

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

ASSET RECOVERY AND MUTUAL LEGAL ASSISTANCE IN ASIA AND THE PACIFIC

**Proceedings of the 6th Regional Seminar on
Making International Anti-Corruption Standards Operational**

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Foreword

Since its inception in 1999, the Asian Development Bank/Organisation for Economic Co-operation and Development (ADB/OECD) Anti-Corruption Initiative for Asia and the Pacific supports its members in strengthening their policies, frameworks, and practices to fight corruption. Driven by the demand and priorities of its members, the Initiative fosters regional policy dialogue and analysis and helps in building capacity through regional technical seminars.

Obtaining legal assistance for investigations and prosecutions of corruption cases from other countries has been identified in the Asia and Pacific region and beyond as one biggest obstacle to effectively fight corruption. Mutual legal assistance (MLA) is also essential for the recovery of proceeds of corruption.

Since early 2005, the member countries and jurisdictions of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific have held regular policy dialogues and expert meetings to strengthen their frameworks and practices for requesting and providing legal assistance. The 5th Regional Anti-Corruption Conference for Asia-Pacific in September 2005 included a workshop to this topic, and a technical seminar on *Denying Safe Haven to the Corrupt and the Proceeds of Corruption* was held in March 2006. In 2006/2007, the Initiative's members carried out an in-depth review on frameworks and practices for mutual legal assistance, extradition, and the recovery of proceeds of corruption.

International anti-corruption instruments, such as the United Nations Convention against Corruption (UNCAC) and the OECD anti-bribery instruments, attach great importance to effective mechanisms for mutual legal assistance (MLA) and asset recovery. As a growing number of countries in Asia and the Pacific have committed to these standards, demand for mutual learning in this area increases. The Initiative's members naturally called on the Initiative and its partners—the Basel Institute on Governance and the UN Office on Drugs and Crime—to provide this assistance. In response to this request, the Initiative conducted a regional technical seminar on asset recovery and MLA.

Hosted and co-organized by the Corruption Eradication Commission of Indonesia, this regional technical seminar gathered more than 150 experts from the Initiative's member countries, observer countries, and OECD member countries in Bali on 5–7 September 2007. This volume compiles the experience shared by experts during the seminar. It is addressed to policy makers,

practitioners, and experts who wish to learn from experiences of other countries in strengthening frameworks and practices for mutual legal assistance and the recovery of assets from abroad.

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The Asian Development Bank/Organisation for Economic Co-operation and Development (ADB/OECD) Anti-Corruption Initiative for Asia and the Pacific and the Basel Institute on Governance express their sincere gratitude to the Corruption Eradication Commission of Indonesia for its valuable cooperation and help in preparing for the regional seminar for Asia and the Pacific on asset recovery and mutual legal assistance. The ADB/OECD Anti-Corruption Initiative and the Basel Institute on Governance hold in high esteem the commission's warm welcome and gracious hospitality.

The organizers specially thank the participants of the seminar, particularly the speakers and authors of the papers in this volume. Their insights and contributions have made the seminar greatly successful in promoting knowledge and information sharing on issues of asset recovery and mutual legal assistance.

Frédéric Wehrlé, then Coordinator for Asia and the Pacific at the OECD Anti-Corruption Division; Kathleen Moktan, Director of the Capacity Development and Governance Division, ADB, and Gretta Fenner, then Director of the Basel Institute on Governance; directed and coordinated the seminar. Joachim Pohl, Project Coordinator of the OECD Anti-Corruption Division; Marilyn Pizarro, Consultant with the Capacity Development and Governance Division of ADB's Regional and Sustainable Development Department; and Mirella Mahlstein, Research Assistant for the Basel Institute on Governance provided coordination and secretariat assistance.

The regional seminar for Asia and the Pacific was made possible through the financial support of the Australian Agency for International Development (AusAID), Canadian International Development Agency (CIDA), Deutsche Gesellschaft für Technische Zusammenarbeit (GfZ) GmbH, Swedish International Development Cooperation Agency (SIDA), United Nations Office on Drugs and Crime (UNODC), as well as the United States Department of State.

Abbreviations and Acronyms

ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
AUD	Australian dollar
AusAID	Australian Agency for International Development
BMZ	Federal German Ministry for Economic Cooperation and Development
CEO	chief executive officer
CIDA	Canadian International Development Agency
COSP	Conference of States Parties
CSO	civil society organization
DAC	Donor Assistance Committee
DPP	director of public prosecutions (Australia)
DPR	House of Representatives (Indonesia)
EUR	euro
ECMA	European Convention on Mutual Assistance in Criminal Matters
FARC	Revolutionary Armed Forces of Colombia
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIU	financial intelligence unit
GBP	British pound
GmbH	Gesellschaft mit beschränkter Haftung
GOI	Government of Indonesia
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit GmbH (German Technical Cooperation)
ICAR	International Centre for Asset Recovery
IMAC	Federal Act on International Mutual Assistance in Criminal Matters (Switzerland)

KPK	Komisi Pemberantasan Korupsi (Corruption Eradication Commission) (Indonesia)
MACMA	Mutual Assistance in Criminal Matters Act (Australia)
MPR	People's Consultative Assembly (Indonesia)
NEPAD	New Partnership for Africa's Development
NGO	nongovernment organization
OECD	Organisation for Economic Co-operation and Development
PEP	politically exposed person
POCA	Proceeds of Crime Act (Australia)
P.R. China	People's Republic of China
SADC	Southern African Development Community
SAR	Special Administrative Region (Hong Kong, China)
SIDA	Swedish International Development Cooperation Agency
SSA	State Supreme Agency (Indonesia)
STR	suspicious transaction report
TA	technical assistance
TI	Transparency International
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

Preface

Taufiequrachman Ruki
Chairman (2004-2007)
Corruption Eradication Commission of Indonesia

“To combat corruption we need to cooperate internationally and to be part of international and regional initiatives aiming to support anticorruption progress in member states. We must of course build our own protection against corruption and refine our anticorruption policies. But in doing so, we must learn from countries that have a positive track-record in fighting corruption and we must learn from discussions and developments related to anti-corruption concepts and mechanisms taking place in international fora.”

This statement was made by the Coordinating Minister for Economic Affairs, His Excellency Boediono, at the opening of the regional seminar on *Making International Anti-Bribery Standards Operational: Asset Recovery and Mutual Legal Assistance* on 5 September 2007 in Bali. The minister expressed the motive behind the series of three seminars the Indonesian Corruption Eradication Commission arranged this year in collaboration with the ADB/OECD Anti-Corruption Initiative: The necessity of knowledge exchange and cooperation.

As a host, we were extremely pleased and grateful that a number of distinguished experts and participants from more than 30 countries made the effort to come to Bali to discuss legal and institutional challenges in using mutual legal assistance and elaborate on the tracing, freezing, confiscating, and repatriating the proceeds of corruption. It reaffirmed that platforms for expert exchange are highly relevant when the challenges become increasingly global in nature and with the introduction of international frameworks, such as the United Nations Convention against Corruption that need yet to be made operational.

This volume is a result of these 2.5-day discussions and analysis and we are confident that it may serve as a source of information, reference, and inspiration not only to the 170 participants from the Asia and Pacific region and beyond who attended the seminar, but also to their colleagues and friends.

Taufiequrachman Ruki
Chairman of the Indonesian Corruption Eradication Commission 2004-2007

Preface

Kuniko Ozaki
Director, Division for Treaty Affairs
United Nations Office on Drugs and Crime

This volume, based on the proceedings of the seminar on *Making International Anti-Corruption Standards Operational: Asset Recovery and Mutual Legal Assistance*, crystallizes the views of outstanding experts and practitioners. It gives an account of their experience and perspectives on the way ahead in two of the most challenging fields of international criminal law. What lies in front of us is an inspiring snapshot of what the international legal community knows, and what questions it asks, on a rapidly evolving and highly dynamic field of international cooperation.

This book comes at the right moment. The last years have seen the fight against corruption rising rapidly to the top of the political agenda. Within an emerging international anti-corruption consensus, a number of international instruments have been negotiated. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions marked an impressive starting point already in 1997. Several strong regional instruments followed, until the negotiations on the United Nations Convention against Corruption (UNCAC) resulted in a landmark consensus in 2003. These instruments send the message that corruption cannot be tolerated and that States parties have to render each other the most comprehensive support in their fight against this phenomenon. The rapid and ongoing increase in the number of ratifications of the UNCAC creates hope that universal adherence can be achieved at an early date, accentuating its role as the first and only truly global instrument against corruption.

To date, 140 states have signed and 122 states have ratified the UN Convention against Corruption. It is already the common standard, the point of reference for anti-corruption efforts worldwide. Its provisions highlight four main areas for action: prevention, criminalization, international cooperation, and asset recovery. During the negotiations of UNCAC, much attention was paid to practical and operational provisions that can make a difference in the daily life of judges, prosecutors, and policy makers. UNCAC goes therefore far beyond the

important political achievement of a global anti-corruption consensus. It should be used in its entirety as a practical tool that will help design efficient policies and improve the success of specific cases.

In Chapter V on asset recovery, UNCAC breaks new ground with a series of innovative provisions. These—combined with more traditional provisions, namely on international cooperation as set out in Chapter IV of UNCAC—create a new dynamic whose potential is still largely unexplored. States, both developing and developed, have limited experience in making these provisions operational. Although the most remarkable international asset recovery cases were resolved before the convention entered into force, a thorough analysis of those cases, as in this volume, is crucial. Meanwhile, they are the only sources of experience and lessons learned, and leave broad space for comparative studies on the impact the convention may have on similar cases in the near future.

The Conference of the States Parties to the United Nations Convention against Corruption at its first session, held in Jordan on 10–14 December 2006, considered developing cumulative knowledge as one priority field of action. Special importance was attributed to locating, freezing, seizing, confiscating, and returning the proceeds of corruption. Events such as the seminar held in Bali are essential for achieving these goals since they give opportunities for experts to exchange knowledge and experience. Thanks to the extraordinary commitment of the authors and editors of this volume, the results of this dialogue are now available to the broader international community, which can further enhance the exchange of experience and knowledge. The importance of such an achievement for implementing UNCAC and other international instruments against corruption cannot be overemphasized.

Kuniko Ozaki
Director, Division for Treaty Affairs
United Nations Office on Drugs and Crime

Executive Summary

While it grows easier for corrupt agents to move—and to move the proceeds of their crimes—across borders, law enforcement operates within national boundaries. Mutual legal assistance (MLA) is often required to bring the corrupt to justice and to recover assets.

Today, existing mechanisms for mutual legal assistance are largely inadequate for a variety of reasons. Legal and institutional frameworks for MLA in many countries in the region and beyond need to be strengthened. Shortcomings in practice, and limited knowledge and capacity to implement the existing frameworks, also contribute to deficiencies in transnational cooperation in prosecuting corruption.

The thorough implementation of international standards—in particular, the UN Convention against Corruption (UNCAC) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)—would clear many obstacles and strengthen the effectiveness of providing MLA for corruption offenses. Enhanced transnational networks of practitioners, regular exchanges among experts, and dissemination of knowledge would further contribute to enhancing the mutual provision of legal assistance in Asia and the Pacific, and beyond.

Strengthening Legal Assistance and Asset Recovery through Implementation of International Standards

Translating international standards into legislation, policies and practice constitutes considerable challenges. To support the member jurisdictions of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific in this endeavor and to strengthen networks among practitioners, the Initiative dedicated its 6th regional seminar to *Making International Anti-Corruption Standards Operational: Asset Recovery and Mutual Legal Assistance*.

The seminar, held in Bali in September 2007, gathered 170 policy makers and practitioners from the Initiative's member jurisdictions and from around the world, as well as representatives of international, regional, and nongovernment organizations. The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific organized the seminar jointly with the Basel Institute on Governance, the

Corruption Eradication Commission of Indonesia (KPK) and the UN Office on Drugs and Crime (UNODC).

The seminar complemented the thematic review on *Mutual Legal Assistance, Extradition, and Recovery of Proceeds of Corruption in Asia and the Pacific* conducted by the members of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific in 2006–2007; this review highlights strengths and weaknesses of frameworks and practice in the Asia-Pacific region.

Challenges in Legal and Institutional Ramifications for MLA...

Expert discussions on the legal and institutional ramifications for legal assistance and asset recovery in the Asia-Pacific region revealed that a combination of treaty-based arrangements and domestic MLA legislation usually provides a sufficient basis for cooperation in recovering the proceeds of corruption and related offenses. It also became clear, however, that legislative provisions concerning MLA in investigation, prosecution, and judicial proceedings in corruption cases vary quite significantly in comprehensiveness and complexity among the members of the ADB/OECD Anti-Corruption Initiative.

The dual criminality requirement was identified as a potential legal impediment to granting MLA, a difficulty that also arises in extradition cases. Reliance on the conduct-based definition of dual criminality, as required under Article 43(2) of the UNCAC, might remedy this problem in many cases. It would notably help in cases of illicit enrichment or bribery of foreign public officials, offenses that, so far, few countries have enacted. Relaxing dual criminality when providing assistance in non-coercive measures was also considered a helpful approach.

The requirement of a foreign conviction as a precondition for cooperation in some Asian and Pacific countries was mentioned as another obstacle to the provision of MLA, especially where statutes of limitations are short. UNCAC provides significant remedies in this respect, notably the approach foreseen under Article its 54(1)(c), which stipulates that assistance can be rendered without a conviction when the offender cannot be prosecuted by reason of death, flight, or absence, or in other appropriate cases.

Certain grounds for denying cooperation—such as interests of national sovereignty or security, general public interests, and financial interests in particular—add hurdles to obtaining legal assistance. Grounds for denying cooperation are often broadly defined and depend upon the discretion of the authorities of the requested State. Participants noted that such arguments were particularly likely to be used in corruption cases with a political dimension.

...and Obstacles in Practice

Discussions among experts and practitioners revealed additional challenges that arise in the application of mutual legal assistance frameworks: limited capacity, overly complex procedures for MLA at the domestic level, the absence of expedient internal coordination mechanisms among domestic authorities, and a general lack of information about MLA procedures and requirements. Limited financial resources hamper the establishment of a specialized, central MLA authority in some countries in the region.

Participants also offered suggestions on how to remedy or mitigate these problems. They agreed that establishment of a specialized MLA authority generally increases the effectiveness of international cooperation, but that expertise of other domestic authorities must still be enhanced regardless.

A general lack of information about MLA procedures and requirements could be remedied by making such information available through the Internet. The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific now makes an online database accessible at www.oecd.org/corruption/asiapacific/mla that provides full texts of legislation and treaties that govern mutual legal assistance in Asia and the Pacific. Another example is Indonesia, which collected comprehensive and detailed information on the mechanisms available for MLA and the recovery of the proceeds of corruption in the course of its UNCAC compliance review in 2006.

Informal Paths to Obtain Legal Assistance

In light of these challenges, many practitioners stressed the importance of informal approaches to MLA. Informal measures make complex and time-consuming formal procedures with foreign jurisdictions redundant in many cases, or can usefully prepare formal procedures where these are inevitable. Informal means of seeking legal assistance may also be useful in the initial investigation phase of corruption cases, which often require rapid action to freeze funds.

Informal assistance is not without pitfalls, though. Identifying appropriate and reliable personal contacts, and maintaining good working relations despite possible changes in foreign interlocutors pose significant challenges. In addition, informal approaches might compromise due process requirements in some jurisdictions.

Tracing, Freezing, Confiscating, and Repatriating the Proceeds of Corruption

Obtaining MLA to seize, confiscate, and repatriate the proceeds of crime is particularly difficult, due to bank secrecy provisions and disparities between legal frameworks for asset recovery across Asia and the Pacific, among other factors. Jurisdictions set different thresholds for the extent of assistance provided with respect to coercive measures of search and seizure. Most countries require that requesting States go beyond demonstrating reasonable grounds to believe that an offense has been committed and that evidence may be found in the possession of the person or entity against whom coercive measures are directed.

Various approaches could mitigate these difficulties: Due diligence requirements for financial intermediaries and systems for suspicious transaction reporting, coupled with well-resourced financial intelligence units, would prevent money laundering more effectively in the first place. Freezing assets would be considerably easier if more countries in Asia and the Pacific make foreign restraining orders enforceable by direct registration in a domestic court; today, only a limited number of countries in the region do so.

In practice, civil forfeiture could become an alternative to criminal proceedings, especially in light of Article 53(a) of the UNCAC. The generally lower standard of evidence in civil forfeiture actions, which are available in the absence of a criminal conviction, makes civil forfeiture an attractive option. Asking a foreign State to start domestic criminal proceedings, for money laundering for example, sometimes speeds up the process.

Only a few countries regulate the actual repatriation of criminal proceeds by law, and wide discretion characterizes this domain. Treaty-based arrangements and clarification of legislative frameworks would increase certainty, transparency, and accountability regarding repatriation of criminal proceeds.

Lessons from Real Cases

Practitioners shared their experiences in seeking and providing MLA in high-profile asset recovery cases, showing the whole range of challenges they face in practice. After the fall of autocratic rulers in Nigeria, the Philippines, and Peru, criminal and civil proceedings began to recover assets that Sani Abacha, Ferdinand Marcos, and Vladimiro Montesinos had placed in various foreign jurisdictions. While attempts to recover the incriminated assets eventually succeeded in all cases, the proceedings met serious obstacles that point to priorities for reform.

Difficulties in communication, rigid banking regulations, massive use of procedural guarantees and appeal procedures dramatically protracted the proceedings. Transmitting evidence between requested and requesting States during the substantive civil recovery actions contributed to speeding up the return of the proceeds. The cases involving Nigeria and the Philippines also showed the benefits of the reversal of the burden of proof for determining ownership over assets, in the context of both criminal and civil proceedings.

The painstaking proceedings in these cases themselves, however, triggered important legal reforms in the requesting States. They led to improved MLA provisions, broader prosecutorial powers, and more efficient law enforcement. The example of Peru also shows the positive impact of the entry into force of the UNCAC, which will assist Peru in ongoing efforts to recover the remaining proceeds of Montesinos' criminal activities.

Needs and Priorities to Strengthen Asset Recovery Mechanisms in Asia and the Pacific

Overall, it became clear that legislative amendments are necessary in many countries to bring frameworks for mutual legal assistance and asset recovery in line with the provisions of UNCAC.

Practitioners agreed, however, that very practical measures can largely enhance transnational cooperation: cooperation among domestic agencies helps to expedite assistance; networks of asset recovery practitioners and preparatory meetings between requesting and requested States can contribute to smooth cooperation; financial centers can provide detailed information about the prerequisites for mutual legal assistance to enable requesting countries to meet these requirements. Capacity building, however, is a precondition to enable many countries to cope with the difficulties and challenges of seeking and granting MLA.

Much still needs to be done to implement the commitment that countries made by ratifying the UNCAC: *"to afford each other the widest measure of cooperation and assistance"* and to exploit the vast potential of the UNCAC. Countries in the Asia-Pacific region can count on the support of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific and its partners, as well as bilateral aid agencies.

The ADB/OECD Anti-Corruption Initiative can support the reform process by facilitating policy dialogue and exchange of experience in the region. It also fosters networks and trust between requesting and requested States in the region, and with countries that are members of the OECD Working Group on

Bribery, provides capacity building and disseminates information that practitioners might need.

The donor community also stressed its commitment to assist countries in enhancing effectiveness in asset recovery through broad international cooperation and technical assistance in bringing international asset recovery procedures to successful closure. In this regard, the UNCAC helps donors such as the German Technical Cooperation gtz and their partner countries agree on needs for implementing international anti-corruption standards and designing assistance.

Donors can also play a role in supporting costly international asset recovery procedures. Many countries cannot afford the legal and technical expertise required to complete these procedures successfully. The Netherlands proposed the creation of a trust fund under the auspices of the United Nations that would assist developing countries in bearing these costs.

Keynote Addresses

Opening Remarks

Patrick Moulette
Head, Anti-Corruption Division, OECD

International cooperation to combat bribery

I would like to thank Mr. Taufiqurrahman Ruki, Chairman of the Corruption Eradication Commission of Indonesia, for his opening remarks. It is an honor and a privilege for me to address this 6th Regional Seminar of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. This is an important and timely effort to make substantial progress in the fight against corruption through enhanced international cooperation involving the Asia-Pacific region.

I commend the Government of Indonesia and the Corruption Eradication Commission of Indonesia for hosting the event and thank the Basel Institute on Governance and UNODC—partners in the organization of the seminar—as well as the partners and donors of the Initiative for their support.

The importance of international cooperation increases

The global context of the fight against corruption is evolving. Transnational trade and investment has multiplied in the past years. This has significantly increased the likelihood of transnational bribery and corruption to occur. In addition, financial transactions across borders are done with ever greater ease. These developments create new opportunities for transnational corruption and hiding of proceeds, and challenges for the current framework for mutual legal assistance that is not fully adapted to the reality of transnational corruption and the characteristics of globalization.

What is true at the global level also applies to the Asia-Pacific region, including its dynamic performance in international trade, and the challenges following the Asian tsunami and other recent natural disasters.

It may also be helpful to summarize how the issue of international cooperation relates to corruption. In particular, it relates mainly to transborder corruption, including the bribery of foreign public officials in international business transactions, as addressed by the OECD Anti-Bribery Convention. It also relates to domestic corruption where the bribe or the proceeds of the corrupt transaction

have been transferred to or laundered in a foreign jurisdiction. Since corruption often has a transborder dimension, international cooperation is particularly relevant to ensure the effective transfer of evidence, extradition, or asset recovery.

Challenges in legal cooperation across borders are by no means specific to the Asia-Pacific region. A comprehensive study that Parties to the OECD Anti-Bribery Convention have undertaken 7 years after the entry into force of the convention shows that difficulties in obtaining legal assistance constitute one of the prime obstacles to a successful fight against the bribery of foreign public officials.

Pursuant to the OECD Anti-Bribery Convention, parties are required to provide effective mutual legal assistance and extradition in relation to offenses of the bribery of foreign public officials. In the context of the on-going review of the OECD anti-bribery instruments, the Working Group is considering ways to improve international cooperation between parties and between parties and nonparties to the Convention. Asia and Pacific countries will have an opportunity to comment on these issues in a consultation paper in early 2008.

The presence of over 170 participants and experts from 28 countries from Asia and the Pacific and 10 States Parties of the OECD Anti-Bribery Convention today is a testimony of the importance attributed to overcoming the weaknesses and improving cooperation in the prosecution of corruption. Four countries from the region (Australia, Japan, Korea, and New Zealand) are also parties to the OECD Anti-Bribery Convention. These countries have demonstrated a strong commitment to fight the bribery of foreign public officials in international business transactions by participating in the activities of the OECD Working Group on Bribery. This includes the Working Group's rigorous peer review monitoring process. All four countries have been subject to Phase 1 and Phase 2 examinations, and continue to provide comprehensive follow-up reports. They have also participated as lead examiners in the review of other parties to the Convention.

Responses to this demand are being developed

Need has triggered action to enhance frameworks and practices in providing mutual legal assistance (MLA). Reform of frameworks is partly driven by international instruments: the OECD Anti-Bribery Convention is the first and, so far, the only international instrument dedicated to the fight against bribery of foreign public officials. The Convention, which celebrates its 10th anniversary this year, requires its parties to provide prompt and effective legal assistance. UNCAC

likewise establishes obligations to grant legal assistance in the fight against corruption and provides a framework for MLA in the fight against corruption among the parties to the UNCAC. These international instruments seek to enhance frameworks and policies for international legal cooperation that, today, often remain insufficient and inadequate.

The standards and policies need to be thoroughly implemented. The thematic review that the Initiative's members finalized yesterday and this morning is an important contribution to the development of more effective frameworks for MLA in Asia and the Pacific, as it encourages the development of policies and frameworks that ease and speed up the requesting and granting of MLA.

But establishing an effective framework is only the starting point. Countries must put these frameworks into practice. There is also room for improvement in the practice of granting and requesting legal assistance. In this area, efforts are being undertaken; practitioners from Asia and Pacific countries discussed and developed possibilities to strengthen effectiveness of existing frameworks at the Initiative's capacity building seminar in March 2006 in Kuala Lumpur. States Parties of the OECD Anti-Bribery Convention conduct meetings of prosecutors periodically to exchange experiences on how to tackle difficulties they meet in investigating bribery cases, which is a practice that countries in the Asia-Pacific region may wish to adopt as well, and that the ADB/OECD Initiative could facilitate.

The seminar that we open today marks another step toward strengthening frameworks and practices in MLA in the fight against corruption with a cross-border dimension. It will serve to exchange experience in using both formal and informal ways to grant and receive MLA. It will also assess policies in tracing, freezing, and confiscating proceeds of corruption and will seek to identify ways to strengthen these mechanisms and policies. Finally, this seminar provides a forum to establish face-to-face contacts and networks among practitioners from Asia and the Pacific countries and States parties to the OECD Anti-Bribery Convention to facilitate effective assistance across borders in the Asia-Pacific region and worldwide. I am looking forward to fruitful exchanges over the coming 2 days.

Opening Remarks

Kuniko Ozaki
Director, Division for Treaty Affairs
United Nations Office on Drugs and Crime

United Nations Convention against Corruption: An Innovative Legal Framework for Asset Recovery

It is a great honor and pleasure for me to be in this seminar representing the United Nations Office on Drugs and Crime (UNODC). As everyone knows, UNODC is a custodian of several global crime conventions—including the United Nations Convention against Corruption (UNCAC)—and a promoter of international cooperation in criminal matters.

Mutual legal assistance (MLA) is the most traditional subject matter of international criminal law. We all know that MLA is an indispensable tool in our fight against crime. We also know the difficulties we are facing—some are legal, some are administrative, and some are political—dual criminality; differences in procedural law, especially in evidentiary rules; existence of inefficient and ineffective central authorities; communication difficulties; slow procedure; low priority given to the issue; and most important is the lack of political will. The international community has taken various steps to overcome these difficulties such as less strict application of dual criminality; direct contact between criminal justice officials; or the use of informal communication. One such effort is the adoption of multilateral instruments, including the United Nations Convention against Transnational Organised Crime (UNTOC), which is another significant global instrument to which UNODC is a custodian.

