

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

DENYING SAFE HAVEN TO THE CORRUPT AND THE PROCEEDS OF CORRUPTION

Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance,
Extradition, and Return of the Proceeds of Corruption

Capacity Building Program

ADB



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Abbreviations and Acronyms

ABA	American Bar Association
ACA	Anti-Corruption Agency, Malaysia
ADB	Asian Development Bank
AMLO	Anti-Money Laundering Office, Thailand
APEC	Asia-Pacific Economic Co-operation
art.	article
ASEAN	Association of Southeast Asian Nations
FAQs	frequently asked questions
FIU	financial intelligence unit
GBP	British pound
MACA	Malaysia Anti-Corruption Academy
MLA	mutual legal assistance
MOU	memorandum of understanding
OECD	Organisation for Economic Co-operation and Development
OIA	Office of International Affairs, United States Department of Justice
STR	suspicious transaction report
THB	Thai baht
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organised Crime
US	United States
USD	United States dollar

Foreword

The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific is dedicated to supporting Asia-Pacific countries in the fight against corruption with the overriding aim of reducing poverty, promoting welfare, and attaining social and political stability. One key aspect of the fight against corruption is international cooperation among law enforcement agencies and prosecutorial authorities. It is no longer uncommon for 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. Criminals also seek safe haven in foreign countries. Yet, despite the recognition of the importance of mutual legal assistance (MLA) and extradition, many practitioners in Asia-Pacific decry the current ineffectiveness of the available legal and institutional tools. The end result is that international cooperation in the fight against corruption remains less than completely effective.

Against this background, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific organized its 4th Master Training Seminar, "Enhancing Asia-Pacific Cooperation on MLA, Extradition and the Recovery and Return of the Proceeds of Corruption." The Malaysia Anti-Corruption Academy graciously hosted the seminar on 28–30 March 2006 in Kuala Lumpur, Malaysia. The seminar was conducted in partnership with the UN Office on Drugs and Crime (UNODC) and received support from the American Bar Association/Asia Law Initiative (ABA). It was the fourth in a series organized by the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific that aims to strengthen the capacity of Asia-Pacific countries to fight corruption. This seminar brought together more than 70 participants from 26 Asia-Pacific countries, most of whom were practitioners who investigate and prosecute corruption cases and who have to seek or render international legal assistance. Together with experts from parties to the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions, the Asia Law Initiative of the American Bar Association, and the United Nations Office on Drugs and Crime, the participants explored topics ranging from legal and practical challenges in extradition and MLA, to measures for freezing,

confiscating, and repatriating the proceeds of corruption. By discussing and sharing their rich and diverse experiences, the participants heard many practical solutions to a myriad of problems.

Asia-Pacific countries have made great strides in facilitating international cooperation in the fight against corruption. However, it is clear that more obstacles lie ahead. The analyses and discussions that unfolded during the seminar and are compiled in this publication illustrate both past achievements and future challenges. This volume, produced jointly by ADB's Regional Sustainable Development Department and the OECD's Directorate for Financial and Enterprise Affairs, seeks to serve both as a resource to practitioners and as guidance to policymakers in meeting the challenges ahead.

Acknowledgments and Editorial Remarks

The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific would like to express its sincere gratitude to the Malaysia Anti-Corruption Academy for its expertise, guidance, and cooperation in the preparations for the 4th Master Training Seminar and especially for its warm welcome and gracious hospitality.

Special thanks are also due to the participants at the seminar, most particularly to the authors of the papers in this volume, whose insight and ideas enriched the discussions and outcome of the event. The seminar was directed and coordinated by Frédéric Wehrlé, Coordinator for Asia-Pacific, OECD Anti-Corruption Division, and Kathleen Moktan, Director, Capacity Development and Governance Division, ADB, and managed by Joachim Pohl, Project Coordinator of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. William Loo, Legal Analyst of the Anti-Corruption Initiative for Asia and the Pacific, Anti-Corruption Division, OECD, oversaw the preparation of this publication, and Marilyn Pizarro, Consultant with the ADB, provided professional and organizational assistance to the seminar on which this publication is based.

The Initiative's work is supported by ADB, the OECD, the Australian Agency for International Development, the Pacific Basin Economic Council, the Swedish Agency for International Development Cooperation, Transparency International, the United Kingdom Department for International Development, the United Nations Development Programme, and the World Bank.

The term "country" as used in this publication also refers to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever concerning the legal status of any country or territory on the part of ADB's Board and members and the OECD and its member countries. Every effort has been made to verify the information in this publication. However, the authors disclaim any responsibility for the accuracy of the information or the

effectiveness of the regulations and institutions mentioned in this report. ADB's Board and members and the OECD and its member countries cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

Executive Summary

The fight against corruption in Asia-Pacific has increasingly taken on an international dimension. This has given rise to a need to gather evidence abroad and to seek the return of fugitives for trial in corruption cases. Countries also seek to repatriate proceeds of corruption that have been exported. Extradition and mutual legal assistance (MLA) are therefore crucial tools in the fight against corruption.

Legal frameworks are generally necessary to formally obtain extradition and MLA. Asia-Pacific countries have adopted different types of legal frameworks for this purpose. Some are based on bilateral treaties, of which there are over 70 among the member countries of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. In addition, Asia-Pacific countries have passed domestic legislation that complements these treaty-based arrangements. For example, many member countries of the Initiative that are also part of the Commonwealth have designated other Commonwealth countries as extradition partners without treaties. Member countries of the Pacific Islands Forum have done likewise. In the absence of treaties or standing arrangements based on legislation, most countries will consider requests for cooperation on a case-by-case basis.

More recently, Asia-Pacific countries have placed greater emphasis on multilateral instruments for international cooperation. The most important multilateral instrument in corruption cases is the United Nations Convention against Corruption (UNCAC), which 17 members of ADB/OECD Anti-Corruption Initiative have signed or ratified. The UNCAC deems corruption offenses described in the Convention to be included in any existing treaties between States Parties. It obliges States Parties to include these offenses in any future extradition treaties that they sign. States Parties that do not have bilateral extradition or MLA treaties can also consider the UNCAC as the basis for cooperation.

Another multilateral instrument dedicated to anti-corruption is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which three members of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (Australia, Japan, and Korea) are parties. A party to the OECD Convention must provide

prompt and effective assistance to other parties to the fullest extent possible under its laws and relevant treaties and arrangements. As for extradition, the OECD Convention deems bribery of foreign public officials as an extradition offense under the laws of the signatory states and in extradition treaties between them.

Several other multilateral treaties could provide international cooperation among Asia-Pacific countries in corruption cases. Member countries of the Association of Southeast Asian Nations have signed a regional Treaty on Mutual Legal Assistance in Criminal Matters. Cooperation in corruption cases involving transnational organized crime may be provided under the United Nations Convention against Transnational Organized Crime. Member countries of the Commonwealth of Independent States may also turn to the Conventions on Legal Assistance and Legal Relationship in Civil, Family, and Criminal Matters.

Apart from these formal channels of cooperation based on treaties and legislation, Asia-Pacific countries may also resort to informal means of obtaining assistance in corruption cases. These range from direct law enforcement cooperation and civil procedures to the use of specialized bodies such as securities regulators and tax authorities. Notably, practitioners in the fight against corruption have found financial intelligence units (FIUs) especially useful. FIUs' usually extensive powers to gather financial information and numerous contacts in the public and private sectors make them a very useful source of informal assistance in corruption cases.

Despite this variety of legal bases for extradition and MLA, many instruments and legislation applicable to Asia-Pacific countries present similar obstacles to cooperation. Some of these obstacles are legal. For example, many practitioners who attended the seminar in Kuala Lumpur cited the requirement of dual criminality as a potential impediment. This is particularly so in cases involving illicit enrichment or bribery of foreign public officials, since many countries do not have these offenses. Another obstacle is differences in evidentiary procedures between the requesting and requested states. This often leads a requesting state to include insufficient evidence in the request for assistance, or causes a requested state to gather evidence through procedures that are unacceptable to the requesting state. The grounds for denying international cooperation listed in treaties and legislation are also potential obstacles, according to the experts at the seminar. For example, almost all extradition and many MLA arrangements deny cooperation in cases of political offenses and persecution. Most experts predicted that the ground could be raised

in corruption cases, but there was much less agreement on its precise scope.

When faced with these difficulties in a particular case, corruption investigators and prosecutors will likely not be able to change the relevant legislation or treaty to overcome the difficulties. They can, however, take many practical measures to reduce the difficulties. For instance, they could overcome problems with dual criminality by emphasizing that the concept is conduct-based. Hence, if the requested state does not have the same offense as the requesting state, practitioners should use their creativity and try to “fit” the conduct into a different offense in the requested state. Another practical measure is communication between the requesting and requested states to eliminate any misunderstandings due to differences in evidentiary procedures. It is also vital for a requested state to interpret its legal requirements flexibly so as to accommodate the requesting state as much as possible.

In addition to resolving legal obstacles, communication is also essential to effective, smooth, and efficient cooperation. All experts and practitioners repeatedly identified frequent and effective communication as a cornerstone of success. To this end, many countries in Asia-Pacific have established central authorities to transmit, receive, and handle all requests for assistance. Most practitioners have found central authorities to be crucial to the practice of extradition and MLA. Central authorities facilitate the process by identifying a visible contact point for other countries. Staffed with specialists in international cooperation, these central authorities serve as repositories of expertise and thus provide a source of advice for domestic and foreign law enforcement bodies on these matters. Some countries further enhance communication by posting liaison magistrates abroad or by establishing law enforcement liaison units.

In addition to these general issues, further challenges arise when tracing, freezing, confiscating, and repatriating the proceeds of corruption. International instruments are beginning to address these issues. For instance, the UNCAC obliges States Parties to provide mutual legal assistance in these areas. The ADB/OECD Anti-Corruption Action Plan encourages governments to take concrete steps in these matters. Some recent bilateral treaties in Asia-Pacific also address MLA in relation to the proceeds of crime.

Despite these instruments, the practice of international cooperation concerning the proceeds of criminal activity, including corruption, remains challenging. The procedure for obtaining MLA to seize, confiscate, and repatriate the proceeds can be complex. Requested states can be

uncooperative. Private litigation is a possible option, but it is often prohibitively expensive. Cases of successful recovery are therefore relatively rare.

Faced with these hurdles in obtaining MLA in relation to the proceeds of corruption, practitioners must take steps to maximize the likelihood of receiving cooperation. For example, practitioners should take particular care in drafting a request for assistance, such as by ensuring that all identifying information is included. Experts at the seminar also noted that certain institutional measures, e.g., the use of multinational task forces to investigate and seize the proceeds of crime, can be highly effective.

Keynote Addresses

Opening address

Dato' Seri Mohamed Nazri Bin Tan Sri Abd Aziz
Minister in the Prime Minister's Department, Malaysia

I am most honored and privileged to have this opportunity to address and declare open this 4th Master Training Seminar this morning. While thanking the Director General of ACA Malaysia, let me also say "Selamat Datang" to all of you. It is my fervent hope that you will enjoy the Malaysian hospitality during your stay here.

On behalf of the Government of Malaysia, I would like to take this opportunity to extend my appreciation and thanks to the Asian Development Bank and the Organisation for Economic Co-operation and Development for choosing Malaysia as the venue for this seminar.

It gives me great pleasure to note that we are not alone in the fight against graft. The sheer presence of so many participants from around the world certainly drives home the message to the perpetrators of corruption that their days are numbered and that we will go after them no matter where they hide with their loot.

The world we know today is becoming increasingly abhorrent of corruption. The fight against corruption is no longer merely a moral issue. The compelling reason is the suffering and deprivation that corruption brings to society and in most cases to the world's poorest.

Nevertheless, this evil persists and is often responsible for hindering the proper functioning of political systems, the implementation of state policies, and the effective allocation of national resources. Corruption undermines the principle of social fairness and erodes public morality. Many have likened corruption to a pervasive cancer that infests both public and private sectors.

In recent decades, corruption has ceased to be largely local in origin and effect. It is fast becoming a global phenomenon, and not peculiar to developing countries. Gone are the days when developed countries could claim moral superiority when it comes to corruption.

It is saddening to note sometimes that, while corruption is not tolerated at home, it is viewed as less sinful abroad because “they do things differently abroad.” Fortunately, this practice is changing, as evidenced by international institutions promulgating conventions to standardize business ethics in both local and international dealings.

Transnational crime is becoming a growing industry and is further facilitated by the existence of corruption. Criminals have access to enhanced methods of travel and communication through which they can flee from detection and prosecution and conceal the evidence of and profits from their crimes. Criminals continue to perfect their techniques and are quick to take advantage of national boundaries to shield themselves from justice.

Therefore, law enforcement authorities throughout the world must unite to combat this common threat. No one should underestimate our determination to relentlessly pursue and prosecute the corrupt no matter where they hide, and to recover the proceeds of corruption. In this aspect, it is pertinent that nations cooperate to achieve the common goal that is the eradication of corruption.

Malaysia, too, has had its fair share of problems when investigating certain high-profile cases. Enforcement agencies such as the ACA and the police found themselves in dire straits when procuring evidence to bring the culprits to account. The international connections and “safe havens” enjoyed by these perpetrators of corruption were simply overwhelming.

Investigators and prosecutors faced problems beyond their capacity to solve. The Government had to step in to find ways and means to facilitate the investigations carried out by these agencies. Since then, multilateral and bilateral agreements on mutual legal assistance and technical cooperation have been reached with countries that the criminals previously thought were safe havens.

Parliament ratified Mutual Assistance on Criminal Matters Act 2002 to provide the legal framework for the enforcement agencies in their pursuit of the corrupt and their ill-gotten proceeds. This act complements two other pieces of legislation, i.e., the Anti-Corruption Act 1997 and the Anti-Money Laundering Act of 2001. Together, these acts have made the long arm of the law even longer by sending to the corrupt a clear message that “corruption does not pay.”

Recent years have witnessed unprecedented efforts by governments and international agencies to combat the growing threat of corruption. In the forums and seminars of many anti-corruption initiatives, there have been numerous calls for more international cooperation to fight corruption.

Malaysia for one believes in international cooperation and collaboration. It is to this end that the Malaysia Anti-Corruption Academy

was established, not only to further enhance the capacity and capability to fight corruption among local law enforcement officers but also to serve as a regional hub for anti-corruption initiatives, especially in the Asia-Pacific region.

It is quite encouraging to note that organizations such as the Asian Development Bank, Organisation for Economic Co-operation and Development, United Nations Office on Drugs and Crime, and the American Bar Association/Asia Law Initiative have taken the lead in bringing about greater global awareness of corruption and providing forums for harnessing global resources to combat corruption.

I thank you for your initiatives and I hope the seminar achieves the desired objectives. I am confident that our efforts remain one of the most honest in the world, one that is driven by a vision of creating an international community that is intolerant of bribery and corruption.

Let us hope and pray that all our efforts bear the fruits that we seek through the achievement of global consensus, especially in the area of mutual legal assistance.

As for the participants at this seminar, it is my sincere hope that you make full use of this opportunity to learn from the new possibilities created and acquire the necessary knowledge that can be used to fight graft in your respective countries. Use this seminar as a good training ground and a forum for discussion.

Kindly share with your colleagues your knowledge and experiences that would be of mutual benefit. More importantly, I hope at least some of your deliberations would find their way into the basic policies of your respective governments. Remember: mutual legal assistance is an important mechanism through which we can more effectively suppress transnational crimes and in this case corruption.

In conclusion, I would like to take this opportunity to once again thank the Anti-Corruption Agency of Malaysia and the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific for organizing this seminar in MACA. I am sure your efforts will go a long way to fostering good relationships among anti-corruption agencies.

My compliments and congratulations, too, to the presenters of the seminar papers and thank you very much for sharing with us your knowledge, which will certainly be invaluable in our efforts to fight and overcome corruption.

On that note, I take great pleasure in declaring open the 4th Master Training Seminar, "Denying Safe Haven to Corruption and Its Assets: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition, and the Recovery and Return of the Proceeds of Corruption." Thank you.

Welcome remarks

Rajaretnam Rathakirushnan

Director, Malaysia Anti-Corruption Academy (MACA)

The Malaysia Anti-Corruption Academy expresses its sincerest gratitude to the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific for choosing Malaysia as the venue for the 4th Master Training Seminar. This is the second international program that MACA has jointly organized and hosted with other institutions since it began operations in December 2005. This demonstrates the Academy's potential as a regional hub for providing anti-corruption studies and training programs that will enhance anti-corruption capacity and capability building in the Asia-Pacific region.

The theme of this Seminar is "Denying Safe Haven to Corruption and Its Assets: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition, and the Recovery and Return of the Proceeds of Corruption." This subject matter is indeed very appropriate and timely, since it reflects international collaboration and cooperation in the fight against transnational corruption. The message to the corrupt is very clear: The fruit of ill-gotten gains is not safe from seizure and forfeiture by the authorities.

Concerted and holistic international efforts and collaboration have become the holy grail in the war against corruption. It is only through such cooperation that we can deny safe havens to the perpetrators of corruption.

To the international participants, I urge you to take advantage of this opportunity to share and exchange new ideas and effective anti-corruption methodologies. Use this occasion also to explore areas of cooperation with other member countries that have the common goal of eradicating corruption regionally and globally. I also take this opportunity to thank your governments for their cooperation in realizing this seminar. We are honored by your attendance and we look forward to future cooperation and participation.

I thank the Secretariat of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific and my colleagues in MACA for their diligent work, which has ensured the successful organization of this program.

Seminar overview by the Secretariat

Raza Ahmad

Capacity Development and Governance Division, ADB

Frédéric Wehrlé

Anti-Corruption Division, OECD

Governments' resolve to fight corruption in the Asia-Pacific Region is strong. This is evidenced by the commitment of 25 countries to the goals of the Anti-Corruption Action Plan for Asia-Pacific. The Action Plan acknowledges that only concrete steps will produce tangible progress in the fight against corruption. In this spirit, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific has been organizing training seminars for and with the Initiative's member countries over the past 4 years.

The Initiative's support to the member countries' endeavor to curb corruption is driven by the countries' demands and their assessment of what is most urgently needed to increase the effectiveness of their efforts in the fight against corruption. A particular concern in this area, expressed both by policy makers and by practitioners in Asia-Pacific and beyond, is the current ineffectiveness of legal assistance across countries' borders. It is no longer uncommon for corrupt individuals to hide or launder bribes and embezzled funds in foreign jurisdictions, to keep secret slush funds in bank accounts abroad, and to launder the proceeds of corruption internationally. Yet the procedures of international cooperation among law enforcement agencies and prosecutorial authorities remain cumbersome, slow, and often fruitless.

Member countries are determined to address this challenge, and have called upon the Secretariat to convene experts and policy makers to share their experience in strengthening mutual legal assistance, extradition, and the repatriation of proceeds in corruption matters. The Secretariat is therefore very pleased that more than 80 senior experts from 22 member countries of the Initiative, 4 observer countries, OECD members from outside the region, and international organizations are convening this week to discuss these important issues.

We are very grateful to our partners: the UN Office on Drugs and Crime, leading the work on the UN Convention against Corruption, and the American Bar Association/Asia Law Initiative, a very valuable partner since the Initiative's inception. We thank our experts for their willingness

to share their experience in this important matter. Last but not least, we are very thankful for the relentless support that the host of this event, the Malaysia Anti-Corruption Agency, extends to the Initiative.

We are very much looking forward to insightful presentations, rich exchanges, and fruitful discussions during this seminar.

Chapter 1

Initiatives and legal instruments for international cooperation in corruption matters in Asia-Pacific

Legal frameworks are usually necessary for countries to formally obtain extradition and MLA. As William Loo, Legal Analyst, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, OECD Anti-Corruption Division, observed, Asia-Pacific countries have adopted different types of arrangements for this purpose. These include over 70 MLA and extradition bilateral treaties among member countries of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. In recent years, Asia-Pacific countries have increasingly turned to multilateral instruments as the basis for international cooperation, e.g., the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In the absence of treaties, many Asia-Pacific countries also have domestic legislation that allows case-by-case cooperation. Despite differences in the types of frameworks, these arrangements often have comparable features and present similar challenges.

Two United Nations conventions are particularly important to international cooperation in corruption cases: the United Nations Convention against Corruption and, to a lesser extent, the United Nations

Convention against Transnational Organized Crime. Kimberly Prost, Chief, Legal Advisory Section, Treaty and Legal Affairs Branch, UNODC, described the extradition and MLA aspects of these conventions in detail. In some areas, such as asset recovery, these conventions include innovations that could enhance international cooperation in corruption cases. As more and more Asia-Pacific countries become States Parties to these conventions, the prominence and importance of these instruments in extradition and MLA in corruption cases is likely to increase in the years to come.

Frameworks for extradition and mutual legal assistance in corruption matters in Asia-Pacific

William Loo

Legal Analyst

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

OECD Anti-Corruption Division

As with other regions in the world, the fight against corruption in Asia-Pacific has taken on an international dimension. Countries in this region increasingly need to gather evidence abroad and to seek the return of fugitives for trial in corruption cases. Many would also like to ensure the repatriation of proceeds of corruption that have been exported. Extradition and mutual legal assistance (MLA) are therefore more important now than ever before.

Asia-Pacific countries have adopted different types of legal frameworks to address the need for effective extradition and MLA in corruption cases. Some are based on bilateral treaties, of which there are over 70 among the member countries of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. Many of these treaties are very recent and contain all of the features found in modern extradition and MLA treaties. However, others are decades old and may need to be updated.

More recently, Asia-Pacific countries have placed greater emphasis on multilateral instruments. A growing number of countries have signed or ratified the United Nations Convention against Corruption. Three members of the Initiative (Australia, Japan, and Korea) are also parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. As its title suggests, the OECD Convention requires its 36 signatories worldwide to criminalize the bribery of foreign public officials in international business transactions. The OECD Convention deems the bribery of foreign public officials as an extraditable offense under the laws of the signatory states and in extradition treaties between them. As for MLA, a party to the OECD Convention must provide prompt and effective assistance to other parties to the fullest extent possible under its laws and relevant treaties and arrangements. Member countries of ASEAN have also signed a regional treaty on Mutual Legal Assistance in Criminal Matters. Member countries of the Commonwealth of Independent States may

rely on the Conventions on Legal Assistance and Legal Relationship in Civil, Family, and Criminal Matters.

In addition, Asia-Pacific countries have passed domestic legislation that complements these treaty-based arrangements. For example, most member countries of the Initiative that also belong to the Commonwealth have designated other Commonwealth countries as extradition partners without treaties. Member countries of the Pacific Islands Forum have done likewise *viz.* other Forum members. In the absence of treaties or standing arrangements based on legislation, most countries will consider requests for cooperation on a case-by-case basis.

Whether based on treaties or legislation, these schemes of cooperation often appear sufficiently broad to cover most corruption and related offenses. For example, when the severity of the offense is a prerequisite for cooperation, the threshold is relatively low. Most Asia-Pacific countries only require the criminal conduct to be punishable by imprisonment of 1 year in the requesting or requested state; this would cover most corruption and related offenses. In addition, although many countries require dual criminality for extraditions and MLA, most arrangements use a conduct-based definition of dual criminality that broadens the range of offenses eligible for assistance.

There are also commonalities among Asia-Pacific countries in the grounds for denying international cooperation. For example, under many arrangements, an Asia-Pacific country may refuse cooperation that would impair its “essential interests.” Since that term is not well-defined, a requested state may conceivably deny cooperation in a corruption case because of considerations such as its national economic interest, the potential effect on relations with another state, or the identity of the parties involved. This would in turn reduce the effectiveness of extradition and MLA in corruption cases. Similarly, while most arrangements deny cooperation in cases involving political offenses, what amounts to such offenses is not always clear. To remove this uncertainty, some arrangements expressly state that corruption can never constitute a political offense.

Other grounds for denying cooperation exhibit more variation. For instance, several countries (e.g., Australia, the Cook Islands, Fiji, Indonesia, Korea, Malaysia, Palau, and Vanuatu) may grant extradition or MLA in corruption cases involving their nationals. Others refuse to do so on a mandatory basis. In some cases, a requested state that refuses to extradite an offender for this reason must prosecute the national. More often, prosecution in place of extradition is only discretionary. Similarly,

Asia-Pacific countries take different approaches when cooperation is requested in relation to an offense that may attract a severe penalty (such as death). Some countries allow cooperation in these cases. Others (e.g., Australia; Cook Islands; Fiji; Hong Kong, China; and Vanuatu) may cooperate if the requesting state provides sufficient assurances that the penalty will not be carried out.

Many schemes for cooperation in Asia-Pacific also incorporate procedures that expedite assistance in corruption cases. To promote effective oversight and to maximize economies of scale, many member countries of the Initiative now use central authorities to send, receive, and handle requests for assistance. In urgent cases, these procedures are often sufficiently flexible to permit oral requests for assistance and communication outside normal channels. In addition, several member countries of the Initiative offer simplified means of extradition, such as endorsement of arrest warrants (e.g., extradition between Malaysia and Singapore, and among the Pacific Forum countries) and extradition by consent (e.g., Australia; Cook Islands; Fiji; Hong Kong, China; Malaysia; Palau; Papua New Guinea; and Vanuatu). Others have tried to attain the same goal by reducing or eliminating evidentiary requirements to avoid protracted hearings.

Several Asia-Pacific jurisdictions have taken other practical measures to facilitate international cooperation. Some countries (e.g., Australia; Cook Islands; Fiji; Hong Kong, China; Kazakhstan; Kyrgyzstan; Malaysia; Papua New Guinea; and Vanuatu) allow officials of a requesting state to attend the execution of certain MLA requests; this could prove useful in corruption cases with complex financial aspects. Some jurisdictions (e.g., Australia and Hong Kong, China) have appointed liaison personnel to provide advice and to act as contact points for both incoming and outgoing requests for assistance.

In many respects, the framework in Asia-Pacific for tracing, seizing, and confiscating the proceeds of corruption is similar to MLA in other cases. The legal basis for doing so is found in many bilateral and multilateral treaties. Domestic legislation often allows for cooperation with non-treaty partners. Many of these arrangements were created recently and include fairly modern features to expedite assistance, such as allowing the direct registration of foreign freezing and confiscation orders. Less common are provisions to share and repatriate confiscated assets. Most arrangements require the requesting and requested states to negotiate on a case-by-case basis and thus provide little guidance on these issues.

