. In this instance, the highest courts of both Switzerland (Swiss Federal Supreme Court) and the Philippines (Philippine Supreme Court) were involved in the seizure, confiscation, transfer, and final award of the wealth.
- Many agencies were involved in the seizure of the ill-gotten wealth. For the Philippines, the key players were the PCGG, the Office of the Solicitor General, the Sandiganbayan, and the Supreme Court. For Switzerland, the involved agencies were the Swiss Federal Police, the Zurich District Attorney, the Examining Magistrate, the Zurich Superior Court of Appeals, and the Swiss Federal Supreme Court.

Conclusion

The Philippines has statutes ensuring the stability of its financial system, including the secrecy of bank deposits. Foreign countries have similar statutes for that purpose. Corrupt Philippine officials have taken advantage of these domestic and foreign laws to conceal, protect, and spirit away their ill-gotten wealth, and later launder the proceeds through

seemingly legitimate investments. The identification, seizure and confiscation, transfer, and disposition of the ill-gotten wealth in favor of the Philippine Government demand international cooperation, especially from the competent law enforcement and judicial authorities where these ill-gotten wealth are located. Bilateral treaties provide an effective legal framework as to the mechanics for this cooperation.

The passage of an anti-money laundering law by the Philippines has boosted the anti-corruption initiatives of the Office of the Ombudsman in its domestic investigations and prosecution. Further, the ratification and implementation of bilateral and regional MLATs would ensure the placement of mechanisms to detect, trace, seize, confiscate, transfer, forfeit, and dispose, in favor of the Philippine Government, wealth unlawfully accumulated by its corrupt officials. Finally, to ensure a successful and sustained anti-corruption campaign that would cut through international borders, the competencies of Philippine anti-corruption investigators and lawyers must be upgraded to equip them with the knowledge and legal skills to use the various MLATs and other treaties vis-à-vis the anti-corruption and anti-money laundering laws of other states.