At the same time, growing interests in the financial aspect of crimes or in financial measures to fight against crime, such as anti-money-laundering measures and confiscation of criminal proceeds, have posed new opportunities and challenges to MLA regimes. Opportunities because they provide us with new tools, weapons, and mechanisms such as assistance in freezing and confiscating assets; cooperation with financial and banking regimes; as well as establishment of and cooperation between financial intelligence units. Challenges because confiscation laws and financial regulations vary in different legal traditions and different jurisdictions.

MLA and asset recovery provisions of UNCAC can be seen as a peak or culmination of this process.

Since the 1990s, the fight against corruption has become higher in the political agenda. Now, it enjoys the strong commitment of governments and international organizations. One result was the adoption of the UNCAC, which is the first global and comprehensive instrument against corruption. The number of parties to the UNCAC has increased rapidly and steadily and points toward universal adherence.

Although the UNCAC contains state-of-the-art provisions in various areas of anti-corruption measures, the parts on asset recovery and MLA, as I said, are the products and *crème de la crème* of collective wisdom gained from the experiences already mentioned and lessons learned. Specifically, its chapter on asset recovery contains the most advanced provisions in this area throughout the whole body of relevant international criminal law. Asset recovery is a fundamental principle of UNCAC, and the parties agreed to afford each other the widest measure of cooperation and assistance. UNCAC emphasizes on the effective mechanisms to prevent the laundering of the proceeds of corrupt practices; to prevent transfers of proceeds of a crime; to trace, seize, and confiscate such funds; as well as on international cooperation for the return of assets.

But implementing the UNCAC and making asset recovery happen is not an easy task. Asset recovery is a very recent field of international anti-corruption activity. It involves an efficient and effective criminal justice system, sound preventive policies, and transparent financial regulations. Solutions to the problem are not to be found in either developing or developed countries acting alone. Asset recovery is a truly global challenge; it requires our cooperation.

The work before us is tremendous. We must first identify the gaps in various existing domestic laws and regulations and find out the best combination of laws for countries with different legal traditions. It is not a simple task. Past major asset recovery cases show that authorities involved used a variety of laws and procedures including those on MLA; anti-money-laundering; anti-fraud; and anti-organized crime as well as provisions on participation in criminal organizations, various financial regulations, civil action, etc. What are the most relevant legislative measures to locate and freeze the stolen assets? As for recovery, it has been pointed out that civil forfeiture should be utilized more. UNCAC itself encourages civil action as well. Shifting the burden of proof has also been mentioned. So, as a more informal alternative to MLA, are they all usable in various jurisdictions without compromising due process? If not, what are the obstacles? Is it possible to draft a set of model legislation? I understand most of

these issues will be discussed during this seminar. I am looking forward to listening to the deliberations.

Developing tools and manuals to effectively implement these laws and regulations will be also essential.

Analyzing past cases is tremendously important for us. Again, I am happy to listen to the discussions in this seminar. More important will be the future cases to be resolved in accordance with UNCAC and with those domestic laws implementing UNCAC. The next 5 years will be critical. The cases to be resolved during this period will provide us not only with experiences and with the best body of lessons learned, but they will be extremely important judicial precedents that will become a part of international jurisprudence. We cannot afford to fail in those cases. We should be ready to cooperate with each other and provide help, if needed.

The high priority accorded to asset recovery brought about a number of international initiatives, including those by development agencies/organizations. The Stolen Asset Recovery (StAR) Initiative—a joint initiative by UNODC and the World Bank—will be launched in a couple of weeks. Moreover, other important activities are carried out or planned by the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, the International Centre for Asset Recovery (ICAR) at the Basel Institute on Governance, U4 Anti-Corruption Resource Centre, KPK, and other entities.

The close relationship between asset recovery and development is another interesting topic to be discussed. It is also worth mentioning that it will be helpful to follow a two-pronged approach in technical assistance delivery on asset recovery. On the one hand, it is important to help countries with the expeditious return of assets in the short term; while on the other hand, the long-term needs of criminal justice systems must not be neglected. The significance of the former from the legal, practical, and political point of view is obvious—while we should never ignore the latter, as asset recovery cannot be isolated from comprehensive picture.

The Conference of the States Parties (COSP) to the UNCAC decided to make asset recovery one of its priority areas. It established the Intergovernmental Working Group on Asset Recovery, which advises and helps COSP in implementing its mandate on the return of proceeds of corruption. This Working Group held its first meeting last week in Vienna. It underlined that it was, at this stage, essential to build collective knowledge and exchange experience on asset recovery. The Working Group recommended, *inter alia*, the establishment and improvement of relevant instruments for the documentation and analysis of legislation, judicial decisions, and lessons learned. The Working Group also

highlighted the importance to exchange expertise and opinions, share information, and build networks. Events such as the present seminar are the best opportunities for these tasks. Thus, let me thank you for your willingness to share your expertise, views and experiences, and encourage you all to benefit from this excellent opportunity.

I wish to thank the Government of Indonesia for hosting this important event. My thanks are addressed in particular to the Corruption Eradication Commission of Indonesia, for taking this excellent initiative. I wish to thank the OECD/ADB and the Basel Institute on Governance for their cooperation and the Asia Foundation, Australian Agency for International Development (AusAID), Canadian International Development Agency (CIDA), Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), Swedish International Development Cooperation Agency (SIDA), and United States Agency for International Development (USAID) for their generous support.

Our agenda for the next 2 days is rich and ambitious. I am looking forward to working with you and to learning of your valuable experience. I wish the seminar fruitful deliberations.

Opening Remarks

Amien Sunaryadi
Vice Chairman, Corruption Eradication Commission, Indonesia

The Fight against Corruption in Indonesia

A number of efforts have been undertaken since 1957 to eradicate corruption in Indonesia. The Indonesian Corruption Eradication Commission (KPK) can be counted as the eighth effort of a number of initiatives, taskforces, and institutions established in the last 50 years.

The difference today is that there is some real willingness and political commitment to fight corruption. After the downfall of Soeharto's regime, the People's Consultative Assembly (MPR) issued Decree No: TAP XI/MPR/1998 on a clean State administration free from corruption, collusion, and nepotism during an extraordinary session in November 1998.

Following this decree, the House of Representatives (DPR) and the President had enacted a number of laws:

- Law 28/1999 on a corruption-free State administration;
- Law 31/1999 on the eradication of corruption, which was amended by Law 20/2001;
- Law 30/2002 on the Corruption Eradication Commission; and
- Law 15/2002, amended by Law 25/2003 on money laundering.

These legislative efforts are supported by the Government. On the first International Anti-Corruption Day on 9 December 2004, 2 months after his inauguration, President Susilo Bambang Yudhoyono (SBY) issued Presidential Decree No. 5 of 2004 on the accelerated eradication of corruption.

From a constitutional point of view, the fight against corruption in Indonesia is a crucial part of the fulfillment of the 1945 Indonesian Constitution which states, in its preamble, among others, two objectives: to promote the general welfare and to enhance the education of the people.

To meet these objectives, the State needs an adequate budget. However, until today, funds are insufficient to achieve those objectives in relation to the general welfare and education of the Indonesian people. Individuals or certain groups have corrupted, for their own benefit, huge amounts of State funds.

Therefore, it is a constitutional obligation to fight corruption to ensure that sufficient resources are allocated for the general welfare of the people and their education.

Indonesia and the United Nations Convention against Corruption

Indonesia participated in the processes involved in developing and designing the UNCAC at a very early stage. Today, Indonesia is one of the 146 State parties that have signed the Convention and is among the 95 ratifying parties. In December 2003, the Indonesian Minister of Law and Human Rights signed the UNCAC in New York. In March 2006, the Convention was ratified by the DPR.

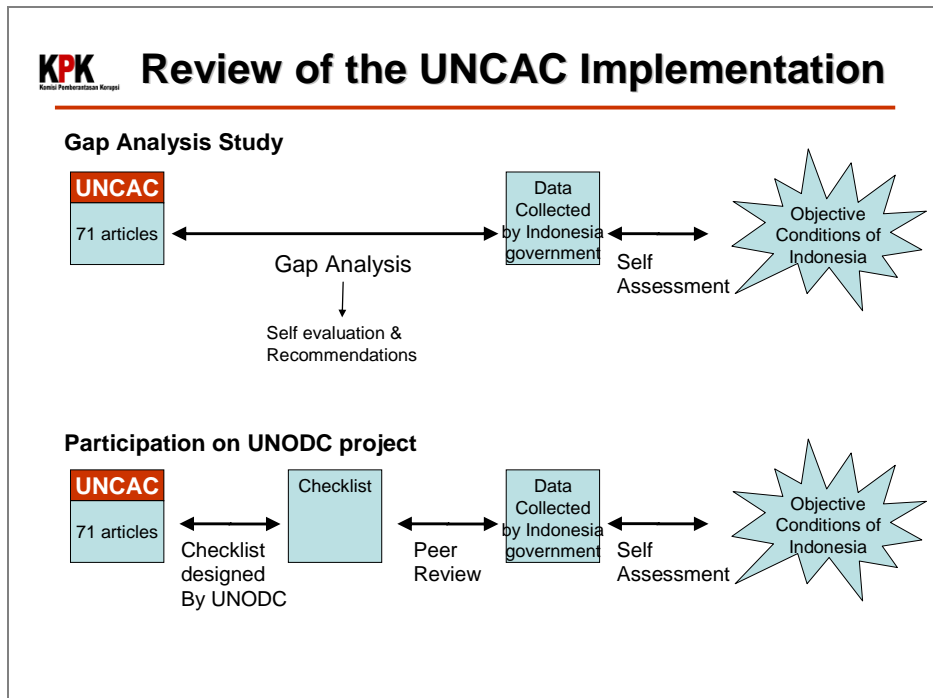
Indonesia has reviewed in detail the contents of the UNCAC and found that its provisions provide important frameworks and tools to fight corruption domestically as well as internationally. Therefore, Indonesia intends to use the UNCAC as a standard or guide in fighting corruption both in Indonesia and internationally.

In conclusion, Indonesia's 50-year effort to combat corruption in Indonesia has not resulted in significant achievements. The 1998 reform movement throughout the country included the fight against corruption as an important element of the reform measures. However, it was observed that instead of being reduced, corruption spread even more widely during the first years of reform. Therefore, by implementing the provisions of the UNCAC, the country is expected to benefit largely.

The Implementation of the United Nations Convention against Corruption in Indonesia

In its efforts to improve the sociopolitical environment in Indonesia, KPK initiated a gap analysis in 2006, which reviewed the existing Indonesian legislation and regulatory framework concerning the provisions of the UNCAC.

The gap analysis has provided the real benefit of identifying weaknesses of the legal infrastructure and obstacles in the fight against corruption. The eye-opening results led KPK to publish and share its experience with the gap analysis process at the First Conference of State Parties to the UNCAC in Jordan in November 2006.



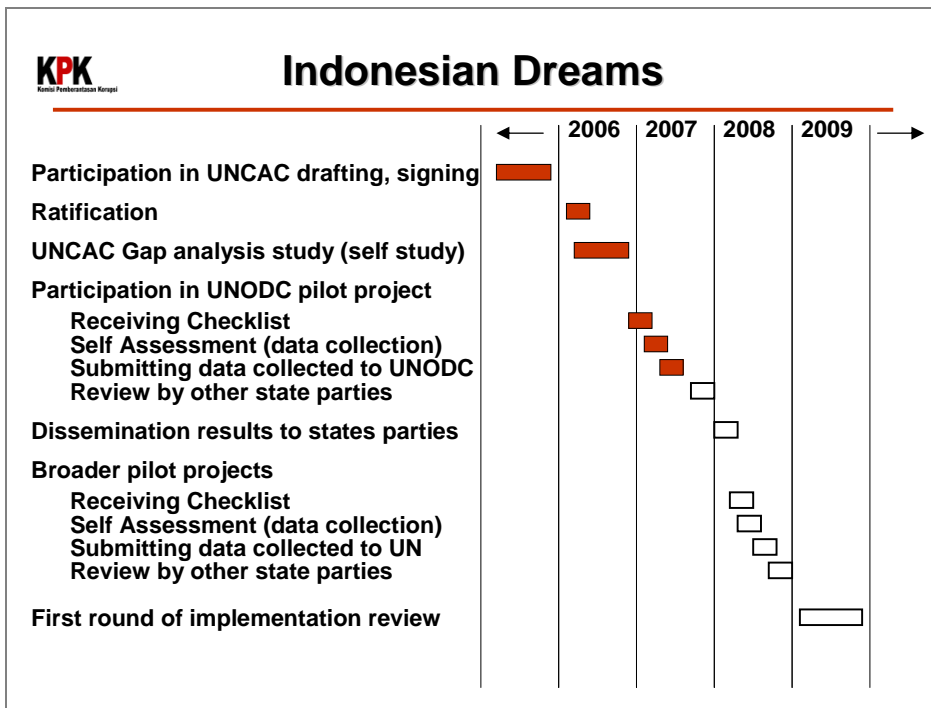
By measuring the gaps and considering Article 63.4(e) of UNCAC that calls for “reviewing periodically the implementation of this Convention by its States Parties”, Indonesia has shown interest in learning how to conduct a self-assessment and to use the review to strengthen the implementation of the UNCAC. Again, we hope that with the application of UNCAC standards, corruption will be reduced significantly.

The Indonesian experience from the gap analysis undertaken last year has encouraged us to participate in the United Nations Office on Drugs and Crime (UNODC) voluntary pilot project for review mechanism. Currently, 17 countries are participating. Indonesia received the self-assessment checklist a few months ago and has submitted it to the UNODC. Within the voluntary pilot project, a regional partner and one from outside the region will review Indonesia's self-assessment. Indonesia will similarly review the self-assessments of two countries.

We hope that the results will be presented and shared during the Second Conference of State Parties to the Convention here in Bali by end of January 2008. Moreover, we expect that the self-assessment checklist could be extended to more pilot countries in 2008.

From our experience, the monitoring and review process used by the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific indicates that it might be useful to have peer review in the context of the UNCAC. Naturally, we cannot just copy the existing regional mechanisms because they are built for different purposes.

However, considering the sensitivity of reviews, the basic characteristics of a review mechanism that were agreed upon during the 1st Conference of State Parties to UNCAC in Jordan, and many States ratifying the UNCAC, constructing the review into a peer review within regional or even subregional groupings seems advisable. Furthermore, because of the extensive number of provisions in the UNCAC, the review mechanism could initially focus on certain chapters, then later, extend to and complete the remaining chapters.



Indeed, this issue will have to be discussed further. On this note, I would like to encourage discussion and brainstorming among us all during the next few days. As KPK Chairman, Taufiqurrahman Ruki said, we are very happy that so many experts have come to Bali from all over the world and we hope that discussions will continue beyond the sessions in this room.

Chapter 1

Legal and Institutional Challenges in Mutual Legal Assistance

Challenges in Mutual Legal Assistance

Marita van Thiel

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National Public Prosecutor's Office, the Netherlands

This paper is written from a practitioner's point of view. It describes the situation in the Netherlands and the experience with the Asia-Pacific region. The Dutch situation can be considered similar to some other European countries, but still more differences exist than similarities even between European countries.

Mutual legal assistance (MLA) is a tool we use and need in handling international corruption cases. It is an essential and crucial tool for we have to gather evidence and assets abroad.

Legal Framework

MLA requests can be handled without a treaty. Only when coercive measures are requested will a treaty be required, such as ordering a bank or another financial institution to reveal information.

Besides the formal requirements—dual criminality and human rights requirements—, a request has to contain:

- a brief but thorough description of the facts;
- specific details of people and companies mentioned;
- the legal framework; and
- a translation in Dutch, English, German, or French.

The central authority (Ministry of Justice) tends to put a very high standard to these conditions. Often, MLA requests are returned to the sender for further clarification because of these very high standards. Of course, this is a very time-consuming and frustrating process for the requesting country.

The UNCAC was ratified in the Netherlands in 2006. It is considered a treaty in which all MLA requests in corruption cases can be based upon, irrespective of coercive measures or not. The UNCAC treaty is not a basis for extradition. The UNCAC has not yet been incorporated into our extradition law. However, this is to be expected for 2009.

With UNCAC, MLA is possible with all other parties to the Convention. This could be considered as a big step ahead in combating corruption. Mainly, this

region has only one bilateral MLA treaty (i.e., between the Netherlands and Hong Kong, China).

Figures

In 2005, the Netherlands handled about 36,000 incoming requests. In that same year, the Netherlands received about 7,000 requests. This is to be considered an average year because just a handful of these requests considered corruption cases. Of course, this was the year before implementing the UNCAC treaty. In 2006, the Netherlands only received three requests from the Asian and Pacific region (from the People's Republic of China; Hong Kong, China; and Indonesia).

The average time to handle incoming requests is 2 months for an uncomplicated MLA-request and 6 months for a complex one, for instance, when a coercive measure is involved. One does wonder how such a large number of requests can be so promptly dealt with. The Netherlands has five regional expertise centers and one national expertise center. Public prosecutors and specially trained police officers work together in these centers and only carry out MLA requests.

Apart from these MLA experts, we have many good experts in seizure and confiscation. A national bureau, which is part of the public prosecutors' service, has accountants, civil lawyers, asset tracers, and public prosecutors who work closely together. The bureau supports all public prosecutors in implementing the special confiscation provisions and can be reached 24/7. This bureau also has an expert permanently assigned to the central authority to assist when immediate seizure or confiscation actions have to be taken upon request of another country.

All the conditions are present to make MLA and asset recovery a success. But it is not just a beautiful success story because a lot of challenges have to be considered.

Challenges

Personal contact

The standards that the Dutch central authority works with are very high. It is strongly advised to communicate informally before sending a formal request, to prevent frustration and waste of valuable time. By explaining what is wanted and why would make a big difference in the proceeding procedure.

A good use can be made of the liaison officers of the Dutch federal police stationed by Beijing and in Thailand and in the near future in Indonesia. Every personal contact creates trust and responsibility.

Be patient

Inspired by the OECD Working Group on Bribery's second evaluation round, Dutch authorities have sent out MLA requests in corruption cases in international trade to various countries with which the Netherlands has no bilateral treaty. Notwithstanding personal contact, not much effort has been made; many requests still have to go through formal challenges. Moreover, personal contacts are moved to another office. Nothing much happened in the past year, so a lot of patience is required.

Priority choices

Receiving an MLA request in a complex corruption case takes far more resources and expertise of the requested country. There is a need for specialized financial police and specialized public prosecutors. Dealing with a case of foreign bribery could last many months, even years. This forces the public prosecutors' service to choose. For example, when the priority set is to benefit another country, then this means a prosecutor cannot handle domestic cases. Those are difficult decisions to make that ask for political commitment.

Incompatibility of legal systems

The most complicated hurdle is the incompatibility of legal systems. It is a big challenge to match requests for seizure and confiscation. As a requesting country in a drug-related case, the Netherlands and Thailand have been trying for over more than 10 years to overcome the differences in their confiscation laws. The case is still ongoing. Many lessons have been learned and the work has involved a lot of creativity.

Within Europe, MLA regarding seizure and confiscation is most often dealt with on the principle of asset sharing. For example, Belgium and the Netherlands have agreed that assets confiscated upon request of one country to the other will pertain fully to the confiscating country. In a case last year in which the Dutch government suffered a EUR 20million loss because of fraud and embezzlement, the Belgian authorities were asked to seize and confiscate property that the suspects invested in on Belgium territory. The requests of the Dutch government were handled fast and promptly, but the assets stayed in Belgium. Because of this principle, a bridge has to be crossed in MLA between European countries and countries in the Asian and Pacific region.

To be able to confiscate illegally obtained profits or advantages in the Netherlands, the suspect has to be convicted. Additionally, a person sentenced for an offense may also be ordered to pay a sum of money in the confiscation of illegally obtained profits in relation to other similar offenses or to offenses punishable with the highest fine. The Netherlands does not know the separate offense of illegal enrichment. Thus, a conviction is needed for a requesting country asking for confiscation.

Conclusions

Thanks to the UNCAC and other efforts, the possibility of asset recovery through MLA has improved a lot. Still, a lot has to be done. Seminars in which countries from different regions meet help provide the first steps in this long process. Getting to know one another and showing political will can make the changes possible. Indeed, changes have to be made.

Trends in Mutual Legal Assistance and Asset Recovery in Asia and the Pacific

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Legal Analyst

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

Corruption is often a crime with an international dimension. Many offenders use foreign bank accounts to keep slush funds for bribery or to launder the proceeds of corruption. Bribery of foreign public officials has become a widespread phenomenon in international business transactions. To prosecute corruption cases effectively, countries therefore need to seek evidence and recover proceeds of corruption from other States. Consequently, international cooperation in corruption cases has become more important than ever before.

In the fall of 2007, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific completed a review of extradition and mutual legal assistance in criminal matters in corruption cases in 27 member countries.¹ The purpose of the exercise was to assess the members' legal frameworks and practices for international cooperation and to identify areas for improvement. The review was based on publicly available material and information provided by the Initiative's members. The following are some of the review's major findings concerning MLA, including assistance relating to the proceeds of corruption.²

Treaty as Basis for Mutual Legal Assistance

A country has no obligation to provide MLA to another country under customary international law; such obligations must be created through treaties. Like countries in other parts of the world, many States in Asia and the Pacific have concluded bilateral treaties for this purpose. The number of treaties is not high, however. As of fall 2007, 27 bilateral MLA treaties were in force among the 27 members of the Initiative, an average of two treaties per member. The figure is higher—i.e., 71 treaties or an average of 2.63 treaties per member—for bilateral treaties in force between the Initiative's members and the 37 parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.³ Yet this figure is somewhat deceiving since two members of the Initiative account for 32 treaties, and the remaining 25 members average

only 1.56 treaties with parties to the OECD Convention. In short, most members of the Initiative have very few or no bilateral MLA treaties at all.

It is not very clear why so many members of the Initiative have so few bilateral MLA treaties. The cost and time involved in bilateral treaty negotiations could be challenging for some countries. Yet this should not be a problem for many others, considering the size of their economies on an absolute and per capita basis. Many of these countries are also closely integrated into the international economy and would presumably benefit from a more extensive treaty network. In other words, many members of the Initiative should have both the means and the need to negotiate more bilateral MLA treaties.

The situation is somewhat ameliorated by multilateral conventions that can be used to seek and provide MLA in corruption cases. As of September 2007, the provisions on MLA in the United Nations Convention against Corruption (UNCAC) apply to 11 members of the Initiative, and may soon apply to a further 10 members.⁴ Three members of the Initiative are also parties to the OECD Convention. The seven members of the Initiative that are also members of the Association of Southeast Asian Nations (ASEAN) have signed a regional treaty on MLA in criminal matters. However, only three of those members have ratified the treaty. Nine members of the Initiative are party to the United Nations Convention against Transnational Organised Crime (UNTOC), and two are party to the Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family, and Criminal Matters. On the whole, the level of participation in multilateral instruments by the Initiative's members is encouraging. Nonetheless, the treaty framework for MLA in corruption cases would be significantly enhanced if more members of the Initiative ratify these multilateral instruments.

Another means of dealing with the absence of treaties is to allow MLA to be provided to foreign States in the absence of a treaty. Within the Initiative, 21 jurisdictions (78%) may do so under their domestic laws. It should be noted, however, that domestic legislation does not create international obligations to provide assistance, and hence, is not a complete substitute for treaties and conventions.

National Mutual Legal Assistance Legislation

Many countries in Asia and the Pacific have passed legislation to provide a domestic legal framework for MLA. In some countries, a concluded treaty does not immediately become part of the domestic legal order; legislation is necessary to implement the treaty. Even for jurisdictions in which treaties

automatically become domestic law, legislation may still be necessary to address issues that treaties generally do not cover such as the procedures for obtaining a search warrant, compelling the attendance of a witness, or appealing a decision of judicial or law enforcement authorities. If a country wishes to provide assistance in the absence of a treaty, then legislation may be even more important. In short, a complete framework for MLA usually includes not only treaties but also some form of legislation.

The complexity of the MLA legislation among members of the Initiative varies. Only 16 members (59%) have passed comprehensive legislation detailing the types of assistance available, the procedure for rendering cooperation, and the grounds for denying MLA. Most of the remaining members have legislation that is much briefer. Some apply their domestic criminal procedure laws with such modifications as necessary. But since these laws were designed for domestic investigations, they fail to address some issues that arise in MLA but not in domestic cases (e.g., grounds for denying cooperation or channels of communication with foreign States). Several of the Initiative's members have no legislation whatsoever that applies to MLA. On the whole, many members need to enact new MLA framework laws or bolster existing ones.

Dual Criminality

The review also examined some specific features of the members' MLA legislation, such as whether dual criminality is a precondition for assistance. Recent multilateral instruments advocate a more flexible and inclusive approach to dual criminality, for instance, by making the requirement optional or eliminating it for noncoercive forms of assistance.⁵ Based on available information, dual criminality is mandatory for MLA in 14 members (52%) of the Initiative, discretionary in 6 members (22%), and not required in 3 members (11%).⁶ In almost all cases, whether dual criminality is required does not depend on whether the assistance sought is coercive in nature.

Dual criminality could pose problems when the offense under investigation exists in the State requesting MLA but not in the requested State. This situation could arise in corruption cases since many members of the Initiative have not criminalized certain types of corrupt conduct. For example, only seven members (26%) of the Initiative have created an offense of illicit enrichment,⁷ and six members (22%) have created an offense of bribery of foreign public officials.⁸ Fortunately, all members whose legislation requires dual criminality have adopted a conduct-based definition to the concept. In other words, when assessing dual criminality, the question is whether the conduct underlying the extradition request is criminal in both States. It is not whether the conduct is

punishable by the same offense in the two States, or whether the offenses in the two States have the same elements. By taking this conduct-based approach, the Initiative's members are likelier to be able to provide MLA even if they have not created the offense under investigation in the requesting State.