International cooperation under the United Nations Convention against Corruption

Kimberly Prost

Chief, Legal Advisory Section, Treaty and Legal Affairs Branch
United Nations Office on Drugs and Crime

Multilateral Conventions for International Cooperation

In recent years, there has been a growing trend among countries to create schemes for international cooperation through multilateral conventions. The UN has been a leading forum for creating many of these conventions. The United Nations Convention against Corruption (UNCAC) is one of the most relevant instruments in corruption cases and will be the focus of this paper. However, practitioners should bear in mind other UN conventions that also contain provisions on international cooperation:

- United Nations Convention against Transnational Organized Crime (UNTOC)
- 1998 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Drug Convention)
- 13 UN Counter Terrorism Conventions

Overview of UNCAC Provisions on International Cooperation

The UNCAC contains five key components, two of which are international cooperation and asset recovery (the others are prevention, criminalization, and general technical assistance/information exchange/implementation). The international cooperation component can be further divided into the following topics:

- Extradition (art. 44)
- Transfer of Sentenced Persons (art. 45)
- Mutual Legal Assistance (art. 46)
- Transfer of Criminal Proceedings (art. 47)
- Law Enforcement Cooperation (art. 48)
- Joint Investigations (art. 49)
- Special Investigative Techniques (art. 50)

Extradition under the UNCAC

Fundamental Provisions Concerning Extradition

Offenses established in accordance with the UNCAC are deemed to be included in any existing treaties between States Parties. States Parties must also include these offenses in any future extradition treaties that they sign. In addition, a State Party may consider the UNCAC as the basis for extradition if that State Party requires a treaty for extradition. If a State Party does not require a treaty for extradition, then it is required to recognize the offenses in the UNCAC to be extraditable as between States Parties.

General Provisions Concerning Extradition

The UNCAC contains some general provisions that aim to enhance the ability of States Parties to extradite those accused of crimes of corruption. States Parties are required, subject to their domestic law, to endeavor to expedite extradition procedures and to simplify evidentiary requirements for extradition (art. 44[9]). The convention recognizes provisional arrest and gives States Parties discretion to give effect to requests for provisional arrest, subject to their domestic law and treaties (art. 44[10]). It also guarantees fair treatment of the person sought at all stages of proceedings (art. 44[14]).

Dual Criminality in Extradition

The UNCAC takes a flexible approach to dual criminality in extradition. The convention's provisions on extradition apply only if the offense underlying an extradition request is punishable under the domestic law of both the requesting and requested States Parties. However, a State Party may waive this requirement if its domestic law allows extradition for offenses not punishable in that State Party (art. 44[1] and art. 44[2]).

Extradition of Nationals

Recognizing that some countries are constitutionally barred from extraditing their nationals, the UNCAC contains several provisions to deal with these situations. First, the convention adopts the "extradite or prosecute" principle. If a State Party refuses to extradite a person solely

on the ground that he or she is a national, then it must submit the case to its competent authorities for prosecution upon the request of the State Party seeking extradition (art. 44[11]). Second, the convention provides for the conditional surrender of a national, who will be returned to the country of nationality to serve any sentence that is imposed (art. 44[12]). Third, if a State Party refuses extradition to enforce a sentence because the person sought is a national, that State Party must consider enforcing the sentence itself, if its domestic law so permits (art. 44[13]).

Grounds for Refusing Extradition

The UNCAC permits extradition to be refused on certain grounds. For instance, a request for extradition may be denied if “the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons” (art. 44[15]). In addition, before refusing extradition on any ground, the requested State Party must consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to any allegation (art. 44[17]).

Equally important, the UNCAC prohibits States Parties from relying on certain grounds to deny extradition. Some States Parties ordinarily deny extradition for political offenses. The UNCAC, however, prohibits these States Parties from applying that exception to any of the offenses established in accordance with the convention (art. 44[4]). The UNCAC further prohibits States Parties from refusing extradition on the sole ground that the offense is also considered to involve fiscal matters (art. 44[16]).

MLA under the UNCAC: A Mini-Treaty

In the past, some multilateral conventions that deal with a particular type of crime have included some provisions on MLA in relation to offenses that fall within those conventions. Examples of such conventions are the UN Drug Convention and the UNTOC.

The UNCAC is similar to these conventions but contains some additional features. The UNCAC broadly requires States Parties to afford one another the widest measure of MLA in investigations, prosecutions, and judicial proceedings in relation to the offenses covered by the

convention (art. 46[1]). The convention does not affect the obligations of States Parties under any existing or future bilateral or multilateral MLA treaties (art. 46[6]). States Parties are asked to conclude agreements to give effect to the MLA provisions in the convention (art. 46[30]). The UN Model Treaty on Mutual Assistance in Criminal Matters could be used as a precedent for such agreements. The UNCAC, however, also includes a mini-MLA treaty that can be used by States Parties not bound by a treaty, or that can take the place of a treaty if the States Parties agree (art. 46[7]). This mini-treaty details the conditions and procedure for requesting and rendering assistance. These provisions are similar to those found in many bilateral MLA treaties.

MLA and Dual Criminality: A Provision Born of Controversy

The provision in the UNCAC dealing with dual criminality in MLA was fairly controversial during its negotiation, partly for historical reasons. Dual criminality is discretionary grounds for denying MLA under the UNTOC, an earlier convention. States Parties may grant MLA in the absence of dual criminality when they deem it appropriate to do so (art. 18[9]).

The corresponding provisions under the UNCAC are more elaborate. In the absence of dual criminality, a State Party may deny assistance only after taking into account the purposes of the convention (art. 46[9][a]). Furthermore, if the request is for assistance that does not involve coercive action, a State Party must render that assistance if it is consistent with the basic concepts of its legal system to do so (art. 46[9][b]). Finally, the UNCAC asks States Parties to consider adopting such measures as may be necessary to allow for a wider scope of assistance in the absence of dual criminality (art. 46[9][c]).

Types of Assistance

The UNCAC (art. 46[3]) provides for a wide range of assistance, including:

- Service of judicial documents
- Execution of searches, seizures, freezing of assets
- Examination of objects and sites
- Provision of information, evidentiary items
- Provision of documents and records
- Identification and tracing of proceeds and property for evidence
- Assistance in asset recovery

- Presentation of evidence or statements, through technology or other means
- Facilitation of voluntary appearances
- Temporary transfer of persons in custody
- Other assistance, unless prohibited

Central Authority

The UNCAC requires States Parties to designate central authorities that are competent to receive requests and to execute requests or transmit them for execution (art. 46[4]). The purpose of this provision is to speed up the execution and transmission of requests. As a matter of best practice, to obtain maximum benefits from the use of central authorities, each country should ensure that it has one central authority for all extradition and MLA matters. The form of the central authority can be flexible: it can be an existing office or a person within an office. Regardless of its form, the central authority should not act merely as a mailbox, but should be staffed with persons who have substantive knowledge on extradition and MLA. The authority should have the capability and responsibility to follow up requests and to control the quality of incoming and outgoing requests.

Form and Content of a Request

The mini-MLA treaty in the UNCAC specifies the requisite form and content of requests for assistance. Requests should be in writing in a language acceptable to the requested State Party. In urgent cases, requests may be made orally, with written confirmation to follow (art. 46[14]). The Convention conveniently provides a checklist of the required information for a request (art. 46[15] and art. 55[3]), although a requested State Party may ask for additional information (art. 46[16]).

Execution of a Request

When executing a request, a State Party must do so according to its domestic law. It must also respect any procedures specified in the request unless it is illegal or impossible to do so (art. 46[17]). The requesting State Party is not permitted to use the information that it receives for investigations, prosecutions, or judicial proceedings other than those stated in the request unless it secures the consent of the requested State Party (art. 46[19]). As a matter of best practice, practitioners are encouraged to reduce limitations on use as much as possible.

A requesting State Party may require the requested State Party to keep confidential the fact and substance of the request except to the extent necessary to execute the request (art. 46[20]). To speed up the execution of requests, the UNCAC requires requested States Parties to execute requests as soon as possible and to take fully into account any deadlines that are suggested by the requesting State Party and for which reasons are given. A requested State Party should respond to reasonable requests by the requesting State Party on the status and progress of the request (art. 46[24]). A requested State Party should bear the cost of executing the request, but substantial extraordinary costs may be dealt with through mutual consultation (art. 46[28]).

Grounds for Refusing MLA

A requested State Party may deny MLA on the following grounds if it gives reasons for the refusal: the requirements for assistance are not met, assistance is prejudicial to the interests of the requested State Party, assistance is prohibited by law, assistance is of a *de minimis* nature, or assistance is available under other provisions of this convention (art. 46[9][b] and art. 46[21]). MLA cannot be denied solely because the underlying offense is considered to involve fiscal matters (art. 46[22]) or because it involves bank secrecy (art. 46[8]). Before refusing or postponing the execution of a request, the States Parties must consult each other and try to agree to execute the request conditionally (art. 46[26]).

Asset Freezing, Confiscation, and Recovery

The UNCAC devotes a full chapter to asset recovery. The convention broadly requires States Parties to put in place comprehensive systems for freezing and confiscating the proceeds of corruption. These obligations apply to the confiscation of the proceeds of crime, both domestically (art. 31) and upon the request of another State Party (art. 55).

The obligations for domestic freezing and confiscation apply to the proceeds and instrumentalities of crime (art. 31[1]), proceeds that have been converted or intermingled with other assets (art. 31[4]), and income and benefits derived from the proceeds (art. 31[6]). States Parties are obliged to take such measures as may be necessary to enable the identification, tracing, freezing, or seizure of these items for the purpose of eventual confiscation (art. 31[2]). They must also adopt, in accordance with their domestic law, measures to regulate the administration of frozen, seized, or confiscated property (art. 31[3]). The courts of States Parties

must be empowered to gain access to commercial banking records (art. 31[7]). If allowed under their law, States Parties are to consider reversing the burden of proof by asking an offender to demonstrate the lawful origin of the alleged proceeds of crime or other property liable to confiscation (art. 31[8]).

One of the UNCAC's biggest breakthroughs is in asset recovery. The return of assets is a fundamental principle of the convention (art. 51). The convention contains provisions to prevent and detect the transfer of proceeds (art. 52). These include: customer identification, particularly of beneficial owners of high-value accounts; enhanced customer due diligence for politically exposed persons; prevention of the establishment of banks with no physical presence; and the possibility of requiring financial disclosure or declarations for public officials.

The UNCAC contemplates a number of avenues for States Parties to recover unlawfully acquired assets, to facilitate the process. A State Party may initiate civil action in another State Party's courts to establish ownership of property acquired through corruption. Courts must be allowed to order corruption offenders to pay compensation to another State Party. They must also be allowed to recognize in confiscation decisions another State Party's claim as the legitimate owner of the property (art. 53).

In addition to direct enforcement, States Parties may recover assets through international cooperation. Building on the UN Drug Convention and the UNTOC, the UNCAC contemplates two means of cooperation in asset seizure and confiscation. First, a requesting State Party may "indirectly enforce" confiscation by asking a requested State Party to obtain a domestic court order (art. 51[a]). Alternatively, a requesting State Party may "directly enforce" a confiscation order that has been issued in its own courts by asking the competent authorities of the requested State Party to give effect to the order (art. 51[b]). To further enhance the process, a State Party must also permit its competent authorities to confiscate proceeds on the basis of a money laundering or related offense (art. 54[1][a]). It must also consider allowing non-conviction-based confiscation (art. 54[1][c]).

The UNCAC also contains provisions dealing with the return of assets to another state (art. 57). Return depends on how closely the assets are linked to the requesting State Party. Public funds embezzled from a State Party must be returned to that state. The proceeds of other offenses covered by the UNCAC are returned if a requesting State Party establishes prior ownership of the asset, or if the requested State Party recognizes damage to the requesting State Party as a basis for returning the

confiscated property. In any other case, the asset may be returned to the requesting State Party, given to a prior legitimate owner, or used to compensate victims.

Miscellaneous Provisions

The UNCAC also includes provisions beyond formal MLA. It requires States Parties to consider transferring or consolidating proceedings in the interest of justice (art. 47) and to consider entering into agreements for the transfer of sentenced persons (art. 45). It requires the law enforcement authorities of States Parties to cooperate in inquiries and maintain channels of communication and information exchange (art. 48). Law enforcement authorities must also consider conducting joint investigations (art. 49) and allow for the use of special investigative techniques in appropriate cases (art. 50).

Conclusion

The UNCAC is the most modern and comprehensive international legal instrument in the fight against corruption. Recognizing that international cooperation is a key part of that fight, the UNCAC includes a comprehensive scheme for extradition, MLA, and asset recovery in corruption cases. As more countries sign and ratify the UNCAC, the Convention should play an increasingly central role in international cooperation in corruption cases.

Chapter 2

Thinking outside the box: Informal and alternative measures for cooperation and mutual assistance

When discussing the subject of international cooperation and assistance, some practitioners often focus immediately on formal means of assistance through bilateral and multilateral treaties and conventions. Informal and alternative measures for cooperation are often overlooked, even though many such channels for assistance exist. These range from direct law enforcement cooperation and civil procedures to the use of specialized bodies such as financial intelligence units (FIUs), securities regulators, and tax authorities.

During the seminar, experts related to participants their experience with these alternative means of international cooperation. The utility of FIUs in efficiently gathering evidence was recounted by Pol. Col. Seehanat Prayoonrat, Acting Deputy Secretary General of Thailand's Office of the National Counter Corruption Commission. The participants also heard many suggestions for seeking and providing informal assistance from Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland.

During the discussion sessions, participants identified several reasons why informal or alternative measures of cooperation are necessary. Since many Asia-Pacific countries and jurisdictions do not have formal bilateral or multilateral MLA relations with other countries, these alternative

measures may be the only means of seeking assistance. Even when there are formal relations, alternative channels are often much faster and simpler. Information gathered through alternative channels can also be useful for laying the groundwork for a formal request, such as by focusing and reducing the scope of the request.

Among the many alternatives to formal assistance, participants found FIUs to be particularly useful in corruption cases. This is mainly because FIUs usually have extensive powers to gather financial information, and because they often have numerous contacts in the public and private sectors. International cooperation is especially feasible and efficient between FIUs that have signed memorandums of understanding for cooperation and exchange of information.

Participants identified the Internet as another alternative source of information. The Internet can sometimes be used to identify the law enforcement agency that is responsible for a case. The United Nations Office on Drugs and Crime (UNODC) maintains a directory of central authorities for MLA on its Web site. Foreign and international press reports are readily available on the Internet and can provide useful information for starting or focusing an investigation. Several participants felt that the Internet can play an even more important role in the future. For instance, international organizations and initiatives (such as the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, and the UNODC) could set up Web pages that list the requirements for incoming requests for assistance. International initiatives and organizations could also consider setting up Web sites on best practices in international cooperation.

Another area with untapped potential may be the creation of liaison networks. Participants stated that they have had positive experiences in using some networks that are already available to Asia-Pacific countries, such as Interpol. Several participants expressed the view that Asia-Pacific countries should establish closer and more extensive liaison networks among police and judicial officials. Some participants suggested the creation of a body akin to Eurojust, which is a permanent network of judicial authorities that aims to enhance international cooperation in criminal cases within the European Union. In this regard, many participants viewed the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific as a forum for networking through its regular Steering Group meetings and events such as this seminar.

International cooperation can also be enhanced if countries spontaneously provide information to other countries, rather than wait for them to ask for it. Several experts and participants recounted cases that resulted in successful investigations. Practitioners were strongly encouraged to provide information voluntarily whenever possible.

Despite their usefulness, alternative channels of assistance should be considered with at least two caveats in mind. First, the legality of these means of gathering information varies across jurisdictions. Therefore, practitioners must first verify that an approach is legal before proceeding. Second, in some jurisdictions, evidence must be gathered, authenticated, and certified through formal procedures to be admissible in court. Information obtained through informal or alternative channels may thus be inadmissible at trial, although it may still be useful in an investigation.

The use of financial intelligence units for mutual legal assistance in the prosecution of corruption

Pol. Col. Seehanat Prayoonrat

Acting Deputy Secretary General

Office of the National Counter Corruption Commission, Thailand

Need for Informal and Alternative Measures for Assistance

Recent developments in corruption cases have given rise to the need for informal and alternative measures for assistance. Corruption cases are often transnational, since criminals use foreign bank accounts to hold slush funds and launder the proceeds of corruption. Corruption cases are also increasingly complex, involving a range of criminal activities from drug and human trafficking to money laundering and terrorist financing. Criminals use ever more sophisticated techniques to prevent the detection of their activities or to launder the proceeds of corruption. As a result, corruption investigations are more complex and resource-intensive. Law enforcement also often needs to seek extensive evidence from foreign jurisdictions. The prevention, investigation, and punishment of corruption, and the recovery and repatriation of its proceeds, therefore cannot be achieved without effective international cooperation.

Countries have created numerous legal instruments to address the need for international cooperation. Many have entered into bilateral treaties as a basis for seeking and providing mutual legal assistance (MLA). Others have entered into multilateral instruments, e.g., the Mutual Legal Assistance Treaty among the ASEAN countries, to the same effect. In addition, several multilateral instruments to combat corruption are in place at the national and regional levels. Among these are the United Nations Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. These instruments contain specific provisions on international cooperation and mutual legal assistance, thus providing the framework for transborder cooperation in the fight against corruption.

However, these formal means of cooperation are not always sufficient. There may be no treaty or convention between the requesting and requested states. Shortcomings in legislation or treaties may preclude the type of assistance that is sought. Furthermore, some countries require the approval of parliament to ratify a treaty or convention. This in turn necessitates a thorough review of existing national legislation and

possibly the passage of new legislation. This may delay and undermine international cooperation in combating corruption in these countries.

Even when legal and institutional tools for mutual legal assistance are in place, their ineffectiveness is very well known. Many countries will cooperate only if the requesting state complies with certain standards, such as dual criminality. Meeting these standards could be difficult, particularly if the requesting and requested states have different legal systems and judicial processes. Substantial time and resources may also be required. Bureaucracy adds unnecessary delays. All of these factors diminish the effectiveness of the formal means of international cooperation—hence the need for informal and alternative measures for assistance.

Channels of Informal and Alternative Measures for Assistance

There are numerous channels for informal assistance and cooperation. Interpol is a common and efficient channel of communication among law enforcement agencies. Law enforcement agencies from ASEAN countries have also signed memorandums of understanding (MOUs) for the exchange of information (see Annex for an example). There are likewise regulatory channels for seeking cooperation. For example, the securities regulators of many countries are members of the International Organization of Securities Commissions. Many of these regulators have signed MOUs to facilitate the exchange of information. Recent cooperation between regulators in Thailand and Hong Kong, China ultimately resulted in the seizure of proceeds from an illegal stock trading boiler room.

One particularly useful alternative to formal MLA is financial intelligence units (FIUs). An FIU is an operational central agency within a government that deals with the problem of money laundering. It obtains financial disclosure information, processes it in some way, and then provides the processed information to an appropriate government authority. An FIU thus makes it possible for financial institutions, law enforcement agencies, and prosecutorial authorities to exchange information rapidly. This exchange can also take place across jurisdictions. FIUs that are part of the Egmont Group have undertaken to cooperate and share information. Individual FIUs may have signed MOUs or letters to accomplish MOUs.

Thailand's FIU is the Anti-Money Laundering Office (AMLO). Recognizing the benefits of being part of a global network for information exchange, AMLO joined the Egmont Group in June 2001. To date, AMLO has signed MOUs with other FIUs in 23 jurisdictions.

Success Stories of FIU Cooperation

The following two examples illustrate the usefulness of informal cooperation among FIUs.

Case No.1: Money Exchange, Cross-Border Money Transportation

In May 2005, a post office in London notified the customs authorities in the United Kingdom of a suspicious transaction concerning a 25-year-old Thai man who wanted to buy a GBP20,000 traveler's check in cash. The UK customs authorities seized the cash and questioned the man, who admitted that he had failed to declare the money when he passed through the airport. The man said that his father also had GBP10,000. With the combined amount of GBP30,000, the man and his father intended to buy a sports car, a Porsche, in the UK and later resell it for profit in Thailand.

The UK customs authorities learned that the import duty for such cars in Thailand is nearly 300%. Moreover, an authorized Porsche dealer in Thailand sells the same vehicle for less than GBP30,000 (and even with after-sales service). Hence, the UK authorities did not believe what they were told.

The Thai male and his father both stated that they had exchanged Thai baht for UK pounds at two money exchanges in Bangkok, but they were unable to produce receipts. The UK customs authorities thus requested AMLO to inquire with the two money exchanges. AMLO found that both money exchanges were unauthorized (i.e., unregistered). One of the suspects also claimed to own a hotel in Bangkok. This claim was untrue, as AMLO learned.

The UK customs authorities gathered all of the information and concluded that the suspects' story was unreliable. The suspects had breached the law by failing to declare the cash when they crossed the border. Accordingly, the authorities asked a UK court to confiscate the money to the state. On 2 September 2005, the court granted the application.

Case No. 2: Suspicious Transaction Report of Significant Wire Transfers from High-Risk Countries

In July 2005, AMLO received a suspicious transaction report (STR) from a local bank. The report indicated that THB500 million was being transferred from the Bangkok branch of a foreign bank into the account of a customer, who was a legal person. The next day, this customer told

the bank that he wanted to deposit a personal check for THB200 million from another local bank and then transfer this amount via Germany to Lichtenstein. The bank refused this request.

AMLO also received an STR from the Bangkok branch of a second foreign bank involving the same customer. The report stated that this customer had received a wire transfer of 26 million euros from a legal person registered in the British Virgin Islands. The transfer was made via Switzerland and the UK. The transaction aroused suspicion because this customer had failed to notify the bank in advance of the large transfer. After receiving the transfer, the bank asked for documents showing the reason for the transfer.

In response, the customer said that he had arranged a joint venture with a foreign company in a copper business. To support his claim, he produced a one-page agreement which was not professionally written. The customer's company runs an oil business with a registered capital of THB2 million. The revenue from the business the previous year was only THB600,000.

Since this customer had failed to comply with customer due diligence, the foreign bank instructed him to close all accounts in early August 2005. The customer then transferred his funds to four local banks, depositing THB300–500 million with each bank.

The last report to AMLO said that this person had applied for a large loan from a local bank, using a fixed deposit that he held at the bank as collateral. After receiving the loan, he transferred the money to a Caribbean country, ostensibly to launder the funds through layering.

Conclusion

These two examples show that FIUs can be a useful means of obtaining international cooperation outside the formal channels. The efficiency with which FIUs can achieve this cooperation makes them an invaluable tool in the fight against corruption. The information obtained through these channels can provide valuable leads even before a formal investigation. FIUs may also assist in freezing, seizing, and confiscating assets.

For these reasons, I urge you to establish alternative networks for fostering and facilitating information exchange and international cooperation. These networks should include, but not be limited to, FIUs. This is not to ignore or discard the existing formal mechanisms. Instead, the alternative networks will promote and strengthen the efforts being made in the global fight against corruption.

Annex

Memorandum of Understanding between the Anti-Corruption Bureau of Brunei Darussalam, the Corruption Eradication Commission of the Republic of Indonesia, the Anti-Corruption Agency of Malaysia, and the Corrupt Practices Investigation Bureau of the Republic of Singapore on Cooperation for Preventing and Combating Corruption

The Anti-Corruption Bureau of Brunei Darussalam, the Corruption Eradication Commission of the Republic of Indonesia, the Anti Corruption Agency of Malaysia, and the Corrupt Practices Investigation Bureau of the Republic of Singapore, hereinafter referred to as “the Parties”:

Realizing that the grave situation caused by corruption has deteriorated the welfare of peoples and nations worldwide;

Acknowledging that preventing and combating corruption which is transnational in nature can be enhanced by the collaborative and continuous efforts among the Parties;

Desiring to strengthen collaborative efforts among them in preventing and combating corruption;

Stressing that the establishment of cooperation among them would further strengthen the existing friendly relations between their respective countries;

Recognizing the importance of the principles of sovereignty, national independence, equality, and mutual benefit;

In accordance with the prevailing laws and regulations of their respective countries;

Agreed as follows:

Article 1: Objectives

The objectives of the cooperation include:

- a. To establish and strengthen collaborative efforts against corruption among the Parties;
- b. To increase capacity and institutional building among the Parties in preventing and combating corruption.

Article 2: Areas of Cooperation

The areas of the cooperation may include, subject to the Parties’ respective domestic laws, regulations, and practices, within the limits of their competence the following:

- a. To exchange information in respect of methods and means of criminal acts of corruption and/or corrupt practices (including money laundering and proceeds of crimes of corruption);
- b. To exchange information in respect of methodology and modus operandi of their respective units dealing with financial intelligence where such units are maintained by the Parties;
- c. To conduct training courses and exchange of expertise and human resources personnel in the areas of forensic accounting, forensic computer, forensic engineering, polygraph, and voice analyzer;
- d. To host and participate in forums, workshops, seminars, conventions, and conferences;
- e. To exchange information on community education, to enhance public awareness on anti-corruption, including media campaigns, and promote integrity, as well as to strengthen public participation;
- f. To provide technical assistance in operational activities;¹
- g. To consider the necessity and appropriateness of a common methodology of evaluation on an anti-corruption index;
- h. To share information on relevant intelligence data, statistics, and corruption crime records;
- i. To perform other areas of cooperation as deemed necessary.

Article 3: Membership

The Memorandum of Understanding shall also be open to be signed by relevant national anti-corruption agencies/commissions of ASEAN member countries.

Article 4: Technical Arrangement

Activities described in this Memorandum of Understanding may be implemented through the development of specific arrangements, programs, or projects between the Parties. Such arrangements, programs, or projects shall specify the objectives, financial arrangements, and other details relating to specific undertakings of all the Parties involved.

Article 5: Confidentiality of Information

The information or documents obtained from the respective Parties shall be kept confidential and shall not be disseminated to any third party, nor be used for administrative, prosecutorial or judicial purposes without prior consent of the disclosing Party.

1. The Parties understand that mutual legal assistance does not fall within this clause. This does not prevent the parties from conducting other forms of assistance or cooperation on a mutually agreeable basis.

Article 6: Implementation Mechanism

- a. The Parties shall hold annual meetings on a rotational basis to review the implementation of this Memorandum of Understanding and to recommend programs of cooperation.
- b. Special meetings can be held on a date and venue as agreed and deemed necessary by the Parties.
- c. The Parties shall discuss and resolve any issues regarding the operation of this Memorandum of Understanding.
- d. Each Party shall designate its representative as Contact Person. Any change of Contact Person shall be communicated to all Parties concerned.

For the Anti Corruption Bureau of Brunei Darussalam:
Senior Assistant Director, Community Relations and Support Services Division

For the Corruption Eradication Commission of Republic of Indonesia:
Director, Fostering Networks Between Commissions and Institutions

For the Anti Corruption Agency of Malaysia:
Director, Research and Planning Division

For the Corrupt Practices Investigation Bureau of the Republic of Singapore:
Deputy Director (Administration)

Article 7: Amendment

The Parties may review or amend any part of this Memorandum of Understanding by mutual consent in writing and such amendment shall become effective on such date as determined by the Parties and shall form an integral part of this Memorandum of Understanding.

Article 8: Entry Into Force

1. This Memorandum of Understanding shall become effective on the date of its signing.
2. Any Party may express its intention to withdraw from this Memorandum of Understanding by written notification 6 (six) months prior notice to all the Parties. The Memorandum of Understanding shall cease to be effective thereafter for that Party.

In witness whereof, the undersigned, the authorized representatives of the respective Parties, have signed this Memorandum of Understanding.

Done in duplicate at Jakarta on this fifteenth day of December in the year two thousand and four in the English language.

Off the beaten track: Alternatives to formal cooperation

Jean-Bernard Schmid

Investigating Magistrate, Financial Section, Geneva, Switzerland

There are numerous informal and alternative measures for assistance that can facilitate international cooperation. Practitioners should explore different channels insofar as their legal systems permit them to do so. The following are examples of some of these techniques.

The Press as a Source of Information

The press can be a useful source of information, particularly if it is international in scope. To address concerns over the accuracy of the information, practitioners should rely on more established and reputable media sources. It is also important to note that, while information from the press is certainly not sufficiently reliable to prove guilt or innocence, it may be sufficient to commence an investigation.

To illustrate this principle, consider the following article in the Swiss press as an example:



Translation:

"Accused of corruption, the prime minister of...resigns

On Tuesday, the president of...accepted the resignation of prime minister...[who] had offered to resign on Monday morning, after having been the subject of a corruption scandal because of...that had been offered to him by businessmen in exchange for his support.... According to his critics, [the prime minister] had not paid anything for ...and had been offered...by businessmen, one of whom had a criminal record." [Le Temps, 15 March 2006]

In Switzerland, this article could lead to an investigation. If a Swiss bank compliance officer were to read this article, he or she might begin to look for the records of the former prime minister at the bank. A Swiss prosecutor, after reading the article, might also start a domestic investigation (e.g., for money laundering) and seek information from the Swiss bank concerning the former prime minister.

Spontaneous Handing over of Information

International cooperation could be greatly enhanced if law enforcement officials were to spontaneously hand over information to other authorities, even without a formal MLA request. The information so provided could lessen the need for a formal MLA request, or it could alert another country to the need to formally request MLA to gather evidence. However, it is important to remember that information should be handed over only if it is legally permissible to do so.

In the case of the Swiss press article, the Swiss prosecutor might discover that the former prime minister has a bank account in Switzerland. The prosecutor might then contact the authorities in the country of the former prime minister and inform them of the existence of the bank account. The prosecutor, however, would not provide detailed account information at this stage. Instead, he or she would merely invite the foreign country to submit a formal MLA request for the detailed information. The Swiss prosecutor would also state that the information could be used only as a basis for a request for MLA from Switzerland and for no other purpose.

Some practitioners may hesitate to hand over information voluntarily to an unknown counterpart in the receiving country. But this should not be an excuse for inaction. The information could be sent through formal means (e.g., through diplomatic channels). The practitioners may also find a contact point by asking colleagues, doing research on the Internet, inquiring with the embassy of the foreign state, or inquiring with their own embassy in the foreign state.

Handing over Information via an MLA Request

Information can also be provided to a foreign country through an MLA request. Again in the case of the Swiss press article, assume that the Swiss prosecutor discovers that the former prime minister has a bank account in Switzerland. The prosecutor may then decide to investigate the former prime minister for money laundering in Switzerland. To gather evidence for this investigation, the prosecutor may send an MLA request to the government of the former prime minister's country. The MLA request will describe the facts of the case, including the existence of the Swiss bank account of the former prime minister. Upon receiving the MLA request and finding out about the account, the foreign country may wish to send an MLA request to Switzerland to obtain more information.

Seeking the Voluntary Cooperation of a Private Party

Formal MLA is often required only if the assistance sought is coercive, e.g., search and seizure. It may not be necessary if the party concerned agrees to cooperate with the investigating authorities. Hence, before a formal MLA request to obtain a statement from a witness is sent out, it may be advisable to ask the witness whether he or she is willing to provide a voluntary statement (perhaps under immunity from prosecution). Similarly, before sending a formal request for bank records, the investigator could ask the owner of the account to voluntarily provide the records.

Administrative Cooperation

Even in a criminal investigation, practitioners are well advised to keep in mind non-criminal means of gathering evidence. Administrative cooperation is often more efficient than formal MLA procedures, particularly when one is seeking only the factual or documentary basis for a full criminal investigation. Of particular importance are financial intelligence units (FIUs), which often have extremely good contacts in other countries. In some jurisdictions, information obtained through an FIU may be inadmissible at trial. Nonetheless, information so obtained may still be invaluable in helping investigators to focus their inquiry.

Civil Procedures

To obtain certain types of assistance (e.g., in freezing assets), a requesting state may wish to start civil proceedings in the requested state. This can be effective but is generally very costly. A more viable alternative is for the requesting state to participate as a civil party in criminal proceedings in the requested state (in jurisdictions where this is allowed).

Conclusion

This brief paper is intended to provide only a few instances of alternatives to formal cooperation that could strengthen the fight against corruption. It does not go into all the alternatives that are available. Still it demonstrates that practitioners should take a proactive and imaginative stance toward international cooperation. Such an approach is vital because of the many obstacles to formal cooperation, many of which will be described in the next several chapters.

Chapter 3

Overcoming legal challenges in mutual legal assistance and extradition

Laws on extradition and mutual legal assistance can appear obscure to non-specialists. Many prerequisites for cooperation derive from legal concepts that are unique to these two fields of law. Practitioners who are unfamiliar with these concepts may therefore have difficulties meeting the legal requirements for cooperation. In fact, there are many practical ways of overcoming these difficulties.

Despite differences in legal systems, many countries face similar legal obstacles in the MLA and extradition process. During the seminar, participants heard the following describe the situation in their home countries: Umar Saifuddin bin Jaafar, Senior Federal Counsel, International Affairs Division, Attorney General's Chambers, Malaysia; and Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland. These presentations identified some common problems among different countries, such as difficulties in meeting intricate procedural requirements in extradition and MLA legislation.

One frequent obstacle is the requirement of dual criminality. As Kimberly Prost, Chief, Legal Advisory Section, Treaty and Legal Affairs Branch, UNODC, pointed out, this issue could be particularly thorny in cases involving illicit, unjust enrichment or bribery of foreign public officials, since this is not an offense *per se* in many countries. The experts at the seminar agreed that the key to overcoming problems with dual criminality is to remember that the concept is conduct-based. In other words, the question is whether the conduct underlying a request is a

crime in the requesting and requested states, and not whether the conduct amounts to the same offense in both states. If the requested state does not have the same offense, then practitioners should try to “fit” the conduct into a different offense in the requested state.

There was lively debate among the participants over the denial of cooperation for political offenses and political persecution. Experts like Charles A. Caruso, Regional Anti-Corruption Advisor, American Bar Association/Asia Law Initiative, predicted that the issue would arise in extradition and MLA in corruption cases. At the same time, there were widely diverging views on what constitutes political offenses and persecution. Participants clearly rejected the exception for cases in which proceeds of corruption are used to fund a political party that is being persecuted by a government. Much less clear was whether cooperation can be justifiably denied if a requesting state prosecutes former government officials who belong to a rival political party that is no longer in power. Some participants believed that this is a valid basis for denying cooperation. Others opined that a political motivation for committing or prosecuting a crime should not obscure the fact that a crime has been committed. In the end, the participants and experts reached no consensus on this issue.

On the other hand, all the experts and participants agreed that communication is the most important factor in resolving legal obstacles in extradition and MLA. Experts like Bernard Rabatel, French Liaison Magistrate in the United Kingdom, emphasized that legal obstacles often do not result from differences between the legal systems of the countries involved, but from a failure to appreciate those differences. Direct dialogue between the requesting and requested states, whether formal or informal, can eliminate many of these misunderstandings. Bilateral discussions could also sometimes allow a requesting state to narrow its request and hence avoid allegations that it is on a “fishing expedition.” Some participants suggested that international organizations and initiatives (such as the ADB/OECD Initiative or the UNODC) consider setting up an Internet database of national legislation and requirements for cooperation.

The participants and experts also held the view that policy makers can take steps to reduce legal obstacles in extradition and MLA. Tan Huanmin, Director, Department of Laws and Regulations, Ministry of Supervision, P.R. China, emphasized the importance of countries not only signing treaties but also providing flexible and pragmatic non-treaty-based alternatives and engaging in multilateral discussions for cooperation. The participants noted as well that most international

conventions and treaties (including the OECD Convention on Combating Bribery of Foreign Public Officials, and the UNCAC) require signatories to afford one another the widest measure of mutual legal assistance possible. In this spirit, legal technicalities and requirements should be reduced to a minimum. More efforts should be made to train prosecutors and judges in MLA and extradition, since their unfamiliarity with these relatively obscure areas of law often leads to protracted proceedings. Countries should consider harmonizing their schemes for extradition and MLA to reduce misunderstandings over differences in legal systems. The use of standardized processes, forms, and language for making and executing requests can also greatly improve efficiency and lower costs.

Practical solutions to legal obstacles in mutual legal assistance

Kimberly Prost

Chief, Legal Advisory Section, Treaty and Legal Affairs Branch
United Nations Office on Drugs and Crime

The legal challenges that may arise in MLA are, for the most part, similar to those that arise in extradition. However, such challenges are generally less frequent and easier to overcome in MLA than in extradition. The following are some of the more common legal challenges that may arise in MLA and some suggestions for dealing with them.

Legal Basis for Assistance

Before MLA can be provided, it must generally have a legal basis. Different bases for assistance include:

- Bilateral treaties
- Multilateral conventions, including general MLA conventions (e.g., MLA Convention involving the ASEAN countries or the Council of Europe Conventions) or crime-specific ones (e.g., the UN Convention against Corruption [UNCAC])
- Schemes or arrangements like the Harare Scheme for Commonwealth countries
- National law, with or without a requirement for reciprocity

When determining whether there is a legal basis for seeking MLA, practitioners should think broadly in terms of applicable instruments. Many practitioners focus only on bilateral treaties when other avenues are available. If reciprocity is required, practitioners should check whether there is already reciprocity, e.g., because the country whose assistance is sought has given a promise of reciprocity in an earlier case. Ultimately, even when there is no apparent legal basis for cooperation, practitioners should still ask the foreign state for assistance. The foreign state could well be amenable to the request.

Dual Criminality

The concept of dual criminality is far more pervasive in extradition, while its applicability varies greatly in MLA. Some countries do not require dual criminality to provide MLA. Others may require it only for coercive measures or search and seizure. There are also countries that consider the absence of dual criminality as a discretionary ground for refusing MLA, while for others it is a mandatory prerequisite.

Given this myriad of approaches, practitioners who seek MLA should anticipate the problem when preparing a request for assistance. They ought to find out whether and to what extent the requested state requires dual criminality.

If a requested state does require dual criminality, practitioners should keep in mind that the test is whether the conduct giving rise to the investigation is criminal in both states, not whether the conduct is punishable as the same offense in the two states. This is particularly important when the offense underlying an MLA request in the requesting state is less common, such as unjust or illicit enrichment. If the requested state does not have the same offense, then practitioners need to be creative in trying to “fit” the conduct into a different offense in the requested state. When doing so, they should note that corrupt conduct can fit into a number of offenses in almost all countries. Many such offenses are also covered by the UNCAC, as follows:

- Bribery of National Public Officials (art. 15)
- Active Bribery of Foreign Public Officials (art. 16)
- Passive Bribery of Foreign Public Officials (art. 16)
- Embezzlement, Misappropriation, and Other Diversion of Property (art. 17)
- Trading in Influence (art. 18)
- Abuse of Function (art. 19)
- Illicit Enrichment (art. 20)
- Bribery in Private Sector (art. 21)
- Embezzlement in Private Sector (art. 22)
- Money Laundering (art. 23)
- Concealment (art. 24)
- Obstruction of Justice (art. 25)

Therefore, practitioners should bear in mind the law of the requested state when drafting a request.

Another important feature of the dual criminality test is that it is generally conduct-based. In other words, the question is whether the conduct giving rise to the investigation is criminal in both states. Hence, the request for assistance should include details of relevant conduct, such as the names of individuals and places. Even more important, the request should describe the details of all of the conduct in the case. In other words, the request should include not only the conduct that constitutes the elements of the offense in the requesting state. It should also include any additional conduct that may constitute an offense in the requested state, bearing in mind that this offense could be different from the one in the requesting state.

Grounds for Refusal

The grounds for denying MLA are largely similar to those in extradition, with perhaps the exception of the general grounds of sovereignty, security, *ordre public* and essential interests.

General Ground of Sovereignty, Security, Law and Order, and Essential Interests

This ground of refusal is not particularly common, except perhaps for national security. Practitioners will often know in advance the cases that may trigger these grounds. When such cases arise, the requesting and requested states should consult each other to strike an appropriate balance between international cooperation and the protection of national interests.

Fiscal Offenses and Bank Secrecy

MLA in corruption cases often involves making bank documents available. Some countries may deny MLA because the information sought falls under bank secrecy regulations. Treaties and legislation in many countries may also allow refusal of MLA because the offense underlying an MLA request involves fiscal matters. In practice, this ground is now rarely invoked.

When faced with a denial of assistance because of fiscal offenses and bank secrecy, practitioners should look at the provisions of a relevant treaty. Some treaties (e.g., art. 46[8] and art. 46[22] of the UNCAC) now prohibit the refusal of assistance on these grounds. Practitioners should also look at the legislation of the requested state to ascertain whether the state's claim of bank secrecy is justified.

Capital Punishment

Many countries may deny MLA if the death penalty could be imposed by the requesting state in the case. The principle is harder to apply to a request for MLA than to one for extradition, because the request for MLA often occurs at an early stage in a case, when it may be difficult to say with certainty whether the death penalty may be imposed. Practitioners faced with this problem may wish to consider whether the death penalty is in fact applicable to the case. If the death penalty is a discretionary ground for denying assistance, then the requesting and requested states should consult each other to resolve the issue.

Extraterritoriality and *Non Bis in Idem* (Double Jeopardy)

There may be special restrictions for MLA in cases where the underlying offense occurs outside the territory of the requesting state. Under some treaties and legislation, MLA may be granted only if the laws of the requested state provide for the punishment of the same offense committed outside its territory. If these principles are applied reasonably, then international cooperation should not be unduly restricted.

MLA may also be denied because of the principle of *non bis in idem* (double jeopardy). There are numerous variations of this principle from one treaty to another. For example, some treaties look at whether a person has been punished for the crime in the requesting and/or requested states, while others may also consider whether the person has been punished in a third state. Different treaties also use different language: some ask whether the person has been punished, while others look at whether the person has been tried, acquitted, or convicted. Hence, if double jeopardy might be an issue, practitioners should closely examine the language of the relevant treaty and legislation.

Another approach to dealing with the problem of double jeopardy is to examine whether there are facts that support a different offense. The comments above concerning dual criminality are also applicable here: corrupt conduct may be caught by different offenses, and, hence, practitioners may need to be creative in trying to “fit” the conduct into a different offense. For instance, if a person has been convicted of laundering a bribe, the principle of double jeopardy arguably does not bar further proceedings against that person for accepting the same bribe, since bribe taking and money laundering are separate and distinct delicts.

Political Offenses, Offenses of a Political Character, and Persecution

Denial of MLA for a political offense or an offense of a political character poses a great challenge in corruption cases. The definition of a political offense is not always clear. Hence, some countries could conceivably argue that this ground applies to the prosecution of a former public official who belongs to a rival political party that is no longer in power.

To address this concern, some instruments such as the UNCAC (e.g., art. 44[4]) state that corruption offenses cannot be political offenses. If the relevant instrument has no such provision, then emphasis should be placed on the facts and evidence. In other words, a claim that an offense is of a political character must be founded on sufficient evidence. As with other grounds for denying assistance, the requesting and requested states must consult each other.

Many countries may also deny assistance on the grounds that the request for assistance was made to prosecute or punish a person on account of his or her sex, race, religion, nationality, ethnic origin, or political opinions. As with political offenses, MLA should not be denied because of a mere allegation of persecution. The claim ought to be supported by adequate evidence.

Differences in Evidentiary Procedures

Different legal systems may call for different procedures to gather the same type of evidence. This can create problems. For example, a requesting state may fail to include sufficient evidence in the request for assistance because the state requires less evidence to obtain the particular investigative measure than the requested state. Another problem could arise when the laws of the requesting state require the evidence to be gathered according to certain procedures. The requested state might not follow these procedures when executing the request, either because its laws do not impose the same requirements or because its laws prohibit such procedures. As a result, the evidence gathered by the requested state may be inadmissible at trial in the requesting state.

To prevent these problems, a requested state must not assume that a requesting state has the same procedures for gathering evidence. It must ascertain and meet the requirements of the requesting state. Requesting states must also clearly explain in the request for assistance any unique procedural requirements that must be met.

Requested states must bear in mind that evidence inadmissible in the requesting state is equivalent to no evidence at all. They should make efforts to follow the instructions for gathering evidence that are provided by the requesting state, unless it is illegal under their domestic law to do so. Flexibility and creativity are key. A requested state must try to interpret its own legal requirements flexibly so as to accommodate the requesting state as much as possible.

Challenges and Appeals

Depending on the relevant laws, the MLA process could be subject to challenges at various stages of the process, such as when the request is sent, when the request is executed, or when the evidence is transmitted. Court orders could be subject to appeal at several levels. There may also be objections when the evidence is gathered, e.g., a witness may refuse to answer a question on the basis of a claim of privilege or immunity. Of course, the requesting and requested states cannot prevent an individual from exercising his or her legal right to challenge the MLA process. Nevertheless, both states should anticipate challenges whenever possible. Cooperation between the states can also sometimes shorten the process.

Legal challenges in mutual legal assistance

Bernard Rabatel

French Liaison Magistrate in the United Kingdom

Investigating judges and prosecutors need evidence to bring alleged offenders to trial. Fifty years ago, they could rely in most cases on evidence obtained locally or nationally. Nowadays, crimes (including corruption) are increasingly complex. Criminals are more sophisticated and employ teams of highly qualified lawyers. Moreover, a large part of the evidence in these complex cases has to be imported from foreign countries. Criminal procedure law has become more and more an evidence-consuming process. Without MLA, this process will break down.

Unfortunately, there are technical and legal obstacles that often prevent the MLA process from working smoothly. Even if these legal hurdles are not as numerous in MLA as they are in extradition, they nonetheless exist. The following are some of the most common legal obstacles and some practical solutions for dealing with them.

Rule of Reciprocity in the Absence of an MLA Treaty

To obtain evidence, judges and prosecutors must rely on the goodwill of foreign states even in the presence of international obligations stated in treaties and agreements. However, if there is no MLA agreement between the two states, then the result may be what economists call a barter economy: reciprocity. In other words, if state A requires evidence from state B, then state A must also give state B evidence that the latter wants in a different investigation.

Reciprocity in MLA differs from a barter economy in at least one respect. In such an economy, the swapping of one thing for another happens simultaneously. However, the exchange of evidence rarely occurs at the same time. Reciprocity is usually only a promise to return the favor in the future, and this is why reciprocity is often unsatisfactory. It is more desirable to rely on bilateral or multilateral agreements.

However, the absence of a treaty is increasingly insufficient to justify, in and of itself, a state's refusal to cooperate. Several states have even removed reciprocity as a prerequisite for providing assistance, though this statement is sometimes viewed with skepticism.

Importance of Communication

Even between countries that have signed and ratified MLA instruments, legal issues often inhibit the rendering of assistance. At first glance, these legal obstacles are often the result of differences in the legal systems of the requesting and requested states. Worse, these problems can even lead to “self-censorship,” i.e., when a requesting state decides not to ask for assistance because it perceives the legal obstacles in the requested state to be insurmountable.

In fact, the greater problem often is not differences in legal systems, but misunderstandings about those differences. In many instances, differences in systems can be overcome if both states make a concerted effort to carefully and fully explain the niceties of their laws to each other. Equally important, states should make inquiries about the other country’s legal systems whenever there is a doubt.

In addition to legal requirements, it is also important to communicate one’s expectations about the timing of a request. Investigating judges and prosecutors frequently denounce significant delays in international cooperation. These delays undermine their mission: “Time and tide wait for no man.” It may therefore be advisable to write on the top of the letter of request the same warning that one finds on perishable goods: “Best before...”

Channels of Communication

Older MLA instruments often require communication through the diplomatic channel, which is notoriously slow. More recent ones often allow communication between central authorities, which are usually located in a ministry of justice or prosecutor’s office. This approach tends to reduce but not necessarily eliminate delays.

There are institutional measures for reducing delays. For example, some practitioners have suggested that embassies create special procedures for urgent cases or designate legal officers to specialize in handling MLA requests. However, these institutional measures are beyond the powers of prosecutors and investigators to implement.

On the other hand, there are more practical solutions for practitioners. Many MLA schemes now allow urgent requests to be transmitted outside the diplomatic channel, followed by written confirmation through the usual channels. Even when this avenue is not available, some practitioners suggest seeking permission to send an informal copy of the request to the authorities in the requested state

that will execute the request. This would allow the executing authorities to begin preparations immediately, e.g., by drafting documents to apply for a search warrant or asking a bank to begin assembling the documents it must produce. When the formal request arrives through the diplomatic channel, the request could then be executed without further delay.

Legal Challenges Concerning the Offense

Dual criminality is one of the most common legal issues concerning the offense that underlies an MLA request. Fortunately, dual criminality is not as great an obstacle in MLA as in extradition. The absence of dual criminality should not prevent non-coercive forms of assistance, but it may preclude measures such as a search of premises, or the restraint or forfeiture of proceeds of crime. The issue could also arise when the investigation in the requesting state is based on extraterritorial jurisdiction.

For this reason, it is important to describe the underlying crime very clearly, so that the foreign authorities can identify a similar offense in its own legal system. For example, the French offense of *abus de biens sociaux*, or the misuse of company property, needs to be explained in a manner that allows the foreign authorities to determine whether the conduct amounts to breach of trust or embezzlement in their jurisdiction. A clear description of the criminal conduct also has the advantage of preventing misunderstandings about the rule of “*Non bis in idem*” (double jeopardy).

Bank Secrecy

Bank secrecy has always been perceived negatively, and many states hesitate to refuse MLA solely for this reason. Moreover, multilateral conventions (e.g., section 46 of the UNCAC) strongly advise states against refusing MLA because of bank secrecy.

At the same time, some states will decline to execute a request in a corruption case because they cannot identify the account of the individual who received the bribe. Unlike France, several other states do not have a national database of bank accounts.

To prevent a rejection on the ground of bank secrecy, the requesting authority should try to obtain as much information as possible concerning a bank account before sending a request, even though this is a difficult task in some investigations.

Undertakings and Affidavits by Requesting Authorities

Many common law jurisdictions require a requesting authority to sign an undertaking. This is a promise not to use the evidence obtained in the requested states in another case or to disclose it to a third party.

Most investigating judges and prosecutors in civil law countries are not familiar with these undertakings and are therefore very reluctant to sign them. They do not know if they are legally qualified to do so and they fear that their signature will be challenged under their domestic law. It is often necessary to explain at length why these undertakings must be signed and why they must be signed with care. To prevent protracted discussions between the authorities of both countries, it may be worthwhile to prepare an advanced draft undertaking that serves as a model for future cases.

Similarly, officials in requesting states are sometimes asked to provide affidavits. These are unfamiliar to prosecutors and investigating judges in civil law countries, who consider that statements under oath should be made only by witnesses. Experience shows that they are right to be careful when signing such documents, which might be challenged by the lawyers of the accused.

Challenges Arising from the Right against Self-Incrimination

Many MLA requests seek permission to take evidence or statements from persons in the requested state. Upon receiving the request, the requested authorities must often ask their counterparts in the requesting state whether the witness is a suspect or a target, because the domestic legislation (and sometimes the constitution) in many states protects witnesses against self-incrimination. Therefore, different rules apply to witnesses and suspects. Another reason for the questions is differences in the rules of evidence between the two countries. To avoid delays, requesting authorities should include the answers to these questions in their request.

It is also common for requested authorities to ask the requesting authorities to offer a witness immunity from prosecution. This could be a problem in civil law countries, where granting immunity to a witness is not common.

Another, similar, issue is witness protection programs. Witnesses under these programs have agreed to cooperate with the prosecution in a domestic case in the requested state. Since these witnesses are often kept in hiding, they are not easy to reach for interviews.

Form of the Evidence

Evidence received from abroad is of no use if it is not in an acceptable, admissible form. A witness statement is sometimes admissible in a requesting state only if it meets specific requirements:

- Interview by a judge or by a police officer of the requested state, or direct questioning by a prosecutor, an investigating judge, or a police officer of the requesting state
- Presence of the accused or his or her counsel, or both (either in person or via videoconference)
- Statement made under oath by the accused, or verbatim statement or summary (*procès-verbal*) of the interview with the accused
- Original documents or certified copies of documents

At the same time, the requested state may have no such requirements for the admissibility of witness statements. The requesting state must therefore clearly stipulate any such requirements in its MLA request. Otherwise, the requested state may not comply with the requirements.