Central Authorities

It is generally acknowledged as good practice for a country to designate a central authority to process all incoming and outgoing MLA requests.⁹ Almost all members of the Initiative have appointed a particular government ministry or office for this purpose. Eleven members (41%) of the Initiative have gone further by creating a department within their ministry of justice or prosecutor's office that specializes in MLA. Using specialized units is advisable because it is more likely to result in greater economies of scale and concentration of expertise.

Particular features of central authorities could further enhance the MLA process. The legislation in 10 members (37%) of the Initiative allows central authorities to send and/or receive MLA requests to and/or from their foreign counterparts directly. Delays caused by communication through the diplomatic channel are therefore avoided. Also useful are special measures for urgent cases such as after-hours telephone hotlines; or accepting urgent requests that are made orally, by facsimile, or outside the diplomatic channel. Only four members (15%) have legislation that contains such special measures, but this figure is augmented by similar provisions in many bilateral and multilateral treaties. A central authority can also help foreign requesting States by maintaining high visibility and providing easily accessible information. This could be accomplished by maintaining a web site in English that contains copies of the relevant legislation and treaties, sample requests for assistance, a description of the requirements for cooperation, and contact information. The central authorities of 11 members (41%) have their own web sites on MLA, but only a few of the sites contain all the information described earlier. To conclude, most members of the Initiative could do more to make their central authorities more effective.

Mutual Legal Assistance Relating to Proceeds of Corruption

Generally, some countries in Asia and the Pacific have passed legislation that specifically deals with MLA relating to proceeds of a crime, including corruption. Over half of the Initiative's members (56%) have comprehensive legislation for tracing, freezing, and confiscating proceeds of a crime upon the request of a foreign State. Many members that do not have such legislation may

resort to their domestic proceeds of crime legislation and/or applicable treaties to provide at least some assistance.

International instruments such as the UNCAC suggest ways to make MLA relating to proceeds of corruption more efficient. One example is enforcing foreign confiscation orders by direct registration with a local court. This reduces delay by eliminating the need to apply for a second confiscation order in the jurisdiction where the proceeds are located. Only eleven members (41%) of the Initiative have adopted this approach. The UNCAC also recommends that countries allow the enforcement of foreign confiscation orders in the absence of a conviction under certain circumstances.¹⁰ Just eight members (30%) of the Initiative have legislation to this effect. In sum, many of the Initiative's members have room for improving their laws on MLA concerning proceeds of corruption.

As for sharing confiscated assets with foreign countries, 15 members (56%) of the Initiative have legislation that touches upon the subject. In almost all cases, the legislation gives the requested State wide discretion on whether to share assets, without identifying what factors may be considered in making that decision. However, this discretion will be somewhat circumscribed when assets are confiscated pursuant to a request under the UNCAC.¹¹

Conclusion

The systems for MLA in the 27 members of the Initiative exhibit a wide range of differences. This is to be expected, considering the size of the group, the diversity of the members' legal history, and their different stages of legal and economic development. Consequently, the strengths and weaknesses of each system vary considerably, as do the needs for reform or improvement. Most jurisdictions could benefit from a larger network of treaty relationships. On the domestic front, many countries have not passed comprehensive legislation on MLA, including assistance relating to proceeds of a crime. Creating a domestic legal framework would add functionality, certainty, and transparency. Countries that already have such frameworks may only need some fine tuning, such as by adding certain types of assistance or relaxing some requirements for cooperation. Some members could benefit from institutional reform by creating specialized central authorities for dealing with MLA. Others may only need to strengthen certain aspects of their existing central authorities. In short, each jurisdiction requires its own unique blend of reform measures.

There is nevertheless one fairly widespread trend among the 27 members of the Initiative. With very few exceptions, the Initiative's members appear to have quite a low level of practice in MLA, especially MLA involving corruption

offenses or the proceeds of corruption. The reason for this phenomenon is not entirely clear. Regardless of the cause, this lack of practice makes it difficult to evaluate how the MLA systems in these jurisdictions function in practice. As more cases arise, unforeseen obstacles could appear. Further monitoring and evaluation may therefore be beneficial.

NOTES

- 1 The review covered the following 27 members of the Initiative: Australia; Bangladesh; Cambodia; People's Republic of China; Cook Islands; Fiji Islands; Hong Kong, China; India; Indonesia; Japan; Kazakhstan; Korea; the Kyrgyz Republic; Macao, China; Malaysia; Mongolia; Nepal; Pakistan; Palau; Papua New Guinea; Philippines; Samoa; Singapore; Sri Lanka; Thailand; Vanuatu; and Vietnam. The review did not cover Bhutan, which became the Initiative's 28th member in September 2007 when the review was near completion.
- 2 The full report is available at: www.oecd.org/corruption/asiapacific/mla.
- 3 The 37 Parties to the OECD Anti-Bribery Convention are: Argentina; Australia; Austria; Belgium; Brazil; Bulgaria; Canada; Chile; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Korea; Luxembourg; Mexico; Netherlands; New Zealand; Norway; Poland; Portugal; Slovak Republic; Slovenia; South Africa; Spain; Sweden; Switzerland; Turkey; United Kingdom; and United States.
- 4 As of September 2007, 10 members of the Initiative are States Parties to the United Nations Convention against Corruption (UNCAC). Nine other members have signed but have not yet ratified the Convention. In addition, the P.R. China (which is a State Party) has declared that the UNCAC applies to Macao, China and Hong Kong, China. Orders by Hong Kong, China's Chief Executive to give effect to P.R. China's declaration were expected to come into force shortly.
- 5 For example, Article 46(9) of the UNCAC.
- 6 Information for the remaining members was unavailable.
- 7 Article 20 of the UNCAC defines the offense of illicit enrichment as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."
- 8 One caveat: the review did not examine the constituent elements of the offenses of illicit enrichment and bribery of foreign public officials in the Initiative's members. Hence, the offenses in the members' legislation may differ in scope from those defined in international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UNCAC.
- 9 Multilateral instruments therefore generally require a party to designate a central authority, e.g., Article 11 of the OECD Anti-Bribery Convention, Article 46(13) of the UNCAC, and Article 4 of the MLA Treaty among Association of Southeast Asian Nations (ASEAN) member countries.
- 10 Article 54(1)(c) of the UNCAC.
- 11 Article 57 of the UNCAC.

Provisions of the United Nations Convention against Corruption on Asset Recovery and Mutual Legal Assistance from the Indonesian Law Perspective

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The Government of Indonesia (GOI) ratified the United Nations Convention against Corruption (UNCAC) via Law Number 7 in 2006. The GOI is very interested and was actively involved in the negotiation process of the UNCAC draft. It is proactive in preparing and accommodating the implementation of the UNCAC into Indonesian criminal law. The ratification reflects a strong commitment of the GOI to enhance its efforts in combating corruption; such efforts have been undertaken since the 1960s and are still being developed today. To accomplish this, the GOI has established a Working Group under the administration of the National Development Planning Agency. The Working Group has six thematic clusters, that is, prevention, law enforcement and criminalization, asset recovery, international cooperation, review mechanism and reporting, and database and information. The Working Group was established to compose a comprehensive draft of a national plan of action on combating corruption in Indonesia (NPACC-INDONESIA) to comply with UNCAC norms and principles.

Pursuant to the ratification, the GOI has been drafting comprehensive new bills on the eradication of corruption. These new laws, called the "Three Laws on Anti-Corruption Package," are: a draft revision of the law on the eradication of corruption; a draft law on the Anti-Corruption Court; and a draft law on the eradication of corruption. This package will hopefully be submitted to the Parliament next year.

International cooperation (UNCAC Chapter IV) and asset recovery (UNCAC Chapter V) are indispensable since we have experienced unsuccessful efforts in returning the proceeds of corruption through our existing mutual legal assistance (MLA) treaties with some countries. We hope that during the discussions in the next few days, we will be sharing information and experience

among experts and law practitioners of the Asian and Pacific regions and beyond.

Indonesian Law on Anti-Corruption

Indonesia adopted the civil law system, which was inherited from the Dutch colonial system that heavily relies on the codification principle. But after the fall of Sukarno which left Indonesia in a huge economic crisis, the Suharto regime, in 1968, opened Indonesia for foreign investment. This policy has turned Indonesia into an indispensable country in Asia and triggered strong support from international institutions. The policy greatly impacted on Indonesia's recovery from the crisis. Since then, Indonesia has been involved actively in international business. Subsequently, the common law system has become a new model within the Indonesian law system, particularly in the process of law making. The adoption of a new model is not without legal impact on Indonesia's criminal law system. Eventually, the codification principle is no longer persistently adopted among judges. More judges today favor the implementation of the judge-made law process. In addition, Judicial Act No. 4 of 2004 also obliges judges to consider society's values besides strong evidence presented to the court.

In the criminal law system, the exclusion of the codification principle is greater than in the commercial law system although the legislature and judges are still reluctant to implement it. Based on Article 103 of the Indonesian Penal Code, regardless of the codification principle, the GOI could enact a special law based on the legal maxim *lex specialis derogate lege generali* (the provisions of a specific law apply rather than those established by the general law). There are about 15 special laws covering inter alia crimes that involve terrorism, corruption, money laundering, and human trafficking. These special laws had been enacted since 1998. Among the special laws, the law on anti-corruption is the most comprehensive and substantially improved.

The response of the Law of 1999 to corruption, where corruption is regarded as a serious crime and a violation of the society's right to development, is clear. Based on this view, the GOI had reformed the law to counter corruption, and adopted five significant changes. These changes are as follows:

- Law number 31/1999 recognizes the reversal of burden of proof during the investigation process (Article 28) and during the trial process (Article 37).¹
- The law recognizes a criminal-based confiscation as well as a civil-based confiscation.²

- The law permits the use of wiretapping and electronic devices as evidence in the court trial (Article 26, Law Number 20/2001).
- The need of society's participation in the prevention as well as in law enforcement is stipulated in Chapter V of Law Number 31/1999. This has also been stipulated in Article 15 of the Law on the Corruption Eradication Commission Number 30/2002.
- To a certain extent, Law Number 31/1999 could apply to corruption beyond Indonesia's boundaries, such as, to restrain property in other countries through a mutual legal assistance treaty (Law Number 1/2006) and to extradite an Indonesian national from the other countries (Law on Extradition Number 1/1979). However, Law Number 31/1999, as amended by Law Number 20/2001, does not comprehensively regulate all aspects of criminalization and asset recovery yet, as stipulated in the UNCAC (GAP Analysis, 2006).

Asset Recovery and Mutual Legal Assistance under the United Nations Convention against Corruption and its Adoption under the Indonesian Legal System

Chapter V of the UNCAC on Asset Recovery is related to Article 31 on freezing, seizure, and confiscation. Article 2(g) of UNCAC stipulates a clear definition about confiscation: "...the permanent deprivation of property by order of a court or other competent authority." However, the Convention does not specifically define asset recovery. Instead of having a definition, the UNCAC describes how the asset should be recovered from one country to another. It means that Chapter V mainly addresses all forms of advantages from corruption or corruption-related offenses that are transnational in nature.

The main theme of Article 53 under Chapter V on asset recovery is the recognition of States as victims of corruption themselves, and of consequent rights to recover assets that have been transferred to a foreign jurisdiction. It is deemed a major breakthrough in the fight against corruption worldwide because it stresses the importance of mutual legal assistance (MLA). Since it is a new strategy to handle the benefits derived from corruption, the criminal law system of State parties should be appropriately updated and armed with this new legal device.

The Department of Law and Human Rights is drafting a new law on anti-corruption to comply with international standard, as stipulated in the UNCAC. The draft law includes new types of corruption such as bribery of foreign public officials and officials of public international organizations (Article 16), trading in influence (Article 18), illicit enrichment (Article 20), and embezzlement of

property by a public official (Article 17). The draft law also inserts articles on asset recovery.

Illicit enrichment and its linkage with asset recovery are indispensable as a new type of offense. To prove illicit enrichment is quite difficult because it needs to consider seriously the burden of proof. One method acknowledged in every legal system is that the prosecutorial authorities need to prove the facts that constitute an offense beyond reasonable doubt; while the other method, as an alternative, is the reverse of burden of proof to the defendant. However, the second method is contrary to the principles of "presumption of innocence" and "non-self incriminating evidence." If we look into the definition of "illicit enrichment" of the UNCAC, it is very clear that if someone has a very significant increase in property, that person is subsequently obliged to explain such increase in wealth vis-à-vis that person's lawful income (Article 20 of UNCAC). It is unnecessary to be too cautious in assuming that the burden should be on the defendant instead of on the prosecutor because the property belongs to the former. Therefore, proving beyond reasonable doubt that person's lawful income does not, *mutatis mutandis*, prove that the defendant is guilty or not guilty.³

Law Number 31/1999 designates the importance of State damage or loss as corroborating evidence in the crime of corruption (Articles 2 and 3). Article 2 addresses anyone who unlawfully has enriched himself/herself, or another person, or a corporation resulting to State damage or loss of property. Article 3 is addressed to public officials who misuse his/her position for his/her benefit, or another person, or a corporation's benefit. The difference of view on what constitutes a crime of corruption as mentioned earlier is very crucial to our effort in composing a new law on anti-corruption. It is quite difficult because Article 3, paragraph 2 of UNCAC clearly states that, "For the purpose of implementing this Convention, it shall not be necessary, except as otherwise stated herein, for the offences forth in it to result in damage or harm to state property."

Releasing the damage or harm to State property as corroborating evidence of corruption is a fundamental change from the old paradigm of State interest-based policy to the individual and State interest-based policy that, eventually, will affect the policy on asset recovery, including the legal status of the asset itself.

A mutual legal assistance (MLA) treaty is a treaty on cooperation between State parties, either bilaterally or multilaterally, in law enforcement to address crimes that are transnational in nature. The United Nations (UN) Model on the Treaty on Mutual Assistance in Criminal Matters (1990)⁴ states that the parties shall, in accordance with the present Treaty, afford to each other the widest possible measures of mutual assistance in investigations or court proceedings in

respect of offenses, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State. The UN Model elaborates further the scope of the treaty that may be afforded by the State party. It includes, inter alia, taking evidence or statements from persons; effecting service of judicial documents; executing search and seizures; providing information and evidentiary items; and providing originals or certified copies of relevant documents and records such as bank, financial, corporate, or business records. Indonesia has promulgated Law Number 1 of 2006 on MLA, which stipulates the scope and the procedure of cooperation in mutual assistance in criminal matters. The law is deemed an umbrella act to conclude a treaty between Indonesia and another State party.

The implementation of a model treaty between State parties varies. Its success depends on the legal system of the State parties and, sometimes, the political commitment of a government may affect a treaty's effectiveness. Our experience has shown that the success of international cooperation in relation to assistance in criminal matters does not solely depend upon the existence of the treaty itself.

Indonesia has signed the treaty on mutual assistance in criminal matters with Australia, the People's Republic of China, the Republic of Korea, and seven member countries of ASEAN, including Singapore (2006). But, for unknown reasons, not one treaty on mutual assistance has been implemented successfully.

For example, the effort of the GOI to confiscate the assets of Hendra Rahardja in Australia failed although both governments had entered into a treaty on MLA. Recently, the Attorney General's Office has not yet successfully applied the treaties with the Government of Australia on MLA and extradition against two fugitives involved in the Bank Indonesia Liquidity Assistance (BLBI) case. The request for assistance and extradition to the Government of Australia has taken more than 1 year, but the negotiation has not been finalized.

The treaty on mutual assistance in criminal matters between the GOI and the Government of P.R. China (24 July 2000) is much more different in substance as well as in procedure from the same treaty between the GOI and seven countries of the ASEAN, including that with Singapore (29 November 2006). The treaty with the Government of P.R. China has explicitly provided the widest measure to each State party to search and seizure (Article 17) and to transfer of proceeds of a crime (Article 18).⁵ On the contrary, the treaty with the seven countries of the ASEAN does not provide the widest measure to the State party to the forfeiture of the property derived from the commission of an offense (Article 22) as well as to the search and seizure procedure (Article 18).⁶

On the other hand, in the case of the Nigerian government to recover its assets in Switzerland, the government successfully cooperated with the Government of Switzerland. Although Nigeria and Switzerland have no treaty on MLA, Switzerland can provide MLA based on national law and a declaration of reciprocity.⁷ In addition to freezing USD660 million, the Swiss judicial authority currently handling the case also indicted Mohammed Abacha and all his followers. Moreover, the judicial authority is also examining the possibility of pressing charges against Swiss financial intermediaries.

Based on the aforementioned case, the effectiveness of asset recovery through MLA in criminal matters should be seen on a case-to-case basis. Many factors could influence it. It could be sufficient factors to success than mere necessary factors. However, one thing is true: the existence of those treaties is not a guarantee for success. The success depends more upon the political commitment of the government of each State party. The differences in legal systems that are always assumed true, in fact, are not solely the cause.

In relation to the Indonesian effort to forfeit assets derived from corruption, such as in the cases of Hendra Rahardja who fled to Australia and Suharto whose assets are known to be hidden in Switzerland, the GOI failed to repatriate them.

It was surprising that the Supreme Court of Justice refused recently to be audited by the State Supreme Agency (SSA). By law, SSA has the power to audit all revenues in any government office, including the highest State institution. The Supreme Court argued that all costs derived from litigation and/or disputes before it could not be audited by the SSA because they were not State-owned budget but belonged to a third party.

Based on the recent issues aforementioned, it might be important to consider seriously how the assets should be managed properly and securely for the welfare of the people.

In the cases of Nigeria, Peru, and the Philippines, it took many years to repatriate their assets. The issue of how their respective governments are using those assets remains. To date, the GOI is seriously considering preparing the draft of a law on asset recovery, which is part of a comprehensive strategy in combating corruption, besides the three-package law relating to combating corruption. The package of laws is expected to be completed by the end of 2007 and will be followed by the law on asset recovery in 2008.

What would make asset recovery operational through mutual legal assistance?

There is no satisfactory answer to the question because cooperation between State parties is not merely a legal process but also a diplomatic one. The world has seen corruption on an octopus-wide scale that brings about misery and poverty to the world. Similarly, most State parties seriously consider their national interests and security, which frequently hampers law enforcement against transnational crime. There is a skeptical and pessimistic response to mutual legal assistance (MLA) in relation to asset recovery among State parties. Besides political factors, legal factors still give impact to effectuate the implementation of mutual legal assistance such as the dual criminality principle; treaty- and non-treaty-based arrangements; nonpolitical offense; rules of specialty principles; and nondiscrimination principle, which delayed the procedure of such cooperation between State parties.

The operation of asset recovery through MLA should be undertaken through a regional cooperation in mutual assistance in criminal matters. Their bilateral treaty was signed, but regional agreements or arrangements will eventually make such cooperation much stronger. For example, the ASEAN Convention on Counter Terrorism that was adopted last year has successfully revealed terrorism networking within the region. A step forward in the implementation of the UNCAC within the Asian and Pacific region or the ASEAN is the ASEAN Forum against Corruption. In the end, perhaps the adoption of the ASEAN Convention against Corruption is one strategic issue that needs to be discussed urgently.

NOTES

- 1 Extracts from Law Number 31/1999:

Article 28: "In the interests of an investigation, a suspect shall be obligated to provide statements regarding his entire wealth and the wealth of his spouse and children and the wealth of persons or corporations known or suspected of being connected with acts of corruption allegedly committed by the suspect."

Article 37, paragraph 1: "Defendants shall be entitled to prove that they were not involved in acts of corruption."

Article 37, paragraph 3: "Defendants shall be obligated to provide information regarding their entire wealth and the wealth of their spouse and children and of persons or corporations known to be or suspected of being connected with the case concerned."

- 2 According to Article 18, Law Number 31/1999 further penalties, that apply in addition to those set down in the Criminal Code, are

- a. The confiscation of tangible or intangible movable assets or fixed assets used to commit or being the proceeds of criminal acts of corruption, including the guilty party's corporation where the criminal acts were perpetrated, and the same shall apply to the price of the assets used to replace the aforementioned assets;
- b. The payment of compensation, the amount of which shall not exceed the amount of assets obtained through such criminal acts of corruption;
- c. the winding up of the entire company or parts thereof shall take no longer than 1 (one) year;
- d. The revocation of all or certain rights or parts thereof or the abolishment of all or certain benefits or parts thereof obtained or to be granted by the government to the guilty party.

The Law also protects the right of a bonafide third party such as stipulated in Article 19, paragraph 1: "The decision of a court of justice regarding the seizure of assets not belonging to the guilty party shall not be applied if the interests of third parties acting in good faith would be harmed thereby"

The Criminal Law Procedure, Law Number 8/1981 also stipulates a criminal-based confiscation. Law 31/1999 also stipulates a civil-based confiscation (Articles 32–34).

- 3 The question of whether a so called "reverse onus" provision is consistent with the presumption of innocence was examined in Hong Kong, where Hong Kong Bill of Rights Ordinance 1991 had entrenched the International Covenant on Civil and Political Rights in the constitution of that territory. Section 10 of the Prevention of Bribery Ordinance of Hong Kong, which preceded the Bill of Rights, provides that any person who, being or having been a public servant, "(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives satisfactory explanation to the court as to how he was able to maintain such standard of living or how such pecuniary resources or property came under his control, be guilty of an offence." The validity of section 10 was challenged on the grounds of inconsistency with the constitutionally guaranteed presumption of innocence.

The court decision upheld that Section 10 was consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary. The court's decision was not triggered by trifling incommensurateness or disproportion, but by incommensurateness or disproportion that is unreasonable in the circumstances. Further, the Court's opinion is that where corruption is concerned, there is need, within reason, for special powers of investigation and an explanation requirement. Specific corrupt acts are inherently difficult to detect, even prove in the normal way. The true victim, society as a whole, is generally unaware of the specific occasions on which it is victimized (cf. Nihal Jayawickrama, Jeremy Pope, and Oliver Stolpe. 2002. *Forum on Crime and Society*, Vol. 2, No. 1, pp. 28–29. December).

- 4 General Assembly Resolution 45/117 of 14 December 1990; International Legal Materials. 1991. 1421.
- 5 For example, Article 17, paragraph 1 states:

The requested Party, shall, insofar as its law permits, and the rights of third parties are protected, carry out requests for search and seizure and delivery of materials to the requesting parties for evidentiary purposes..."

In paragraph 2:

The requested Party shall provide such information as may be required by the requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the material seized.

Article 18, paragraph 1 provides:

Each the Parties to the Treaty shall transfer to the other Party the money and objects illicitly obtained by the offenders in the event of the envisaged crime in the territory of the requesting Party but found in the territory of the requested Party. Such transfer shall not infringe upon the legitimate rights of the requested Party or the third party in relation to the above mentioned proceed.

- 6 Article 22, paragraph 1 states:

The requested Party shall, subject to its domestic laws, endeavor to locate...or confiscate property derived from the commission of an offence and instrumentalities of crime for which such assistance can be given provided that the Requesting Party provides all information which the Requested Party consider necessary.

Paragraph 3 provides:

A request for assistance under this Article shall be made only in respect of orders and judgments that are made after the coming into force of this Treaty.

Paragraph 4 states:

Subject to the domestic laws of the Requested Party, property forfeited or confiscated pursuant to this Article may accrue to the Requesting Party unless otherwise agrees in each particular case.

Paragraph 5 states:

The requested Party shall subject to its domestic laws, pursuant to any agreement with the requesting Party transfer to the requesting Party the agreed share of the property recovered under this Article subject to the payment of costs and expenses incurred by the Requested Party in enforcing the forfeiture order.

- 7 Bola Ige, Abacha, and the Bankers. 2002. *Cracking the Conspiracy. Forum on Crime and Society*, Vol. 2, Number 1, page 113. December. UN: New York.

Improving Procedures for Mutual Assistance and Mutual Legal Assistance in Investigations of Transnational Corruption

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Corruption is, increasingly, a transnational crime and, as such, requires investigators and prosecutors to gather evidence across borders. Equally, in a world of financial networks that may straddle many States, the mounting of a purely domestic corruption case will very often demand evidence from foreign jurisdictions. Against that background, the framework and procedures within which both formal assistance via a letter of request (referred to as “mutual legal assistance (MLA)”) and informal cooperation (referred to as “mutual assistance”) are obtained are often bewildering and very often depend on the attitude and opinions of those on the ground to whom the request is made. With that in mind, what are the real and practical difficulties? What are the solutions?

Mutual Legal Assistance or Mutual Assistance?

Prosecutors and investigators sometimes have recourse to MLA without exploring whether informal mutual assistance would in fact meet their needs. It is often forgotten that the country receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously. Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

Although no definitive list can be made of the type of inquiries that may be dealt with informally, some general observations might be useful. Variations from State to State, must, however, always be borne in mind.

- If the inquiry is a routine one and does not require the country of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.

- The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained informally.
- Potential witnesses may be contacted to see if they are willing to help the authorities of the requesting country voluntarily.
- A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness' evidence is likely to be noncontentious.
- The obtaining of lists of previous convictions and basic subscriber details from communications and service providers that do not require a court order may also be dealt with informally.

The extent to which countries are willing to assist with a formal request does, of course, vary greatly. In many cases, it will depend on a particular country's own domestic laws, on the state of the relationship between that country and the requesting State, and—it has to be said—the attitude and helpfulness of those on the ground to whom the request is made. The importance of excellent working relationships being built up and maintained transnationally cannot be too greatly stressed.

It is possible to draw up an indicative list of the type of request where a formal letter will be required:

- Obtaining testimony from a nonvoluntary witness;
- Seeking to interview a suspect under caution;
- Obtaining account information and documentary evidence from banks and financial institutions;
- Requests for search and seizure;
- Internet records and the contents of e-mails; and
- The transfer of consenting persons into custody for testimony to be given.

Confusion can be avoided if prosecutors and investigators have regard for the limits of the conventions and treaties that relate to mutual legal assistance. In particular, it should be remembered that the regime of MLA is for the obtaining of evidence; thus, the obtaining of intelligence and the locating of witnesses should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.