Legality of Investigative Techniques

Another potential problem is the legality of the investigative technique used to gather evidence. For example, wiretap evidence is inadmissible in the courts of some states. As a consequence, these states will not carry out requests to wiretap. This must be clearly explained to the requesting authority to prevent further misunderstanding.

Similar questions arise when one state requests another to engage in undercover operations. While such operations are an old and traditional way to obtain evidence, they can now involve the use of new surveillance technologies. Whether such requests will be executed depends on whether these technologies are legal in the requested state.

Search and Seizure

Legal challenges concerning search and seizure are among the most common causes of misunderstanding in international cooperation. Requested states often reject such requests because of insufficient evidence to justify the issuance of a search warrant by their judicial authorities. Experience shows that difficulties can often be avoided if

the requesting authority is aware that “fishing expeditions” are not permitted. However, this is not always so simple.

In other instances, a requested state may refuse to seek a search warrant because a production order is sufficient. This often arises in a request for bank documents. If an investigator or magistrate in the requesting state does not know the difference between these two procedures, he or she may be disappointed by the response of the requested state. Requesting authorities should therefore try to ascertain beforehand whether production orders are available in the requested state, and whether these are suitable substitutes for search warrants in a particular case.

Conflict with the Interests of the Requested State

An MLA request can come into conflict with the national or security interests of the requested state or with an ongoing investigation in this state. These conflicts remind us that MLA is a form of interference in state sovereignty, and that breaking through the language barrier does not always mean overcoming the legal and political ones. To resolve a problem with ongoing investigations, the requested state may have to postpone the execution of the request.

Punishment for the Offense

The issue here is the form of the punishment that might be imposed in the requesting state for the crime underlying a request. While this has always been an important issue in extradition, it is traditionally less so in MLA.

Nevertheless, requesting states are increasingly asked to provide assurances that the evidence requested will not lead to the imposition of degrading punishment against a person. Many requested states will likewise not accede to an MLA request unless they are assured that the requesting state will not impose capital punishment in the case.

These requirements may be understandable, but their practical application could be more difficult in MLA than in extradition. Unlike extradition requests, MLA requests often occur at a very early stage of a case. At that point, it may not yet be possible to identify the suspects and crimes involved, let alone the punishment that could subsequently be meted out. Practitioners should nonetheless be proactive by trying to anticipate problems in this area. By addressing them in the request for MLA, they stand a better chance of having their requests carried out.

Conclusion

This paper discusses some of the more common legal issues that arise in MLA, but it by no means presents an exhaustive list. The paper tries to demonstrate that, while these problems are legal and technical, they often have practical solutions. However, the overriding principle behind these solutions is that it is vital for practitioners (in both the requesting and requested states) to anticipate potential problems and to proactively address them. Communication between the two states is essential. Whenever there is doubt about an issue, making inquiries leads to better results than simply ignoring the problem.

Legal problems in MLA from a Swiss perspective

Jean-Bernard Schmid

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Despite almost universal agreement on the necessity to fight corruption, the phenomenon remains as prevalent as ever. In theory, the legal framework for doing so is becoming state-of-the-art. The recent international treaties and conventions (such as the UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) are close to the best that can be formally achieved. At the same time, financial crime has become global as criminals use or abuse financial institutions, while law enforcement remains a prisoner of national boundaries that are hard to escape.

These are not necessarily intractable problems. With dedication and imagination and a lot of courage when pursuing the powerful and the rich, the judiciary can be an essential contributor to the fight against corruption. Technical obstacles often derive from a fragmented judicial world in which every country has its own set of laws and procedural idiosyncrasies. Yet this need not be the case. Every country has similar practical and judicial problems in the field of MLA.

The practice of MLA from Switzerland's perspective can thus be of relevance to these issues. This is especially so because Switzerland, along with other well-known financial hubs, remains a tempting place to harbor the proceeds of financial criminality, including corruption and its many derivatives. This paper will examine a series of legal problems that are routinely encountered in MLA and suggest solutions that Switzerland has tried to implement. A continuation in the next chapter will study problems and solutions relating to the practice of MLA in Switzerland.

Problems Arising from the Legal Framework for MLA

MLA in Switzerland operates under three concurrent regimes, namely, international conventions, bilateral treaties, and domestic law. Two problems of a general nature arise regularly. First, neither the requesting nor the requested state masters the other's legal system, such that requests for cooperation are badly formulated, precious time is wasted, and legally flawed means of proof that are of little use to the requesting state are communicated. Second, red tape and appeal procedures can slow any MLA request down to a near standstill.

There are a few basic rules for addressing these problems. Practitioners seeking MLA should contact their counterparts in the foreign state. For instance, the details of a bank account cannot be transmitted over the phone, but it is perfectly acceptable to help the person in charge in the requesting state to formulate a demand to obtain that information. In addition, whenever possible, authorities in a requested state should open a domestic investigation that permits quick local action and strengthens the judicial process against defendants who refuse to cooperate. Finally, requesting states sometimes seek material damages in cases involving acts of a corrupt public official. If the case is particularly important and complicated, the requesting state should consider hiring a lawyer in the requested state and joining the proceedings as a civil party.

Dual Criminality

Modern international treaties and conventions specifically address the question of dual criminality. The difficulty in corruption cases usually stems from the fact that every country punishes active and passive corruption of its national servants, but not corruption of foreign public officials. For years, Switzerland had to resort to interpreting dual criminality as an “abstract” or “fact-oriented” concept. In other words, one must transpose the facts (but not the offense) under investigation in the requesting country to the legal system of the requested country, and ask whether such facts would be considered illicit if committed there. In cases of bribery of foreign public officials, the corresponding foreign offense would often be different, e.g., falsification of books, unlawful management, embezzlement.

General Grounds for Denying Cooperation

International treaties and conventions, as well as national legislation, reserve specific grounds for denying an MLA request. Some of the most common ones are as follows.

Essential National Interests

The domains that are prone to bribery are numerous: economic interests, international competition, access to important resources (e.g., oil), defense requirements (e.g., arms), etc. One cannot deny the national importance of these realms of activity. However, one must also

acknowledge that another very essential national interest lies in developing, nationally and internationally, societies free of corrupt practices, in which citizens can trust the state's institutions and officials.

Human Rights

Cooperation can be refused when a requesting state does not respect basic rules such as the UN Universal Declaration of Human Rights and Pact II, and their European equivalent (see Annex for the relevant texts). One sensible approach for the requested state is to consider each case on its own and avoid general standpoints that would lead to blanket refusals of all MLA requests from certain countries.

Death Penalty

European countries refuse cooperation if it leads to the death penalty for a defendant. This could arise in corruption cases, since certain Asian countries apply the death penalty for serious corruption. The normal approach is for a requested state to ask the requesting state to guarantee that the death penalty will not be inflicted or carried out on the basis of the information transmitted through international cooperation. Trust is essential in that respect.

Corrupt Requesting States

A similarly difficult issue is executing MLA requests from judicial authorities that are known to be corrupt. Not only is it objectionable to trust one's counterparts in such a situation, but there is no way of knowing how the information sought will be used. However, no single country is totally corrupt or free of corruption. Hence, one solution is to get to know the country in question, including its political and legal systems, without any prejudice or preconceptions. The same applies to foreign officials that one has to deal with. A requesting state can require assurances from the country concerned. International openness is a means of checking whether the guarantees are respected. Finally, there always is a next time. In international cooperation, as in any business, it is in the interest of every party to respect promises that are made.

Political Offenses

The concept of political offenses is poorly defined. Almost anything can fall under that notion. An issue could arise if a real case of corruption is prosecuted for personal political reasons, e.g., to get rid of a political opponent.

Fiscal Offenses

Denying cooperation for fiscal offenses is a Swiss specialty. Switzerland will cooperate in cases of fiscal fraud but not fiscal evasion, though few specialists understand the difference. Should this become an issue, practitioners should ask and rely on their Swiss counterpart for advice.

Annex: Relevant Legal Documents

Instruments of the 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 offense 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 offense on account of any act or omission which did not constitute a penal offense, 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 offense 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 offense 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 offense 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 offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Instruments of the Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms (Rome: 4 November 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 offense or when it is reasonably considered necessary to prevent his committing an offense 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 offense shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offense 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.

Overcoming legal challenges in extradition: The Malaysian perspective

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Traditionally, extradition cases have often been plagued by legal hurdles. Fugitives are also sometimes discharged from extradition proceedings on the basis of mere technical objections. This paper will examine some common problems by looking at Malaysia's experience in extradition cases.

Legal Basis for Extradition in Malaysia

Extradition matters in Malaysia are governed by the Extradition Act 1992 (Act 479). The act came into force on 21 February 1992 and has never been amended. It contemplates two bases for extradition, depending on whether or not Malaysia has a treaty with the requesting state.

For extradition based on treaties, the relevant treaty may be published in the Gazette (Act 479, s. 2[1]). The publication of a treaty in the Gazette is conclusive proof of the treaty and precludes challenges to the validity of the treaty in any legal proceeding (Act 479, s. 2[4]). As of March 2006, four treaties had been published in the Gazette (those with the Hong Kong Special Administrative Region, China; Indonesia; Thailand; and the United States). Malaysia signed a treaty with Australia on 15 November 2005, but the treaty has not yet come into force.

In the absence of a treaty, extradition requests must be sent to the Minister of Internal Security (Act 479, s. 12). The matter will proceed only if the Minister gives special direction in writing (Act 479, s. 3) that Act 479 applies to the non-treaty state, and the extradition request may then be acted upon. This may take considerable time, especially in the case of provisional warrants of arrest. In practice, although the Minister of Internal Security is the legal authority in extradition matters, the Attorney General's Chambers examines and advises the Minister on whether a request complies with Act 479. This requires communication between the two bodies and usually causes delay. Further delay may also occur because every request must be made through diplomatic channels. These delays could affect the prospects of locating a fugitive criminal.

Another difference between extradition with a treaty and without is that Act 479 applies to requests by non-treaty states in its entirety. For treaty-based extraditions, the relevant treaty may modify provisions of the act to suit the requirements of the states parties. A treaty may modify the application of Act 479, for example, by allowing the transmission of extradition requests outside diplomatic channels, thereby reducing delay. Treaty-based extraditions are thus more practical.

Dual Criminality

Dual criminality is a requirement under Act 479. A request can be entertained only if the foreign offense underlying the request is punishable by at least a year's imprisonment or death, and if the foreign offense is not punishable by a lesser punishment if committed in Malaysia (Act 479, s. 6). The focus is on the act or omission underlying the extradition request. In other words, the offense need not have the same label in Malaysia and the requesting state. The Malaysian authorities will do their best to "fit" the conduct into an offense under Malaysian law to accommodate the requesting state.

The requirement of dual criminality could be problematic for offenses that attract a mandatory death penalty in Malaysia, e.g., drug trafficking (Dangerous Drugs Act 1952, s. 39B). If Malaysia requests extradition for such an offense from a foreign state that does not have the death penalty, that state may not be able to grant the request.

Grounds for Denying Extradition

Section 8 of Act 479 lists the grounds for denying extradition:

- (a) The offense is of a political character
- (b) The request was made to prosecute or punish a person on account of his or her race, religion, nationality, or political opinions
- (c) The person sought would be prejudiced on account of race, religion, nationality, or political opinions
- (d) Prosecution is time-barred
- (e) The request violates the rule of specialty, namely, that the fugitive must not be detained or tried for an offense other than the one specified in the request, unless the requested state so consents
- (f) The fugitive cannot be further extradited to a state other than the requesting state, unless the requested state so consents

Extradition Proceedings before the Court

Extradition proceedings before Malaysian courts are two-tiered. The Magistrate's Court issues a warrant of arrest (Act 479, s. 13). Upon arrest, the fugitive criminal is brought before the Magistrate. The case is then transferred to the Sessions Court for a "committal hearing" (Act 479, s. 15 and s. 19). The decision of the Sessions Court may be appealed to the High Court, whose decision is final (Act 479, s. 37).

Case of *P.P. v. Ottavio Quattrocchi*

The recent landmark case of *PP v. Ottavio Quattrocchi*, [2003] 1 CLJ 557 demonstrates some procedural difficulties in extradition proceedings in Malaysia. Quattrocchi was an Italian national who was wanted in India for alleged corruption. He was arrested in Malaysia and brought before the Sessions Court for a committal hearing. Quattrocchi raised a preliminary objection before the hearing began, arguing that he had not been served with the charges against him. The prosecution submitted that the failure to serve charges was not fatal to its case because Quattrocchi had been served with the extradition request. Furthermore, Act 479 does not require the service of charges on a fugitive.

The Sessions Court upheld Quattrocchi's objection and ordered his discharge. The Court found that it would be unable to determine whether there was dual criminality if the charges were unknown. At a minimum, the prosecution should have provided a statement of the particular offense. On appeal, the High Court upheld this decision.

Because of this decision, the practice in Malaysia is now to read to the fugitive the relevant charge in the requesting state. To avoid any further technical deficiency, a charge formulated according to Malaysian law (the "Malaysian charge") is also read to the fugitive.

Procedure for the Committal Hearing

Act 479 also creates some uncertainties in the procedure for the committal hearing. For instance, the act is ambiguous as to which party should proceed first during the hearing. Section 19(1)(a) states: "Where a fugitive criminal is brought before the Sessions Court,...[the Court] shall receive any evidence tendered by or on behalf of the fugitive criminal to show that he did not do or omit to do the act alleged to have been done or omitted by him." The language of this provision suggests the fugitive must proceed first, since it allows the fugitive to tender evidence.

On the other hand, Section 19(4) states that the Sessions Court shall discharge the fugitive if a prima facie case is not made out. This suggests that the prosecution should proceed first, since the onus of proof is on the prosecution. This is in fact the current practice.

Act 479 creates another uncertainty regarding the standard of proof. Before ordering committal, the Sessions Court must be satisfied that there is a prima facie case in support of the extradition request (Act 479, s. 19). In Malaysian criminal proceedings, the Criminal Procedure Code also requires proof of a prima facie case (Criminal Procedure Code, s. 173(f)(i) and s. 180). Because both Act 479 and the Criminal Procedure Code use the same language, courts may find that the same standard of proof applies to both extradition and criminal proceedings. In this event, the committal court would be tantamount to a trial court, which requires evidence akin to that in a criminal trial. This would be inconsistent with the principle that extradition proceedings are not meant to be a trial, but merely a hearing to determine whether a fugitive should be surrendered to face trial in the requesting state. This trend may have the effect of elevating a committal hearing to the status of a trial, which may require the prosecution to produce more evidence than what is provided in the extradition request at the committal hearing. This would make it more difficult for Malaysia to extradite wrongdoers, and would undermine the global effort to fight transnational crimes. It would also encourage criminals to seek safe haven in Malaysia.

Because of these uncertainties, it may be desirable to review and revamp Act 479.

Conclusion

The system for extradition to and from Malaysia is similar to those in many other countries, particularly ones with common law traditions. The peculiarities created by Act 479 and certain judicial decisions may also exist in other countries. It is hoped that this overview of some of the legal hurdles in extradition in Malaysia will be instructive to practitioners in other countries.

Legal challenges in extradition and suggested solutions

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Extradition, the formal process by which an individual is restored to the competent judicial authority seeking to exercise in personam jurisdiction over the subject, is a process generally based on treaty relations, comity, or reciprocity. While at first blush this process would seem to apply solely to a relationship between states, modern practice, the evolving concept of individuals as subjects of international law, and the social and legal significance of the emergence of human rights considerations has complicated extradition as a tool of international cooperation.¹ As a general statement, it is accurate to say that most extradition is governed by treaty relations between engaged states and that it is not as yet regarded as an international duty according to customary international law.² Nonetheless, much of the legal regimen that now surrounds extradition is the result of the significance given to various recurring legal themes by the individual national judiciaries. Thus, in discussing ways of overcoming legal challenges in extradition, as with all things left to the disparate national judiciaries, we find differences as well as similarities between jurisdictions.

It is the purpose of this brief paper to: (1) identify and analyze various concepts, defenses, and substantive requirements commonly implicated in extradition practice; (2) discuss the interpretation of these issues in the jurisprudence of the US and other jurisdictions; (3) recognize alternative methods of rendition; and (4) suggest possible solutions to the difficulties caused by the employment of some of these mechanisms.

Substantive Prerequisites for Extradition

Extraditable Offense and Dual Criminality

The process of extradition, either by treaty or reciprocity, requires that the offense for which the relator³ is to be returned is an act, or series of acts, that each of the national parties recognizes as extraditable, either on the basis of reciprocity or by specific reference to the applicable treaty. It therefore follows that the first prerequisite for extradition is the

recognition by both the requesting and requested parties that the offense is in fact one for which extradition is available. Thus, it is traditionally the case that extradition treaties either (1) list the offenses to which the treaty applies (thus the designation "list treaty"), or (2) create a formula by which the states indicate those offenses that are extraditable, i.e., all offenses that imply a term of incarceration of a specified period or a fine of a specified amount or both, etc.⁴

Additionally, in the establishment of extraditable offenses, the content of the offensive conduct must satisfy the requirement of dual criminality,⁵ i.e., the imperative that "an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations."⁶ While the concept of dual criminality has been defined in various ways, it is generally accepted that "When the laws of both the requesting and the requested party appear to be directed to the same basic evil, the statutes are *substantially analogous*, and can form the basis of dual criminality"⁷ (emphasis added). Thus, an extraditable offense is generally defined as "not requiring that the offense charged be identical to an offense listed in the treaty, but requiring that the acts performed which support the charge could sustain a charge under the laws of the requested state...."⁸ The controlling law governing whether an offense is extraditable or not is the law of the requested state.⁹

In some jurisdictions the majority of serious challenges to the completeness of an extradition request are focused upon either: (1) the identity of the subject or (2) the question of whether or not the offense is extraditable. In the latter instance, the issue of dual criminality is one to be settled in the courts on a case-by-case basis.¹⁰ While this issue can be troublesome, there are several arguments to be made in support of an act being properly characterized as extraditable.

Suggestion: It may correctly be argued that: (1) the laws of the involved states need be substantially analogous only as to the inherent harm they strive to prevent and the activity they intend to punish; (2) that while one statute may be broader in scope than another, if the *conduct* for which extradition is sought would be included under both laws, an extraditable offense is noted; and (3) the primary focus of dual criminality is on the conduct charged, not the technical elements of an offense as they are found in the respective statutes.¹¹

It should also be noted that purely jurisdictional elements of elaborated statutes need not be replicated under both systems in order for the charged conduct to be included as an extraditable offense. For

example, under US statutes often utilized in the prosecution of corruption offenses, it is necessary to prove the use of the mail or telephone in the commission of the underlying offense.¹² This proof, although essential to the assertion of federal jurisdiction under US law, has little if anything to do with the conduct being proscribed. The usually prevailing position in such cases is that this element is purely jurisdictional and should not hinder the dual criminality analysis, nor concomitantly, should it undermine the conclusion that the offense is extraditable.¹³

Doctrine of Specialty

This principle of law has been defined as representing the proposition that the requesting state must specify the offense or offenses for which it seeks the relator's return and that, upon his return, it may only try him for the offenses covered in the request and the treaty authorizing that request.¹⁴ Obviously, one of the purposes of this doctrine is that it supports the doctrine of dual criminality and prevents the relator from being prosecuted for an act that would not be a crime in the requested state. "Accordingly, the principle of specialty is designed to ensure against a requesting state's breach of trust to a requested state and to avoid prosecutorial abuse against the relator after the requested [or for that matter, the Requesting] state obtained *in personam* jurisdiction over the relator."¹⁵

Suggestion: Whether or not the relator has the right to raise a violation of this principle as a defense against extradition in the absence of an objection made by the requested state may be in question in some jurisdictions.¹⁶ Nonetheless, in practice this problem, at least in part, is dealt with by the current trend in the drafting of extradition treaties. In some instances the treaty itself clearly provides the remedy by stating that a relator may be tried for "an offense for which the executive authority or the Requested State consents to the person's detention..." following his extradition.¹⁷ Although it does not speak directly to the doctrine of specialty, the UNCAC provides for extradition in cases of otherwise non-extraditable offenses under particular circumstances.¹⁸

Doctrine of Non-inquiry

Operating precisely as described by its title, the doctrine of non-inquiry is generally designed to prevent the courts of one state from reviewing the internal governmental processes of another state. This

principle is the means by which one sovereign respects the laws, beliefs, and indeed the culture of an equal sovereign. Thus, the principle implements the belief that no state may judge another state's legal system or process.¹⁹ Following this doctrine, the court of the requested state is presumably precluded from judging or "supervis[ing] the integrity of the judicial system of another sovereign."²⁰

While formerly this rule was breached infrequently by various means and for various reasons,²¹ it can now be reasonably asserted that the doctrine of non-inquiry is beginning to be seriously challenged in some areas, among which is extradition practice. Perhaps the major impetus for this shift is the place that international human rights concerns are now engendering in the law as a whole.²²

While this doctrine has no freestanding effect on extradition practice, its effects and the evolution it is undergoing are having rather dramatic repercussions in several areas that directly relate to extradition. Thus, the doctrine and its erosion may be considerations in the following areas.²³

Denial of Extradition

The Political Offense Exception

The political offense exception is in large measure meant to provide that the legal processes of the requested state are not used to assist in the prosecution of an individual for either his or her political beliefs or to foster a politically motivated prosecution by the requesting state.²⁴ To say that the political offense exception has had a complicated genesis and an even more complicated growth is to put it mildly. However, a detailed history of this evolution will not be explored here.

The political offense exception has three basic purposes, i.e., the recognition of political dissent, the guaranteeing of the rights of the accused, and the protection of both the requesting and requested states. The political offense exception is further subdivided into those offenses known as *pure* political offenses and *relative* political offenses, the former being those directly related to the structure of national matters while the latter combine political goals with common illegal activities. Briefly stated, while pure political offenses are easily identifiable and traditionally non-extraditable, the claimed relative political offense is more difficult to categorize and has caused considerable consternation in extradition practice.²⁵ It is unnecessary here to distinguish these differences further other than to point out that in recent practice the political offense

exception has become more limited in scope, i.e., its application has become less acceptable and confined to a narrower range of circumstances.²⁶

Suggestion: As pointed out above, there is a growing trend in extradition law to limit the scope of the political offense exception. This is obvious in the construction of treaties specifically excluding the use of the exception in the case of treaty-delineated crimes.²⁷ Of more interest at present, the UNCAC contains a proviso whereby if a country “uses [the UNCAC] as the basis for extradition, [it] shall not consider any of the offenses established in accordance with this Convention to be a political offense.”²⁸

Extradition of Nationals

One of the most sensitive problems confronted in extradition practice is the request that one country surrender one of its nationals for prosecution or service of sentence to another. Many nations, particularly those of the civil law tradition, refuse to extradite their nationals. The basis for this refusal is in many instances of constitutional origin,²⁹ and in others grows out of a jurisdictional philosophy that suggests that the criminal justice system of one’s native land has the authority to punish the illegal behavior of one of its citizens irrespective of where that behavior may have occurred.³⁰ However, as an adjunct of this jurisdictional position, many countries following this philosophy adopt the policy of *aut dedere, aut judicare*—prosecution in the offender’s native jurisdiction for crimes committed in other jurisdictions, or, more commonly, “prosecute or extradite.”³¹ As might well be anticipated, however, this policy is often criticized as one that is more often ignored than not, given to sham prosecutions, inefficient in that the evidence and witnesses are located elsewhere, or fostering sentences in the case of conviction that don’t meet the expectations of the offended state.³² For better or for worse, little can be done about the constitutional regimen of a requested state relative to its position regarding the extradition of nationals. However, there are several remedies available to ameliorate the situation where one state refuses extradition on the basis of nationality.

Suggestion: *Aut dedere, aut judicare*³³ and conditional extradition. Many modern extradition treaties, particularly those between states with contiguous borders, feature an option much like that envisioned by the UNCAC. Thus, (1) where the domestic law of a state permits a national

to be extradited only on the condition that he or she be returned for purposes of sentencing, and (2) both parties agree that such an arrangement will satisfy the “extradite or prosecute” responsibilities of the requested state,³⁴ conditional extradition may be a viable alternative to traditional measures. Along similar lines, where extradition is sought to execute a sentence and is refused on the basis of nationality, where the state law of the requested state so permits, both parties may agree to the service of sentence under the domestic law of the requesting state party.³⁵ In both cases, the obligation to extradite will be deemed to be satisfied.

Capital Punishment

Perhaps contrary to popular belief, the prohibition on the extradition of individuals based on the possibility of their being subjected to capital punishment is not a new concept.³⁶ In general, treaties were formulated, and still are to a large extent, with the provision that if the requesting state did not guarantee that the subject would not be subjected to the death penalty, the requested state was free to deny extradition.³⁷ In today’s practice, the typical extradition treaty between states with differing views on capital punishment often conditions extradition as follows: “Extradition may be refused in any of the following circumstances...[i]f the offense for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives *such assurance as the requested State considers sufficient* that the death penalty will not be imposed or, if imposed, will not be carried out”³⁸ (emphasis added). Even in those instances where both states have and use the death penalty, extradition treaties feature limits on the use of capital punishment and the ability of one party to deny extradition based on those issues.³⁹

Suggestion: Thus, it seems that to overcome opposition to extradition based on the fact that the crime for which extradition is sought carries the death penalty, “sufficient assurances” must be given that if extradition is granted the death penalty will not be imposed. On occasion, assurances that, should the death penalty be imposed, commutation will be recommended by the requesting state are considered sufficient.⁴⁰ Short of these assurances being made and accepted, this seems to be one of the areas in which the doctrine of non-inquiry is losing ground.⁴¹

Alternatives to Extradition

On occasion, governments have found it convenient or necessary to avoid the process of extradition in order to achieve jurisdiction over the person of an individual wanted for prosecution in their country. Here follows a review of some of these methods of rendition.

Irregular Rendition

The return of an individual through the “informal surrender” of that individual by one nation to another (1) without formal or legal process; (2) through the use of immigration laws to expel an accused or convicted criminal from a country; (3) by means of luring a fugitive to the territory of the country seeking his return; (4) in international waters; (5) or to other countries where their renditions can be more readily obtained has been termed “irregular rendition.” Simply put, this term describes processes for returning fugitives without resort to the recognized extradition regimens of the respective countries.⁴²

Luring

This is a practice that has been used successfully in instances where extradition is unavailable (no treaty) or barred by other circumstances. In simple terms, it involves the country that seeks the rendition of the otherwise unavailable fugitive taking measures to entice the wanted individual to a place from which extradition is possible or unnecessary. Lures usually involve a subterfuge, trick, or other deception, often by undercover law enforcement agents or informants in communication with the fugitive, which attempt to trick the wanted person to voluntarily leave the country of refuge.⁴³ For example, prosecutors have used the guise of collecting a prize, attending a social event, further engaging in a criminal activity, or delivering funds to entice a fugitive to a particular location. This was the case in 2000, when unknown persons believed to be in Kazakhstan were attempting to extort Michael Bloomberg, founder and owner of Bloomberg L.P. The subjects demanded via the Internet that Bloomberg pay them money in exchange for information on how they had managed to infiltrate Bloomberg L.P.’s computer system. Undercover agents, with the assistance of Mr. Bloomberg, engaged in e-mail communications with the subjects while they were in Kazakhstan—an area where extradition was not possible—and convinced them to travel to London for a meeting. On 10 August 2000, they were identified as the

authors of the communications to Bloomberg and arrested for extradition to the US by the London Metropolitan Police and New Scotland Yard.⁴⁴

Suggestion: While this technique can be effective, it can likewise produce undesirable collateral, and sometimes direct, consequences. In some jurisdictions, luring is illegal and those who put such a device in motion are themselves thus exposed to criminal sanctions.⁴⁵ Law enforcement agencies that use lures also run the risk of incurring the disfavor of the country in which the fugitive was located on the basis that such a technique is regarded, correctly or incorrectly, as an intrusion into national sovereignty. This being the case, the techniques involved in irregular rendition might best be cleared through an agency such as the central authority discussed earlier in an effort to determine what the overall effect of such an operation will be.

Expulsion and Deportation

On other occasions where extradition was either impossible or difficult, countries have resorted to other legal techniques demonstrating voluntary cooperation between governments. Thus, for example, where a citizen of one country is located in another country and an arrest warrant is outstanding in the former jurisdiction, that jurisdiction may cancel the passport of the wanted individual and request that the country of refuge expel that person. This device proceeds on the theory that the fugitive is in the host country without a valid travel document and allows the host country to use its immigration law or other available legal means to return the wanted person to his country of origin. Whether and under what circumstances a foreign country is willing to execute such requests varies, and depends both on its domestic law, and its willingness to utilize immigration procedures to accomplish a purpose more often pursued via international extradition.⁴⁶

Suggestion: Despite their appeal to some based on the fact that they may be easier to execute than the standard extradition procedures, these methods have their detractors⁴⁷ and have in some instances been found to be outside the law.⁴⁸ Thus, once again, it must be seriously suggested that a central authority as previously described would be strategically and tactically positioned to determine the efficacy, and more importantly the legality, of such measures prior to their employment.

Common Obstacles Encountered in Extradition Practice

Non Bis In Idem or Double Jeopardy Provisions

Many modern extradition treaties contain provisions prohibiting extradition when the person sought has been convicted or acquitted for the same offense in the country from which extradition is sought⁴⁹ or in a third country.⁵⁰ The increased international mobility of many of today's criminals, combined with the inherently transnational nature of much contemporary organized crime, corruption, and terrorism, creates a growing need for the interpretation of such double jeopardy, or *non bis in idem*, provisions.⁵¹

Suggestion: As a practical matter, if there exists no clear, mutually accepted *travaux préparatoires* or negotiating history to the treaty, which sheds light on this issue, the answer will likely turn on the requested state's interpretation of the clause and its applicable domestic law. This may become particularly difficult where the requested and requesting states rely on fundamentally different legislation, such as was reviewed earlier in this paper.⁵²

Severity of Punishment

In addition to those issues concerning capital punishment and its impact on extradition practice, analogous concerns have recently arisen relative to the severity of punishment in non-capital cases. The variation on this theme arises in instances where the punishment for a particular crime is life imprisonment in the requesting state or, in some instances, an indeterminate sentence. In all but a few instances, extradition treaties do not provide for sentencing with the exception of the previously mentioned "assurances" in capital punishment cases.⁵³ However, based on judicial decisions interpreting their own constitutions (wherein life and indeterminate sentences are found to be unconstitutional) and outside the terms of extant extradition treaties, some countries have begun to deny extradition where such sentences could be imposed. To implement domestic policy and jurisprudence in this case, demands have been made that the traditional "assurances" now be made in cases where life sentences could be imposed.⁵⁴

Suggestions: In instances of this nature, short of the implementation of UNCAC art. 44(13) arrangements, where appropriate, there is little in the way of standard prosecution that addresses this issue. This, as well as many issues in extradition, is a concern that must ultimately be resolved politically as well as legally.

Conclusion

As crime and criminals continue to have less respect for international boundaries, which modern society dictates they are both bound to do, the function of extradition becomes more vital. Concurrently, those involved in the practice will be required to become ever increasingly familiar with international legal practice, not solely on a theoretical but on a practical level as well. Functionally, modern criminal justice systems must discover, collate, and absorb the rules, policies, and practices of their partners in the international community. Thus, if there is a central theme in this paper, it is that the themes lightly explored here will by necessity require further cooperative development to meet the changing demands of extradition practice.

Notes

- ¹ M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 29, 54 (4th ed., Oceana Publications Inc., 2001) [hereinafter, Bassiouni]
- ² *Id.* at 37
- ³ This is the term commonly used in the jurisprudence of the US and other common law systems to refer to the person whose return is sought by the requesting state.
- ⁴ Bassiouni note 1, at 473
- ⁵ Satya D. Bedi, *Extradition in International Law and Practice* 69 (1966)
- ⁶ *United States v Saccoccia*, 18 F.3d 795, 800 n.6 (9th Cir. 1994)
- ⁷ *Shapiro v Ferrandina*, 478 F.2d 894, 908 (2nd Cir.), *cert. dismissed*, 414 US 884 (1973)
- ⁸ Bassiouni note 1, at 475
- ⁹ *Id.* at 483; see also United Nations Convention against Corruption, art. 44(8) [hereinafter UNCAC] found at www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf as of 15 March 2006.
- ¹⁰ "Representing Foreign Governments in Extradition Proceedings before United States Courts: A Manual for United States Attorneys," Office of International Affairs, Criminal Division, US Department of Justice (2003), at 19
- ¹¹ *Theron v United States Marshall*, 832 F.2d 492, 496 (9th Cir. 1987); *Cleary v Gregg*, 138 F.3d 764 (9th Cir. 1998)
- ¹² 18 U.S.C. §§ 1341 and 1343
- ¹³ Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 Wm. & Mary Bill Rts. J. 209, 236 (December 2002) [hereinafter Snow]
- ¹⁴ *United States v Rauscher*, 119 U.S. 407, 424 (1986)

- ¹⁵ Bassiouni, note 1, at 515 [added by the author]; compare with *United States v Tse*, 135 F.3d 200 (1st Cir. 1998)
- ¹⁶ Id. at 511-17
- ¹⁷ Extradition Treaty, 25 June 1997, US-India, art. 17(1), S. Treaty Doc. 105-30 (1997); see also *United States v. Riviere*, 924 F.2d 1289 (3d Cir. 1991)
- ¹⁸ UNCAC note 10, art. 44(3)
- ¹⁹ Bassiouni note 1, at 569
- ²⁰ *Flynn v Schultz*, 748 F.2d 1186 (7th Cir. 1984)
- ²¹ See *Ex parte Fudera*, 162 F. 591 (S.D.N.Y. 1908); *Ex parte La Mantia*, 206 F. 330 (S.D.N.Y. 1913)
- ²² Bassiouni note 1, at 569; see also William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 Loy. L.A. Int'l & Comp. L. Rev. 581 (Summer, 2003) [hereinafter Schabbas]
- ²³ Kathryn F. King, *The Death Penalty, Extradition, and the War Against Terrorism: U.S. Responses to European Opinion about Capital Punishment*, 9 Buff. Hum. Rts. L. Rev. 161, 188 (2003) [hereinafter King]
- ²⁴ Bassiouni note 1, at 609
- ²⁵ Kai I. Rebane, *Extradition and Individual Rights: The Need for an International Criminal Court to Safeguard Individual Rights*, 19 Fordam Int'l L.J. 1636, 1653-54 (April, 1996) [hereinafter Rebane]
- ²⁶ Bassiouni note 1, at 655; Rebane note 25, at 1657
- ²⁷ Snow note 14, at note 25
- ²⁸ UNCAC note 10, art. 3
- ²⁹ See *Constitucao Federal* [Constitution] art. 5 (LI) (Braz. 1988); Grundgesetz [Constitution] art. 16(2) (F.R.G. 1949) (amended 1993, 2000) ("No German may be extradited to a foreign country.")
- ³⁰ Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. Int'l L. & Pol. 813, 847 (1993)
- ³¹ Rebane note 25, at 1668
- ³² Id.; see also Snow note 14, at 22
- ³³ UNCAC note 10, at art. 44(11)
- ³⁴ Id. at art. 44(12)
- ³⁵ Id. at art. 44(13)
- ³⁶ J.S. Reeves, *Extradition Treaties and the Death Penalty*, 18 Am. J. Int'l L. 298 (1924)
- ³⁷ Schabbas note 23, at 585
- ³⁸ Model Treaty on Extradition, U.N. GAOR 3d Comm., 45th Sess., Agenda Item 100, at 6, U.N. Doc. A/RES/45/116 (1991)
- ³⁹ Extradition Treaty With Thailand, Treaty Doc. 98-16, 1983 U.S.T. Lexis 418 December 14, 1983, Date-Signed: ("ARTICLE 6 Capital Punishment – When the offense for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the laws of the Requested State, the competent authority of the Requested State may refuse extradition unless: (a) the offense is murder as defined under the laws of the Requested State; or (b) the competent authority of the Requesting State provides assurances that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed.")
- ⁴⁰ See however *Venezia v. Ministero di Grazia e Giustizia*, Corte cost., 27 June 1996, n.223, 79 Rivista di Diritto Internazionale 815 (1996)
- ⁴¹ King note 24, at 181–93
- ⁴² Melanie M. Laflin, *Kidnapped Terrorists: Bringing International Criminals to Justice through Irregular Rendition and Other Quasi-Legal Options*, 26 J. Legis 315, 320 (2000) [hereinafter Laflin]

- ⁴³ Snow note 14, at 229
- ⁴⁴ *Id.* at note 76
- ⁴⁵ Schweizerisches Strafgesetzbuch [Swiss Criminal Code] art. 271(2) (Switz.) (“Whosoever, using violence, ruse or threat, lures a person abroad in order to deliver him to an authority, a party or another organization abroad, or to put his life or physical integrity in danger, will be punished by reclusion.”)
- ⁴⁶ Snow note 14, at 229
- ⁴⁷ Stefano Manacorda, *Restraints on Death Penalty in Europe: A Circular Process*, 1 J. Int’l Crim. Just. 263, 283 (August, 2003) (“More subtle are the dangers arising from the increasing recourse to criminal and administrative procedures for the purpose of surrendering individuals to retentionist countries. Here, the development of European case law is not fully satisfactory, considering the dominant role played by political evaluations in the field of extradition and, even more so, expulsion where diplomatic considerations carry more weight than the standards of human rights law.”)
- ⁴⁸ *United States v. Usama Bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001), finding that the use of a similar technique violated South African law.
- ⁴⁹ Extradition Treaty, 25 June 1997, US-India, art. 6(1), S. Treaty Doc. 105-30 (1997)
- ⁵⁰ Extradition Treaty, 13 Nov. 1994, US-Phil., art. 2(4), S. Treaty Doc. No. 104-16 (1995) (“If the offense was committed outside of the territory of the Requesting State, extradition shall be granted in accordance with the provisions of this Treaty: (a) if the laws in the Requested State provide for punishment of an offense committed outside of its territory in similar circumstances; or (b) if the executive authority of the Requested State, in its discretion, decides to submit the case to its courts for the purpose of extradition.”)
- ⁵¹ Snow note 14, at note 129
- ⁵² See discussion concerning Dual Criminality above
- ⁵³ Compare with Extradition Treaty, 19–21 Jan. 1922, US-Venez., art. 4, 43 Stat. 1698 (“In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted.”)
See also Por. Const. (Constitutional Law No. 1/97, 1997) art. 33(5) (“Extradition in respect of offenses punishable, under the law of the requesting State by deprivation of liberty or detention order for life or an indeterminate term, shall only be permitted on condition of reciprocity based on an international agreement and provided that the requesting State gives an assurance that such sentence or detention order will not be imposed or enforced.”)
- ⁵⁴ Shaw note 14, at note 135; on 2 October 2001, the Mexican Supreme Court ruled that a sentence of life imprisonment constitutes inhumane punishment under the Mexican constitution, which permits only a sentence of finite years. *Jurisprudencia de 2 de octubre de 2001, 14 Semanario Judicial de la Federacion* [S.J.F.] 13 (Mex. 9a época 2001); *Mexico Makes Extraditions to U.S. Harder*, San Diego Union-Trib., 4 Oct. 2001, at A19, 2001 WL 27292686. Subsequently, lower courts in Mexico began demanding assurances from the United States that fugitives extradited to this country will not be imprisoned for life.

Strengthening bi- and multilateral cooperation against corruption to overcome challenges in extradition

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Corruption is a problem of international concern. It is an ulcer in the economic and political life of human society. With globalization, corruption has become a cross-boundary phenomenon that affects the political, economic, and social life of every country, severely undermining each country's political stability, economic development, and social advancement. The Chinese Government has always understood the grave damage caused by corruption and has dealt with corruption as an issue of great importance to the very existence of the whole country. We have been fighting corruption resolutely with marked results.

The Chinese Government has always attached great importance to international anti-corruption cooperation and drawn on successful experiences and practices from other countries. Bilateral and multilateral exchange and cooperation have been strengthened constantly. P.R. China has joined the United Nations Convention against Transnational Organized Crime and developed fruitful exchange and assistance with relevant countries in law enforcement cooperation and mutual legal assistance. On 27 October 2005, the National People's Congress of P.R. China ratified the United Nations Convention against Corruption, thus showing the firm stance of the Chinese Government on international anti-corruption cooperation.

The anti-corruption organs in P.R. China are strengthening the exchange and cooperation with other countries' corresponding departments. Currently, P.R. China has established friendly relationships of exchange and cooperation with over 70 countries and regions. Some of them have signed cooperation agreements and held high-level exchange visits, personnel training, and professional exchanges with P.R. China. In recent years, P.R. China's anti-corruption organs have established relationships with many international organizations: United Nations, World Bank, OECD, ADB, APEC, AOA, etc. P.R. China is actively participating in the International Anti-Corruption Conference, Global Forum on Re-inventing Government, Global Forum on Fighting Corruption and Safeguarding Integrity, APEC Anti-corruption Conferences, and other

influential international anti-corruption conferences. P.R. China also dispatches several delegations to attend the relevant anti-corruption seminars or workshops annually. As an APEC economy, P.R. China develops anti-corruption exchanges and cooperation actively under the framework of APEC. In April 2005, P.R. China became an endorsing member of ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. In September 2005, it successfully hosted the 7th Steering Group Meeting and 5th Regional Anti-Corruption Conference of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

There will be great developments in the 21st century in international legal assistance in criminal matters. Extradition deals a deadly blow to those who engage in corruption and is the most important and common mechanism of legal assistance in criminal matters. Most countries admit the importance of extradition, but disputed issues continue to arise because of ideological, social, and legal differences. The main disputed issues include:

- Refusal to extradite political criminals: A request for extradition may be rejected if the requested state believes that the offense underlying the request for extradition is of a political nature. This principle originally aimed to protect revolutionaries in exile, but it has encountered certain difficulties in practice. First, because of the differences in ideology and social systems among countries, there are considerable discrepancies in the definition of a political offense. Second, a requested state has the power to decide whether to deny extradition on this ground and thus could use this power to protect a person. This can amount to interfering in the internal affairs of another country, thereby abusing and distorting the principle of non-extradition of political criminals.
- The principle the dual criminality: The conduct underlying an extradition request may not be criminal in both countries. A request for extradition may be rejected by the requested state because the conduct does not constitute a crime there.
- The principle of non-extradition of nationals: Most countries have adopted this principle, but others have not, and this discrepancy causes many disputes.
- Refusal to extradite because of the potential penalty: This principle applies when the requesting state may impose a certain penalty for the offense underlying an extradition request but the requested state does not recognize or impose that penalty. In these cases, the

requested state could reject extradition unless the requesting nation promises not to impose the penalty in that particular case.

Faced with these challenges in legal systems and practices in the field of extradition, I would propose the following solutions.

First, one solution to the refusal to extradite because of the potential penalty is partial rejection of an extradition request. Some countries wholly refuse to extradite because of the potential penalty. In other words, if a requested state does not accept the potential sentence that could be imposed, it will reject the extradition request absolutely and without any alternatives. A more flexible approach is to refuse extradition only partially, i.e., to allow extradition if the requesting state promises to meet certain requirements. We believe that partial rejection is more acceptable. In the ultimate analysis, whether to keep or to abolish a penalty is a matter for the requesting state to decide. For example, while the international trend is to abolish the death penalty, the number of states that have retained the penalty remains in the majority. Absolute rejection of extradition to countries that may impose the death penalty would not give adequate consideration to the interests of the states that have retained the penalty. It also hinders the ability of the international community to combat transnational crime. Partial rejection, however, would strike a balance among these competing interests.

Second, another solution to the refusal to extradite because of the potential penalty is to “shift” or change the penalty in question. When a requested state has grounds to believe that the requesting state may impose a certain penalty on the person sought, the requesting state may promise to change the criminal penalty as a precondition to extradition. For example, if extradition may be refused because the death penalty may be imposed, the requesting state can agree to shift the penalty to imprisonment of 100–200 years. Under such an approach, the offender will not escape justice and the punishment imposed still has a deterrent effect.

Third, it is necessary to sign limited bilateral extradition treaties. In international practice, extradition is usually based on treaties among states. Extradition treaties are very important because countries are not obliged to extradite in the absence of a treaty. However, there are still many obstacles to signing extradition treaties because of differences in ideology, and social and legal systems among states. We therefore suggest that countries negotiate and sign bilateral extradition treaties that are limited to certain serious crimes such as bribery and

embezzlement, money laundering, terrorism, and drug trafficking. Since a limited extradition treaty is easier to negotiate and ratify, this approach would allow the negotiation and signing of more extradition treaties that cover the most important crimes.

Fourth, it is necessary to conduct regular multilateral negotiations on extradition. For example, within the framework of APEC, many states have practical needs to extradite offenders. Accordingly, we could call on these states to come together and negotiate the various issues concerning extradition. After several rounds of talks, negotiations, and law enforcement cooperation on cases, these states could then sign bilateral or multilateral extradition treaties.

Fifth, it is necessary to consider alternatives to formal extradition. Considering the harmfulness and complexity of transnational crime (including corruption), every state must strengthen cooperation in the area of extradition. If there is no extradition treaty between two states, then the countries should take a flexible and pragmatic approach and consider alternatives such as repatriation for a specific crime.

Finally, it is important to study the financial aspects of corruption. States should explore cooperation measures to combat money laundering, to deny safe haven to proceeds of corruption, and to recover such proceeds. Possible measures include directly recovering proceeds through civil procedures, sharing proceeds, and signing asset-sharing agreements with relevant states.

Chapter 4

Overcoming practical challenges in mutual legal assistance and extradition

Legal obstacles aside, extradition and MLA also present many challenges in practice. Some of these issues are more technical and detailed, such as drafting requests for assistance. Others are larger and of an institutional nature, such as establishing central authorities. Regardless of the differences, all of these issues significantly affect the efficacy of international cooperation.

During the seminar, the use of central authorities was the most frequently discussed topic under the rubric of the practice of MLA. More and more countries have now designated central authorities that are responsible for transmitting, receiving, and handling all requests for assistance on behalf of a state. By way of example, Charles A. Caruso, Regional Anti-Corruption Advisor, American Bar Association/Asia Law Initiative, described in detail the operation of the central authority for the United States. Participants almost unanimously found central authorities to be crucial to the practice of extradition and MLA. Central authorities facilitate the process by identifying a visible contact point for other countries. Staffed with specialists in international cooperation, these central authorities serve as repositories of expertise and thus provide a source of advice for domestic and foreign law enforcement bodies on these matters. Unfortunately, the use of central authorities

remains far from universal, as Hasan Saqib Sheikh, Deputy Director, National Accountability Bureau, Pakistan, pointed out.

Though central authorities are useful, practitioners usually have little influence over their creation or operation. Nevertheless, there are many practical measures that they can take to improve international cooperation. As with overcoming legal obstacles, Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland, emphasized the need to be proactive and imaginative. For instance, practitioners in a requested state could alleviate the delay in formal communication channels by starting domestic investigations or by transmitting copies of evidence through informal channels.

There was also much discussion about technical matters such as the drafting of requests for assistance. Sean Mowbray, Senior Legal Officer, International Crime Cooperation Branch, Attorney-General's Department, Australia, offered some advice on the basic details that must be included in a request. Bernard Rabatel, French Liaison Magistrate in the United Kingdom, pointed out the importance of including information of a less obvious nature, ranging from the statute of limitations to assurances provided by the requesting state. Kimberly Prost, Chief, Legal Advisory Section, Treaty and Legal Affairs Branch, UNODC, demonstrated a software tool that should greatly assist practitioners in including all necessary information in requests. The tool is available at www.unodc.org/mla.

While all of these practical measures are important in facilitating cooperation, the most indispensable measure of all is likely to be communication. All experts and participants reiterated that frequent and effective communication is a cornerstone of success. As Gerry Osborne, Assistant Director of Operations, Independent Commission against Corruption, Hong Kong, China, pointed out, communication and liaison is necessary among all parties involved in both the requesting and requested states, not just between central authorities. As a liaison magistrate, Bernard Rabatel provided some helpful insights into the importance and utility of such magistrates in facilitating communication. In the end, participants and experts alike agreed that without effective communication, international cooperation cannot be effective.

The practice of MLA from a Swiss perspective

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The previous chapter looked at some legal problems that arise in MLA from a Swiss perspective. This paper will now discuss some problems that have arisen in the practice of MLA in Switzerland.

Drafting an MLA Request

It is trite to say that the description of the facts of a case is crucial to an MLA request. The description must be complete and sufficiently detailed to allow the requested state to determine whether the preconditions for cooperation are met. Incomplete description of the facts carries at least two risks. First, the requested state may consider the request to be an “exploratory” demand or a “fishing expedition.” The requesting state can provide additional facts to rebut this challenge, but this is time-consuming. In the interests of justice, practitioners in the requested state should consider acting first and asking for additional facts later if necessary, rather than waiting for the perfect request to arrive. Second, an incomplete description of the facts may make it difficult to apply the test of dual criminality. The conduct that amounts to an offense in the requesting state may not be criminal in the requested state. Additional facts may be necessary to satisfy the test of dual criminality.

As to content, the description of facts should, of course, include the names of the individuals involved in the case. In some cases, the names of family members should also be included. Care should be given to the spelling of names. Dates of birth, if possible, should be included. The dates of events and the amounts of transactions are very important. The description of the *modus operandi* should be clear and simple. Avoid legal terms such as “embezzlement” or “corruption,” if possible, as these could have different meanings in different legal systems. For most cases, the description of the case should be one to at most two pages.

Practitioners should also bear in mind concerns over confidentiality when describing the facts in an MLA request. In some cases, a requested state may have to provide a defendant with access to the request. Consequently, it may be advisable to withhold certain facts from a request for assistance. Decisions to freeze a bank account and to hand over the relevant documentation may have to be communicated as well to the

account holder. This may in turn reveal elements of the investigation to third parties and could thus jeopardize the case. To address these difficulties, practitioners may wish to inquire with the requested state about the legal possibility of ordering banks and similar entities to delay the disclosure of such information to their clients. They should also find out from the requested state what evidence is necessary to obtain assistance, and omit excess information from the request.

Urgent Requests

MLA requests are often urgent, but examining requests, checking their translation, and transmitting them through the formal channels take time. While waiting for these steps to be completed, the requested state could consider opening its own investigation, e.g., for a different crime such as money laundering or any other offense over which it has jurisdiction. The legislation of many countries requires law enforcement agents to act as soon as they learn of a crime within their jurisdiction. The source of this information could be a newspaper article or an e mail from a reliable foreign counterpart. Once an investigation is opened, the requested state can quickly freeze assets and safeguard evidence on a provisional basis.

Another interim measure that a requested state can take is to ensure that financial intermediaries respect their obligations to report suspicious transactions to FIUs and law enforcement. These intermediaries are required to act even on the basis of information contained in newspaper articles. It is therefore perfectly acceptable to draw their attention to such articles or other information about their clients or assets that have been deposited with them.

Gathering of Evidence

The information collected pursuant to an MLA request needs to be compatible with the legal system of the requesting state. A flawed testimony or seizure of documents can ruin the entire procedure. To avoid this problem, the requesting state must inform the requested state of any legal requirements in its own procedural law. This usually includes the form of sworn statements or affidavits (if they are to be used as evidence), the rights to be guaranteed to witnesses before they testify, validation of documents and signatures, etc. In turn, the requested state should ask its counterpart whether there are any special requirements in these matters.

Participation of Foreign Authorities

The participation of foreign authorities in the execution of a request is a very touchy matter that can boost the efficiency of any inquiry or ruin it. The requesting state knows best the evidence and issues at stake in its inquiry, but its officials cannot operate in foreign territory. Hence, whenever possible, requested states should allow foreign investigators to:

- Be present when hearing witnesses, and allow them to ask questions, or signal what questions to ask
- Be present during searches, to help decide what to seize
- Participate in sorting out of the documents seized, to indicate which ones are of use to them

For example, Swiss legislation allows these measures on the condition that foreign investigators commit themselves to not using the information that they obtain in the foreign state until they receive it through the formal MLA channels.