It is often forgotten just how many types of evidence and other material may be obtained informally. For example, some countries have directories of telephone account holders available on the Internet, although consideration will need to be given as to whether it is in a form that may be used evidentially.

Sometimes a degree of lateral thinking is required. For instance, it might be quicker, cheaper, and easier for the requesting country's investigators to arrange for and pay a voluntary witness to travel to the requesting country to make a witness statement, rather than the investigators themselves travelling to take the statement. Similarly, if the consent of the State in which a country's embassy is situated is obtained, witness statements may be taken by investigators at the requesting country's embassy.

Taking matters one stage further, many States have no objection to an investigator of the requesting State telephoning the witness, obtaining relevant information, and sending an appropriately drafted statement by post thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to help the requesting authority and in circumstances where no objections arise from the authorities in the foreign State concerned from whom prior permission must be sought.

There are certain key considerations for a prosecutor when deciding whether evidence is to be sought by informal means from abroad:

- It must be evidence that could be lawfully gathered under the requesting State's law, and there should be no reason to believe that it would be excluded in evidence when sought to be introduced at trial within the requesting State;
- It should be evidence that may be lawfully gathered under the laws of the requested State;
- The requested State should have no objection;
- The potential difficulty in failing to heed these elements might be that such evidence will be excluded in States with an exclusionary principle in relation to evidence; and
- In addition, but no less important, inappropriate actions by way of informal request may well irritate the authorities of the foreign State who might therefore be less inclined to assist with any future request.

The golden rule must be: ensure that any informal request is made and executed lawfully.

Any consideration of informal assistance (i.e., mutual assistance) should not overlook the use to which it can be put to pave the way for a later, formal request. For instance, it might be possible to narrow down an inquiry in a formal letter of request by first seeking informal assistance. For example, if a statement is to be taken from an employee of a telephone company in a foreign company, informal measures should be taken to identify the company in question, its address, and any other details that will assist and expedite the formal process. It is sometimes overlooked, but should not be, that an expectation always exists

among those working in the field of mutual legal assistance that as much preparation work as possible will be undertaken by informal means.

Formal Requests (Mutual Legal Assistance)

In criminal matters, there is no universal instrument or treaty which governs the gathering of evidence abroad. However, the building blocks for formal requests are the conventions, schemes, and treaties that States have signed and ratified. For instance, in the field of corruption investigations, the United Nations Convention against Corruption (UNCAC) specifically provides for mutual legal assistance and the encouraging of international cooperation.

Prosecutors and judges making a formal request should always assert the international obligation of a requested State to help where such an obligation exists by way of international instrument. Equally, the authority upon which the letter of request is written should also be spelt out. To give a practical example, the United Kingdom (UK) made a statement of good practice in accordance with Article 1 of the Joint Action of 29 June 1998 adopted by the Council of Europe, in which it declared that the UK Home Office (Interior Ministry) will ensure that requests conform with relevant treaties and other international obligations. Prosecutors generally need to take heed of any such declarations of such intent made by their own State and to take action accordingly.

Similarly, the person making a request must carefully ensure that his or her own domestic law allows the request that is actually being made. For instance, a piece of domestic legislation might, in fact, disallow some requests or type of requests that many conventions, treaties, or other international instruments would appear to allow. For some countries, the domestic legislation will have primacy. To make a request otherwise in accordance with domestic law in such circumstances will invite arguments for exclusion of evidence.

Prosecutors and prosecuting authorities are recommended to contact early a counterpart in the country to which the request is to be made. Notwithstanding the existence of a convention or treaty and its broad and permissive approach, the requested State may well have entered into reservations that limit the assistance that can be given. For instance, some countries have reserved the right to refuse judicial assistance when the offense is already the subject of a judicial investigation in the requested country. The key principle must be this: regard should always be given to the fact that a requested State will have to comply with its own domestic law, both as regards to whether assistance can be given at all and, if so, how that assistance is given.

The Form of the Letter of Request

The requesting authority should compile a letter that is a stand-alone document. It should provide the requested State with all the information needed to decide whether assistance should be given and to undertake the requested inquiries. Of course, depending upon the nature of those inquiries and the type of case, the requested State may be quite content for officers from the requesting State to travel across and to play a part in the investigation.

A problem that occurs in all jurisdictions in respect of both incoming and outgoing requests is that of time. A request may take weeks, sometimes months, and occasionally and unfortunately, years to execute. As soon as grounds emerge to make the request abroad and the need for such a request is clear, then the letter should be issued. It is important that urgent requests be kept to a minimum and that everyone involved in the process should appreciate that an urgent request is urgent and unavoidably so. If a request is urgent, the letter should say so clearly and in terms that explain the reasons.

The material conditions to be satisfied within the letter of request may be summarized as follows:

- If the requested country requires an undertaking of reciprocity on the part of the requesting country, then this should be given. In this respect, common law countries are usually more restrictive than those with a civil code.
- A prerequisite for some States is the criminalization of the act in both the requesting and requested State (i.e., the dual-criminality rule). This should therefore be addressed in the letter.
- The assistance must relate to criminal proceedings, whether at an investigative stage or after court proceedings have begun, in the strict and accepted sense; that is, an investigation or proceedings against the perpetrators of a criminal offense under ordinary law.
- Although it need not be specifically asserted within the letter, a prerequisite for formal assistance is the guarantee of a fair trial and respect for the fundamental rights laid down in the International Covenant on Civil and Political Rights (ICCPR) within the legal system of the requesting country.
- Some requested countries may require an assertion that the request does not relate to fiscal, political, or military misdemeanors.
- The letter must contain a description of the facts that form the basis of the investigations/proceedings. Such a description must be as detailed as possible and should indicate in what way the evidence being sought is necessary.

- If the requesting and requested State is each a party to a multilateral or bilateral agreement, then the international instrument concerned should be referred to.

Although a request is executed by a competent judicial authority of the requested country in accordance with its own laws and its own rules and procedures, very often it will be possible for the requesting authority to make an express request that the requested country apply the requesting country's rules of procedure. If such a request is available to the requesting authority, advantage should be taken of it. The reason is obvious. A fundamental difficulty, often overlooked, is that different States have different ways of presenting evidence. The whole purpose of a request is to obtain usable, admissible evidence. That evidence must therefore be in a form appropriate for the requesting country, or as near as possible to that form as circumstances allow. Therefore, the requesting country should clarify in what form, for instance, the testimony of a witness should be taken. The requested State cannot be expected to be familiar with the rules of evidence gathering and evidence adducing in the requesting State.

Furthermore, instruments may contain a provision to the effect that the method of execution specified in the request shall be followed to the extent that it is compatible with the laws and practices of the requested State. If in doubt, the requesting authority should provide examples of what is required to the requested authority.

Particular Problems Experienced in Mutual Legal Assistance Sought in Corruption Cases

If an investigation involves an influential politician or business figure in the requested country, the requested assistance may never be provided. The requested authority may cite "national interest" or immunities enjoyed by certain sections of the community (e.g., ministers of the government or judges).

In some States, the person for whom the request for mutual legal assistance is made is able to appeal against the sharing of evidence with the requesting country. When such an appeal is available, it may well cause lengthy delay. In those European countries that have traditionally enjoyed favorable tax and banking conditions—for instance, Liechtenstein and Switzerland—an appeal avenue is available in relation to the disclosure of information on financial position, etc. In those countries, in addition, institutions such as banks may have similar rights of appeal.

Requests for confiscation, repatriation of proceeds of crime, and extradition have traditionally caused particular difficulty. The UNCAC has addressed these issues in detail and has provided fresh obligations. However, it is still the case that no internationally binding legal instrument sets out a comprehensive mandatory regime for the repatriation of assets.

Search and/or seizure generally can be problematic. Essentially, the requesting authority should be careful to provide as much information as possible about the location of the premises, etc. But it must be remembered that different jurisdictions set different thresholds. Search and seizure is a powerful weapon for investigators. It must be assumed that the requested State will only be able to execute a request and search or seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offense has been committed and that there is evidence on the premises or person concerned which goes to that offense. These "reasonable grounds" should be specifically set out within the letter. Generally, it will not be enough to ask simply for search and seizure without explaining why it is believed the process might produce evidence. For a request within Europe, it is undeniably good practice to have written regard for the core principles of the European Convention on Human Rights (namely, necessity, proportionality, and legality). Interference with property and privacy in European countries is now frequently justified only if pressing social reasons exist, such as the need to prosecute criminals for serious offenses. Even if all these factors are addressed, it may well be that the searching of the person and taking of fingerprints, DNA, and other samples will have less chance of success in some jurisdictions.

As corruption becomes increasingly sophisticated and transnational, and as more and more cases involve a link with organized crime, it may well be that there are extremely sensitive aspects to an investigation. Nevertheless, it may be that that sensitive information will have to be included in a formal request for assistance to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by criminals, organized crime, or those who are otherwise corrupt needs to be weighed carefully. In reality, the system for obtaining mutual legal assistance globally is inherently insecure. The risk of unwanted disclosure will be greater or lesser, depending on the identity of the requested State. When considering the matter, those requesting must have regard for duty-of-care issues that arise for them. Sometimes, difficulties can be avoided by issuing a generalized letter that leaves out the most sensitive information but provides enough detail to allow the request to be executed. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance; in other words, a request

that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed.

If one were to put together a checklist for the requester on what must be included in the letter of request, it would include the following:

- an assertion of authority by the sender of the letter;
- citation of relevant treaties and conventions;
- assurance (i.e., as to reciprocity, dual criminality, etc.);
- identification of defendant/suspect;
- present position regarding the investigation/proceedings;
- charges/offenses under investigation/prosecution;
- summary of facts and how those facts relate to the request being made;
- inquiries to be made;
- assistance required; and
- signature of the sender.

Principles of Extradition and Jurisdiction

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The purpose of this paper is to provide an overview of the principles of extradition and jurisdiction, as the two are inextricably linked. It was the narrow approach of States to jurisdiction based on the notion of State sovereignty that led to the birth and development of extradition between States.

The traditional approach of States was that "all crime is local," more particularly in common law systems, and therefore, the courts could only try those matters that occurred within the territory of the State. The primary reason that States did not assert extraterritorial criminal jurisdiction, as stated above, was founded in the concept of State sovereignty. It was for each State to try offenders within its own geographical territory(ies) or its own nationals. It was, to put it bluntly, not the business of another State to impose or exercise its criminal laws or extend its criminal jurisdiction in another State. Thus, the law and practice of extradition developed with the first United Kingdom (UK) treaty dating back to 1794.

Initially, States entered into bilateral treaties with other States to seek the surrender of a fugitive accused or convicted of a crime within its "jurisdiction." But as crime became more transnational in nature, in effect, the international community has responded by adopting multilateral international and regional treaties such as the numerable UN Conventions of which the United Nations Convention against Corruption (UNCAC) is one such example; the 1957 European Convention on Extradition; 1977 European Convention on the Suppression of Terrorism; and the Southern African Development Community (SADC) Protocol on Extradition.

It may help to address the concept of jurisdiction before examining extradition principles and practice.

Principles of Criminal Jurisdiction

A State may assert criminal jurisdiction in one or more of the following ways:

- territorial,
- active personality (nationality of an offender),
- passive personality (nationality of a victim),
- protective personality (national security), and
- universal jurisdiction.

The first two bases of asserting jurisdiction have been the bedrock of common law systems, save for piracy that has long been an exception to the territorial rule for criminal jurisdiction under English law.

Whereas according to international law, the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own national wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but "*hostis humani generis*" and as such he is justiciable by any State anywhere...¹

However, the idea of territorial jurisdiction has been subject to revision over the centuries. In 1927, the Permanent Court of Justice in the *Lotus* case observed that:

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty..."

The position under common law however remained largely territorial unless jurisdiction was expressly extended by statute. This is in contrast to civil law jurisdictions where the concept of jurisdiction is not seen as a concept separate to and from the aspect of statehood or indeed international law.

Extraterritorial Jurisdiction

A number of inroads have developed through both common law and statute that allows courts to consider acts or omissions which are not committed

within the territory, hence extending the scope of criminal jurisdiction—i.e., “extraterritorial jurisdiction.”

Common law recognized and developed the limits of territorial jurisdiction in the Privy Council decision in *Liangsiriprasert v. Government of the United States of America* (1991):

“Crime has ceased to be largely local in origin and effect. Crime is now established on the international scale and the common law must now face this new reality....there is nothing in precedent, comity[explain] or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the criminal offences in England....” per Lord Griffiths.

Extraterritorial jurisdiction can be asserted on the following grounds:

- active personality (nationality of an offender),
- passive personality (nationality of a victim), and
- Protective personality (national security).

Active personality (nationality of offender)

In common law systems, exceptions to the basic principle of territoriality are based on the principle of active personality and are normally provided by statute.

Examples from the UK are as follows:

- Offences Against the Person Act 1861 – murder or manslaughter of British or foreign victim outside our territory can be tried if offender is a British national.
- Anti-terrorism, Crime and Security Act 2001 – Proceedings for an offense committed under Section 47 or 50 outside the UK may be taken, and the offense may, for incidental purposes, be treated as having been committed in any part of the UK. However, both Sections 47 and 50 apply to acts done outside the UK, but only if a UK person does them.
- International Criminal Court Act 2001.

Most civil law systems, in contrast, assert criminal jurisdiction on this basis. The rationale being that the State exercises jurisdiction over its own nationals wherever they may commit an offense. Equally, civil law systems would recognize passive personality; but until recently, this was not the case for common law systems.

Passive personality (nationality of a victim) and protective personality (national security) as a means of asserting criminal jurisdiction are developing within common law systems, particularly in the light of the attacks on nationals by

terrorists groups. This is illustrated in the extradition case of Al-Fawwaz and others [2001] UKHL 69, which involves an extradition request from the United States (US) following the US Embassy bombings in East Africa.

The application of the protective personality basis was demonstrated in a recent US anti-corruption case, Statoil (2006). On 13 October 2006, Statoil ASA agreed to a 3-year deferred prosecution agreement with US authorities having admitted it had violated the US law on bribery of foreign officials. Bribes had been used to induce an Iranian official to help Statoil obtain a contract to develop Iranian oil and gas projects. No "active" conduct took place in the US. The company is registered in Norway where it had already tendered a guilty plea on the same conduct. The US asserted jurisdiction based on US instrumentalities that were used to transfer the bribe payments. Statoil was quoted on the New York Stock Exchange, thereby, asserting jurisdiction arguably protective and/or "extended" active personality. Foreign Corrupt Practices Act (FCPA) of 1977 grants jurisdiction where the legal person is a US issuer.

As crime transcends national boundaries, the UN Conventions have sought to reflect this trend through mandatory (where appropriate) and discretionary measures to extend extraterritorial criminal jurisdiction. The rationale is to give effect to the principle of "extradite or prosecute" (*aut dedere, aut judicare*).

Therefore, in implementing these Conventions, member States must extend their jurisdiction provisions to give effect to the intent of the international community and to provide a truly international response through the denial of safe havens.

For the purposes of UNCAC, the relevant provision is Article 42, which provides:

Article 42: Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:
 - (a) The offence is committed in the territory of that State Party (territorial); or
 - (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed. (deemed extended jurisdiction)
2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:
 - (a) The offence is committed against a national of that State Party (passive personality); or
 - (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory (active personality); or

- (c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or
 - (d) The offence is committed against the State Party (protective personality).
3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.
 4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.
 5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.
 6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

By contrast, the OECD Convention approaches jurisdiction from the traditional territorial basis but seems to encourage a wider construction on jurisdiction under Article 4(4) of the Convention and provides:

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

However, the mandatory provisions are contained in Article 4(1) and (2) which require State parties to ensure that:

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. (territorial)
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. (active personality)

Universal Jurisdiction

By contrast, States had however recognized and accepted extended jurisdiction in relation to those crimes that were regarded as so abhorrent to humanity that they deserved international condemnation and censure; that is,

any State could assert criminal jurisdiction over individuals wherever they were found. Universal jurisdiction however only applies to a narrow range of offenses such as piracy, grave breaches of the Geneva Conventions, torture, and slavery. The list is limited and restricted to grave offenses.

Universal jurisdiction means exactly that—the power of the State to try an offender irrespective of the nationality of the offender or of where the crime occurred. So at first blush, it would appear that no nexus is required between the offender and the State asserting jurisdiction. The International Court of Justice in an arrest warrant case made it clear that a nexus was required and universal jurisdiction could not be asserted if the offender was not within its territory or there was no other nexus with the State. Hence, there are practical limitations to what amounts to universal jurisdiction. The matter, however, has been reopened and the issue will be revisited before the International Court of Justice in certain criminal proceedings in France (i.e., Republic of the Congo v. France).

Extradition: Principles and Practice

Having considered the broad principles of jurisdiction and the interrelationship with extradition, let us examine the basic principles in extradition before looking at the process and issues relevant to corruption cases.

The first factor in any extradition request is that there must be a legal basis for the making of a request. Broadly speaking, there are five bases for extradition:

- 1) bi-lateral arrangements;
- 2) regional extradition treaties (e.g., the 1957 European Convention on Extradition, European Arrest Warrant, and Southern African Development Community (SADC) Protocol on Extradition);
- 3) international instruments (e.g., UN Conventions such as Article 44(5) of the UNCAC; the “London Scheme” governing Commonwealth countries; and Article 10 of the OECD Convention;
- 4) ad hoc arrangements; and
- 5) comity.

The procedures with regard to each scheme overlap largely; the main difference lies in the detail.

Procedure

The extradition process may be commenced in essentially two ways:

- (1) Provisional Arrest – where there is a flight risk. Usually the treaty will set out the provisions for a provisional arrest and provides the period in which the requesting State must submit a request, for example, Article

16 of the 1957 European Convention on Extradition. Where a State is relying on UNCAC, Article 44(10) of UNCAC provides for provisional arrest.

The provisional request for arrest is submitted via Interpol with an accompanying letter, which provides an undertaking that an extradition request will follow, and the following documents:

- warrant of arrest
- list of charges
- Description of conduct
- Details + photograph of person sought

(2) "Full" order request – submitted for processing through diplomatic channels. Arrest takes place after consideration of the request.

Following arrest, through either route, domestic law of the requested State governs the proceedings.

Step 1

The requesting country submits a request through one of the aforementioned routes. In cases where the provisional arrest of a fugitive is sought, the requested State would usually submit the foreign warrant and accompanying documents to its courts for consideration. If satisfied that the warrant discloses an extradition crime and that there is a flight risk, it issues a "local" warrant, which is then executed, and the fugitive is usually brought before a court for the first hearing.

Step 2

The court will then—depending on the scheme involved—adjourn the case accordingly for the receipt of the formal request. For example, in case of a request under the 1957 European Convention on Extradition, the maximum period allowed by the Convention is 40 days. If it is a "full" order, the court will usually fix a date for the extradition hearing.

Step 3

Once the formal request is received from the requesting State, the law of the requested State will govern the process. In most countries, the executive considers the request first prior to the judicial hearing. Generally speaking, the executive will issue an order or authority indicating that it considers the request to be valid. Domestic law governs what falls to be determined by the executive. In some countries, particularly civil law countries, the request is submitted directly to the judiciary for proceedings to commence.

Step 4

The matter is then heard at the court of first instance to determine whether or not the fugitive should be surrendered to the requesting State. A number of issues/challenges can arise at this stage, such as:

- Is the offense for which extradition is sought an "extradition crime"?
- Authentication – this invariably raises a number of challenges and is a particularly burdensome requirement in common law countries.
- Sufficiency of facts and evidence – The European Convention on Extradition removed the need to adduce evidence and simply relies on a statement of facts; other schemes require the requesting State to submit sufficient evidence in accordance with the standard of proof set out in domestic law. For common law jurisdictions, it is usually a prima facie case.

The judge, in certain jurisdictions, may also be invited by the defense to hear evidence as to why the fugitive should not be committed. Upon conclusion of the committal proceedings, the fugitive may be entitled to lodge an application for appeal or a writ of habeas corpus.

Step 5

The fugitive may apply for an appeal or a writ of habeas corpus. The last step usually takes a disproportionately long time and practice shows that the fugitive generally makes more than one application for habeas corpus, which adds to the delay in the extradition proceedings.

Step 6

Once all the judicial proceedings are concluded, the matter is then referred once again to the executive to decide on the final surrender of the fugitive to the requesting State. At this final stage, the defense may still be entitled to put representations before the final surrender (discussed below).

Double or Dual Criminality

At the heart of extradition lies what has always been regarded as an essential safeguard—the rule of double criminality. This rule requires that for an extradition request to succeed, the conduct complained of in the requesting State must also amount to a crime in the requested State. Failure to satisfy this requirement would lead to the discharge of the fugitive at the first step:

"For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime

under the law both of Spain and of the United Kingdom. This is known as the double criminality rule” (Lord Browne-Wilkinson, Pinochet (No. 3) [2000] 1 AC 147).

What amounts to an extradition crime varies between instruments. Broadly speaking, there are two different approaches to determine what amounts to an extradition crime: the conduct test and the “list” test.

Most recent extradition treaties adopt the conduct test because it avoids the complexities usually associated with trying to fit the conduct in a general list. The main criteria under this test is that the offense is punishable under the laws of both the requesting and requested State for 12 months or more²; in some cases, the sentence threshold is set at 2 years or more.³

Therefore, when determining an extradition crime under the conduct test, the requested State transposes the conduct from the requesting State as if it has occurred within the requested State. If the conduct amounts to a crime, then the next stage is to look at the sentence threshold to ensure it satisfies the requirement. If the conduct does not amount either to a crime or does not satisfy the sentence threshold, it fails the double criminality rule. This approach has been found to be a more flexible and one that encompasses both statutory and common law offenses.

The list test, in contrast, has proven to be more difficult particularly in relation to common law offenses. So for example, in the UK, “conspiracy to defraud” is an extradition crime for requests emanating from European and Commonwealth/Colony countries, but it was deemed not to be an extradition crime where requests from the US are concerned.⁴

Apart from the transposition of conduct, consideration must also be given to the following matters, all of which must be satisfied for the purposes of the double criminality rule:

(1) Date of the offense – the act had to be criminalized by both the requesting and requested State at the time when it was committed. For example, the extradition request submitted by Spain with respect to Pinochet related to offenses committed between 1973 and 1990 when he was the head of State of Chile. The crimes included genocide, torture, taking of hostages, and murder of Spanish citizens. The proposed English charges included conspiracy to torture between January 1972 and September 1973; August 1973 and January 1990; January 1972 and January 1990; and torture in June 1989.

The request was challenged on the ground that the rule of double criminality was not satisfied given that the conduct alleged had occurred prior to

torture being an offense under the UK law. As torture was criminalized by the Criminal Justice Act of 1988 and hostage taking after 1982, the conduct did not amount to an extradition crime.

The House of Lords determined that for an offense to amount to an extradition crime, the conduct must be an offense in the UK at the date it took place and not merely the date of the request for extradition. Therefore, only those parts of the conspiracy to torture and torture relating to the period after 29 September 1988 were considered extradition crimes.

In effect, this decision—although *per curiam*—overruled the divisional court decision in *Gotthold*⁵ when the court considered a similar argument but concluded that if the conduct was an offense at the time when a request for extradition is submitted, then it would amount to an extradition crime and not at the date of commission of the offense.

(2) Are there any extraterritorial elements to the conduct? Where the conduct spreads over a number of countries the transposition exercise still remains the same to determine if there is an extradition crime. Generally speaking, treaties and domestic law refer to conduct that occurs within the "territory" of the State party. However, courts have always read "territory" to mean "jurisdiction" to capture conduct in both the requesting State and elsewhere. This is now particularly relevant given that crime is no longer local in commission or effect (e.g., in the US extradition request of Al-Fawwaz and others).⁶ Al-Fawwaz, Abdel Bary, and Eidarous were accused of a conspiracy to murder US nationals, American diplomats, and American personnel as part of a conspiracy by members of Al Qaeda. The US sought their extradition because of the embassy bombings in East Africa in 1998. Following the committal hearing, the defense lodged an application for habeas corpus. It submitted that to amount to an "extradition crime," the conduct should have occurred within the US. But in the present case, the conduct was largely extraterritorial; thus, it could not be considered as if it had not occurred in US territory. On behalf of the US, it was submitted that the word "territory" in the treaty had to be given a broader interpretation—in line with paragraph 15 of Schedule 1 of the 1989 Act and the case of *Minervini*—to mean "jurisdiction."

The House of Lords stated that the conduct was not required to have occurred in the USA and reliance could be placed on extraterritorial conduct in order for the offenses to be justiciable in the USA, particularly because serious crimes were committed globally. Moreover, it stated that "an ordinary meaning of the term "the jurisdiction of the state," is the power of that State to try an offence and includes extra-territorial jurisdiction."

In a more recent case dealing with the European Arrest Warrant, the Divisional Court in *Office of the King's Prosecutor, Brussels v. Cando Armas and another* [2004] EWHC 2019 (Admin), Mr. Justice Stanley Burnton analyzed the approach to be taken where conduct occurs other than in the requesting State as follows:

“The object of the Framework Decision was to facilitate extradition between Member States of the European Union: we refer to the recitals and to Article 1.2. The list of framework offences includes offences of the most serious kind. Many of them are by their nature often committed by conduct occurring in the territory of more than one Member State: terrorism, trafficking in human beings, illicit trafficking in narcotic drugs and weapons, illicit trafficking in endangered species and in cultural goods are some examples. We are reminded of the speech of Lord Slynn in *Re Al-Fawwaz* [2001] UKHL 69, [2002] 1 AC 556 at [37], when giving reasons for not regarding the jurisdiction of a State seeking extradition as being limited to its territory:

...It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal.

It is not coincidence that all of the offences to which Lord Slynn referred are now framework offences. We also refer to Lord Bridge of Harwich in *R v Governor of Ashford Remand Centre, Ex p Postlethwaite* [1988] AC 924, 947, cited by Lord Hutton in *Re Al-Fawwaz* at [64]:

I also take the judgment in that case [*In re Arton (No 2)* [1896] 1 QB 509, 517] as good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would “hinder the working and narrow the operation of most salutary international arrangements.

It would be highly regrettable if transnational offences were not extraditable offences simply because a (possibly minor) criminal act in the totality of criminal conduct occurred in this country. For example, if the decision of the District Judge is correct, a person involved in drug trafficking, importing drugs into Belgium, who in the course of his

criminal conspiracy came for a day to London and made a telephone call to Belgium to arrange a collection of drugs imported into Belgium by his co-conspirators cannot be extradited under section 64(2), because a part of his criminal conduct occurred in the United Kingdom. His offence is not within subsection (3), because not all his conduct occurred in Belgium; subsection (4) does not apply, because some of the conduct occurred within Belgium; subsection (5) is inapplicable, because the conduct occurred within the category 1 territory and part of it occurred within the United Kingdom; subsection (6) similarly is inapplicable; and so is subsection (7). It may be that the offender could be prosecuted in this country; but if the principal criminal activities and consequences occurred in a category 1 territory, it will normally be appropriate for him to be tried there, and particularly so if his co-conspirators are to be tried there. This result is so absurd that we would strain not to interpret the Act as producing it."

Thus, to amount to an "extradition crime" under the 1989 Act, the conduct had to satisfy the following criteria:

- double criminality;
- sentence; and
- within the "jurisdiction" of the requesting State, which includes both territorial and extraterritorial offenses.

It does not mean however, that if part of the conduct does not satisfy the double criminality rule, it would lead to a refusal of extradition on the entire conduct. As illustrated in Pinochet and other cases, the requested State can find that part of the conduct satisfies the test and return a fugitive for it. Such a finding would be binding on the requesting State under the speciality rule.

Double criminality, as aforementioned, has long been regarded as one key safeguard in extradition; such that if conduct did not amount to an extradition crime, then no extradition could lie. There has been a slight shift, however, in this approach as demonstrated by the recent adoption in the European Union of the European arrest warrant under the Council Framework Decision of 13 June 2002. This approach has also been adopted more recently by the Caribbean Community (CARICOM) at their annual meeting of the Conference of Heads of Government of the Caribbean Community in July 2007.

The European Arrest Warrant has two distinct categories of extradition offense:

1. offenses punishable with 12 months or more imprisonment;
2. offenses contained in the framework list punishable with imprisonment of 3 years or more and, as "defined by the law of the **issuing** Member

State, shall under the terms of this Framework Decision and **without verification of the double criminality** of the act, give rise to surrender pursuant to a European arrest warrant"⁷ [emphasis added].

The Council Framework Decision of 13 June 2002 identifies a list of generic serious offenses which member States regard as serious offenses and common to all member States (e.g., corruption, terrorism, laundering of proceeds of crime). Consequently, the framework decision seeks to remove the need for the transposition of conduct to satisfy the double criminality rule. This perceived removal of the double criminality rule raised a huge concern among practitioners as it was thought that extradition would be granted for offenses that are not offenses under English law. The House of Lords in *Dabas*,⁸ upon a request from Spain for offenses of "terrorism," observed:

"These provisions show that the result to be achieved was to remove the complexity and potential for delay that was inherent in the existing extradition procedures. They were to be replaced by a much simpler system of surrender between judicial authorities. This system was to be subject to sufficient controls to enable the judicial authorities of the requested State to decide whether or not surrender was in accordance with the terms and conditions which the Framework Decision lays down. But care had to be taken not to make them unnecessarily elaborate. Complexity and delay are inimical to its objectives.

The scope of the European arrest warrant is described in article 2. It may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months: article 2.1. Verification of the double criminality of the act is dispensed with in the case of a European arrest warrant which is issued for any one or more of the 32 offences listed in article 2.2, provided that the act is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. Acts which constitute offences other than those on the list may be subject to the condition that they constitute an offence under the law of the executing Member State - that is, subject to verification of their double criminality: article 2.4." – Lord Hope.

One main driver in the adoption of the European arrest warrant⁹ was the delay inherent in extradition proceedings brought about by unnecessary complexities of the process (e.g., authentication and certification) particularly in

common law systems where an extradition request is seen both as an exercise of the executive and judicial branches. The European arrest warrant, by contrast, relies on mutual recognition and surrender and is a judicial decision issued by a member State and has gone some way to remove some of the cumbersome authentication and certification requirements.

Authentication and Certification

This has proven to be one of the most cumbersome requirements for most Commonwealth countries because it requires a two-tier approach before the judge or magistrate can embark on the actual proceedings:

- Authentication – the warrant or judicial decision must be signed by a judge, magistrate, or an officer of the State; and
- Certification – the entire request bundle must then be sealed by the official seal of the Minister of Justice or some other Minister of State.

Unless, they are so satisfied, the request cannot be considered. The UK has a host of cases where these technical points have been taken leading to unnecessary delays in proceedings. This is illustrated amply in two cases, one from Namibia and the other from Trinidad and Tobago.

In the case of Hans-Jurgen Gunther Koch,¹⁰ the Supreme Court of Namibia dealing with the Apostille attached to the request in German—which had not been translated—found that evidence of authentication must be placed before the Court. Moreover, as the Apostille was not translated, the documents submitted by the German authorities should have been rejected by the magistrate notwithstanding the Hague Convention.

In *Steve Ferguson & Ishwar Galbaransingh and John Jeremie Attorney General of Trinidad and Tobago and His Worship, Chief Magistrate* [2007], the defense submitted that "the record of case" was not certified by a prosecuting authority in the US but by an assistant US Attorney. Therefore, the requirements of section 19 A(5)(a) of the 1985 Act were not complied with. Justice Breaux rejected the submission.

Although there is a general move toward relaxing these requirements, most States still retain them. This was raised in the case of *Dabas*, which deals with "certification" of the European Arrest Warrant.

Sufficiency of Facts/Evidence

Most international conventions such as the UNCAC, urge States to "expedite extradition procedures and to simplify evidentiary requirements

relating thereto in respect of any offence to which this article applies" Article 44(9).

Commonwealth countries, unless they have agreed otherwise bilaterally, require the production of sworn prima facie evidence from the requesting State. In practice, this has posed difficulties given that most civil law countries adopt a different test, use investigating magistrates to collate the evidence, and do not generally provide firsthand sworn statements from the witnesses. This in itself presents a difficulty because States are being asked to present the evidence in a manner they are not accustomed to, thereby, leading to delay and frustration. Furthermore, Spanish-speaking countries have always viewed extradition requests as a judicial process and therefore do not have the mechanisms under their laws to ensure the certification demanded by most common law systems. This has led to requests not being pursued. These are some common frustrations in extradition cases at the first stage of the proceedings.

Following the conclusion of the extradition hearing, a fugitive would be entitled to lodge a writ of habeas corpus.¹¹ Most Commonwealth extradition laws set out a number of grounds upon which a fugitive may challenge the decision to commit. Here, most of the delay occurs because the defense can challenge and renew their applications. The UK cases illustrate amply the number of challenges during the course of an extradition request. For example, a request from France submitted in 1995 was not concluded until 2005!

Once the judicial proceedings have ended, the executive may still have to consider the surrender of the fugitive. Here, too, the defense can challenge the decision to surrender through the judicial review mechanism, adding to further delay!

"Extradite or Prosecute"

In the event a State refuses to extradite a fugitive particularly on the ground of nationality, most treaties require the requesting State to submit the papers to its prosecuting authorities, as required by Article 44(11) of UNCAC. Most civil law countries assert criminal jurisdiction over their nationals for all offenses,¹² wherever those nationals may have committed the offense(s), i.e., active personality. The corollary is that they will not extradite their own nationals.¹³ This is in direct contrast to common law practice where the assertion of active personality criminal jurisdiction must be specifically provided for. To accommodate this difference between the legal systems, most recent conventions require States to consider extending their jurisdiction. Therefore, as aforementioned, UNCAC creates two categories: mandatory and discretionary for asserting jurisdiction. The mandatory provision contained in Article 42(2),

which requires States to assert active personality jurisdiction, indeed seeks to cater for such situations.

Political Offense: Exception and Immunity

As requests for extradition relate to persons accused or convicted of a crime, it follows that States are obliged not to manipulate the extradition process to seek the return of political offenses (e.g., members of the opposition or those whose political views are at odds with the government) unless, of course, genuine criminal proceedings are pending against such individuals. So, it is not the case that a State may not submit a request for extradition of a person accused or convicted of a crime who may also be, in some way, connected to the political situation in the requesting State. It is the allegation that will be examined as opposed to the status of the individual concerned.

However, there have been cases—although few and far in between—where the requested State has refused to extradite the fugitive on the ground of the political offense exception. The most recent case was a request to Botswana from Namibia in relation to high treason,¹⁴ where the Court applied the exception on the grounds that high treason was an offense that was political in nature, and therefore, a refusal must follow.

It is usually for the fugitive to raise the “defense” that the request relates to a “political offense,” and therefore, must be an exception to extradition. To put it simply, that is what is meant by political offense exception.

This is, however, distinct and quite apart from raising a challenge that, if returned, the fugitive may be persecuted for his/her political opinions.¹⁵

Extradition law and international instruments have, over time, identified a range of offenses that do not fall to be considered as “political offenses”; so, the exception does not apply. Such offenses include almost all the counter-terrorism convention offenses and are also provided for under Article 43(4) as follows:

... A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

The offenses stated in UNCAC cannot amount to a political offense. Therefore, any request to extradite or surrender a fugitive alleged to have committed acts of corruption cannot rely on the exception.

This has been demonstrated by the following recent extradition requests submitted by States in relation to their former heads of State:

- (1) by Guatemala to Mexico – for its former President, Portillo, who transferred USD15 million to the Defense Department, the money being embezzled on his behalf by officials. He was arrested and his extradition was ordered in October 2006.
- (2) by Peru to Chile – for its former President, Alberto Fujimori. He is accused in Peru of a number of offenses ranging from human rights abuses, kidnapping to embezzlement. It is alleged that he committed large-scale corruption that deprived Peruvians of public resources, and that, through corrupt activities, he controlled the Congress and the judiciary. Following the submission of the request, the Supreme Court in Chile on 11 July 2007 dismissed the extradition request on the ground of insufficient evidence. Peru has announced that it intends to lodge an appeal.
- (3) The Thai Supreme Court has recently approved the commencement of criminal proceedings against former Thai Prime Minister, Thaksin Shinawatra, and his wife, Pojaman, because of charges of corruption. It is alleged that, in 2003, Thaksin used his authority as Prime Minister to influence the purchase of a land in Bangkok worth 772 million baht (33 baht to one US dollar) by his wife Pojaman from the Financial Institutions Development Fund, a government agency effectively controlled by her husband. The first hearing was scheduled for 14 August when the couple failed to appear to be officially arraigned. Thai Supreme Court's Criminal Tribunal for Political Office Holder approved the request of the public prosecutors to issue arrest warrants for Thaksin Shinawatra and Pojaman. As Thaksin Shinawatra and Pojaman currently reside in London, it is likely that Thailand will seek their extradition. Developments are awaited.

It also follows that the plea of immunity does not apply in such cases, as demonstrated by the arrests of former Presidents Portillo and Fujimori. Immunity is often raised as a jurisdictional bar, such as in the confiscation proceedings¹⁶ in London against a Nigerian State Governor, Joshua Chibi Dariye, who submitted that since he enjoyed constitutional immunity¹⁷ in Nigeria, he could not be subjected to confiscation proceedings in the UK. This plea of immunity was rejected.

Equally, there is a move in international organizations to waive diplomatic immunity in cases involving allegations of corruption/corrupt activities. The UN recently waived immunity of two of its employees, Sanjaya Bahel and Nishan Kohli.¹⁸

Bahel was employed as the chief of the UN's Commodity Procurement Section from 1998 to 2003. It is alleged that in 2000, Bahel used his influence at

the UN to improperly benefit his co-defendant Kohli and the companies he represented. The indictment alleges that he granted Kohli exceptional access and provided him with a line of communication and a source for information, which exceeded any advantage that could properly be obtained by other vendors. Furthermore, Bahel also lobbied for Kohli and his companies within the UN and cancelled competitive bids. As a result, Kohli secured a 3-year service contract worth some USD12 million. At the same time, Kohli bought a luxury flat that he rented out at a much-reduced rent or no rent at all for a period of 2 years. Thereafter, he sold it to Bahel. Bahel also benefited from Kohli when he purchased from the latter a luxury apartment at a much-reduced rate. The Southern District of New York indicted both men, and the UN waived Bahel's diplomatic immunity.

Possible Ways Ahead

Given the complexities and technicalities addressed earlier, States may wish to consider simplifying extradition procedures in one or more of the following ways:

- relax the requirements for authentication and certification;
- relax evidentiary requirements;
- consider backing of warrants/regional arrest warrants to expedite proceedings; and
- regional memorandum of understanding (MOU) for hot pursuit on land and cross-border cooperation.

NOTES

- 1 L.C., Viscount Sankey. 1934. In Piracy Jure Gentium. AC 586 PC.
- 2 E.g., Article 2 of the European Convention on Extradition 1957.
- 3 The London Scheme for Extradition within the Commonwealth (Nov. 2000).
- 4 The Secretary of State for the Home Department ex parte Gilmore&Ogun, Divisional Court [6 June 1997].
- 5 Divisional Court, 8 May 1998, CO/2497/97.
- 6 [2001] United Kingdom House of Lords (UKHL) 69.
- 7 *Official Journal of the European Communities*, 13 June 2002.
- 8 [2007] UKHL 6.
- 9 And the more recent Caribbean Community arrest warrant.
- 10 Case No. SA 13/2005 [2006].
- 11 A common law remedy to release a person from unlawful detention.

- 12 Under English law, there are specific offenses for which "active personality jurisdiction" can be asserted.
- 13 Article 6 of the European Convention on Extradition (ECE) allowed for the non-extradition of a state's nationals.
- 14 *The Republic of Namibia v. Kakaena Likunga Alfred & others*, Court of Appeal, Botswana [July 2004]
- 15 Article 43(15) of the United Nations Convention against Corruption.
- 16 Stratford Magistrates Court, 2005.
- 17 Although referred to as "constitutional immunity," it amounts to a "jurisdictional privilege."
- 18 *US v. Bahel et. al*, US District Court S.D.N.Y 06, Crim Indictment.

Chapter 2

Formal and Informal Paths to Obtain International Legal Assistance

Formal and Informal Paths to Obtain International Legal Assistance

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Investigating judges and prosecutors of all countries need evidence to bring alleged offenders to trial. Fifty years ago, investigating judges and prosecutors, in most cases, could rely on evidence obtained locally or nationally. Nowadays, they need more and more evidence in complex cases since criminals have become more sophisticated and are assisted by highly qualified teams of lawyers. At the same time, in complex cases such as corruption, a large part of the evidence has to be imported from foreign countries. Criminal law procedure has increasingly become an "evidence-consuming" process. Without efficient mutual legal assistance fighting corruption will break down.

In most countries, foreign legal assistance can be obtained only through official channels, which may delay domestic investigations. When unofficial channels are available, evidence can be obtained faster. Lawyers, however, may challenge informal paths.

Indeed, what is the use of receiving evidence from abroad if it is not in an acceptable form? Very often, the prosecutor or investigating judge asks the requested State's authorities to use their country's standard procedure for taking evidence. But some requests might ask for the evidence to be obtained in a specific way:

- interview by a judge or a police officer;
- possibility for the prosecutor, investigating judge, or police officers of the requesting State to directly question the witness,
- a statement under oath;
- a verbatim report or a summary (procès-verbal) of the witness' interview;
- certification that the seized bank papers are genuine, certified copies of the seized bank papers, or products of the original documents; and
- the possibility of the defendant's lawyer being present in the office of the investigating judge or via a video link.

In the same way, we all know that some States ban the use of wiretap evidence in courts. Consequently, a letter of request for a wiretap will not be

granted in those States. This has to be clearly explained to the requesting authority to prevent misunderstanding.

A prosecutor from the requesting State might also request a traditional style of undercover operation in the requested State. He can also request the use of new technology to keep a suspect under surveillance. There is no doubt that the success or otherwise of such mutual legal assistance requests will largely depend on the legislation of the requested State.

In many countries, common law legislation requires that the requesting authority sign an undertaking. This is a promise not to use the evidence obtained in the requested States in a different case or disclose it to a third party.

Most investigating judges and prosecutors in civil law countries are not familiar with these undertakings and are very reluctant to sign them. They do not know if they are legally qualified to do so and fear that their signature will be challenged under their domestic law.

Similarly, affidavits raise the same issues in civil law countries, where prosecutors and investigating judges are not familiar with these written sworn statements. They consider that it is not they but witnesses who have to sign statements under oath. Experience shows that they are right to be careful before signing such a document that the defendant's lawyers might challenge.

Of course, informal paths do not mean illegal procedures. The question that can be asked is: Between formal and informal, is there any room for a more efficient avenue to get evidence abroad safely?

For a little over 14 years now, investigating judges and prosecutors have been able to receive assistance from certain colleagues if they wish to get legal assistance from a foreign country. I would like to take this opportunity to make a short presentation of the liaison magistrates' experience.

In March 1993, the first appointment of a French "*magistrat*"—in France either a judge or a prosecutor—to a post in the Italian judicial authorities was made in Rome with the primary mission of improving mutual judicial assistance between France and Italy. This first appointment was followed by the appointment of another French judge, this time in Holland. Several other posts for the so-called "liaison magistrates" have been created within the judicial authorities in the United States (US), Spain, Germany, the United Kingdom (UK), Czech Republic, Canada, and Morocco. 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 upon 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, and
- the forging of links between judicial authorities.

I will only refer to their mission in mutual legal assistance in criminal matters.

Because of their knowledge of the law and procedure of both their own country and that of their host, liaison magistrates tend to be in a position to remove the principal obstacle, which a domestic investigating judge or prosecutor is likely to encounter when he considers that it would be useful to get evidence from abroad, the misunderstanding created by 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 lead all too often to a form of self-censorship. Thus, for example, a French *juge d'instruction* who wishes to hear evidence from a witness who is abroad or who wishes to collect evidence (e.g., bank documents, DNA samples, etc.) may well hesitate to send an international letter of request, fearing that a response is uncertain. On the other hand, if such a judge is able to request assistance from a colleague posted in the relevant country, he is able to direct his request, taking into account the requirements which are particular to the procedure applied in that other country.

An increasingly large number of *juges d'instruction* in France now send to the liaison magistrate, by fax or by e-mail, letters of request that they wish to send to the authorities of that country. Their colleague in the foreign post will accordingly be led to clarify certain points such as the capacity in which a person is to give evidence as a witness or as a suspect; to provide the evidence required for a search warrant; or to have telephone numbers identified. This advisory—indeed, expert work carried out prior to the transmission of the request for mutual assistance in the criminal sphere—can preempt the need for the foreign authorities to request for further information, which would otherwise delay the execution of the letters of request. 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 for judicial assistance 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 exchange, face-to-face, between two people who know each other and meet regularly.

Equally, the investigating judge who has made the request for mutual assistance can, with the help of his colleague posted to the relevant member State, follow the execution of his request. Thus, the investigating judge will not receive the impression that his request 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 investigating 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 detained. It is often heard that a *juge d'instruction* cannot finish his dossier because he is still waiting for the response to his international letters of request.

The formation of joint inquiry teams between two or more countries—a form of cooperation that is now indispensable to combat more effectively the new types of international organized crime—causes liaison magistrates to play increasingly the role of facilitator and interpreter of legal systems. Although 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 be founded on 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 14 years now, liaison magistrates have thus intervened as real “legal adapters” between different systems. Since they are integrated in the workplace of their foreign colleagues, the judicial authorities of their host country also regularly consult liaison magistrates when members of such authorities have inquiries regarding legislation, jurisprudence or, more generally, the operation of the French legal system.

The role of facilitator between different countries also encompasses extradition procedures, which have profoundly changed for European Union member states in 2004 with the entry into force of the European arrest warrant.

At the point at which linguistic and textual barriers disappear, the barrier that exists too often in the minds of those participating in the legal systems must also be removed to give way to trust. Liaison magistrates are dedicated to achieving this aim. They are an informal way that can help obtain formal legal assistance.

International Cooperation in Criminal Matters in Thailand

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Formal and Informal Cooperation

International cooperation in criminal matters may be divided into two types: formal and informal. The difference between both types principally centers on the speed with which cooperation may be provided and the purpose for which what is obtained is to be used. Informal cooperation generally refers to cooperation between law enforcement authorities between countries (e.g., police to police and custom officials to custom officials). Of importance nowadays is cooperation between financial intelligence units (FIUs). The role of FIUs in exchanging financial information on potential criminal activities and money laundering cannot be overestimated because it is a national anti-money-laundering center.

Informal cooperation is “quick” because it does not need to go through a formal channel. As a result, very little effort is needed to obtain assistance. For example, the police in one country can simply phone or send a letter detailing a case to their counterpart, assistance needed, and then simply wait for a response. That is it. Or an official may send a request to a financial intelligence unit in a foreign country and seek financial information relating to a particular person or a particular account. What is obtained from informal cooperation, however, may only be used as operational intelligence; it cannot be used as evidence in a court. This is a limitation to informal cooperation. Although this is truly a case, it must be noted that operational intelligence is not useless. Intelligence can surely be used as a lead for further investigation. For example, investigating authorities, when questioning the suspect, may be able to disprove a particular story or account made by him at the investigation stage. In addition, operational intelligence may also be valuable in deciding whether formal cooperation should be sought. As will be seen hereafter, formal cooperation is relatively costly and time-consuming. It is therefore very important that what is expected of going through formal channel is going to be useful or relevant to the

case; otherwise, it will not be worth going through the process. Operational intelligence has a value in this regard.

Formal cooperation is often known as mutual legal assistance (MLA) in criminal matters. Traditionally, a request has to go through diplomatic channel such as the Ministry of Foreign Affairs. Thus, it is generally very slow. Although it is now more common that many States have set up a central authority through which a request for assistance can be directly sent, providing assistance is still slow compared with assistance via informal channel. However, an advantage of formal cooperation is that evidence obtained is admissible in a court in the requesting State. Further, the requesting State can provide evidence in a form specifically specified by the requesting State, if this is necessary, for evidence to be admissible in a court in the requesting State unless doing so is prohibited under domestic laws of the requested State. This is an advantage of formal cooperation that is not shared by informal cooperation.

Formal Cooperation in Thailand

The law governing formal cooperation in Thailand is the Act on Mutual Assistance in Criminal Matter BE 2535 (AD 1992), hereinafter referred to as "the 1992 Act." Some of its main aspects are outlined hereafter.

Central Authority

Under this Act, the attorney general is the Central Authority.¹ For incoming requests, the Central Authority determines whether it is executable; if it is, further forward it to a competent authority for execution. For outgoing requests, the Central Authority considers whether to seek assistance from a foreign State. The International Affairs Department within the office of the attorney general is responsible for matters relating to mutual legal assistance (MLA) in Thailand. It is staffed with experienced prosecutors who are able to provide information to foreign States on Thai laws and the making of a proper request (e.g., whether the request is made in accordance with the 1992 Act; whether facts described in the request constitute an offense; or whether the facts are sufficient for the issuance of search and seizure warrants under Thai laws, etc.).

Channel of Communication

A request may be sent directly to the Central Authority where the requesting State has an MLA treaty with Thailand; otherwise, it must go through diplomatic channel.²

Types of Assistance

A full range of assistance may be provided such as taking testimonies and statements of persons; providing documents, records, and evidence; serving documents; search and seizure; transferring a person in custody for testimonial purposes; locating a person; and asset forfeiture.

Conditions of Assistance

A Mutual Legal Assistance Treaty (MLAT) with Thailand is not a requirement. Assistance may be provided to non-MLAT States if they commit to a reciprocity with Thailand.³

Double criminality

Generally, the principle of double criminality must be fulfilled. For example, the offense described in the request must constitute an offense under Thai laws, unless an MLAT between Thailand and the requesting State provides otherwise.⁴

In Thailand, double criminality is considered based on the conduct. In other words, as long as the offense described in the request is criminal under Thai laws, this requirement is met. It does not matter whether the offense described has the same denomination or is placed in the same category under Thai laws. This allows Thailand to consider the double criminality flexibly and contribute to more effective international cooperation. For example, an Australian Central Authority requested for evidence based on the offense of acquisition, possession, or use of proceeds of a crime. Although the offense of money laundering in Thailand required the specific purpose of concealing or disguising the criminal origin of a property, the Central Authority found such purpose in the facts of the case. Thus, the principle of double criminality was fulfilled and assistance was rendered.

Further, Thailand always considers whether the principle of double criminality is met at the time of the request. As a result, it does not matter whether the offense described in the request was criminal in Thailand at the time of commission, as long as it is criminal in Thai laws at the time of the request. This practice does not violate the principle against retroactive application of penal laws since providing assistance pursuant to a request is not considered a proceeding for punishing a person concerned.

Asset freezing and forfeiture assistance

In addition to the aforementioned four conditions, two additional requirements must be produced for asset freezing. First, a request must be

accompanied by a nonfinal forfeiture or freezing order of a court in the requesting State. Second, the request must contain facts that would enable the freezing of the asset under Thai laws.⁵ For asset forfeiture, a final forfeiture order against the asset and a description of facts that would allow the forfeiture of the assets under Thai laws, is required.⁶

The system of confiscation in Thailand is based on property or generally known as “forfeiture.” Property that is freezable or forfeitable in Thailand must be tainted in connection with an offense. In other words, a connection between the offense and the property must be established or proved. In terms of proceeds of a crime, the connection is that that property must be proved to have been derived from the crime. As such, without evidence of asset described in the request being criminally derived, a freeze or forfeiture request cannot be acted upon or executed. Thus, Thailand cannot assist in freezing or forfeiting an asset where the request comes from countries whose confiscation system is value-based. A value-based confiscation order simply states the confiscated amount without describing which property is confiscated or without giving evidence of its criminal source. Given this problem and with a view to have more effective international cooperation especially regarding confiscation of the proceeds of a crime, Thailand is currently preparing a legislative amendment to allow the enforcement of a foreign value-based order.