Issues arise time and again when officials of the requesting state conduct undercover operations in the requested state. One of the obstacles to such operations is that the requesting state loses control over the gathering of information and its use by the requested state, which contradicts the basic principles of international cooperation. Hence, such undercover operations can be practiced only between countries bound by a “particular relation of confidence.”¹

Handing over of Evidence

Evidence is traditionally handed over through diplomatic channels, which are slow. Many pieces of national legislation and bilateral treaties have provisions about urgency that allow, or do not prohibit, direct handing over between law enforcement agencies. Practitioners should therefore send a copy of the documents directly to the requesting state’s investigators whenever possible. They may not be able to use them formally as judicial proof, but the documents will help focus their inquiry.

Summary

MLA procedures are slow and cumbersome. They must conform to the requirements of at least two judicial systems, possibly of different inspiration and tradition. Nonetheless, this fact should stimulate rather

than discourage our imagination and ability to achieve the indispensable cooperation between law enforcement authorities if we want to successfully fight what we all consider to be serious crimes, among which corruption ranks high.

Note

- ¹ See the 2003 decision of the Swiss Federal Supreme Court (ATF 130 II 1). All decisions of the Court can be found at <http://www.bger.ch/fr/index.htm>.

Trends in the practice of MLA in Asia-Pacific

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It has been often observed that countries face similar challenges and problems in the practice of MLA. A comparison of the experiences of different countries could therefore assist in identifying both problems and solutions to common problems.

A common issue is the process used by various countries for transmitting requests. Older treaties and conventions tend to require conventional methods of transmission, e.g., through diplomatic channels. Recognizing the need for speed in MLA, more recent instruments permit transmission via fax or e-mail. For some countries, however, electronic transmission of the request must still be confirmed by transmission of the original request through conventional channels. The reason for subsequent confirmation is ostensibly to ensure the authenticity of the request. Some practitioners, however, find this unduly cumbersome. In their view, authenticity can be easily confirmed with a telephone call to the originator of the request.

Another development brought about by technological advancement is the use of videolink technology. Several countries now permit officials and defense counsel in the requesting state to participate in taking evidence through videolink. In practice, it appears that there is limited use of this technology in MLA among Asia-Pacific countries. This could be because the cost of the technology remains prohibitive. Regardless, most practitioners believe that it will be a matter of time before the use of videolink in MLA becomes widespread.

A more immediate issue is the drafting of requests for MLA. Most practitioners appear to agree on the nature and detail of the information that should be included in a request. All agree that it is essential to state precisely what assistance is sought. The request should include a copy of the relevant law of the requesting state, a description of the offense and the penalty (including the death penalty), and the purpose of the assistance. It is always a good practice to include a deadline, and urgent requests should be clearly so marked. Countries should consider developing a standard format for requests, as this would reduce the time required to prepare requests and make it less likely that important information is omitted.

FAQs on the extradition process

Bernard Rabatel

French Liaison Magistrate in the United Kingdom

The law enforcement and judiciary of one country cannot tackle corruption without forging close links with their counterparts abroad in order to obtain evidence and to seek the extradition of criminals. To achieve this aim, the vast majority of countries agree that the fullest international cooperation between states should be a priority.

Unfortunately, extradition in practice often falls short of this laudable goal. One recent example shows how difficult it can be for practice to coincide with theory. France sought the extradition from one European country of a man allegedly involved in the terrorist bombings in the Paris metro in summer 1995 in which many people were killed and injured. The man was arrested in England in November 1995, following a request for provisional arrest. He was surrendered to France on 1 December 2005, 10 years, 3 weeks, and 3 days after France had requested his extradition. The authorities of both countries did their best to bring this person to justice, but obstacles came from differences in legal systems and from the specificities of the extradition law in the requested country at that time. Fortunately, this legislation has been replaced by a more modern one.

The obstacles in this extradition case should be considered in a wider context. Two factors already favored extradition. The countries involved were signatories of a multilateral extradition convention (the European Convention on Extradition). Furthermore, fighting terrorism has been a priority for the last several years. If such inordinate delay resulted despite these factors, how can one reasonably hope that international cooperation will be successful in fighting other types of crime (such as corruption) between countries that:

- do not have extradition treaties,
- do not have the same definition of the offenses of corruption, or
- have different legal systems?

It is true that the legal landscape is much more developed today. Prosecutors and judges can rely on an armory of national codes, and bilateral and multilateral agreements to seek international cooperation. Yet, can these tools improve international cooperation in both theory

and practice? What are the practical “bricks” for building bridges between countries in order to overcome the main differences in their legal systems? To address these issues, it will be instructive to examine the questions on the extradition process that practitioners most frequently ask.

What Is the Legal Basis for Extradition?

The most common legal bases for extradition are bilateral extradition agreements, multilateral treaties and conventions, and memorandums of agreement.

It is crucial that the appropriate agreement is identified as soon as possible. For example, a fugitive was arrested last year on the Isle of Man, an island in the center of the British Isles. A new surrender procedure between EU member states, the European Arrest Warrant, had been in force between France and the UK since July 2004. A French prosecutor was about to issue such a warrant. Unfortunately, the warrant could not be enforced in the Isle of Man because the island had not implemented the framework decision on the European Arrest Warrant. Instead, France had to request provisional arrest under the old European Convention on Extradition. If France had issued the European Arrest Warrant instead, precious time would have been lost.

Which Type of Request Should Be Made?

One of the first decisions in making an extradition request is the type of request. Should the requesting state make a full order request (known in the United States as a full extradition package) or a request for provisional arrest?

The decision is sometimes dictated by the circumstances. Some countries like France may accept a request for provisional arrest even though there is no urgency or reason to believe that the fugitive will flee, e.g., the fugitive has been located and has been living and working in the requested country for a period of time. Other countries will accept full order requests only in these cases.

There are also practical considerations. When a person has been provisionally arrested, the requesting state must provide the full extradition package by a relatively short deadline. In complex extradition cases, this may not be enough time to prepare all of the documents.

How Should the Crime(s) Be Described?

Dual criminality is a requirement in many bilateral extradition treaties, especially in old treaties with lists of extraditable crimes. In theory, it should not be an obstacle to extradition in modern treaties such as multilateral conventions. In reality, dual criminality may still prevent a judge from issuing a warrant against a fugitive who has been charged with a crime of corruption. This could occur when the presentation of the facts in the extradition request is not as clear as it should be. Some commonly asked questions that should be addressed in the request include:

- Is it a criminal or civil case?
- Is it a fiscal matter?
- Has the fugitive been prosecuted for the same crime in the requested state (*non bis in idem* [double jeopardy])?

Practitioners should also anticipate the consequences of the rule of specialty to prevent future difficulties in the requesting state. This is the principle that precludes a person from being extradited for one crime and being tried for another.

Which Statute of Limitation Applies?

If not clearly explained in the request, the statute of limitation in the requesting state may create an unfortunate misunderstanding in the requested state. The request should therefore explain what the limitation period is, how it is calculated, and how it has not yet expired in the particular case. In some cases, the request should state why the limitation period has not yet expired (e.g., explain that the limitation period is suspended when an accused absconds).

Which Procedure in the Requesting State Applies?

It may be important to describe the procedure that will be applied to the fugitive in the requesting state if extradition is granted. When a fugitive is sought for prosecution, the definition of what constitutes a prosecution in the requesting state can raise questions for the requested state. One common question is whether the person is sought for prosecution or merely for questioning.

If the person is wanted to serve a sentence, convictions resulting from a trial in absentia may be subject to challenge. If a conviction is obtained under such circumstances, the request should clearly so state. Some countries (such as the UK) also require the request to show that the convicted person is “unlawfully at large.” The definition of this concept varies from one jurisdiction to another. Practitioners should therefore seek clarification in this regard.

What Evidence Should Be Included in the Request?

This is a recurring question to which the unsatisfactory answer is: “It depends.” One particularly difficult issue is the evidentiary requirements of the requested state. Judges in some states do not examine the arrest warrant too closely. In others, they appear to be trying the foreign case. Different jurisdictions also use different evidentiary tests (e.g., prima facie case or probable cause). It is advisable to find out more about this issue when preparing the request.

Bail issues should also be anticipated. In several countries, fugitives may be granted bail after their arrest. Bail has always been considered a domestic issue to be decided by an independent judge of the requested state. This judge will base his or her decision largely on the evidence provided by the authorities of the requesting state. If the requesting state has information and arguments relevant to this issue, it is very important to communicate them to the requested state in a timely fashion. The requested state is often surprised to find out about these arguments after the judge has decided on bail.

Additional questions that should be considered when drafting a request include:

- Is it necessary to include a photo, fingerprints, or a description of the fugitive, or all of these? If none is available, it may be advisable to so state in the request so that the requested state will not have to ask for them.
- What are the authentication requirements? Do the main request and all supplementary evidence have to be bound and sealed?
- The authorities of the requested state may ask for an update about the status of the case in the requesting state. This can be anticipated in the request.

What Is the Impact of the Fugitive's Citizenship?

Many countries do not extradite their nationals. Moreover, the principle of *aut dedere, aut judicare* (extradite or prosecute) is easier said than done. Prosecuting a national for an alleged offense perpetrated in a foreign country is not simple. It becomes impossible if the two states do not cooperate closely on procedural and evidentiary aspects to ensure the efficiency of the prosecution.

What Assurances Should Be Given?

The requesting state may be asked to provide different levels of assurances in return for extradition. These could include assurances that the fugitive will receive a fair trial, or that torture, degrading punishment, or the death penalty will not be imposed on the fugitive. The issue becomes even more complicated if the requesting state has a federal structure. It will then be necessary to ascertain whether the federal or state authorities or both should provide assurances.

Which Language Should Be Used?

Language requirements are often stipulated in the relevant treaty or legislation. On a more practical level, poor translations of the request in the language of the requested state can delay or even seriously compromise the extradition process. Translation is time-consuming and expensive as well. There is therefore a tendency to reduce it when possible, such as by translating only a part of the evidence or an excerpt. However, the requested state may consider partial translations of evidence as unfair and hence unacceptable.

What Is the Priority of a Request?

How should a requested state treat multiple extradition requests for the same person from different countries? The relevant treaties and legislation may contain provisions dealing with these situations. There may also be provisions dealing with a fugitive who is serving a sentence in the requested state. In these situations, the requested state may consider delaying surrender, or conditionally surrendering the fugitive for trial before he or she is returned to complete the sentence.

What Is the Appeal Process?

The extradition process is often subject to appeals, be it a habeas corpus appeal, judicial review, *pourvoi en cassation* or *recours en Conseil d'Etat*. Appeals not only delay the surrender of a fugitive, but they can cause confusion for the authorities of the requested state if they are not explained. As always, "Explain—do not complain!"

Which Channels of Communication Should Be Used?

It is very important to consider the use of judicial networks and liaison magistrates in addition to or in place of diplomatic and official transmissions. Most of the time, these channels complement each other. It is therefore advisable to include one's phone number and e-mail address in the request so that a contact point can be quickly identified.

Conclusion

In theory, extradition in corruption cases is no different from that involving other types of crimes. However, experience shows that the former is often more complicated. One of the reasons is that corruption cases are usually complex. They also often involve defendants who can afford to spare no expense and hire highly qualified lawyers. The defendants cannot be blamed for acting in their own interests. Nevertheless, prosecutors and law enforcement would be rightly criticized if they do not take the practical steps that maximize the usefulness of all available legal tools.

Working together and intensifying actions to strengthen the extradition process

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Chapter IV of the United Nations Convention against Corruption (UNCAC),¹ specifically article 44, deals with the framework proposed for extradition in the instances of rendition between States Parties. Among the many challenges posed by the UNCAC and this regimen is the issue of preventing safe haven to those who would abuse their public position to amass enormous wealth, and follow this crime by fleeing to a jurisdiction in which they believe they can find shelter from prosecution. Oftentimes this shelter is not purposely provided by the country to which these criminals have fled, but is the result, in part, of the inefficacy of the extradition mechanisms existing between the injured state and the state reluctantly providing safe haven. It cannot be denied that even in the most sophisticated extradition regimens between states there are on occasion: (1) long periods of delay between the request for extradition and the decision on rendition; (2) extraordinary procedural demands made by the legal regimen in the requested state; 3) difficult and unnecessary proofs required before extradition; (4) the danger of the party being sought fleeing yet once again; and (5) other problems that delay the procedure, resulting in at least a temporary safe haven for these criminals. Thus it is that article 44(9) of the UNCAC requires that "States Parties shall...endeavor to expedite extradition procedures and to simplify evidentiary requirements relating thereto..."² This paper will address only a few of these problems as they have surfaced in one extradition regimen and demonstrate the manner in which that system has dealt with simplifying the evidentiary and procedural requirements in an effort to create a more efficient process. As all countries ratifying the UNCAC will be called upon to "expedite" and "simplify" their procedures, it is hoped that some of the processes outlined here may prove useful in other systems.

A Central Authority

Often, in connection with mutual legal assistance and other recurring matters involving foreign governments, treaties require that parties

“designate a central authority...” to be responsible for coordinating intergovernmental efforts to accomplish a variety of tasks. In extradition matters this can be particularly important given the time constraints that invariably accompany the extradition process. However, such an office so created has the potential of being far more effective and vital to the process of extradition when it provides more than a receptacle for the service of international documentation.

By way of example, the United States Department of Justice has created the Office of International Affairs (OIA), which has been designated by the US Attorney General as the central authority of the United States for dealing with international legal issues, including both extradition and mutual legal assistance. However, this office has evolved into much more than the official point of service for foreign governments wishing to engage in the extradition process with the US.

As a demonstration of the importance of such a mechanism, it is worth noting that when OIA was created in 1979, it employed five attorneys and was then handling only a limited number of extradition cases per year. It can be well argued that the growth of the office to more than 40 lawyers, stationed around the world, and a caseload of hundreds of cases per year is the direct result of the globalization, the internationalization, of organized criminal activity. What cannot be argued is the growing importance in finding successful solutions to the ever-growing number of complications in the extradition process.

While OIA does not, in the normal course of extradition proceedings, actually appear at the in-court hearing, it is always responsible for coordinating the efforts of the US in these proceedings; e.g., the representation of foreign governments by the United States Government in extradition matters must be done in coordination with the OIA. The government prosecutors actually appearing in court are advised by members of OIA, which is also responsible for ensuring assistance in seeing that all time parameters of the extradition processes are met among the other technical requirements that attend this intergovernmental effort. What is most important about the concept of the OIA is that these attorneys are specialists on the topic of extradition and thus are current on the law that governs the process. This expertise and up-to-date understanding of the law and current policy helps to ensure that embarrassing and harmful errors do not jeopardize international relationships. While it might seem as though having a layer of authority above the attorneys actually handling the case would slow the process, experience has demonstrated that because that layer of authority reduces errors and stimulates timeliness in meeting deadlines,

a comparatively small cadre of attorneys deal effectively with the problem in some 94 federal districts.

It is also clear that in many instances, extraditions are delayed or, in some cases, defeated by the inadequacy or tardiness of required documentation. There is less likelihood of these errors occurring where a specialized office is available for consultation by both members of the requesting and requested state officials. Where experts are available to assist in the drafting of extradition documentation, both outgoing and incoming, experience has demonstrated fewer ministerial or technical glitches. Again by way of example, the US maintains in Asia, i.e., Bangkok, Jakarta, Manila, and Beijing, attorneys charged, in part, with assisting in extradition and other matters of mutual legal assistance.

An effective centralized authority can also serve as the mechanism that has intergovernmental responsibility for agreeing to simplification procedures with similar bodies of other treaty partners. A policy of scheduling annual or biannual conferences with extradition or MLA treaty partners for the purposes of agreeing to interparty simplification procedures or updating partners as to changes in national law and problems encountered in particular cases between partners, etc., has proven very useful.³

To the extent that maintaining an office specifically to monitor and supervise extraditions might be seen by some as extravagant, it should be pointed out that OIA currently employs a relatively small staff to accommodate the needs of a very large constituency. Perhaps most importantly, having one central office deal with all extradition matters involving foreign governments assures (1) consistency in results; (2) the utmost in efficiency; and (3) the assurance that one office is ultimately answerable for the results obtained.

In summary, one could reasonably suggest that the single most fruitful suggestion for improving the extradition process between cooperating governments would be the existence of a well-informed, well-functioning central authority. To the extent such a body exists, its maintenance and financial support would appear to be wise investments in the overall process of extradition.⁴

Extradition under US Law

A brief review of the extradition law of the US, which follows a pattern similar to other common law jurisdictions, may be helpful in this discussion. Extradition under the law of the United States can be accomplished only when: (1) there is a treaty in place between the country requesting the

return of the fugitive and the country in which the fugitive is found,⁵ and (2) the request for extradition meets the terms and conditions specified in that treaty.⁶ Thus, for UNCAC purposes, the US can be described as a country "...that makes extradition conditional on the existence of a treaty..."⁷ Once it is established that a treaty exists and that the request for extradition meets the terms and conditions of the treaty, the question to be answered by the courts of the US is whether the evidence is "sufficient to sustain the charge under the provisions of [that treaty]."⁸

Common Scenario for Extradition from the US to a Foreign Jurisdiction

The following set of facts illustrates a common, but not the only, scenario where a requesting state seeks the extradition of a fugitive from the US.

Extraditions can be sought from the US either through (1) a *formal request* through diplomatic channels or (2) *provisional arrest*. Where extradition is formally sought through diplomatic channels, the US Department of State reviews the extradition documents submitted to ensure compliance with formal requirements. Where provisional arrest is employed, the matter is reviewed and processed for compliance with proper procedure and adherence to protocol by OIA. After that, the matter is referred to the appropriate United States Attorney's Office (the prosecutor) for handling in the courts. Then the court makes a judicial determination as to whether or not the person is extraditable according to US law (e.g., certifies that the subject is extraditable). Ultimately, the warrant for the subject's extradition, should it be decided that extradition is appropriate, is a matter for the signature of the Secretary of State.

Practical Issues that Arise in Extradition Proceedings

Bringing the Subject before the Court

As previously pointed out, extradition requests can be received through separate means—either through a formal request for extradition made through diplomatic channels or, where the circumstances dictate urgency, through a request for provisional arrest.

Before a determination is made as to whether a person can be extradited, that individual must be brought before the court. This is accomplished through the issuance of a warrant of arrest based on the facts alleged in the extradition papers forwarded by the requesting state.

Content of the Requesting Documents

Although they vary between the several jurisdictions, modern extradition treaties share several paradigms that are generally agreed to be sufficient for the purposes of the requested state. Most modern treaties require that requests are accompanied by, at least:

- A copy of the warrant or order of arrest, issued by a judge or other competent authority
- A copy of the charging document
- Documents, statements, or other types of information that describe the identity and probable location of the person sought⁹

These documents must be in a form that is readily usable by the authorities of the requested state, since copies are generally distributed directly to the authorities who will be involved throughout the procedure. It is equally important that all documentation be complete and in a form understandable to the requested state. One of the most common reasons for delays and resultant failures in the process is poorly translated documents, which cannot be sufficiently understood by those having to use the documents. While standard forms are useful in identifying a format that will be acceptable to the requested state authorities, the use of standardized language to describe the incidents supporting the documents is to be avoided. It should always be remembered that the content of the documents submitted will be the basis for establishing, or not, the standard of proof required to order extradition. By rule of thumb, it is a fair general recommendation that the requesting state submit as much of its file, most particularly sworn documents and those filed in national courts, as security allows. It also goes without saying that the more collaboration there is between the requesting state and requested state authorities before filing the requisite documentation, the more likely the result will be satisfactory to both parties.

The Parties in Court

Because extradition is most often a matter of parties entering appearances in court, one such party being the country asking for the return of a fugitive (the requesting state) and the other being the fugitive resisting that return, representation before the court for the requesting party can be anticipated. Anticipating the need for representation can accelerate the entire extradition process.

For example, while the US is itself not a party to extradition proceedings (as the requested state), it provides representation to the foreign government seeking extradition through the offices of US prosecutors. To provide clarity as to this aspect of the extradition process, the US often specifies in the terms of the treaty, or through other forms of diplomatic agreement, that it will provide such representation. Having a United States prosecutor representing the foreign government is of great import in that it provides the requesting state with a representative experienced in US law and serves to avoid errors that would result in costly delays. In the not too distant past, inasmuch as the United States was not a party to the extradition proceedings, the consulate of the country seeking extradition actually hired private American lawyers to represent their interests before the court. The far more efficient practice is that prosecutors familiar with national law and practice handle the procedures before the court. This practice (1) streamlines the process, (2) makes the cost of extradition more reasonable, and (3) avoids costly and embarrassing errors.

Appeals from the Court's Decision

An often criticized aspect of any legal process is the amount of time consumed between the start of the procedure and its final step—in this case, from the time extradition is requested until the time the fugitive is returned or the request is denied. One of the methods by which that time is shortened in extradition proceedings in the US is the absence of any appeal as to the certification by the court of whether the fugitive can be extradited. The court's finding that a person can legally be extradited cannot be directly appealed.¹⁰ Once such a finding is made by the court, the matter is then referred to the Secretary of State for final decision as to whether the subject will be surrendered. Because the United States federal judicial system contemplates appeal by right to the Federal Appellate Courts and possible appeals to the Supreme Court of the United States under specific circumstances, limiting the right to appeal of the original decision in extradition matters saves a great deal of both time and expense.

Procedural Rules in Effect in Extradition Proceedings

The *nature* of extradition as characterized under United States law allows for considerable savings in time where extradition is involved. In the United States' understanding, extradition is a matter neither wholly

criminal nor completely civil. It is in fact described as *sui generis* (in a class by itself) and as such, procedures surrounding its execution are likewise unique. In this case, the rules of procedure regularly employed in matters before the federal courts of the United States are not applicable to extradition proceedings.¹¹ Because extradition is not regarded in the same light as are criminal proceedings before the courts, the safeguards normally surrounding such proceedings are not considered necessary in extradition matters. Likewise, because of the status of extradition as a *sui generis* proceeding, the rules of evidence ordinarily used in criminal matters before US courts are also not applied in extradition matters.¹²

Finally, in ordinary criminal matters brought before US courts, the device of pretrial discovery of the prosecution's evidence is ordinarily available to the defendant. Again, because of the legal characterization of extradition under US law, discovery is not available to the subject of an extradition proceeding. Thus, with the position under US law that the facts proffered in the extradition documents filed by the requesting state must be accepted at face value, there are few if any factual issues to be resolved in the process in the courts of the US. This being the case, there is no justification for discovery and the time that vehicle usually requires.¹³ With the elimination of these three procedures from the various hearings, substantial savings in time and expense are realized in extradition proceedings with no violation of due process standards as defined under US law.

Waiver of Extradition or Consent to Be Extradited

In a process known as "simplified extradition" under some extradition treaties, an individual is advised that he or she may waive various rights under the rules of extradition and consent to be returned to the requesting country without the need for further judicial proceedings. This process is explained to a subject by the court, the individual's counsel, the prosecutor, or all three before the subject is permitted to sign a written waiver. Securing a written waiver supplies to the states involved the advantage of an obvious saving in time and expense that can otherwise be used in conducting formal proceedings. Where a waiver is obtained, the subject can be returned immediately without further formal intervention. The advantage to the subject lies in the fact that he or she returns to the requesting country and can more quickly attend to his or her defense. The disadvantage is that some of the possible protections attendant on formal extradition are waived where this avenue

is taken. This process, however, may not be recognized by the laws of some countries.

In a similar vein, a subject may consent to be extradited, wherein he or she allows the judge to certify him or her as extraditable without further court appearance. Again this method saves time and expense, while preserving the subject's rights to various extradition defenses, most particularly the rule of speciality.

Bail (Pretrial Release)

One of the most disconcerting aspects of extradition is the prospect that the subject may escape the jurisdiction of the requested state only to have to be pursued again, thus causing further expense and delay. Likewise, it cannot be gainsaid that whenever a fugitive is aware of pending detection and detention, he or she will take measures not only to escape but also to find further safe haven for ill-gotten gains. Thus, the issue of bail pending extradition proceedings is an important and sensitive aspect of extradition practice.

As previously mentioned, extradition in the United States is not considered to be a strictly criminal offense to which the various constitutional and statutory rules regarding pretrial release must apply.¹⁴ It is the case in the United States that a presumption favoring bail in extradition cases does not exist and that the opposite is in fact true.¹⁵ Bail should be denied in extradition proceedings absent "special circumstances."¹⁶

Provisional Arrest

Often in matters involving fugitives, urgent action is necessary to ensure that a fugitive in transit between countries—one who is likely to intimidate or harm witnesses or one who will dispose of his or her assets when threatened with arrest—cannot succeed in these efforts before a formal extradition request can be prepared and delivered. This is most often accomplished through the provisional arrest of these individuals, on the condition that a formal extradition request will follow. To avoid legal disputes and the possibility that this mechanism will not be available, many modern extradition treaties specify provisions allowing for provisional arrest where urgency is demonstrated. Employing this method lessens the chances of further flight by an offender before formal extradition can be accomplished.

Certification of Documents

The authentication of documents from foreign countries is often one of the most problematic and time-consuming issues in international cooperation. The US has greatly reduced this problem. It has eliminated the usual courtroom challenges to these documents by statutorily requiring that in all extradition cases, where it is certified by the US consular officer that such documents would be received for the same purposes in the requesting country, these documents "shall be received and admitted as evidence...."¹⁷ Thus, one of the most time- and labor-intensive processes in international litigation is made more efficient and less costly.

Summary

As extradition remains one of the most important mechanisms in international cooperation, the process must be constructed and utilized efficiently. While recognizing that extradition is a legal process and thereby subject to the constraints of due process under the major legal systems of the world, great strides toward a more efficient process can be made by simultaneously recognizing that the extradition process is not one in which guilt or innocence is determined, but one meant to ensure that the courts of the offended government will ultimately make such a determination. Regarding the extradition process in that light accommodates both efficiency and fairness while at the same time allowing a State Party to meet its obligations under articles 44(9) and 44(14) of the UNCAC.