Grounds for Refusal

Nonmilitary offense

The offense described in the request must not be military offense; otherwise, assistance will be denied.⁷ A military offense is an offense against military laws, which does not constitute an offense under ordinary laws. Thus, a murder or theft committed by a soldier is not a military offense. It must be noted that military offense is a mandatory ground for refusal.

Nonpolitical offense/No essential interest affected

Thailand may deny assistance where the request affects national sovereignty, or security, or other crucial public interest or relates to a political offense.⁸ The 1992 Act does not define what constitutes “political offense.” This ground for refusal is discretionary.

Ground for Postponement

Assistance may be postponed where the execution of a request may interfere with the investigation, inquiry, prosecution, or other criminal proceedings pending in Thailand.⁹

Execution of a Request

Once the Central Authority has determined that a request is eligible for execution, it will be forwarded to a competent authority for further actions. Depending on the type of assistance sought, the competent authorities are as follows:

- Police commissioner for investigation, evidence gathering, service of documents, search and seizure, and locating persons;
- Chief public prosecutor for litigation in case of obtaining witness testimonies in court and forfeiture proceedings;
- Director general of the Correction Department for transferring persons in custody for testimonial purposes; and
- Police commissioner and chief public prosecutor for litigation for initiating criminal proceeding upon request

In executing the requests, especially those for witness interviews, search and seizure of objects for evidentiary purposes, foreign States often request permission to go to Thailand to participate in the proceedings. Such participation is not legally permissible. However, foreign investigating authorities can observe the execution of the request; they cannot do it themselves.

Completion of a Request

Having rendered the assistance sought, the competent authority will send the result of the execution back to the Central Authority who will forward it to the requesting State either directly in case of mutual legal assistance treaty (MLAT) States or via diplomatic channel in case of non-MLAT states.

Number of countries where Thailand has Mutual Legal Assistance Treaties

Currently, Thailand has mutual legal assistance treaties (MLATs) with the following States: United Kingdom (UK), United States (US), Canada, France, Norway, India, People's Republic of China, Korea, Sri Lanka, and Poland. All these MLATs are in force. In addition, Thailand has signed MLATs with Peru, Belgium, and Australia, but they are not yet enforceable. It should also be noted

that double criminality is waived in relation to all such effective MLATs except those of P.R. China, Korea, and Sri Lanka.

Conclusion

As described, although speed with which assistance is provided is very important to the fight against transnational crime, it must not be forgotten that a quick result will not be of any use in a court. Therefore, informal cooperation cannot be used as a substitute for formal cooperation. As an illustration of a formal cooperation process, the law of Thailand has been examined.

NOTES

- 1 Section 6.
- 2 Section 10.
- 3 Section 9(1).
- 4 Section 9(2).
- 5 Section 33(2).
- 6 Section 33(1).
- 7 Section 9(4).
- 8 Section 9(3).
- 9 Section 11(4).

Combining Formal and Informal Mechanisms: Ways for Speeding up Mutual Legal Assistance

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New tools to communicate and carry out sophisticated functions, symbolized by the Internet and modern computing software, have made it all but impossible anymore, in legal terms, to apprehend crime as a national phenomenon.

Lawbreakers having always played with borders to evade detection and prosecution, it comes as no surprise today that serious crime, like any significant business, has gone global. Criminals have expanded their illicit activities beyond the territory of any one State, looking for the best jurisdictions to "optimize" and insulate the various segments of their operations, outsourcing the most sensitive ones.

Opposing them are judicial authorities who are bound by tight national rules that have clearly reached the limits of their efficiency. The use of public force, necessary to impose coercive measures, remains a national monopoly.

Whenever an investigation spreads geographically beyond their jurisdiction, judicial authorities must require the cooperation of their foreign counterparts. This cooperation follows a strict formalism that tends to complicate the simplest tasks to the extreme since international cooperation infringes upon national sovereignty, the logic of which limits a State's capacity for legal action to its national territory, possibly to its nationals acting on foreign territory.

Conventions and treaties have been signed and ratified to ease some of these difficulties, but strong barriers remain that inhibit quick and efficient law enforcement through public action.

Structurally, this materializes into a number of challenges and time-consuming operations for the State requested to provide legal assistance, including:

- coordinating two or more legal systems which implies, besides basic logistics, accommodating different legal principles, definitions of crime, procedural laws, and provisions for international cooperation;
- limiting or denying cooperation when susceptible to affect its national interests; and
- controlling the conformity of the foreign State's procedure to international standards and treaties, besides its own national law.

The judiciary of the requested State is thus compelled, before it can take any action, to examine the usual mandatory grounds for denying cooperation, including that the request:

- does not jeopardize internal security, defense secrets, public order, and other so called "essential national interests";
- does not aim to prosecute political opinion or discriminate with regard to race, nationality, sex, or religion;
- could not be labeled as a "fishing expedition" or, a Swiss reservation to international treaties and conventions, a simple tax evasion inquiry; and
- meets the legal conditions relating to reciprocity, dual criminality, double jeopardy, proportionality, and similar principles or reservations.

Some of the decisions it takes on those matters might further require the approval of a superior authority and eventually be challenged in court.

Practically, legal assistance operations are time consuming and resources demanding for the following reasons:

- The usual vehicle for international cooperation is the diplomatic channel, which is not known to be particularly fast and sensitive to political intervention.
- Carrying out a mutual legal assistance (MLA) procedure means that some of the national judiciary's resources are mobilized to the benefit of another State. Politically, it has, at times, proven to be difficult to justify in view of budget restrictions and "insecurity" at home, where citizens are allegedly more concerned with their tax money and street crime on their doorsteps than with international legal cooperation the direct gains of which remain elusive.
- Judges in recurrent situations of work overload on their national cases find it difficult to prioritize another country's criminal investigation.

These classical difficulties arise in any MLA operation, whether extraditing persons, collecting and handing out elements of proof, or freezing and repatriating assets

Informal and alternative practices have been proven to answer some legal challenges of international cooperation and improve its speed. They have yielded some positive results with a few, if any, drawbacks.

The Judiciary

International legal cooperation is indispensable to investigate financial crime in a globalized economy, and should be dealt with by the judiciary as a normal and necessary way of conducting a criminal inquiry.

It implies accepting to devote specific resources to legal assistance, from training judges and staff to streamlining the procedures and setting up smooth channels to conduct them. The best laws and treaties will not be of much use without the proper structures, people, and coaching to implement their provisions.

It also requires that the judiciary acts on an international request for cooperation just like it would on a national inquiry considering, among other points, that any measures that treaties, conventions, or one's internal law does not explicitly forbid, are allowed to be taken.

Personal contacts with colleagues requesting cooperation help build confidence and expertise in the foreign law's requisites. Meetings, even over a phone or by videoconference, can help understand an investigation and orientate it, as well as solving the many practical problems that cause painful delays or other hindrances. It is invaluable to avoid the numerous legal errors that could invalidate, in the requesting country's courts, the measures taken by the requested State.

National Procedure

Whenever possible, the inquiry being conducted for the requesting State should be doubled up with a domestic procedure. A domestic criminal inquiry allows the requested State, in sole accordance with its own legislation, to incriminate people or companies that are under its jurisdiction, without having to consider dual criminality and other mutual legal assistance restrictions.

This is particularly noteworthy in cases related to corruption since, for some years now, many countries can try their nationals and residents—whether individuals or companies—for active corruption of foreign public officials even if they acted abroad.

Similarly, money laundering offenses could provide sufficient ground for admitting jurisdiction over people concealing proceeds of foreign bribery on local bank accounts.

If anything, an autonomous domestic procedure might significantly facilitate the freezing and confiscating of assets related to corrupt practices, considering that it can be conducted to its legal end independently of the international cooperation procedure.

Spontaneous Information

National laws and recent international conventions (United Nations Convention against Corruption (UNCAC) Articles 46/4–5 and 56; United Nations Convention against Transnational Organised Crime (UNTOC) Article 18/4; Council of Europe (CoE) Convention 141 on money laundering, Article 20; Organisation for Economic Co-operation and Development (OECD) Convention, Recommendation VII-i; Swiss Federal Act on International Mutual Assistance in Criminal Matters (IMAC), Article 67[a]) regulate the spontaneous forwarding of information to a foreign State, without prior request, usually on the condition that it could facilitate an ongoing criminal investigation, or enable the foreign State to present a formal demand for mutual legal assistance (MLA) if it seeks elements of proof.

Mutual Legal Assistance Requests as a Source of Information

MLA requests are by themselves a valuable source of information, since they must, by law, state at minimum a summary of the relevant facts from the requesting State's own investigations. They will most likely include names, dates, places, operating modes, possibly bank connections, or similar and documentary evidence.

Such factual elements can justify the opening of a domestic procedure if jurisdiction appears to be given, notably over acts of corruption or money laundering.

It might be of interest to note that sending out a formal MLA request amounts, for the requesting State, to transmit—on purpose or not—information and elements of proof to the requested State, which may use them for its own investigations without some of the legal limitations it would face if it had itself formulated a request for cooperation.

The same can be said about delegating a prosecution to a foreign State, which implies for the country proposing the delegation to hand over the evidence it has itself gathered.

These ways to proceed have sometimes been labeled "wild legal assistance," and could, arguably, be successfully challenged in court if they appear to be nothing but a blatant procedural misuse.

Regular Mutual Legal Assistance Requests

Specific provisions in national laws or conventions, often overlooked, can prove helpful to accelerate a cooperation process:

- urgency clauses allow to bypass the diplomatic channels (UNCAC, Articles 13 and 14);
- provisional measures can be taken rapidly, on a prima facie or reasonable basis, notably to temporarily freeze assets (UNCAC, Articles 54/2; 55 /7–8);
- foreign investigators can be allowed to participate, on the requested State's territory, to the execution of their cooperation request, notably a house or office search to help sort out the documents to be seized, or attend auditions of witnesses and suggest questions (UNCAC's joint investigation, Article 49; Swiss IMAC, Article 65a).

Voluntary Cooperation of a Party

Parties concerned by an inquiry might find it opportune to cooperate with the investigation.

A witness might thus accept that a statement he has signed, or bank records and documents that have been seized be handed over to the requesting State, possibly at certain conditions to be discussed, like limiting the scope of the cooperation provided or granting him some degree of immunity.

This might be worth considering, since it can help dispensing with some irritating formalities and save valuable time.

Financial Intelligence Units

Administrative cooperation is usually quicker and less formal than regular MLA procedures, particularly to gather information and documentary references relevant to criminal investigations.

Many countries have set up so-called financial intelligence units or similar (cf. UNCAC, Article 58). The data that these units have been collecting over the years is increasingly reliable and far reaching.

Even if the information is often handed out to prosecuting authorities with a "for-intelligence-purposes-only" restriction, it can prove quite helpful to initiate or focus an inquiry.

Financial Intermediaries

In recent years, many countries have implemented legislation that imposes on banks and other financial intermediaries, under various conditions, the obligation to report suspicious clients or transactions to judicial authorities.

Banks have themselves taken a number of measures to curb their "ethical risk" of getting caught in a criminal procedure for laundering proceeds of large-scale corruption or embezzlement of public funds.

Multinational companies have, likewise, developed extensive compliance structures for the same purpose.

Such compliance data collected by the companies themselves, or through specialized private agencies, about every country where they run their businesses will prove quite helpful if one can legally gain access to it (for instance, through a formal seizure of client's files, know-your-customer notes, compliance records, etc.).

Valuable information, privately collected in a foreign country, is thus passed on to the judiciary without much formalism and with none of the restrictions of international legal assistance.

Civil Procedures

Initiating a civil action in foreign courts may help in freezing and confiscating assets (UNCAC, Article 53 [a]).

The process will most certainly be costly, but might prove effective considering that the level of evidence required to prove the illicit origin of assets to be confiscated is lower in civil cases than in criminal ones. An example is the well-known OJ Simpson case, where he was found liable for murder by a civil court and condemned to pay USD33.5 million in damages after being acquitted in a criminal court.

Another alternative worth considering for the requesting State is to participate as a civil party in criminal proceedings in the requested State, which could notably grant it full access to documentary evidence useful for its own investigations. Such evidence might not be presented in court before a formal mutual legal assistance (MLA) procedure is brought to an end but will certainly facilitate ongoing inquiries.

Politics

As a rule, politics should not interfere with the judiciary, although in MLA matters the ubiquitous references to "essential national interests" leave it open to consider a request for cooperation beyond strict legal criteria (UNCAC, Article 21 (b); partially excluded by the OECD Convention's Article 5).

In turn, and usually with the same argument of defending "national interests," a government can take autonomous measures to order the banks operating in the country to provisionally freeze assets suspected to proceed from large-scale looting of foreign public funds. It has been done by the Swiss government in a number of sensitive cases, outside any request for assistance by the countries directly concerned.

The Media

Granting an interview to a reputable media can spread factual information internationally and arouse the interest of a foreign investigator who might orientate his inquiry accordingly or, if necessary, file a formal legal assistance request. The Internet has become a precious, if not devastating, tool in that matter.

Besides law officers, compliance staff—notably in banks and multinational companies—do screen the media for information about their clients, the businesses they run, the origin of their wealth, and their agents. According to what has become public through the press, they might find themselves obliged to report to the judiciary or at least increase their level of internal control on a particular client.

Also, the press does succeed, at times, in building up enough pressure to prevent the burying of a sensitive criminal case.

Pitfalls of Informal Cooperation

Where the rule of law prevails, there is little "risk" for the judiciary to do its job, such as to investigate criminal activities and try criminals.

Some obvious pitfalls can easily be avoided:

- plain illegality in conducting an investigation, disregard of the rule of law and the requirements of fair trial, and general violations of elementary legal principles end up eventually ruining not only individual cases but the reputation, the long-term efficiency, and the legitimacy of the whole judicial system, with devastating effects on international cooperation;
- lack of formalism may lead to imprecision, hence, unreliable facts and elements of proof that will complicate rather than facilitate an investigation; and
- flawed elements of proof will be unusable in court, with potentially costly consequences for the prosecution.

This being said, probing in good faith alternative ways to formal mutual legal assistance (MLA) procedures will, at worst, invalidate all or part of an investigation—which remains a rare event—and will at least set precise standards through jurisprudence, allow an open legal debate on issues of interest for international cooperation, and possibly trigger adjustments to the corresponding legislation.

Conclusion

International MLA is certainly not the most popular duty assigned to the judiciary since it draws precious resources from fighting "local" crime. It is also viewed, especially when it comes to fighting corruption of foreign officials, as potentially damaging to national companies, for the sole benefit of third parties that might besides be fierce competitors.

Serious tendencies exist toward curtailing the means allotted to the judiciary for legal assistance procedures. Financial crime has logically become as globalized as the economy, whereas the judiciary lags behind, tied to a dusty formalism that is totally unfit to challenge modern legal issues.

This political debate notwithstanding, one professional answer that the judiciary can give is to work as quickly and effectively as possible on international cooperation, to not fear such procedures, and to be technically as imaginative and creative as when operating on national cases.

The true future of MLA is to become ordinary routine for all of us.

Chapter 3

Tracing, Freezing, Confiscating, and Repatriating the Proceeds of Corruption

Tracing, Freezing, Confiscating the Proceeds of Corruption in Australia

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Several different options are available to investigators for tracing and then to the director of public prosecutions (DPP) for freezing and recovering the proceeds of corruption. Whether the corruption offense was committed within Australia or overseas, proceeds of the offense located in Australia can be restrained and then forfeited under the Proceeds of Crime Act (POCA) 2002. If the offense was committed within Australia, the person who committed the offense can be ordered to pay an amount equivalent to the corrupt payment as pecuniary penalty to the Commonwealth¹ and this can be satisfied out of lawfully acquired assets owned by that person or under that person's effective control. Lawfully acquired property can be restrained to satisfy a pecuniary penalty order. It is not necessary for the person to have been charged with or convicted of the offense if the offense was committed within the preceding 6 years. If the offense was not committed within the preceding 6 years, a restraining order can be obtained but will lapse if charges are not laid within 28 days. Final orders would only be obtained if the person is convicted of the offense.

Property located outside Australia can be restrained and forfeited under POCA although a formal request may need to be made to the central authority of the country where the property is located to enforce the orders.

Proceeds of foreign corruption offenses can also be traced and restrained upon request of the foreign country and then a foreign forfeiture order or pecuniary penalty order can be enforced under the provisions of the Mutual Assistance in Criminal Matters Act (MACMA) 1987. A foreign pecuniary penalty order can be recovered from lawfully acquired property under MACMA.² In this paper, I will briefly summarize the options available under both POCA and MACMA for tracing, freezing, and confiscating the proceeds of corruption offenses in Australia.

Tracing

Notices to Financial Institutions

The Australian Federal Police can issue notices to financial institutions to determine whether a person holds an account with the institution and to obtain information about account balances, transactions on accounts over a specified 6-month period, details of related accounts, and transactions conducted by a specified person where the information is required to determine whether to take action under the Proceeds of Crime Act (POCA).³ Similar notices can be issued by the attorney general or a senior departmental officer under the Mutual Assistance in Criminal Matters Act (MACMA) for enforcing a foreign restraining order, forfeiture order, or foreign pecuniary penalty order.

Search Warrants

Proceeds of Crime Act

A magistrate may issue a search warrant under section 225 of POCA to search premises for tainted property,⁴ or evidential material⁵ upon application by an authorized officer.⁶ Documents obtained by search warrant can be provided to officers of other enforcement agencies for investigating or prosecuting an offense or recovering proceeds or an instrument of an offense.

Mutual Assistance in Criminal Matters Act

Search warrants can also be obtained upon the request of a foreign country under MACMA. If a criminal proceeding or criminal investigation has commenced in a foreign country because of a foreign serious offense, the foreign country may request the attorney general to issue a search warrant relating to the proceeds or an instrument of the offense or a property-tracking document in relation to the offense.

Production Orders

Proceeds of Crime Act

A magistrate may make an order, pursuant to section 202 POCA, requiring a person to produce property-tracking documents⁷ to an authorized officer or to make one or more property-tracking documents available for inspection to be used in POCA proceedings or investigations. Legal professional privilege and the privilege against self-incrimination cannot be claimed. No provision expressly permits the dissemination of documents obtained by production order to the

investigators of a criminal offense or other law enforcement agencies. An order can be made prohibiting the disclosure of the existence of the order.

Mutual Assistance in Criminal Matters Act

A foreign country can formally request Australia to issue a production order for a property-tracking document pursuant to section 34N MACMA. If a document is obtained pursuant to a request under MACMA, the attorney general may direct that the document be sent to an authority of the foreign country.

Monitoring Orders

Proceeds of Crime Act

A judge may issue a monitoring order pursuant to section 219 POCA requiring a financial institution to provide information about future transactions conducted during a particular period through an account. This is one way of obtaining information about transactions within a short time after the transaction occurs. This is limited to situations where a person has committed, or is suspected to be about to commit a serious offense, or to have benefited, or be about to benefit from a serious offense. It is an offense to disclose the existence of a monitoring order.

Mutual Assistance in Criminal Matters Act

A foreign country can request that a monitoring order be obtained in relation to a foreign serious offense pursuant to section 34X MACMA. The offense must be punishable by 3 or more years of imprisonment and involve a money laundering offense, a narcotics substance, a fraud of AUD10,000 or more, smuggling of migrants, or a failure to report financial transactions.

Examinations

If a restraining order is in force under POCA, the court may also order that a person be examined about the affairs of the person suspected of committing the offense, or the person whose property is restrained or who claims an interest in the property and the affairs of that person's spouse. An examinee cannot refuse to answer a question on the grounds that the answer may incriminate them or claim legal professional privilege. The answers cannot be used against the person in criminal proceedings. The questions must be for the purposes of POCA. Although there is no derivative-use immunity contained in POCA, the

court has held that the transcript can only be used for POCA purposes; so, it cannot be provided to the prosecutor or investigators of the criminal offense.⁸

Freezing

Proceeds of Crime Act Restraining Orders⁹

Person directed

Orders restraining any dealings with property can be obtained under POCA. These can be over all of a person's property or specified property of a person, or property suspected on reasonable grounds of being under a person's effective control. The person must either have committed an indictable offense or have committed a serious offense¹⁰ within the last 6 years. If the offense is indictable but not a serious offense, the restraining order will lapse if the person is not charged with the offense within 28 days. If the restraining order is obtained on the basis that the person is suspected of committing a serious offense, the restraining order will lapse if the person is not either charged with the offense or confiscation proceedings commenced within 28 days. Confiscation proceedings will be either an application for forfeiture of the restrained property or an application for a pecuniary penalty.

Asset directed

Property suspected on reasonable grounds of being the proceeds of an indictable offense or a foreign indictable offense committed within the last 6 years, can be restrained. It is not necessary to identify who owns the property or show that the owner of the property committed an offense. These are asset-directed provisions. Within 28 days, an application for forfeiture of the restrained property must be filed.

Information provided on a police-to-police basis may be sufficient for an authorized officer to suspect that property located in Australia is the proceeds of a foreign indictable offense which will enable an asset-directed restraining order to be obtained. A formal request may then have to be sent to the foreign country to obtain the evidence in admissible form to prove, on the balance of probabilities, that the property is a proceed of that offense or another foreign indictable offense. To be a foreign indictable offense, the conduct must constitute an offense in the foreign country and be a conduct that—if it had occurred in Australia—would have constituted an indictable offense in Australia. It is not necessary for any court proceedings or criminal investigation to have commenced in the foreign country.

Enforcement of Foreign Restraining Orders

A formal request can be sent to Australia requesting Australia to locate and restrain proceeds of a foreign offense or property of a person suspected of committing a foreign offense. The attorney general can authorize the director of public prosecutions to apply for a restraining order if a criminal proceeding has commenced, or there are reasonable grounds to suspect that a criminal proceeding is about to commence in the foreign country in respect of a foreign serious offense, and there are reasonable grounds to believe that property which may be made or is about to be made the subject of a foreign restraining order, is in Australia. The restraining order will cease at the end of 30 days, although this period can be extended. It is expected that the foreign country will obtain a restraining order during this period, which will then be registered in Australia.

Restraining orders can be obtained where a person has not been charged and is not about to be charged if confiscation proceedings have commenced in the requesting country and the country is specified in the regulations made for the purposes of Section 34(2) of MACMA.

A formal request can be sent to Australia requesting the registration of a foreign restraining order. A faxed copy of a sealed order can be registered, but the sealed or authenticated copy will have to be filed within 21 days.

Exclusion

Proceeds of Crime Act (POCA)

A person with an interest in property restrained under POCA can apply to have that property excluded from the restraining order by showing that it is not from proceeds of an unlawful activity, not under the effective control of the person suspected of committing the offense, and not needed to satisfy a pecuniary penalty order. If a property has been restrained on the basis that the person is charged with committing an offense, the applicant for exclusion will also have to show that the property was not used in committing the offense and, if the offense is serious, that the property was not used in committing any unlawful activity.

If the property is restrained on the basis that the property is the proceed of an offense or foreign indictable offense, the applicant will have to show that the property is not from proceeds of any indictable offense or foreign indictable offense to exclude the property from the restraining order.

Applicants can also exclude property from forfeiture under POCA by showing that the property was lawfully acquired.

Mutual Assistance in Criminal Matters Act

A third party can apply to exclude property from a restraining order obtained under MACMA¹¹ by showing that they were not involved in the committing the offense and that the property is not a proceed nor an instrument of the offense. The court can also exclude property from a restraining order under MACMA if it is in the public interest, having regard for financial hardship or other consequences of the interest remaining subject to the order.

Confiscation

Statutory Forfeiture

If a restraining order is obtained under the Proceeds of Crime Act (POCA) and the person is convicted of a serious offense that the restraining order relates to, all restrained property is forfeited 6 months after conviction. This 6-month period can be extended by court order to enable an application to exclude property from statutory forfeiture to be heard. If the owner is unable to show to the civil standard of evidence that the property was lawfully acquired and not used in committing an offense or intended to be used in committing an offense, it is forfeited to the Commonwealth.

Civil Person-Directed Forfeiture

If a restraining order has been obtained based on a suspicion that a person committed a serious offense within the last 6 years, the director of public prosecutions will need to prove to the civil standard that the person committed the offense. If the offense is proven in the civil court, the restrained property will be forfeited. Any person who claims an interest in the property will have to apply to have the interest excluded from restraint or forfeiture and show that the property was lawfully acquired. If the property was partially acquired with the proceeds of unlawful activity, the property will be forfeited. With a compensation order, however, the Commonwealth can be ordered to compensate the owner of the property with an amount equivalent to the value of the proportion of the lawfully acquired property. A hardship order can also be made to relieve the hardship that will be suffered by the spouse or dependents of the person who committed the offense as a result of the forfeiture.

Civil Asset-Directed Forfeiture

If a restraining order was obtained based on suspicion that the property is from the proceeds of an indictable offense or a foreign indictable offense, the

director of public prosecutions will be able to obtain a forfeiture order 6 months after the restraining order was obtained. This can be done by proving that anyone suspected of having an interest in the property was notified and that no application has been made to exclude the property from the restraining order or that the application has been withdrawn.

Where an application is made to exclude property from the restraining order, the applicant will have to show—on the balance of probabilities—that the property is not from proceeds of unlawful activity. To obtain forfeiture, the director of public prosecutions must prove—on the balance of probabilities—that the property is from proceeds of one or more offenses committed within the last 6 years. The offense must be an indictable offense, a foreign indictable offense, or an indictable offense of Commonwealth concern.

A property is a proceed if it is partially derived with proceeds of an offense. If the property was partly derived with proceeds of an offense, a compensation order can be made. A hardship order can also be made if property is forfeited under the civil asset-directed provisions.

Conviction-Based Forfeiture of Proceeds or Instruments of an Indictable Offense

Within 6 months of a person's conviction for an indictable offense, an application can be made for forfeiture of the proceeds of that offense. If the court is satisfied—on the balance of probabilities—that the property is a proceed of the offense, it is forfeited.