Notes

- ¹ United Nations Convention Against Corruption, on the Web at www.unodc.org/unodc/crime_convention_corruption.html
- ² Id. art. 44 (9)
- ³ Thomas G. Snow, *The Investigation And Prosecution Of White Collar Crime: International Challenges And The Legal Tools Available To Address Them*, 11 Wm. & Mary Bill Rts. J. 209 (December 2002), footnote 68
- ⁴ For those interested in its structure and organization, the Office of Internal Affairs can be found on the Web at www.usdoj.gov/criminal/oia.html
- ⁵ For the sole exception to this statement see 18 USC § 3181(b)
- ⁶ 18 USC § 3181
- ⁷ UNCAC art. 44(5)
- ⁸ 18 USC § 3184

- ⁹ Extradition Treaty, 25 June 1997, US-India, art. 2(1), S. Treaty Doc. 105-30 (1997), art. 9(2) and 9(3)
- ¹⁰ The matter may be attacked collaterally through habeas corpus, but that process and its ramifications are beyond our purposes here.
- ¹¹ Federal Rules of Criminal Procedure, Rule 1(a)(5)(A)
- ¹² Federal Rules of Evidence, Rule 1101(d)(3)
- ¹³ *Gill v Imundi*, 747 F. Supp. 1028; *Surrender of Ntakirutimana*, 988 F. Supp. 1038 (S.D. Texas 1977)
- ¹⁴ 18 USC § 3142
- ¹⁵ *Beaulieu v Hartigan*, 544 F.2d 1, 2 (1st Cir. 1977)
- ¹⁶ *United States v Williams*, 611 F.2d 914, 915 (1st Cir. 1977)
- ¹⁷ 18 USC § 3190

Some common problems and practice points in the extradition process

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Extradition is often a time-consuming and procedurally complex process. The following are several common problems and some practice points that may help alleviate them.

Political Crimes

Many countries deny extradition for political crimes. This is a potential obstacle, since most developing countries experience corruption by people who hold political power. Denying extradition for political crimes gives a political hue to extradition in corruption cases that, more often than not, works to the benefit of the corrupt.

Absence of Central Authorities

Many countries now have central authorities to transmit and receive requests for extradition. The practice, however, is by no means universal. In these cases, requests must be transmitted via other means (e.g., through diplomatic channels), which can be time-consuming.

Confidentiality of Request

The requesting state may wish to keep an extradition request or the information in the request confidential. This may be necessary to effectively arrest the person sought, or to keep from divulging sensitive information. Practitioners should bear in mind that some requested states may be so corrupt that confidentiality may not be maintained, especially if the person sought is a high official. One possible solution is to minimize the number of agencies and officials that handle a request, e.g., through the use of a central authority.

Translation

Extradition treaties and legislation usually specify that an extradition request and all of the supporting evidence must be provided in a particular language. Documents therefore often have to be translated. Translation is not only time-consuming and costly, but its quality is often so poor that the success of the case is jeopardized. At the same time, requesting states often do not have qualified translators at their disposal. To overcome these problems, some countries now “outsource” the translation tasks to either a private company or the language faculty of a university. In some instances, the requested state may also be able to provide assistance.

Endorsement of Warrants

Extradition can be simplified through procedures such as the endorsement of warrants. This is a procedure in which a requesting state need not send a full extradition request and evidence that is ordinarily required under most extradition treaties. The requesting state only has to send the arrest warrant for the fugitive to the requested state. A judicial authority in the requested state then endorses the warrant, which becomes the legal basis for the fugitive’s arrest and surrender. The extradition process is expedited because the requesting state does not have to send the same amount of documentation as in a regular extradition request, and because there is no lengthy extradition hearing to examine the evidence.

Consent Extradition

The extradition process can also be simplified if the relevant treaty and legislation provide for consent extraditions. Under this process, a fugitive is allowed to waive his or her right to have an extradition hearing and consent to his or her surrender. The extradition process is expedited, again because less documentation is required and because there is no full extradition hearing.

Five practice points for effective extradition

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It has often been said that extradition is a unique area of law. The legal intricacies in this area and the differences in legal systems pose many obstacles and challenges. Nonetheless, practitioners and policy makers can adopt certain policies and practices that may eliminate, or at least reduce, many of these problems. The number of good practice points in extradition are too numerous to be exhaustively discussed here, but the following are five of the most important ones.

Understanding of Evidentiary Requirements in the Requested Country

The authorities in the requesting country may omit certain evidence from the extradition bundle because the evidence could be considered inadmissible in the requesting country. However, the requesting and requested countries may have different rules for determining admissibility. Hence, evidence that is inadmissible at trial in the requesting country may be admissible in the extradition hearing in the requested country. The omitted evidence might therefore be very useful in the extradition hearing. To avoid this problem, the requesting country should fully understand the evidentiary requirements in the requested country.

A Dedicated Central Authority for Extradition Requests

The establishment of central authorities is one of the most important developments in the practice of extradition in recent years. As noted above, extradition can be effective and efficient only if the requesting country understands and complies with the legal requirements in the requested country. Having a central authority in the requested country with a team of experts who can provide prompt advice on these issues would make compliance much easier for the requesting country. Countries should also widely publish the contact details of central authorities, e.g., on a mutually known Web site.

Coordination between Central Authorities and Law Enforcement Officials

Even when central authorities are handling a request, it is still important to ensure the participation of all other agencies and authorities who are involved in the case. Central authorities are experts in extradition law and are thus best suited to deal with the legal issues in that area. On the other hand, the law enforcement authorities of the requesting country are more familiar with the evidence in the case. Court hearings in the requested country are usually conducted by the department of justice of the requested country, not the central authority. Hence, the extradition process may involve several bodies that have different responsibilities and expertise. To effectively address problems that arise, all parties should work closely together and constantly share information and concerns.

Attendance of Case Officer of Requesting Country at Extradition Hearings

One example of coordination among the parties is for the case officer of the requesting country to attend the extradition hearing in the requested country. During the hearing, the lawyers representing the fugitive may raise arguments that the case officer could easily refute because he or she has full knowledge of the case. Any political or legal issues raised by the lawyers representing the fugitive should be referred to the legal team in the requesting country, which is likely to be more familiar with the issues raised.

Financial and Personal Profiles of the Person Sought

When a fugitive is arrested under a provisional warrant in a foreign jurisdiction, he or she very often applies for bail. In determining whether to grant bail, a judge must assess whether the fugitive is a “flight risk.” This involves considering many factors that are unrelated to the facts of the case, e.g., the background of the fugitive, personal ties, financial standing. It would therefore be useful for the requesting country to include in the extradition request financial and personal profiles of the person sought, for use in a bail hearing.

The role of liaison magistrates in international judicial cooperation and comparative law

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French Liaison Magistrate in the United Kingdom

Until relatively recently, it was not common practice for a domestic judge to consult the legislation or the jurisprudence of foreign countries before giving his decision, though he might well have been given the opportunity to find out about the legal system of a foreign country more or less distant from his own, in geographical, cultural, and linguistic terms, during his legal studies.

This interest in foreign law now appears to be one of the elements forming part of the training of young lawyers. The large number of requests for internships that are received by French embassies confirms this and suggests that future judges may well adopt a different approach from that of their predecessors toward foreign legislation.

The *École de la Magistrature*, which has ensured the initial and continuing training of French judges for more than 40 years, has developed programs with the primary objective of raising awareness of the legal systems of other countries. However, there is a difference between, on the one hand, initiation in the law of other countries and, on the other hand, the concrete and practical use that judges are able to make of such knowledge when they must give judgment in cases where the issues are not merely domestic.

However, times are changing. The development of community law and the jurisprudence of the European Court of Human Rights, and the accompanying consequences, have profoundly changed the way in which judges have, up until now, viewed the operation of their legal systems. Equally, the arrival of the Internet in courts means that judges now have access to the law of foreign jurisdictions by means of a simple click.

It could therefore be thought that most of the barriers that discouraged judges from being inspired by, or indeed from borrowing, legal concepts or solutions from their neighbors have fallen. That would, however, be a somewhat premature conclusion. In reality, even with the assistance of technology, obstacles remain, and such obstacles go beyond simple questions of linguistics. A desire to resolve a legal problem by comparing solutions already adopted in other jurisdictions can come up against the problems caused by a greater or lesser understanding of the real meaning of foreign legislation and case law. A lack of knowledge

of the local context of a country's laws and jurisprudence can lead to misunderstanding, which does not assist the reasoning of a judge curious to know how a foreign colleague would respond to a question similar to the one before him.

For a little more than 10 years now, judges wishing to find out how foreign jurisdictions tackle a novel problem have been able to receive assistance from certain colleagues. In March 1993, the first French judge was appointed to a post in the Italian judicial authorities, in Rome, primarily to improve mutual judicial assistance between France and Italy. This first appointment was followed by the appointment of another French judge in Holland. Several other posts for so-called "liaison magistrates" have been created within the judicial authorities in Canada, the Czech Republic, Germany, Morocco, Spain, the United Kingdom, and the United States. Reciprocal posts for "liaison magistrates" have been created in France at the Ministry of Justice in Paris. These appointments, made with the common objective of improving, in a general manner, judicial cooperation between countries, have encouraged other countries to embark on this route. The process was formalized by a Joint Action of the European Union of 22 April 1996.

The activities undertaken by liaison magistrates fall into four broad categories:

- Mutual assistance in the sphere of international criminal law
- Mutual assistance in the sphere of civil law
- Comparative law
- The forging of links between judicial authorities

Liaison Magistrates and Mutual Assistance in Matters of International Crime

With their knowledge of the law and procedure of both their own country and their host country, liaison magistrates tend to be in a position to remove the principal obstacle that a domestic judge is likely to encounter when he or she considers that it would be useful to consult the law of another country: the misunderstanding, created by the real or imagined differences between the legal systems. In the sphere of bilateral cooperation in criminal law, an imperfect understanding of another country's legal system can still all too often lead to a form of self-censorship. Thus, for example, a French *juge d'instruction* (examining magistrate) wishing to hear evidence from a witness who is abroad or to collect evidence (bank documents, DNA samples, etc.) may well hesitate

to send an international letter rogatory, fearing that a response is by no means certain. On the other hand, if such a judge can request assistance from a colleague posted in the relevant country, he or she can direct the request, taking into account the requirements particular to the procedure applied in that other country.

An increasingly large number of *juges d'instruction* in France now send the liaison magistrate, by fax or e-mail, letters rogatory, which are in turn forwarded to the authorities of the foreign country. Their colleague in the foreign post will accordingly wish to clarify certain points, such as the capacity in which a person is to give evidence (as a witness or as a suspect), the evidence required for obtaining a search warrant, or the identification of telephone numbers. This advisory, indeed expert, work, carried out before the transmission of the request for assistance, can preempt the need for the foreign authorities to request further information, which would otherwise delay the execution of the letters rogatory. In an urgent case, the proximity of the liaison magistrate to his colleagues in the host country enables him to draw their attention to the need to respond to the request as quickly as possible.

Similarly, liaison magistrates are able to provide information to their foreign colleagues on the requirements of French law and on the rules of procedure applicable in their country of origin. This explanation is rendered easier by their presence in the workplace of their foreign colleagues. Even in the era of the Internet, nothing compares to a direct, face-to-face exchange between two people who know each other and meet regularly.

Equally, the judge who has made the request for mutual assistance can, with the help of the colleague posted to the relevant member state, follow the execution of the request and so will not receive the impression that it has fallen into a black hole, a reproach heard all too often in the area of cooperation in international crime. Moreover, should difficulties arise in the execution of the request, the judge can swiftly be informed of the reasons for the problem. Such information is particularly useful if one or more of the people being investigated are being held in detention. How often is it heard that a *juge d'instruction* cannot finish his dossier since he is still waiting for the response to his international letter rogatory!

The formation of joint inquiry teams between two or more countries—a form of cooperation that is now indispensable in combating more effectively the new types of international organized crime—will cause liaison magistrates to increasingly play the role of facilitator and interpreter of legal systems. Even though the rules applicable in a country are often no more than the specific enunciation of common principles,

the intervention of liaison magistrates means that a rapid response can be provided to the everyday, practical problems of cooperation: changing the letter of the law is not enough unless there is also a simultaneous change of mentality. Mutual assistance must derive its strength from a great degree of confidence between operators, based on common standards that guarantee the respect of the rights and liberties of those participating in a criminal trial.

For some 10 years now, liaison magistrates have thus intervened as real “legal adapters” between different systems. Since they are integrated within the workplace of their foreign colleagues, liaison magistrates are also regularly consulted by the judicial authorities of their host country when members of such authorities have an interest in the legislation, the jurisprudence, or, more generally, the operation of the French legal system.

This role of facilitator between the procedures of different countries also encompasses extradition procedures (which underwent profound change in 2004 with the entry into force of the European Arrest Warrant). Around the world, there remain significant differences in extradition procedures among countries. Which should take priority: a provisional arrest request or an extradition request?

The answer may differ depending on the country in question. The compilation of a dossier must also take into account the avenues of appeal available in the country in question: for example, the opening of a dossier of extradition to the United Kingdom is directly dependent on habeas corpus appeals and judicial review, exercised against the decisions of the judge sitting at Bow Street in London and of the executive power (the Home Secretary). The liaison magistrate must thus play the role of adapter between two systems that are even farther apart.

The same goes for matters concerning the transfer of people who have been sentenced to imprisonment and who wish to serve their sentences in their country of citizenship.

Liaison Magistrates and Mutual Assistance in Civil Matters

Liaison magistrates also participate in the handling of bilateral cases, such as those concerning the international abduction of children by a parent (The Hague Convention of 1980). Liaison magistrates ensure that the two parties who are claiming custody of the child do not take advantage of the different legal systems to deprive one of them of the exercise of his or her rights as a parent of the child, or to render impossible any amicable agreement. Liaison magistrates thus aim to fill the gaps

between the legal systems that might otherwise present problems to the parents when they make submissions to the foreign judiciary.

Moreover, the recent creation of the European Judicial Network, including liaison magistrates, in civil and commercial matters should contribute to facilitating the execution of judicial decisions of one country in another, thereby preventing parties from “choosing” their judges.

The implementation of measures to protect those under guardianship also increasingly gives rise to the intervention of liaison magistrates, since as soon as those under guardianship move from one place to another, difficulties in the administration of their possessions arise.

The execution of letters rogatory in civil matters therefore means that the liaison magistrate’s sphere of competence is not limited to matters of criminal law.

Liaison Magistrates and Comparative Law

An area in which liaison magistrates are increasingly involved is that of the dissemination of foreign law when a national court is called to pronounce on a new legal question.

In the absence of any relevant legislative provision or case-law precedent, it is tempting (maybe even advisable) for a domestic judge to try to find out how a foreign legislature or court has addressed a certain question. This situation can often arise in the sphere of so-called “social problems.” In France, one can cite the legal problems raised by, for example: a couple’s use of a surrogate mother; an application for adoption made by a same-sex couple; the case of involuntary manslaughter of a fetus; the principle of whether compensation should be granted to children who are born handicapped, where the mother was denied the option of abortion because of a clinical error. Each time they have been consulted, liaison magistrates have informed their colleagues of the response, or absence of a response, by the foreign legislature or courts to these sorts of fundamental questions that confront our society.

Even in more so-called “classic” cases, such as those bearing on the right to respect for private life, liaison magistrates are invited to inform the court of the approach adopted by the courts in their country of origin. Obviously, it is not simply a matter of copying another judge’s decision, made in the context of a different legal system. However, the knowledge of the law applicable in another country and of its interpretation by a judge in that country undoubtedly provides valuable assistance in

reaching a decision. Liaison magistrates do not content themselves with simply providing a copy of the relevant judgment, which could be of limited use to a foreign court. Rather, they accompany their response with personal commentary, enriched by their knowledge of the legal system of their host country.

Not so long ago, when a lawyer cited foreign legislation or case law, it was considered an admission that he lacked a serious argument. That era appears to have been consigned to history—a welcome development. At their modest level, liaison magistrates thus participate in the growing convergence of legal cultures.

The “Rapprochement” of Judicial Authorities

Knowledge of the particular characteristics of a foreign legal system can assist in preventing misunderstandings, assuaging anxieties born of ignorance, and facilitating exchanges between those participating in the civil and criminal systems.

Each year, internships are organized to allow lawyers, judges, or public prosecutors to discover or to deepen their knowledge of the operation of justice in other countries. Evidently in those countries where there is a liaison magistrate, the latter will intervene directly, both in setting up the internship and in choosing the program. In this endeavor, liaison magistrates benefit from the valuable assistance provided by organizations that forge links with different legal cultures, such as associations of lawyers, schools, universities, or training institutions. In addition, the goodwill shown by many lawyers in welcoming their foreign colleagues and in helping them to get to know their legal system plays an important role.

Liaison magistrates also participate in the preparation of bilateral negotiations concerning, for example, the implementation of a convention on mutual judicial assistance in criminal matters with a view to forging links between the positions of the countries in question. During the elaboration of these new texts, liaison magistrates are asked to shed light on the difficulties that they have observed in the course of their everyday work, and their views enable the implementation of concrete and useful solutions.

At the point at which linguistic and textual barriers disappear, the barrier existing too often in the minds of those participating in the legal systems must also be removed, to give way to confidence: in their own way, liaison magistrates are dedicated to achieving this aim.

Chapter 5

Working cooperatively to trace, freeze, and repatriate the proceeds of corruption

The tracing, freezing, confiscation, and repatriation of proceeds of corruption present unique challenges and raise issues such as the disposition of seized assets and the rights of third parties and victims. The UN Convention against Corruption (UNCAC) obliges States Parties to provide mutual legal assistance in relation to the tracing, freezing, confiscation, and repatriation of the proceeds of corrupt activity. The ADB/OECD Anti-Corruption Action Plan also encourages governments to take concrete steps in this area. Despite these instruments, the practice of international cooperation concerning the proceeds of criminal activity, including corruption, remains challenging.

The requested state is sometimes a source of problems, according to the participants and experts in the seminar. Hasan Saqib Sheik, Deputy Director, National Accountability Bureau, Pakistan, noted that the procedure for obtaining MLA to seize, confiscate, and repatriate proceeds is often beset with excessively complex requirements. Even more problematic may be the attitude of the foreign state, which is sometimes completely indifferent to a request for repatriation. Some states have sought the assistance of private lawyers in the jurisdiction in which the assets are found, but this process is usually extremely costly.

Nevertheless, practitioners seeking MLA can take certain practical steps to improve the likelihood of receiving cooperation. Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland, discussed extensively the key to drafting a request for assistance in relation to proceeds of crime. Participants added other helpful observations, such as the need to consider the nature of an asset and the impact of freezing an asset on third parties.

There are also steps of an institutional nature that can facilitate assistance. According to Sean Mowbray, Senior Legal Officer, International Crime Cooperation Branch, Attorney-General's Department, Australia, it is vital that both requesting and requested states have the necessary infrastructure to deal with the proceeds of crime. Mr. Mowbray also related Australia's positive experience of using multinational task forces to investigate the proceeds of crime. Prof. Syed Noh Syed Ahmad, Faculty of Accounting, MARA University of Technology, remarked that knowledge of forensic accounting can result in more effective cooperation. Unfortunately, as some participants pointed out, Asia-Pacific countries may not all have the necessary resources to implement these institutional measures. In this regard, assistance from the UN or wealthier countries may be necessary, especially in large, complex cases.

Australia's approach to international cooperation concerning proceeds of corruption

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Transnational financial transactions have become increasingly easy to conduct. Criminals, including those involved in corruption, have taken advantage of this situation by laundering the proceeds of their crimes internationally. For this reason, the confiscation and repatriation of the proceeds of corruption through MLA has become a major topic of discussion in recent years. This paper will discuss Australia's legal framework and experience in dealing with these issues, with a view to sharing the lessons learned with other jurisdictions.

International Action against Corruption

In recent years, the international community has reacted vigorously to the transnational laundering of the proceeds of corruption. This is evidenced by the creation of international initiatives that deal with this issue. Prime examples are the United Nations Convention against Corruption (UNCAC) and the UNODC Global Programme against Corruption.

A significant portion of the UNCAC is devoted to international cooperation and asset repatriation. Article 46 of the convention covers mutual legal assistance in general. MLA may be requested for, among other things, identifying, freezing, and tracing the proceeds of corruption, and recovering assets. Articles 54 and 55 relate specifically to proceeds and oblige States Parties to restrain or forfeit the proceeds of corruption in response to a request from another State Party. Article 57 deals with the return of confiscated assets. Under certain circumstances, States Parties are required to return or to consider returning confiscated assets to a requesting State Party or another party.

There are also instruments specific to the Asia-Pacific region, such as the ADB/OECD Anti-Corruption Action Plan for Asia and the Pacific. Pillar 2 of the Action Plan urges countries to take effective measures to actively combat bribery by "strengthening bilateral and multilateral cooperation in investigations and other legal proceedings by developing systems which—in accordance with domestic legislation—enhance...cooperation

in [the search and discovery of]...forfeitable assets as well as [the] prompt international seizure and repatriation of these forfeitable assets." Also relevant to Asia-Pacific is the APEC Anti-Corruption and Transparency Experts Task Force.

The development of these various initiatives is highly encouraging. At the same time, it will be important for these initiatives to work together and avoid duplication of efforts.

How Can Countries without Domestic Infrastructure Recover Proceeds of Corruption?

Despite the development of these instruments, international cooperation concerning the proceeds of crime remains insufficient in practice. To be effective, a country must have a legal infrastructure that includes laws on the proceeds of crime (including MLA), anti-money laundering laws and practices, a functioning financial intelligence unit (FIU) to identify and track funds, and adequate human experience and expertise. Many countries are still completing their infrastructure in this regard, and some lack even the most basic framework to make or respond to MLA requests on proceeds-of-crime issues. The situation will take time to improve.

In the absence of an adequate domestic infrastructure, countries may face significant difficulties in recovering the proceeds of corruption. Perhaps the only option is international cooperation to recover proceeds that have been transferred to other countries. Even then, there must be early notification and consultation with the other country, since the proceeds can be moved elsewhere very quickly.

Case Study

The following hypothetical case study demonstrates the operation of Australia's infrastructure on the proceeds of crime and MLA.

Mr. Smith embezzles millions of dollars from a company in his home country, but leaves that country when the offenses are exposed. A part of the proceeds from Smith's criminal activity is transferred to Australia. Smith is then arrested in Australia, after which he begins moving his assets abroad. Smith's home country notifies Australia that it would like Smith's assets confiscated and returned. Unfortunately, this notification comes too late to prevent many of Smith's assets from leaving Australia. The lack of information exchange between the two countries has hindered the ongoing investigation linking Smith to corruption, and the tracking of assets.

Nonetheless, Australian agencies respond by quickly forming a “task force” with agencies from Smith’s home country to facilitate cooperation and pooling of information between countries. The task force identifies fund transfers where Smith’s assets enter and leave Australia. Accordingly, Australian authorities obtain restraining orders under civil forfeiture laws to freeze assets that are still in Australia. These assets are later forfeited to the Australian Government and presented to the government of Smith’s home country. Importantly, the Australian money laundering offense is the basis for the restraining and forfeiture orders, rather than the corruption offenses in Smith’s home country.

The task force, however, does not stop at Australia’s borders. It tracks Smith’s assets that have left Australia by using Australian MLA relationships with third countries. Australian authorities then obtain restraining orders in Australian courts over Smith’s assets that are now abroad, again using the Australian money laundering offense as the basis for the orders. The Australian orders are enforced in the foreign country through direct registration in the foreign country or the issuance of additional restraining orders by the courts in the foreign country.

Civil Forfeiture in Australia

As the case study shows, civil forfeiture is a significant weapon in Australia in the recovery of proceeds of corruption. Under the Proceeds of Crime Act of 2002, forfeiture may be ordered if a court is satisfied on a balance of probabilities that assets are proceeds of a criminal offense, including a foreign offense. Forfeiture may be ordered even though no individual has been charged or convicted. A suspect does not even have to be in the same jurisdiction as the assets for confiscation. Forfeiture and extradition proceedings can also be taken in parallel.

A “Task Force” Approach

The case study also illustrates the “task force” approach that is often used in Australia. The benefits to this approach are many. Task forces can improve the flow of information among member countries and enable the pooling of all relevant information. They can also bring particular benefits to countries with limited powers to restrain or forfeit the proceeds of corruption under their domestic law. Countries can take advantage of other member countries’ proceeds-of-crime laws and MLA relationships with third countries.

The task-force environment also generates some desirable long-term effects. It facilitates a transfer of skills among officers from member countries and fosters an understanding of the complexities of tracing and confiscating the proceeds of crime. Officers from countries with little knowledge of the proceeds of crime can draw on the experience of their counterparts from other countries. The task-force environment also demonstrates countries' willingness to recover proceeds regardless of their location. This in turn spreads the message that there is "no safe haven for proceeds of corruption."

Lessons Learned

The case study also demonstrates some lessons about international cooperation concerning the proceeds of crime. The case clearly shows that early notification and consultation is essential. Countries should be ready to restrain identified proceeds of corruption *before* arresting a suspect. This requires early liaison between the affected countries to identify the proceeds. Without early consultation, the proceeds can be moved out of reach before a restraining order is issued.

Another important lesson is that there must be open communication of information between countries. Without open flow of information *in both directions*, investigators and prosecutors will work with only half the picture, thus giving criminals an inherent advantage. The necessary information that must be exchanged includes information linking a suspect to corrupt activity; details of the suspect's bank accounts, business dealings, family members, etc.; information on the movement of assets since the time of the offense; and the connection between the corrupt activity and the assets identified. In this regard, the early work of the FIU in the source country is vital.

Finally, the case study shows the advantages of a broad money laundering offense. It is not always possible to rely on a foreign or domestic corruption offense as a basis for seeking a confiscation order, e.g., where limitation periods have expired. The money laundering offense may provide an appropriate alternative basis for such an order. Ideally, a money laundering offense should cover a broad range of predicate offenses, both domestic and foreign, including corruption offenses. The offense should cover any money or other property derived or realized, directly or indirectly, from the commission of the offense. It should also cover any form of conduct in relation to that money or property.

Conclusion

To conclude, law enforcement now has at its disposal major practical tools in the fight against corruption. These tools must now be used to deny safe haven to the proceeds of corruption. With luck, these tools will allow the proceeds of corruption to be returned to your country.

International cooperation to trace, freeze, and repatriate the proceeds of corruption: Pakistan's perspective

Hasan Saqib Sheik

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The repatriation of the proceeds of corruption has been a focal point of discussion in the international community in recent years. Pakistan has had the experience of seeking the repatriation of such proceeds from another country. That experience demonstrates a number of inadequacies in the present system.

First, the repatriation process is often beset with excessively complex requirements for MLA. These range from legal requirements such as dual criminality, to procedural requirements such as certification and authentication of documents and court orders, and proof of conviction. Years pass while the requesting state wades through this morass of procedural rules, giving plenty of opportunities for criminals to move the assets to another haven.

Less tangible are problems with the attitude of the foreign state. Requested states are often completely indifferent to a request for repatriation. Accordingly, they place on requesting states the entire onus of complying with the legal requirements of the requested states. In addition, they sometimes require the requesting state to identify the proceeds of crime in the requested state. Consequently, there has been a proliferation of private asset tracing companies that charge the requesting states heavily for this purpose. If a requesting state wants to resort to civil remedies for recovery, there is usually little or no technical support from the requested state. More often than not, requesting states must hire private lawyers in the jurisdiction in which the assets are found. In the end, the recovery process becomes prohibitively costly for all but the cases involving extremely large assets.

Even when the proceeds of crime are seized and confiscated in the requested state, a requesting state may face even greater difficulties in seeking the repatriation of the assets. The lack of will of the requested state is often again the source of the problem. Only in rare instances will a requested state consider sharing the income or assets generated from the proceeds of crime with the requesting state.

To conclude, international cooperation in the freezing, forfeiture, and return of the proceeds of corruption is not sufficient. The creation of

instruments such as the United Nations Convention against Corruption is a step in the right direction, but even then many countries have yet to sign or ratify the convention. Until countries demonstrate a greater will to repatriate or share confiscated assets equitably, these problems will persist.

Particular issues in tracing, freezing, and repatriating proceeds of corruption

Jean-Bernard Schmid

Investigating Magistrate, Financial Section, Geneva, Switzerland

The general practical measures that facilitate MLA are equally vital when seeking cooperation in relation to the proceeds of corruption. Nevertheless, practitioners who venture into this area may face some additional challenges.

At the outset, particular care must be taken when drafting a request for assistance. Precision is key. When tracing funds, an MLA request should cover not only the owner of the account but also any beneficial owners and persons who hold power of attorney. The request should clearly indicate what is sought, e.g., client profiles, customer due diligence information, audit reports, notes, correspondence, electronic data. When transactional information is sought, it may be preferable to ask only for information concerning transactions above a certain limit. This could reduce the volume of evidence to be gathered and hence decrease the delay in executing the request. Time frame is also very important. Requests should state precise dates and periods for which information is sought. These periods ought to be sufficiently large to provide the necessary information, but not too large so as to turn the request into a “fishing expedition.”

Particular care must be taken when executing a request to freeze assets. Before executing the order, it may be prudent to ascertain the nature of an account and the impact of freezing on other entities. For instance, freezing a current account belonging to an operational company could unduly affect the account holder’s business operations.

A common legal obstacle is the requirement of a conviction or prosecution. Some countries will grant MLA in relation to proceeds only if the requesting state has convicted or has begun proceedings against an individual. Practitioners should ascertain whether such requirements exist, and include such information in the request.

Finally, requesting states should consider to whom the confiscated assets should be repatriated. Some countries confer “victims” of corruption with a right to seek compensation, though the definition of “victim” varies. Particularly problematic is when the assets are proceeds of corruption committed by heads of state that are still in power. In these situations, a requested state may agree to repatriate the assets subject to certain conditions.

The role of forensic accounting in MLA concerning proceeds of corruption

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It may be surprising to some that forensic accounting is an important part of MLA, extradition, and forfeiture of assets. By definition, findings from a forensic accounting investigation can be used in the courts of law. They thus become an important part of the documents to be submitted in MLA, extradition, and asset forfeiture cases.

Forensic accounting is also a key component of the capacity-building programs conducted by the Anti-Corruption Agency Malaysia (ACA). Recognizing the importance of forensic accounting skills, the ACA pioneered forensic accounting training programs in 2002 as part of its capacity-building process in the fight against corruption. A number of its officers have now undergone forensic accounting training, including 25 who have taken a 7-week program in advanced forensic accounting. It must be emphasized that a majority of the officers do not have formal training in accounting.

The training methods emphasize a holistic and hands-on approach. The program is conducted by a group of academics and practitioners, including experienced officers from the ACA, police, and the Attorney General's office. The officers who have received training are now deployed throughout Malaysia.

The most important topics covered in the training program are:

- Accounting basics
- Forensic accounting analytical methods and tools
- Laws relating to evidence

The training of ACA officers in forensic accounting is a continuing process. The recently established Malaysia Anti-Corruption Academy (MACA) will offer this course as part of its international cooperative efforts. Those who are interested in attending this program should contact MACA. With the experience that ACA has gained in building capacity in the area of forensic accounting, the training program will be of enormous benefit to attendees.

However, it must be emphasized that knowledge of forensic accounting is not an end in itself. Forensic accounting skills must be

seen as part of the overall investigative skills that investigators must possess.

In conclusion, those who are committing corruption are becoming more sophisticated in their attempts to hide the proceeds of corruption, both domestically and internationally. Tracing and recovering these proceeds call for a new skill set that includes forensic accounting. Such knowledge is in fact critical rather than optional. Building this capacity by offering training programs through international cooperation will contribute enormously toward achieving the theme of this seminar: "Denying Safe Haven to Corruption and Its Assets: Enhancing Asia-Pacific Cooperation on MLA, Extradition, and the Recovery and Return of the Proceeds Of Corruption."

Chapter 6

Strengthening international cooperation to curb transnational bribery

Corruption has become increasingly international in nature. Corrupt officials seek safe havens abroad for themselves and the proceeds of corruption, while bribers take advantage of international financial services to facilitate their crimes. Economic globalization, however, has added a further international dimension to corruption. As international trade and investment have increased, so too have the opportunities for businesses to operate abroad and to bribe officials in a foreign country. Many states unfortunately do not criminalize the bribery of officials of another state. Alarming, some nations even condone or encourage such behavior, such as by allowing businesses to deduct these bribe payments from taxes. Many businesses have thus availed themselves of the opportunity to bribe foreign public officials to gain access to foreign markets. This trend not only raises serious moral and political concerns, but also undermines good governance and economic development, and distorts international competitive conditions.

Transnational bribery of this nature can touch on Asia-Pacific countries in several ways. Many countries in the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific are major players in international trade and/or receive significant amounts of foreign investment and development assistance. The officials of these countries are in regular contact with foreign businesses and are thus at risk of being bribed. At the same time, as many Asia-Pacific economies become more

developed, more businesses from these countries have begun to operate overseas and could therefore commit transnational bribery themselves. Furthermore, the region is home to several significant international financial centers, which could be used to launder the proceeds of, or to facilitate, transnational bribery. For these reasons, Asia-Pacific countries could well find themselves in need of seeking and providing extradition and MLA in transnational bribery cases.

Transnational bribery, because of its very nature and prevalence, calls for a multilateral, coordinated response, which led to the creation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The convention's 36 parties comprise some of the world's most internationally active economies, including three from Asia-Pacific (Australia, Japan, and Korea). Parties to the OECD Convention have agreed to outlaw the bribery of foreign public officials and to extradite perpetrators of such offenses. They have also agreed to provide prompt and effective MLA in such cases to the fullest extent possible under their laws and relevant treaties and arrangements. More recently, several Asia-Pacific countries have signed or ratified the UNCAC, which also requires States Parties to criminalize the bribery of foreign public officials. The UNCAC's provisions on extradition and MLA, described in earlier chapters, apply fully to this offense.

While legal frameworks for international cooperation in transnational bribery are beginning to fall into place, problems remain in the practice and enforcement of these rules. As Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland, observed, prosecutions of transnational bribery remain comparatively rare. Even when allegations of such crimes arise, a lack of political will and extraneous considerations (such as national economic interests) often hinder investigations and prosecutions. Practitioners can employ some practical measures to reduce these problems, but more effective remedies may well require the action of policy makers.

Particular challenges in providing mutual legal assistance in transnational bribery cases

Jean-Bernard Schmid

Investigating Magistrate, Financial Section, Geneva, Switzerland

One of the main obsessions of international business is to lift trade barriers between countries, so that nationals and foreigners play by the same rules when buying and selling goods and services. The benefits expected are efficiency in transactions, cheaper goods, faster service, better quality, and happier consumers. So why does the judiciary not do the same? Why do countries refuse to open their national borders to foreign prosecutors who are investigating crime? What are the “particular challenges” we face in providing international cooperation to prosecute corrupt practices?

Legal problems do exist. It is not easy to coordinate two or more judicial systems and traditions. National legislation is not always up to date with the technicalities of active bribery of foreign public officials, and fighting corruption is only one priority among many others. Law enforcement authorities lack human and financial resources. Furthermore, MLA procedures are slow. It takes a few hours to move a million dollars from, say, New York to Jersey via Singapore, Dubai, Hong Kong, China, or Geneva, but a few years for a prosecutor to trace those funds, not to mention to forfeit them.

Nevertheless, prosecutors still achieve positive results because states are powerful entities. The international legal framework is being adapted to the actual necessities of prosecuting corrupt practices. International cooperation is developing quickly and becoming more efficient. The UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions can be considered major breakthroughs in that respect. They send a clear message that not only is corruption no longer acceptable, but the signatory states will take action to prosecute it.

So what are the next challenges? Practitioners continue to run into difficulties that cannot be solved by revising criminal codes or MLA treaties and conventions. How can law enforcement cooperate when it must take on powerful people and structures, politicians, and enormous wealth? How can it cooperate with a judiciary that is known to be corrupt? How readily will countries cooperate when it implies hurting the realities

of international business or restricting the ability of each country to secure important contracts for its economy?

Practitioners can take some tactical measures when faced with these difficulties. It is important to obtain as much information as possible concerning who in the foreign state may be trusted and what the sources of reliable information are. Embassies in the foreign state and FIUs can sometimes answer these questions. Practitioners can also consider making the investigation public—to the extent allowed under the law—since the press and publicity could force the foreign state to act. It may also be advantageous to involve multiple countries in a case, as is often possible when tracing funds. Countries are usually less inclined to refuse cooperation when more countries are involved. When investigating heads of state, in addition to all of these methods, practitioners should consider also prosecuting intermediaries, to increase pressure on those in power.

Another challenge faces practitioners when the judicial systems and practices of a requesting state do not guarantee basic human rights to an accused. For instance, cooperation will be granted only if the requesting state respects an accused's right to a fair, public hearing before an independent tribunal in which the accused knows the charge that he or she has to meet and has adequate time to prepare a defense. For a practitioner who is faced with requests from a country that does not seem to respect these basic rights, the best approach is probably to treat each case on its merits, rather than systematically reject every request from the country.

Practitioners also face difficulties because of the modus operandi of international corruption. Companies that bribe do so increasingly by outsourcing the payment of "commissions" and "success fees" to local agents, so as to sever all direct ties to local "decision makers." When the company is investigated for corruption, it will typically deny responsibility by claiming that the local agent has been cleared by its compliance department. In these situations, investigators should request MLA to find out the identity of the local agent, his or her operations and connections, etc. Such information is vital to the investigation.

To conclude, the investigation of transnational corruption raises many delicate questions. No single country can pretend to be immune from having to face at least some of them. It is hoped that policy makers will consider these questions as keys to a necessary upgrade of our prosecution techniques to address the roots of structural corruption.

Chapter 7

Application of principles and solutions:

A case study

At the end of the seminar, the experts presented the participants with a hypothetical case study that included many of the obstacles to international cooperation discussed in the seminar. The experts then asked the participants for their views on how to seek international cooperation in the case. The following is the case study provided to the participants, followed by questions posed by the experts and the responses of the participants.

The Kingdom of Myland has decided to build a power plant to meet the country's energy needs. A state-owned corporation, Power Development, is responsible for the project. This company employs Mr. Engin, a former head of the main labor union in Myland, as Chief Engineer, and Mrs. Proc (P), a citizen of Bankland, as Procurement Manager. The contract for the construction of the plant, worth USD330 million, is awarded to Cheap Construction, a foreign company from the Republic of Techland.

Ten months into the construction, the roof of the main building of the plant, made of substandard material, collapses. An audit into the procurement exercise reveals that Mr. Engin rejected all other offers for the construction of the power plant as "technically unacceptable," even though some of the rejected offers met the requirements and were cheaper than the bid of Cheap Construction. Further, it turns out that the bid from "Cheap Construction" was hand-delivered through Mr. Lobby, a freelance lobbyist from the Republic of Techland. Mrs. Proc

accepted the bid 1 day after the deadline for the submission of bids, in violation of Myland's procurement rules.

Preliminary investigations reveal the following:

- Shortly after the contract was awarded, Mr. Engin bought—without a loan—a brand-new luxury car, worth USD400,000. Mr. Engin's income or legitimate assets do not by any means allow such a purchase.
- A search of Mrs. Proc's office reveals a record of a wire transfer from Mr. Lobby in the amount of USD2 million to an account at the Tricky Bank in the Republic of Techland. The account is identified by number and the recipient is listed as "Fly by Night Co." Shortly after the search is conducted, Mrs. Proc flees the jurisdiction to an unknown location.
- A search of Mr. Lobby's hotel room reveals a record of an account number at a bank in Bankland, an offshore financial center reputed to have strong bank secrecy laws. The document is incomplete and the bank where the account is held cannot be identified. The search also produces a document that appears to be a copy of a part of a contract between Mr. Lobby and the CEO of Cheap Construction. The contract mentions Mr. Lobby undertaking to represent the company in a commercial transaction in Myland, but the last two pages of the contract, including presumably details of the fees and the signature page, are missing.

Myland has no bilateral MLA treaties in force, while the laws of Bankland and Techland require a treaty for the rendering of MLA. Myland and Bankland are parties to the UN Convention against Corruption (UNCAC). The Republic of Techland is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions but not to the UNCAC.

With the evidence gathered to date, an investigation has been opened in Myland with respect to Mr. Engin, Mrs. Proc, and Mr. Lobby for a range of offenses. You are working for the competent prosecuting authority of Myland on this case and you are responsible for the international evidence gathering and extradition issues.

1. In order to gather evidence of bribery and to trace assets, you need to obtain from Bankland records of the account number found in Mr. Lobby's hotel-room. How would you go after those records, and

what would be the key content of your request? Assume that, despite your hard efforts, the initial response from Bankland is a one-line refusal based on bank secrecy. What action would you take in response?

To determine the identity of the bank, it is advisable to first resort to informal channels of assistance. One approach is to ask the FIU in your country to inquire with its counterpart in Bankland. You should also make inquiries through the police channel and perhaps Interpol. If these methods fail, the next step may be to request formal MLA under the UNCAC.

Your request should include the relevant provisions of law in Myland, the partial account number, the dates and amounts of the transaction, and the facts of the case. You should also indicate that you are seeking all account and customer due diligence information involving Mr. Engin, Mrs. Proc, Mr. Lobby, Cheap Construction, and Fly by Night Co. Specify an appropriate time period for the records, bearing in mind that older records make take longer to be produced. It may be prudent to expressly ask Bankland to keep the request confidential and to instruct the bank to do the same. Specify also any requirements for certification and authentication that may be necessary to render the records admissible at trial. Finally, set a reasonable deadline for the production of documents.

On the other hand, there may be items that you should not include in the request. There is probably no need to specify whether the authorities in Bankland should obtain a search warrant or a production order; that is a matter that the authorities in Bankland should decide. It is also most likely premature to ask for the account to be frozen, unless it takes a long time for the documents to be produced.

In response to Bankland's one-line refusal based on bank secrecy, you could remind Bankland of its international obligations to provide MLA under the UNCAC, and possibly under other international instruments like the 40 Recommendations of the Financial Action Task Force. Refer as well to the prohibition against refusing to render MLA because of bank secrecy under art. 46(8) of the UNCAC. Finally, try to ascertain the precise extent of the bank secrecy provisions under Bankland's laws.

2. Mr. Engin leaves Myland and flees to Bankland. Subsequently his spouse (who was left behind) comes forward and provides a statement indicating that Mr. Engin received the money for the car

from a shady-looking character who identified himself as an official of Cheap Construction. As the statement from the spouse is not admissible under your legal system, you charge Mr. Engin with “unjust enrichment.” You are preparing a request for Mr. Engin’s extradition to Bankland (a common law country with traditional evidence requirements) on the understanding that an offense of unjust enrichment does not exist and in fact is constitutionally prohibited. You are still interested in pursuing extradition. What would be the content of your extradition request and how would you address the issue of dual criminality?

The contents of the extradition request should include information on Mr. Engin’s identity (name, description, photograph, fingerprints, etc.) and his whereabouts. It should also include all of the facts of the case and not only the evidence relevant to the offense of “unjust enrichment.” This is particularly important in the case because of the problem with dual criminality.

Concerning the statement of Mr. Engin’s spouse, you should try to find out the relevant rules of evidence in Bankland. It is possible that the statement may be admissible in an extradition hearing in Bankland. However, if you do include the statement in the request, it is advisable that you indicate that the statement is not admissible in your jurisdiction.

As for dual criminality, you could ask Bankland to waive this requirement. You should also ask the authorities in Bankland to determine whether the totality of the conduct underpinning the request amounts to a different offense in Bankland.

3. You need to obtain account-holder information and records regarding the account held in Tricky Bank under the name of Fly by Night Co. in Techland. How would you go after those records? Outline briefly the steps you would take and the key content of any request.

As there is no treaty between Myland and Techland, assistance will most likely be based on domestic legislation. Techland may require Myland to provide an assurance of reciprocity. One alternative is to hire a private document tracer to try to obtain the records.

The content of the request should again include all of the information concerning the case. You should again seek all account and customer due diligence information involving all of the actors in the case, not just Fly by Night Co.

4. You have just heard through intelligence channels that Mrs. Proc has been located in Bankland. You seek her provisional arrest and extradition on a passive-bribery charge. The authorities in Bankland tell you that Mrs. Proc is a national of Bankland and that Bankland's constitution forbids the extradition of nationals. What action might you pursue to ensure that Mrs. Proc is brought to justice?

Since there are no treaties between Myland and Bankland, you will again have to resort to domestic legislation as the basis for extradition. To overcome the obstacle presented by Mrs. Proc's nationality, you should ask Bankland to prosecute her domestically. Alternatively, Myland may offer to seek Mrs. Proc's extradition on the condition that, if she is convicted, she will be sent to Bankland to serve her sentence.

Appendices

Seminar Agenda

Day 1: Tuesday, 28 March 2006

9:00–10:30

Opening plenary

Welcome remarks:

R. Rathakirushnan, Director, Malaysia Anti-Corruption Academy

Opening remarks by the host:

Hon. Dato' Seri Mohamed Nazri Bin Tan Sri Abd Aziz, Minister in the Prime Minister's Department

Opening remarks and seminar overview by the Secretariat:

Raza Ahmad, ADB Coordinator, Asia-Pacific Anti-Corruption Initiative, Governance and Regional Cooperation Division, ADB

Frédéric Wehrlé, Coordinator Asia-Pacific, Anti-Corruption Division, OECD

Brief roundtable introduction of participants

10:30–12:00

Plenary I – International cooperation in corruption matters in the Asia-Pacific region: An overview of policies, initiatives, and applicable regional and international instruments in 25 countries

Introduction to the seminar: A brief presentation of mutual legal assistance and extradition in Asia-Pacific, including international initiatives and instruments, followed by discussion among participants

Presenters:

William Loo, Legal Analyst, Anti-Corruption Division,
OECD

Kimberly Prost, Chief, Legal Advisory Section, Treaty and
Legal Affairs Branch, UN Office on Drugs and Crime
(UNODC)

12:00–13:00

Lunch

13:00–14:45

**Breakout groups, session 1 – Thinking outside the box:
informal and alternative measures for mutual
cooperation and assistance**

Exploring forms of cooperation beyond formal bilateral
and multilateral arrangements, including assistance at law
enforcement level, civil procedures, letters rogatory, and
use of specialized bodies (financial intelligence units,
securities authorities, tax authorities)

Presenter:

Seehanat Prayoonrat, Acting Deputy Secretary-General,
National Counter Corruption Commission (NCCC),
Thailand

Moderator Group 1: Jean-Bernard Schmid, investigative
magistrate, Geneva, Switzerland

Moderator Group 2: Kimberly Prost, Chief, Legal Advisory
Section, UNODC

14:45–15:00

Coffee Break

15:00–15:30

**Breakout groups, session 1 – Report on breakout
groups' discussion (in plenary); Report by moderators on
breakout groups' discussions.**

15:30–17:15

**Breakout groups, session 2 – Overcoming legal
challenges**

**A: Overcoming legal challenges in mutual legal
assistance**

Examination of legal preconditions to MLA
(e.g., reciprocity, dual criminality, severity of the offense,
fishing expeditions) and grounds for denying assistance
(e.g., political offenses, capital punishment).

Presenter:

Kimberly Prost, Chief, Legal Advisory Section, UNODC

Moderator, Group 1: Bernard Rabatel, French liaison magistrate in the United Kingdom

Moderator, Group 2: Jean-Bernard Schmid, investigative magistrate, Geneva, Switzerland

Day 2: Wednesday, 29 March 2006

9:00–10.45

Breakout groups, session 2 – Overcoming legal challenges (cont'd)**B: Overcoming legal challenges in extradition**

Examination of legal preconditions to extradition and grounds for denying extradition

Presenters:

Mr. Umar Saifuddin Bin Jaafar, Deputy Public Prosecutor, International Affairs Division, Attorney-General Chambers, Malaysia

Mr. Tan Huanmin, Director, Department of Laws and Regulations, Ministry of Supervision, P.R. China

Moderator, Group 1: Charles A. Caruso, Regional Anti-Corruption Advisor, American Bar Association/Asia Law Initiative

Moderator, Group 2: Merceditas Navarro-Gutierrez, Ombudsman of the Republic of the Philippines

10:45–11:00

Coffee Break

11:00–11:30

Breakout groups, session 2 – Report on breakout groups' discussion (in plenary); Report by moderators on break-out groups' discussions

11:30–13:15

Breakout groups, session 3 – Working together and intensifying actions to strengthen MLA and extradition**A: Challenges and solutions in the practice of MLA**

Practical tips to deal with issues that arise in almost every request for MLA, such as delay, drafting of requests, form

and legality of evidence produced by a requested state, participation of the requesting state in the gathering of evidence, concurrent proceedings in the requested state, appeals.

Presenter:

Mr. Jean-Bernard Schmid, investigative magistrate,
Geneva, Switzerland

Moderator, Group 1: Kimberly Prost, Chief, Legal Advisory
Section, UNODC

Moderator, Group 2: Sean Mowbray, Mutual Assistance
Unit, Attorney-General's Department, Australia

13:15–14:15

Lunch

14:15–16:00

**Breakout groups, session 3 – Working together and
intensifying actions to strengthen MLA and extradition
(cont'd)**

**B: Challenges and solutions in the practice of
extradition**

Practical tips to deal with issues that arise in almost every
request for extradition, such as the preparation of
supporting evidence and required documentation, requisite
formalities, the use of liaison and coordination personnel.

Presenter:

Bernard Rabatel, French liaison magistrate in the United
Kingdom

Moderator, Group 1: Charles A. Caruso, Regional Anti-
Corruption Advisor, American Bar Association/Asia Law
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Moderator, Group 2: Hasan Saqib Sheikh, Deputy
Director, National Accountability Bureau, Pakistan

Moderator, Group 3: Gerry Osborn, Assistant Director of
Operations, Independent Commission against
Corruption, Hong Kong, China

16:00–16:30

Coffee Break

16:30–17:00 **Breakout groups, session 3** – Report on breakout groups’ discussion (in plenary); Report by moderators on breakout groups’ discussions

Day 3: Thursday, 30 March 2006

9:00–10:45 **Breakout groups, session 4 – Working cooperatively to trace, freeze, and repatriate the proceeds of corruption**

Specific challenges and solutions in tracing, freezing, recovering, and disposing of the proceeds of corruption

Presenter:

Sean Mowbray, Mutual Assistance Unit, Attorney-General’s Department, Australia

Moderator, Group 1: Hasan Saqib Sheikh, Deputy Director, National Accountability Bureau, Pakistan

Moderator, Group 2: Jean-Bernard Schmid, investigative magistrate, Geneva, Switzerland

Moderator, Group 3: Syed Noh Bin Syed Ahmad, Professor of Accounting, University Teknologi Mara

10:45–11:00 Coffee Break

11:00–11:30 **Breakout groups, session 4** – Report on breakout groups’ discussion (in plenary); Report by moderators on breakout groups’ discussions

11:30–12:15 **Plenary 2: Strengthening mutual legal assistance to curb transnational bribery**

Particular challenges in providing mutual legal assistance associated with transnational bribery

Presenter: Jean-Bernard Schmid, investigative magistrate, Geneva, Switzerland

12:15–13:30 Lunch

13:30–15:00 **Breakout groups, session 5 – Application of principles and solutions: A case study**

Analysis of a case study to review the principles and issues discussed in the seminar.

Moderator, Group 1: Kimberly Prost, Chief, Legal Advisory Section, UNODC

Moderator, Group 2: Jean-Bernard Schmid, investigative magistrate, Geneva, Switzerland

15:00–15:15 Coffee Break

15:15–16:15 **Breakout groups, session 5** – Report on breakout groups' discussion (in plenary); Discussion in plenary of the analysis of the case study; demonstration of request-writing tool

16:15–16:30 **Closing plenary**

Closing Remarks by Dato' Seri Zulkifli bin Mat Noor, Director General, Anti-Corruption Agency of Malaysia

Closing Remarks by the Secretariat of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

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