An application can also be made within the same period for forfeiture of an instrument of the offense.¹² If the court is satisfied that the property is an instrument of the offense, the court has the discretion to forfeit the property. This provision will normally only be used where the offense is indictable but not a serious offense.

Pecuniary Penalty Orders

Where a person is convicted of an indictable offense or has committed a serious offense within the last 6 years, an order can be made for the person to pay an amount to the Commonwealth. If the offense is indictable but not a serious offense, it will be limited to the benefits from that offense. If the offense is serious, it will include the benefit from all unlawful activity within the 6 years prior to the application or the application for a restraining order. In calculating the benefit, the court can look at all the assets acquired and the amount spent by the person during the period, and then deduct from that the amount that the

court is satisfied is unrelated to the illegal activity. Deductions are also made for tax paid on the benefit and the value of forfeited property. In calculating the pecuniary penalty, the court can include property that is not in the person's name but under the effective control of the latter. This will include gifts made within the preceding 6 years.

If the person has not been convicted of the offense, the director of public prosecutions (DPP) will have to prove the unlawful activity on the balance of probabilities.

A statutory charge is created over the restrained property. The court can also direct that the restrained property be sold to satisfy the pecuniary penalty order.

Enforcement of Foreign Confiscation Orders

A formal request can be sent to the attorney general to enforce a foreign forfeiture order or foreign pecuniary penalty order. The attorney general can authorize the DPP to apply for registration of the order if he is satisfied that the person has been convicted of the offense that the orders relate to and that the conviction and order are not subject to further appeal.¹³ The DPP can then apply to a court for registration of the order and notify anyone who has an interest in the forfeited property. A person who claims to have an interest in forfeited property can apply to have their interest declared. If they were not involved in the foreign serious offense that the forfeiture order relates to, and the property was neither a proceed nor an instrument of the offense, the court will order the transfer of their interest or the payment by the Commonwealth of an amount equivalent to their interest. Anyone who appeared at the hearing of the foreign forfeiture order needs leave to apply. Foreign forfeiture and pecuniary penalty orders once registered are enforced as if they were made under the Proceeds of Crime Act (POCA).

Repatriation

Property forfeited under POCA is forfeited to the Commonwealth. Pecuniary penalty orders are payable to the Commonwealth. Proceeds are paid into the confiscated assets account administered under POCA and payments can be made out of that account at the attorney general's discretion to foreign countries that have contributed to the recovery.

Funds recovered under the Mutual Assistance in Criminal Matters Act (MACMA) because of the enforcement of a foreign order after payment of the official trustee's costs are paid into the confiscated assets account and

payments can be made out of the account under POCA to the foreign country at the discretion of the attorney general.

It is often quicker and easier for the proceeds of foreign offenses to be traced, restrained, and forfeited under POCA than for property to be traced and restrained pursuant to a formal request under MACMA. The tracing and restraint of the proceeds of a foreign offense under POCA may be initiated by either police-to-police inquiries or a formal request for searches to be conducted to obtain evidence of the criminal offense for use in the foreign criminal proceedings. If the proceeds are traced to Australia, the asset-directed restraining and forfeiture provisions can be used, provided the offense was committed within the preceding 6 years. Where the foreign offense was committed outside the 6-year period, restraining orders and forfeiture orders have been obtained based on Australian money-laundering offenses committed when the property was brought into Australia or when there was a subsequent dealing with the property. In either case, it is necessary to show that the conduct, that the property was originally derived from, was an offense in the foreign country and that it would be an offense if it had occurred in Australia. Property is a proceed of an offense if it is wholly derived or realized, directly or indirectly, from the commission of the offense. If the property that is a proceed of a crime is sold, the proceeds from the sale and any property bought partly with the proceeds are proceeds of crime for the purposes of POCA. Property ceases to be the proceeds of crime when it is acquired by a third party for sufficient consideration.

Some Examples

Money alleged to be the proceeds of a fraud on an Indonesian bank was transferred to Australia. The money was invested in real estate in Australia, which was later sold and the proceeds sent offshore. Extradition proceedings were commenced for the return of the alleged offender to Indonesia, but he died in Australia while still contesting his extradition. A civil asset-directed restraining order was obtained when POCA commenced on the basis that money in Australian accounts was proceeds of Australian money-laundering offenses—i.e., being transactions with property derived from money that could be traced back to the Indonesian offenses. This money was forfeited and then paid to Indonesia. Restraining orders were also obtained in Hong Kong, China at the request of Australia over money that was traced to the former. These proceedings were settled and consent orders made for the forfeiture of approximately AUD500,000 in Hong Kong, China.

In another matter, the Australian Federal Police identified Australian bank accounts opened by a Chinese national under a false name. The director of

public prosecutions obtained a restraining order under POCA. A civil forfeiture order was obtained and the AUD3.37 million that was forfeited was repatriated to the People's Republic of China on 7 June 2007.

Corruption Offenses Committed by Persons Employed by the Commonwealth of Australia or by a Commonwealth Authority

In addition to the provisions that will enable the proceeds of corruption to be traced and forfeited under POCA and for orders for repayment of any benefits received by way of a pecuniary penalty order under POCA referred to earlier, orders can be made after conviction for the forfeiture of the government-funded component of the employee's superannuation. These provisions apply where an employee commits an offense that involved an abuse of that employee's office, or was committed for a purpose that involved corruption, or for the purpose of perverting or attempting to pervert the course of justice. The person must have been convicted of the offense and sentenced to a term of imprisonment longer than 12 months. Their own contributions to their superannuation fund are refunded to them.

NOTES

- 1 Payments are credited to the Confiscated Assets Account established under the Proceeds of Crime Act (POCA).
- 2 Section 34D Mutual Assistance in Criminal Matters Act (MACMA).
- 3 Section 213 POCA.
- 4 Proceeds of an indictable offense or property used or intended to be used in the commission of an indictable offense. Most offense with a maximum penalty of more than 12 months imprisonment may be dealt with on indictment and are indictable offenses for POCA.
- 5 Evidence relating to property that can be restrained or forfeited, benefits derived from the commission of an indictable offense or literary proceeds.
- 6 Members of the Australian Federal Police, Australian Crime Commission, an officer of Customs, member of the Australian Securities and Investments Commission, member of the Australian Commission of Law Enforcement Integrity (ACLEI), and officers of the Australian Taxation Officer can be authorized.
- 7 Document relevant to identifying, locating, or quantifying property of a person charged with an indictable offense or suspected of committing a serious offense within the last 6 years or suspected of committing a terrorism offense; or a document relevant to the transfer of property of that person or relevant to identifying, locating, or quantifying proceeds; or an instrument of an indictable offense a person is charged with; or proceeds or an instrument of a serious offense committed within the last 6 years.

- 8 Director of Public Prosecutions (DPP) v. Hatfield [2006] NSWSC 195.
- 9 Restraining orders are made by a court on application by the DPP. The application must be supported by an affidavit by an authorized officer setting out the grounds for suspecting that a person has committed the relevant offense or that the property is proceeds of an offense. The court must be satisfied that the authorized officer has reasonable grounds for these suspicions.
- 10 A fraud involving a benefit of more than AUD10,000 with a maximum penalty of 3 years imprisonment or more is a serious offense. A failure to report cash transactions of more than AUD50,000 over a 6-month period, and transacting AUD 50,000 or more through a false name bank account over a 6-month period are also serious offenses.
- 11 Section 34L MACMA.
- 12 Property used in committing the offense or intended to be used in committing the offense.
- 13 Section 34 MACMA. These requirements may be varied by regulations relating to particular countries.

Tracing, Freezing, Confiscating, and Repatriating the Proceeds of Corruption

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This paper focuses on what is probably the most talked about aspect of the international anti-corruption struggle at present, namely the recovery of stolen assets. By way of a brief introduction to the subject, it is worth noting that despite the visible efforts of the international community to stem the growth of corruption—consider the many international anti-corruption conventions adopted in recent years such as the Inter-American Convention against Corruption, the Organisation for Economic Co-operation and Development (OECD) Convention against Bribery of Foreign Public Officials, the African Union Convention on Preventing and Combating Corruption, and the Council of Europe Criminal Law Convention on Corruption, to name a few—little has been done to address the real problems that countries face in trying to recover what has been plundered from them. Thus, the problem seems to remain almost unabated.

The figures remain depressing. For instance, in 2004, the World Bank announced that in 1 year alone, over USD1 trillion were paid in bribes. This figure—now out of date—does not even include the cost of large-scale fraud or embezzlement from public funds. Research done by Transparency International suggested that of the USD4 trillion spent on government procurement annually, approximately USD400 billion are usually siphoned off by corruption, classically in the form of bribes. These funds are lost to public projects such as roads, schooling, and the construction of hospitals. Alternatively, bribery also often leads to the building of unnecessary infrastructure or infrastructure that is of dangerously poor quality. Finally, in 2003, the European Commission published a paper entitled the EU Africa Dialogue, which estimates that financial institutions around the world hold the proceeds of corrupt practices from across Africa equivalent to more than half of the entire continent's debt!

It is into this rather depressing equation that the United Nations Convention against Corruption (UNCAC) has arrived, raising a lot of hopes and expectations. Fears have been voiced that the UNCAC will simply be another paper tiger and added to the shelf with all the other international and regional anti-corruption initiatives. I would however argue that the UNCAC has a great potential to bring

about some real, slow but inexorable changes, and that it can become the tool by which we start to make a dent into the figures that are declared annually by the Group of 8 nations (G8), for example, on asset repatriation.

UNCAC, the first truly global and legally binding instrument in the fight against corruption, came into force on 14 December 2005. The Convention deals with an impressive range of offenses, covers a wide range of preventative measures, and builds upon the growing array of provisions designed to strengthen international cooperation in criminal matters. Where UNCAC however differs from many other anti-corruption conventions already existing is in its innovative and far-reaching provisions on asset recovery. Borrowing the words of the Executive Director of the United Nations Office on Drugs and Crime (UNODC), Antonio Maria Costa, during the opening session of the first session of the Conference of the States Parties to the UNCAC in 2005, he said:

The section of the convention that seems to get the most attention is asset recovery—and for good reason. To make the return of assets a fundamental principle of the convention, and to agree on bold new measures for such return, were major breakthroughs. Implementing these measures is new to all countries, whether developed or not.

Chapter V of the Convention begins with the statement that the return of assets is a “fundamental principle.” Its substantive provisions set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited, and returned. Most important maybe, in terms of the return of assets, UNCAC goes further than any other similar instrument has done before by proposing a series of provisions that favor return to the requesting State party. Much depends on how closely the assets were linked to the requesting State in the first place. Funds embezzled from the requesting State are returned to it—even if subsequently laundered—and proceeds of other offenses covered by the Convention are to be returned to the requesting State party if the requesting State establishes ownership or if the requested State party recognizes damages as a basis for return. In other cases, assets may be returned to the requesting State party or a prior legitimate owner, or used in some way for compensating victims. Finally, Chapter V also provides mechanisms for direct recovery in civil or other proceedings, and gives a comprehensive framework for international cooperation that incorporates the more general mutual legal assistance requirements.

So what are the real challenges in breathing real life into these new provisions? How do we overcome, for example, the common problems that we have seen in the limited cases so far of difficulties in repatriating monies to its true owners—usually developing nations—when all types of legal and administrative

obstacles are put in the way? How do we prevent the flood of monies that comes out of those countries so easily? Furthermore, how do we make the developed nations face up to the inevitable fact that they appear almost complicit in harboring stolen funds? I believe the following are some of the main challenges to asset recovery that will need to be addressed by the UNCAC and its signatory States.

Lack of an Appropriate Legal Framework

Some of the well-documented recent asset recovery efforts have demonstrated that existing legal frameworks can often fail to provide a sufficiently practical basis for the recovery of assets. Multilateral and bilateral mutual legal assistance (MLA) treaties for example can often be too limited in scope and are often not applicable other than in the context of the specific cases for which they were originally designed. Consequently, no standard procedures have been developed. Indeed, it is difficult to establish what is often required in terms of legislation to allow agencies to follow the requisite steps in a recovery action.

There needs to be a concerted effort to help States in implementing UNCAC and in ensuring that its legal framework is capable of ensuring that requests can be made to repatriate stolen assets and, indeed, that its laws are able to accede to such requests.

Overcoming Jurisdictional Issues

Where legal systems are incompatible or just plain different, for example, when cases require cooperation between civil law and common law systems, cooperation has been historically difficult. When the objective is to trace and freeze assets as a matter of urgency, MLA treaties have often proved to be ineffective. Overcoming jurisdictional problems can slow down investigations, often fatally. By the time investigators get access to documents in one jurisdiction, the assets may have been moved to another.

Changing the Mind-Set of Law Enforcement

Criminal investigators and prosecutors have always naturally emphasized convicting perpetrators of corrupt activity and sending them to prison. The question of seizing their assets has often been almost an afterthought. Increasingly of course, as crime has become transnational and assets are moved at the press of a button, law enforcement agencies the world over have had to rise to a new challenge. They have also realized that sometimes the criminal

route is not quick or flexible enough. For example, in an international criminal recovery, strict requirements often have to be met under the national law of a requested State before the collaboration of its authorities can be obtained. Courts in requested States often set preconditions prior to their agreeing to freeze assets or to keep them frozen.

The new dawn requires that investigators and prosecutors should now also think in terms of civil recovery. Civil law, allowing for confiscation and recovery based on the balance of probabilities, has a clear advantage, as the evidentiary threshold is not as demanding as it is with criminal actions. This civil standard or burden of proof also means that in civil proceedings, the link between the assets and the criminal acts at their origin needs be established only on the grounds of a balance of probabilities. Finally, civil recovery also opens alternative approaches as far as civil actions against third parties are concerned and for the participation of victims in the action. It also has the advantage of civil recovery in a totally different jurisdiction or even in several jurisdictions at once.

Increase Capacity and Expertise

The mind-set change required in our law enforcement agencies leads naturally to the need for an increase in capacity and expertise to undertake the work. Almost all countries, whether developed or developing, have deficiencies in capacity and expertise in the areas of MLA and asset recovery cases. Corrupt officials across the world have exploited this. The solutions are, as usual, political will, training, and funding.

The political will is increasing as can be verified by the number of ratifications on the UNCAC. The training is becoming available through initiatives of the UNODC, the International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance, the World Bank, through Interpol and other organizations. However, there is a large demand for a high level of investment to develop case management tools; manuals; an Internet knowledge database (complete with asset recovery tools, access to pleadings and court decisions, training materials, scholarly articles, and glossaries); comprehensive training; and the expertise to provide follow-up mentoring and help on individual live cases. The funding to support new training and increased resources devoted to anti-corruption and asset recovery has been slow to develop.

What is necessary to increase the flow of funds is a concerted effort to publicize the UNCAC and to demonstrate that individual plans for capacity/expertise building are concrete, well conceived, and will truly reduce levels of corruption in developing countries.

Increasing Vigilance in Financial Centers

There is understandably a great burden of responsibility placed on financial centers the world over to ensure that their practices are not adding to the problems of corruption by allowing corrupt individuals to hide their monies safely. One way in which the centers could help further might be in improving suspicious activities-reporting systems. Articles 14 and 52 of the UNCAC address know-your-customer (KYC) requirements for financial institutions, especially with regard to politically exposed persons (PEPs) and the reporting of suspicious transactions. In terms of PEPs, it is difficult, under the best of circumstances, for financial institutions to keep up with who is or is not a PEP from another country. This problem could be alleviated if countries would circulate their lists of high officials to the banking authorities of the financial center countries.

Proper implementation by financial centers of these UNCAC provisions is critical to detecting money-laundering and improper transactions by corrupt officials. If bank officials are doing this job properly, they generate information relating to criminal matters that can be transmitted to other State parties under Article 46 (4), and they facilitate compliance with requests from victim countries for financial information about corrupt officials. All these combined finally also act as deterrents to corruption and money laundering.

Sharing and Facilitating an Improved Exchange of Information between Countries

Finally, there is a crying need for a systematic sharing of experiences in this field. The sharing of such experiences, whether good or bad, is likely to be able to help countries in formulating policies and practices that will make a positive difference. The access to information in this field—such as to contact details for financial intelligence units or for central authorities in charge of MLA—is, in many cases, inadequate or at least not easily accessible. Although expert conferences on MLA and asset recovery are a wonderful opportunity to discuss such cases and practices, what is required is a firm commitment to create the sort of international database that will allow such information to be accessed relatively easily by those that need to most.

This list should by no means be considered as exhaustive; it is simply intended to be a starting point to guide potential future reform and policy programs. Responsibility for implementing UNCAC and the aforementioned priorities is shared and requires the concerted actions of all concerned stakeholders, including international organizations, international expert nongovernment organizations, donors, and requesting and requested States.

Challenges and Opportunities of Asset Recovery in a Developing Economy*

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Africa's democracy and development faces severe danger today on account of an alarming prevalence of grand corruption. This abuse of public power for private gain is strangling the life process of the polity and alienating the civic sector, while draining active cells from the economic life of the region. By far, corruption is the most destructive force ranged against society and the State.

Nigeria, for instance, has produced several hundred billion dollars worth of oil since its independence forty-seven years ago, yet the majority of our compatriots have received dreadfully little benefit from this massive wealth. Just one of the many past Nigerian military leaders alone stole around USD 2.5 to 5 billion of the national patrimony and exported it abroad. Financial experts are convinced that, today, Africa loses about USD148 billion dollars annually to corrupt practices – twenty-five per cent of its Gross Domestic Product (GDP)—and that this asymmetric capital flight from the world's poorest region to the developed nations, represents more than ten times what it receives as donor aid from the developed nations!

Little wonder, therefore, that despite billions of dollars in aid, scores of African countries have become poorer than they were fifteen years previously. From West Africa, through the Great Lakes region of Central Africa, to the Cape, state performance in sub-Saharan Africa since independence has been, on balance, atrocious and shameful.

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In the face of a palpable and severe resource crunch in the region, and in the light of the debilitating challenges of financing development needs and poverty alleviation programmes, many countries—as Nigeria is doing now will need to devise strategies for retrieving those billions of dollars: enough to pay for our primary healthcare and education needs, but which are currently hidden in safe havens by corrupt politicians, military leaders and their business collaborators.

Why asset recovery?

Making a case for the recovery of the proceeds of crime and corruption seems so obvious: to prevent such proceeds being reintegrated into society as legitimate money, but also to serve as a deterrent to others. Recovery programmes, by their very nature, create a disequilibrium that amplifies the perils of crime over the incentives, and in that process, they help promote an ethical and social framework: that no-one, however powerful or privileged, should profit from crime. Thus, the simple way to understand it is to see asset recovery as the confiscation of assets by the State, either because they are the proceeds of crime, or because they serve as the instrumentalities (for the facilitation) of crime.

Africa, until its recent democratic wave in the twilight of the last decade, was largely 'missing in action' regarding the important issue of how to recover national wealth stolen by its leaders. Mobutu, the late dictator of the Democratic Republic of Congo (DRC) and Nigeria's Sani Abacha led the pack in illicit conduct, stealing about USD 5 billion a -piece and stashing it in safe havens. With dictators who doubled as looters dotting the regional landscape, there was practically not one recovery programme on the agenda of any State in Africa. Neither was it on the agenda of civil society for the obvious reasons that there were no effective local instruments nor international mechanisms to inspire action. Above all, effective internal capacity to conduct meaningful asset recovery campaigns was absent.

Matters started to change in 1997 when Mobutu died and a year later, Abacha followed tow. From all quarters, the call became uncontrollable for the recovery of the assets stolen by these men. The restoration of democracy in Nigeria in 1999, however, proved to be the catalyst in this process. The administration of President Olusegun Obasanjo made anti-corruption a national priority, promptly setting up the Independent Corrupt Practices Commission (ICPC), and the Economic and Financial Crimes Commission (EFCC), as the lead agencies to prosecute that campaign. Above all, the administration defined the recovery of all stolen and exported assets as a main concern, providing it with immense political will. The 'icing on the cake' came with the efforts of the United

Nations, under the remarkable leadership of its former Secretary-General Kofi Annan, which took an important step in 2003 in fostering international co-operation in the struggle against corruption. The ultimate passage, signing and ratification of the United Nations Convention against Corruption (UNCAC) transformed, not only the anti-corruption war in general, but specific aspects of the campaign, like asset recovery.

From the perspective of developing economies, the most important challenge, as we see it, is the political will of the leadership in the country seeking recovery. This important factor helps shape the campaign and determines the type of resources that will be deployed to oil its trajectory. Related to this is how to manage the range of ideas around the campaign. Grand corruption is an easy target to rail against but often, in the din and cacophony of popular hysteria, a great deal can be lost. It follows therefore that the State and civil society ought to harmonise their vision and voices on this important campaign, in order to secure a successful resolution. An asset recovery campaign provides the opportunity for civil society to play an important role: sensitisation, monitoring and conducting independent research that help the process of criminal investigation and the building of strategic intelligence, as well as being advocates for institutional reforms—both locally and in the global environment.

However, this opportunity can be wasted through fractious and acrimonious name calling against the State and its institutions, which is of no benefit to the strategic goal: the restoration of crucial aspects of a national patrimony that has been violated. This is why the issue always tends to be inflammatory—because it boils down to what people collectively believe belongs to them but which has been forcibly stolen.

While some can stick to the strategic goal of conducting this campaign with the vision of removing the profits from crime and, by so-doing denying the looters future encouragement, for many the campaign can be uncertain, giving rise to moments of doubt as to whether a full restoration is ever possible, given that the plunder has been so dispersed that significant aspects of it can no longer be traced. Typically a whole host of challenges can occur at every juncture in the life-cycle of the recovery matrix, from the tracing stage, through the freezing and retention stages, to the actual forfeiture and final disposal: the idea is to keep an eye on the prize. A successful asset repatriation programme, at this time in the history of the region, is a major boost to development efforts—particularly those directed at meeting the Millennium Development Goals and supporting poverty alleviation strategies.

Asset Tracing

Asset tracing, as the opening salvo of what can end up being a long, boring and frustrating process, is where the greatest skills are most likely to be needed, due to the cascading and labyrinthine processes of money laundering and asset concealment. Fastidious forensic investigative and accounting skills are required to uncover and unlock hidden assets: a challenge that is getting easier with advances in software programmes. Nevertheless, a major challenge is presented by the skills needed to analyze suspicious transaction reports (STRs) generated through the financial intelligence agencies (FIUs). Many jurisdictions are setting up their own FIUs, but this must always be complemented by an active citizenry, ready and willing to step forward and offer information either as whistleblowers or open commentators. In our very oral culture, information about internally hidden assets will always be known and offered through the 'rumour mills'. The problem is with the exported assets. This requires the intervention of whistleblowers – not easy to come by as the cabals who raid national patrimonies hardly have any notion of patriotism.

Where whistleblowers are not forthcoming, the way to fill this lacuna is to ensure that a proper intelligence-led law enforcement programme is in place as a strategic and tactical programme. The question as to where an investigator should begin is not new: nor is it peculiar to developing economies: arrest, investigate and freeze, or first gather a sufficient dossier on the subject before arrest? Tough and professional investigators are finding out that the latter strategy is usually helpful. It has the added advantage of solving many of the problems that can arise at the point of prosecution because a water-tight case can be prepared and presented before the courts. A damaging dossier on a target is more likely to lead to co-operation with law enforcement officers.

The statutory framework for asset recovery poses challenges in many jurisdictions. The African Union Convention on Preventing and Combating Corruption has promoted the regional co-operation agenda, providing improved mutual law enforcement assistance, including extradition, investigations, confiscation and the seizure and repatriation of proceeds of corruption. Exceptionally it also includes restrictions on the use of banking secrecy in Article 17. From an African perspective, therefore, what seems to be needed now is to remedy the yawning gaps in the ECOWAS Protocol regarding the obligations of State Parties on asset recovery, in line with the expansive spirit of the SADC Protocol.

At the domestic level, countries like Nigeria have very tough instruments covering the broad anti-corruption war, but also focusing narrowly on asset recovery. The Nigerian Law, Section 44 2 (b) of the 1999 Constitution expressly

makes a case for asset recovery. In addition, Sections 20 to 34 of the EFCC Act, as well as Sections 16 and 18:2 of the Money Laundering Act, reinforce this case. So important is this concern, that asset confiscation responsibilities are shared between the EFCC and the ICPC.

As the anti-corruption war progresses, multi-agency collaboration makes a major contribution to achieving effective breakthrough and to scaling some of the challenges that are bound to surface. Managing such relationships can in themselves be challenging, but once the simple human handicaps are overcome, such collaboration tends to be key to the resolution of tough problems. A creative application of S.44 of the ICPC Act and S.7 (i) (b)] of the EFCC Act represents a powerful force for change regarding asset recovery strategies in a country like Nigeria.

S.44 of the ICPC Act vests its Chairman with the power to require any person to furnish information about his assets, business, bank accounts, etc. S.44(2) goes further by creating an offence of corruption by presumption if a public official can not satisfactorily explain the source of wealth that is disproportionate to his or her earnings: S.(7)(i)(b) of the EFCC Act confers similar powers. Some will argue that asset recovery outside the jurisdiction is always tough. Citing the difficult bureaucracy, the time involved and the enormous resources required to make mutual legal assistance treaties a reality, this might seem correct. However, this is where investment in international co-operation, as well as in the assistance of foreign law enforcement agencies, pays off. Such practices as police-to-police contact will ease most of the problem.

The story of the recovery strategy deployed in relation to the Abacha loot, for instance, centres on the victory of a disciplined and mission-orientated team, operating under a tough leadership. Here the use of an 'inside to outside' approach (or vice versa), forensic accountants deployed to trace from recipient to victim, a strong dose of law enforcement-to-law enforcement contacts, as well as lawyer-to-lawyer contacts, all combined to help bring about the success story that the world celebrates today.

Restraint and Confiscation

With respect to restraining assets, Sections 28 and 34 of the EFCC Act; Sections 37 and 38(6) and 45 of the ICPC Act; and Sections 16 and 18 of the Money Laundering Prohibition Act (MLPA), permit the freezing of accounts subsequent to investigation and analysis of an STR. But there are challenges here as well. Some public officers enjoy constitutional immunities against prosecution, although not against investigation, and, in general, the 'words of wisdom' are

that restraining orders must be effected only after sufficient facts have been gathered. Such a sense of caution helps to diminish the risk of a rush to restrain when the proper connections between the property and the crime have not been established, or where the said property is vested in a nominee.

As far as confiscation procedures go, the instruments are clear in this regard. Sections 20 and 28 of the EFCC Act state clearly that the assets and properties of convicted persons are forfeitable to the Federal Government and payable to the Consolidated Revenue Fund of the Federation. Assets of the convicted person in a foreign country are also forfeitable, subject to a treaty with such a country. The quantum of forfeitable property comprises the gross receipts, or property traceable to the gross receipts. Assets that also serve as instrumentalities of crime, as long as consent of the owners can be established, are also forfeitable according to the Act, and they include:

All means of conveyance, including aircraft, vehicles or vessels used or intended to be used to transport or in any manner to facilitate the transportation, sale, receipt, possession or concealment of the proceeds of economic or financial crimes.

In Lieu of a Conclusion

A number of obvious questions dog the asset recovery mission and, if not addressed adequately, will always threaten to derail it. They are not restricted to the following:

- Balance sheet of recovery effort: Does the balance of the estimated cost associated with recovery against the expected value of what is to be recovered, merit commencing the process at all?
- Is the target a Politically Exposed Person (PEP)?
- What is the strategic objective of the recovery effort? Recovering stolen funds for the State or punishing the culprit by having him or her prosecuted and convicted?
- Is there proportionality of identified property with the alleged crime?
- What is the burden of proof on the prosecution, so as to be able to link the origin of the property to the alleged crime?
- What are the issues at play regarding divergent legal systems?
- What is the burden of language and translation?
- How does one generate political will, particularly when powerful interests, like multinationals based in the requested States, are involved, or when the target of the investigation dies, or when there is a regime of banking secrecy in place?

- Should there be no time frame for closure of cases of corruption when mutual legal assistance (MLA) is sought?
- How are the costs of recovery determined and deducted by the requested State?

The Abacha loot brought to the fore a totally new dimension in the whole debate about recovered funds when the Swiss government demanded conditions on the use of the recovered funds. The question now is whether this should serve as a best practice model? Assuming the requesting State refuses to co-operate, can the requested State be justified in withholding payment when the issue in contention is stolen assets from which the requested State is profiting, whilst apparently collaborating with criminality?

In the Abacha model, Nigeria consented and entered into an agreement with the Swiss Government to put money into social reconstruction through education and agricultural and infrastructural funding. From an international law perspective this is one issue that will not go away, to the extent that it touches on the respect of sovereignty of other nations and represents an under-hand attempt to interfere by imposing conditionalities on how they run their economy and society.

Without doubt, UNCAC has proved to be a veritable boon in the restoration of justice for injuries committed by pilfering leaders who loot their national treasuries and receive collaboration abroad to keep the money safe. The missing link in the process up to this point is for civil society to play a greater role, through vigorous monitoring and as advocates for judicial reform and better international co-operation. An expanded civil society role will undoubtedly deepen the preventive dimensions of the anti-corruption war.

Chapter 4

Seizure, Confiscation, and Repatriation of Assets: Practices in Financial Centers

Fight against Corruption and Restitution of Illicitly Acquired Assets: Switzerland's Practice in Dealing with Politically Exposed Persons

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Switzerland has a comprehensive set of policies to fight crime such as corruption, both at the national and international level. The anti-corruption policies are closely linked to the Government's efforts to fight organized crime and money laundering. In many cases, there is a close link between corruption and illegal holdings of politically exposed persons (PEPs). As a major international financial center, Switzerland has a fundamental interest in ensuring that illicitly acquired assets do not find a safe haven in Switzerland. The Swiss government has, therefore, put in place a comprehensive range of legal instruments and measures for identifying, blocking, and returning assets of criminal origin.

Switzerland handles assets illicitly acquired by PEPs in the same way as other assets of criminal origin. The Swiss banking secrecy law does not protect assets of criminal origin. The legal instruments deployed for preventing entry of illegally acquired assets, and for identifying, blocking, and returning such assets, are manifold: criminal law; money laundering provisions; mutual legal assistance; and regulations governing the due diligence of banks. In some specific cases, the federal government has the power to block assets on its own initiative, to assist the country concerned in its efforts to recover them.

Experience has shown that the existing array of instruments is effective in dealing with illicit assets of PEPs. Switzerland is a worldwide leader in the field of asset recovery of PEPs. Over the past 20 years, Switzerland has returned about USD1.6 billion to their countries of origin. No other government has returned a comparable amount.

From these many successful proceedings, some practical advices can be drawn:

- Be ready to help. Enact a domestic legislation that puts you in a position to be able to grant assistance without treaty. Use an all-crimes approach. In case of doubt, submit the assistance to conditions (e.g., human rights).

- Find the money. Effective know-your-customer (KYC) requirements and swift reporting mechanisms are necessary.
- Restrain the money. Enact domestic legislation to give one the power to act quickly and under reasonable standards of evidence.
- Keep the money restrained. Corresponding domestic law provisions are necessary to allow the requesting State to bring the criminal proceeding to an end and confiscate the money.
- Return the money. Find the accurate ground(s) for this decision
 - a) foreign confiscation decision,
 - b) domestic confiscation decision,
 - c) evident link between the money and the facts under investigation in the requesting State, and
 - d) decision issued in other related proceedings (administrative/civil).
- Monitor the use of the money, case by case and only with the consent of the requesting State. Monitoring must be made under the responsibility of an international organization.
- Use a lawyer in the requested State as an interface—a useful adviser (and traveler!) between requesting and requested States.

Corruption and Other Offenses Linked to Politically Exposed Persons – Restitution of Assets

Along with other financial places of major importance, Switzerland had to find an answer to the problem of assets embezzled or stolen abroad and subsequently transferred to its territory. The main problem was to find a way to return such assets quickly to their rightful owner abroad and to take into account any justified claim filed in Switzerland against these funds. In 1983, when the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) entered into force, a provision was enacted to regulate the question (Article 74, IMAC). Since then, the Swiss authorities have, on numerous occasions, been able to help foreign countries by returning funds to the victims abroad.

International Overview

Only in recent years has the issue of returning stolen or embezzled assets been tackled within the field of international cooperation in criminal matters. Most of the time, the rightful owners of such funds were obliged to turn to civil law to recover their property.

There were always doubts whether Article 3 of the 1959 European Convention on Mutual Assistance in Criminal Matters (ECMA) covered seizures with a view to compensation (*séquestre conservatoire*) in addition to seizures of

evidence (*séquestre probatoire*). The Swiss Supreme Court has ruled that the Convention applies only to the seizure and transfer of evidence.

The absence of an international rule on the surrender of assets has not been compensated for by the Convention on Money Laundering and the Search, Seizure, and Confiscation of the Proceeds from Crime (in short, Money Laundering Convention)¹, which regulates support for investigations and the confiscation of criminal moneys, but not their handing over. The basic rule established by the Convention is the confiscation of assets in the country where they are located, with a subsequent possibility under Article 15 to share them with another member country that has helped in the confiscation. But the Convention permits extensive reservations in favor of domestic law, thereby often lowering its value in individual cases. An inquiry made by the Council of Europe has shown that the vast majority of members has not frequently applied the Convention in practice.

The return of assets to the victims is now regulated in several recent conventions (not yet in force) or draft conventions.²

Return of Assets under Swiss Law

Legal Basis

The new rule on the handing over of assets was one main change in the law amending the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) of 4 October 1996. It establishes a clear distinction between handing over for giving evidence³—normally followed by repatriation to Switzerland—and handing over for the purpose of forfeiture or return to the person entitled abroad.⁴

At this stage, it must be expressly pointed out that the handing over of objects or assets within the framework of an extradition procedure is regulated separately⁵ (so-called "extradition of objects and assets").

The question of the handing over of objects and assets is dealt with in many bilateral agreements.⁶

The requirement of reciprocity⁷ plays an important role in the handing over of assets. This requirement is, however, not absolute and can be left aside, depending on the type of offense or the necessity of combating certain offenses.⁸

Handing over to Provide Evidence

The handing over of objects, documents (originals), or assets to foreign authorities to provide evidence is regulated in Article 74 of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC), as well as in most international agreements.⁹ As a rule, third parties that have acquired rights in good faith¹⁰ are protected and the requesting State has an obligation to return.¹¹ There are also rules in favor of authorities.¹² It is worth mentioning here that, in some cases, valuables turned over as evidence are not returned because they are restored to the victim within the framework of the foreign proceeding.

In practice, as long as the transport costs remain insignificant, surrender only for the purpose of providing evidence poses few problems.

Handing Over for the Purpose of Forfeiture or Return

Problems of greater significance arise when the assets or objects are to be sent to the foreign authorities for the purpose of forfeiture or return to the person entitled (usually the claimant).

The former provision of the IMAC was not precise enough for the Federal Supreme Court, which subsequently clarified the regulation in two well-known cases.¹³ This was one main reason for amending the IMAC. The present provision of Article 74(a) of IMAC broadly follows the solution proposed by the Federal Supreme Court.

First, it should be mentioned that handing over for the purpose of forfeiture or return can be influenced by Part Three (before the judgment¹⁴) as well as Part Five (after the judgment¹⁵) of the IMAC. If an order for judicial assistance fulfills the condition in Part Three of the IMAC that the requesting State must have made a final and enforceable judgment before the handing over is executed, this does not change the nature of the case, which remains one of providing assistance in accordance with Part Three of the IMAC.

The description of the assets or objects to be handed over is regulated in Article 74(a), paragraph 2. The list is exhaustive and includes the objects used to commit a punishable offense as well as the profits of the offense and any replacement value.¹⁶

The handing over is ordered with the usual conclusive decree.¹⁷ However, as a rule, the objects are not handed over until the requesting State presents a final and enforceable decision that settles the question of future ownership (return to the State/return to the person entitled).¹⁸ However, the regulation has a certain degree of flexibility as regards two elements:

- Instead of a sentence, it solely refers to a ruling, which implies simpler forms of decree (return decisions, etc.).
- The condition is not mandatory, but is to be imposed only as a rule, which excludes all clear-cut cases.¹⁹

Stringent requirements are set not only for the handing over to foreign authorities, but also for the release to an entitled person who has acquired rights in good faith in Switzerland.²⁰ It is, therefore, possible that the number of lengthy clarification procedures by the Swiss assistance authorities will increase in future.²¹

Special Issues Raised by Cases Involving Politically Exposed Persons

Based on Switzerland's practical experiences, cases related to politically exposed persons (PEPs) raise the following specific problems:

- (i) The long time spent as head of a country makes it very difficult to trace the proceeds from offenses committed when the PEP was governing the country (e.g., Mobutu, Suharto, and Duvalier). The evidence needed to confiscate such proceeds is often no longer available.
- (ii) Immunity of the Head of State can hinder or delay prosecution. The Swiss Supreme Court has ruled that, in relation to bank accounts, the immunity privilege can only be disputed if the link between the account and a foreign State was recognizable (i.e., no immunity granted to an account opened on behalf of a PEP by a straw man or a shell company).
- (iii) Political stability, human rights issues (procedural guarantees) in the requesting State – It is often precarious and makes a return of funds impossible, or at least risky. Moreover, it is not easy to set conditions for the allocation of funds to a sovereign State.

NOTES

¹ Übereinkommen über Geldwäscherei sowie Ermittlung, Beschlagnahme und Einziehung von Erträgen aus Straftaten (Geldwäschereiübereinkommen, GwUe).

² Second Additional Protocol to The European Convention on Mutual Assistance in Criminal Matters (Article 8); European Union Convention on Mutual Assistance in Criminal Matters (Article 8) , United Nations Convention for the Suppression of the Financing of Terrorism; UN Convention against Transnational Organized Crime.

³ Article 74, Federal Act on International Mutual Assistance in Criminal Matters (IMAC).

⁴ Article 74(a), IMAC.

⁵ cf. Article 59, IMAC; note that such handing over of objects and assets can still be effected if the person is not actually extradited (e.g., in case of the escape or death of the person

- pursued); Article 59, paragraph 7, IMAC. Under Article 74(a), IMAC, the return of objects and assets is mandatory if the conditions for extradition are met.
- 6 An actual obligation to surrender exists with Germany, Austria, and France. With the US, an obligation to surrender exists only for objects and assets belonging to the requesting State or one of its member states or cantons.
 - 7 Article 8, IMAC.
 - 8 Article 8, paragraph 2, IMAC.
 - 9 For example, Articles 3 and 6, European Convention on Mutual Assistance in Criminal Matters (ECMA).
 - 10 Only property rights remain reserved.
 - 11 Article 74, paragraph 2, IMAC; Article 6, paragraph 2, ECMA.
 - 12 Also, in particular, the often-cited fiscal liens (cf. Article 74, paragraph 4 and Article 60, IMAC) that, however, are of minor significance in practice.
 - 13 PEMEX (Mexico) and Marcos (Philippines).
 - 14 This rule, however, is already ambiguous. In practice, judicial assistance is still permissible for the examination of a plea agreement already accepted by a US court, i.e., an admission of guilt. The revision of sentences was also considered, cf. Article 5, paragraph 2, IMAC.
 - 15 Article 94 ff. IMAC (execution of criminal judgements).
 - 16 According to Article 59, paragraph 2, Swiss Criminal Code ; Article 7, paragraph 2 and Article 13, paragraph 3 of the Money Laundering Convention. The return of the replacement value has simplified the matter considerably. Now, it is no longer necessary—e.g., in the case of narcotics dealing—to link each entry made to an account with the corresponding sale of drugs.
 - 17 Article 80(d) IMAC; Article 74a, paragraph 1, IMAC.
 - 18 This regulation was particularly disputed on the occasion of the amendment of the IMAC. There was no general acceptance of the objections that handing over should not involve a change of ownership and that the requirement of a judgment would result in a substantive judgment that is otherwise not usual in mutual legal assistance law.
 - 19 The example given in Parliament was the theft of a famous work of art from a well-known museum. A judgment of the Federal Court on a stolen painting created an initial positive precedent. The Abacha case is also an example where the link between the assets in Switzerland and the offenses committed abroad was so evident for a part of the money that no confiscation decision was necessary.
 - 20 Article 74a, paragraph 4(c) and paragraph 5 IMAC.
 - 21 Article 33(a) Decree, IMAC, whereby objects and assets that have been secured can be seized.

Seizure, Confiscation and Repatriation Assets: Practice in Hong Kong, China

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This paper discusses the practice of seizure, confiscation and repatriation of assets pursuant to international requests for legal assistance in criminal matters to Hong Kong, China. It provides an overview of the constitutional basis upon which Hong Kong, China may provide assistance pursuant to bilateral and multilateral arrangements to foreign States, including those in the Asia and Pacific region. It discusses the domestic legal framework under which requests for confiscation and repatriation of assets are processed in Hong Kong, China including the minimum legal requirements that must be met for such assistance to be provided. Finally, the paper explores from an operational perspective ways to best achieve effective implementation of mechanisms available for international asset recovery.

The Constitutional Background

In 1984, the Chinese and British governments signed the Joint Declaration on the Question of Hong Kong affirming that the People's Republic of China would resume the exercise of sovereignty over Hong Kong effective 1 July 1997.¹

Upon resumption of sovereignty in 1997, a Hong Kong Special Administrative Region (SAR) was established in accordance with the provisions of Article 31 of the Constitution of the P.R. China under the principle of "one country, two systems."²

The Basic Law of Hong Kong, China was enacted in accordance with the Constitution prescribing the systems to be practiced in Hong Kong, China.³

Article 13 of the Basic Law provides that the Central People's Government shall be responsible for the foreign affairs relating to Hong Kong, China. It also provides that the Central People's Government authorizes Hong Kong, China to conduct relevant external affairs on its own in accordance with the Basic Law.⁴

Several provisions in the Basic Law relate to the maintenance and development of relations by Hong Kong, China at the international level, the application of international agreements to the region both before and after 1997, and arrangements for reciprocal juridical assistance with foreign States.

First, Article 151 of the Basic Law provides that Hong Kong, China may, on its own, using the name "Hong Kong, China" maintain and develop relations and conclude and implement agreements with foreign States and Regions and relevant international organizations in appropriate fields. In addition, Article 152 permits the region to participate in international organizations and conferences limited to States but affecting the Region in appropriate fields using the same name. Thus, the Region continues to hold membership of a number of international organizations and initiatives under its own name Hong Kong, China including membership to the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

Second, Article 153 of the Basic Law provides that the application of international agreements to which the P.R. China is or becomes a party shall be decided in accordance with the needs and circumstances of the Region and after seeking the views of the government of the Region. It also provides that international agreements to which the P.R. China is not a party but which are implemented in Hong Kong, China may continue to be implemented in Hong Kong, China. For example, it is under Article 153 of the Basic Law that the Central People's Government applied to the region the United Nations Convention against Corruption (UNCAC) in February 2006.

Third, Article 96 of the Basic Law provides that with the help or authorization of the Central People's Government, the Government of Hong Kong, China may make appropriate arrangements with foreign States for reciprocal juridical assistance. Accordingly, the Region has negotiated a number of bilateral agreements for mutual legal assistance in criminal matters with foreign States and it has implemented these agreements under its domestic law. These agreements, which follow a fairly standard model, include mechanisms for international asset recovery.

Ten years have passed since the resumption of Chinese sovereignty over Hong Kong, China and it is fair to say that the system envisaged under the Joint Declaration and Basic Law for the application of international agreements to the Region and the provision of international cooperation in criminal matters to foreign jurisdictions, has withstood the challenge of time and is, by and large, working well.⁵

Multilateral International Agreements

A number of multilateral agreements that apply to Hong Kong, China and that include provisions for mutual legal assistance (MLA) in criminal matters are as follows:⁶

- (i) Convention for the Suppression of Unlawful Seizure of Aircraft 1970;
- (ii) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971;
- (iii) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973;
- (iv) International Convention against the Taking of Hostages 1979;
- (v) Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984;
- (vi) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- (vii) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and the Fixed Platform Protocol 1988;
- (viii) International Convention for the Suppression of Terrorist Bombings 1997;
- (ix) International Convention for the Suppression of the Financing of Terrorism 1999;
- (x) United Nations Convention against Transnational Organised Crime 2000;
- (xi) United Nations Convention against Corruption 2003;

Parties to these conventions may seek assistance from Hong Kong, China pursuant to the provisions in them for MLA.

Bilateral International Agreements

To date, Hong Kong, China has signed bilateral agreements for MLA with the following 21 jurisdictions⁷:

Australia, Belgium, Canada, Denmark, France, Germany (not yet in force), Ireland (not yet in force), Israel, Italy (not yet in force), Korea, Malaysia (not yet in force), Netherlands, New Zealand, Philippines, Poland, Portugal, Singapore, Switzerland, Ukraine, UK, and US.

All these agreements contain provisions for tracing, restraining, confiscating, and sharing proceeds of crime.

Domestic Law

Requests for mutual legal assistance in criminal matters, including those for asset recovery, are processed under the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 (MLAO). This Ordinance was enacted in 1998 and is a purpose-built legal mechanism to facilitate and regulate the provision and obtaining of assistance in criminal matters between Hong Kong, China and places outside Hong Kong, China, and for matters incidental thereto or connected therewith.⁸

Assistance can be rendered pursuant to “arrangements for MLA” (e.g., bilateral or multilateral agreements which have been made the subject of an order under the ordinance), or based on the principle of reciprocity. As regards the latter, the ordinance provides that the appropriate authority of the requesting place may give an undertaking to the Secretary for Justice which satisfies the Secretary for Justice that the place will, subject to its law, comply with a future request by Hong Kong, China to that place for assistance in a criminal matter. It is, therefore, not a prerequisite that a bilateral or multilateral agreement exists before assistance can be rendered under the ordinance.

The types of legal assistance available include:

- taking of oral evidence and production of things before a magistrate (including by live TV link)⁹;
- search and seizure of things under search warrant¹⁰;
- obtaining of material under production orders (e.g., on banks to produce documents)¹¹;
- arranging the travel of a person to another place to assist in criminal investigations or proceedings¹²;
- enforcement of external confiscation orders and restraining of dealing in property that may be subject to external confiscation orders¹³; and
- service of process.¹⁴

Assistance can only be provided in relation to a “criminal matter,” which is defined in the Ordinance¹⁵ to be:

- an investigation,
- a prosecution, or
- an ancillary criminal matter.

Of particular relevance to requests for asset recovery, “ancillary criminal matter” is defined¹⁶ to mean restraining or dealing with; or seizing, forfeiting, or confiscating any property in connection with an external offense; or obtaining, enforcement or satisfaction of an external confiscation order.

“External offense” means an offense against the law of a place outside Hong Kong, China, and “external serious offense” means an external offense, the maximum penalty for which is death or imprisonment for not less than 24 months.

External confiscation order, which is a key term in relation to requests for asset recovery, is defined¹⁷ as:

... an order, made under the law of a place outside Hong Kong, for the purpose of –

- a) recovering (including forfeiting and confiscating) -
 - (i) payments or other rewards received in connection with an external serious offense or their value;
 - (ii) property derived or realized, directly or indirectly, from payments or other rewards received in connection with an external serious offense or the value of such property; or
 - (iii) property used or intended to be used in connection with an external serious offense or the value of such property; or
 - b) depriving a person of a pecuniary advantage obtained in connection with an external serious offense,
- and whether the proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property.

It can, therefore, be seen that the law permits action to be taken in Hong Kong to restrain, forfeit, or confiscate property in relation to a foreign offense punishable by at least 24 months imprisonment in the requesting jurisdiction. This can be done whether the foreign proceedings are criminal or civil in nature, and whether the proceedings are against persons or property. That is, the procedure allows for action in cases of confiscation following a criminal conviction, or action based on civil *in rem* proceedings against identifiable property arising from criminal conduct but not necessarily requiring a criminal conviction.

Contents of Requests

Certain key minimum statutory requirements¹⁸ must be contained in all requests for MLA, including those relating to asset recovery. The request should be in writing and include the following:

- particulars of the “appropriate authority” making the request, supported by the relevant documents or statutory provisions to enable the Secretary for Justice to be satisfied as to the legal basis for the request;

- name of the authority, if different from the aforementioned, concerned with the criminal investigation or proceedings to which the request relates (for example, the judicial or prosecuting authority conducting the investigation or proceeding relating to the request);
- description of the nature of the criminal matter (in particular, whether it relates to an investigation, prosecution, or ancillary criminal matter and the details of the offense alleged) and a statement setting out a summary of the laws contravened;
- statement setting out the maximum penalty for the offense to which the criminal matter relates;
- summary of the relevant facts including, in particular, the circumstances indicating their connection with any evidence sought in Hong Kong, China;
- description of the purpose of the request and the nature of assistance being sought;
- relevance of the required evidence (that is, the manner in which the evidence is expected to assist in the investigation or to be used in the prosecution);
- details of the procedure that the requesting place wishes Hong Kong, China to follow in giving effect to the request, including details of the manner and form in which any information, document, or thing is to be supplied under the request;
- if confidentiality of the request is required, a statement expressing that requirement supported by reasons why confidentiality is sought;
- if the original of a thing is requested, a statement specifying the reason for requiring the original;
- details of the period within which the requesting place wishes the request be complied with; and
- any other information that may help in giving effect to the request.

In addition, other information may be required for specific types of assistance sought. For information specifically in relation to requests for asset recovery, please see subsequent section (Additional Considerations in Asset Recovery Cases).

The Ordinance provides a number of statutory grounds¹⁹ on which requests will be refused. These are:

- a. the request relates to the prosecution or punishment of a person for an offense that is, or is by reason of the circumstances in which is alleged to have been committed, an offense of a political character;
- b. there are substantial grounds for believing the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice

- to a person on account of the person's race, religion, nationality, or political opinions;
- c. the request relates to the prosecution of a person for an offense in respect of conduct pursuant to which the person has been convicted, acquitted, pardoned, or punished (i.e., double jeopardy);
 - d. acceding to the request would impair the sovereignty, security, or public order of the People's Republic of China;
 - e. the request relates to the prosecution or punishment of a person in respect of an act or omission which, if it occurred in Hong Kong, China, would have constituted an offense only under military law and not also under the ordinary law of Hong Kong, China;
 - f. acceding to the request would seriously impair the essential interests of Hong Kong, China;
 - g. the request relates to an act or omission that, if it had occurred in Hong Kong, China, would not have constituted an offense (i.e., dual criminality).

A request should contain a positive statement confirming that none of the grounds at (a) – (c) above apply.

A request from a foreign jurisdiction that does not have a bilateral agreement with Hong Kong, China will also be refused if the appropriate authority of the requesting place fails to provide a reciprocity undertaking²⁰ in the body of the request. An undertaking in the following form is acceptable:

... [requesting place] undertakes that it will, subject to its laws, comply with a future request from the Hong Kong Special Administrative Region for similar assistance having a comparable effect to that requested from the Hong Kong Special Administrative Region in this case....

If the offense relates to an investigation (as opposed to prosecution) of an offense in relation to taxation,²¹ it will be refused if the requesting place does not have an agreement with Hong Kong, China. If an agreement exists, the requesting place should provide in the body of the request information to satisfy the Secretary for Justice that the primary purpose of the request is not the assessment or collection of taxation. These restrictions do not apply if a criminal prosecution has started.

There is no death penalty²² in Hong Kong, China. If a request for assistance from abroad relates to an offense punishable by death, the request may be refused if the requesting place fails to give an undertaking that satisfies the Secretary for Justice that the death penalty will not be imposed or, if imposed, will not be carried out.

Additional Considerations in Asset Recovery Cases

An external confiscation order may be registered and enforced in Hong Kong, China through an application made by Secretary for Justice, on behalf of the requesting place, to the Court of First Instance in Hong Kong, China.²³

An application to the Court must contain sufficient information to satisfy it that:

- at the time of the registration, the order is in force and not subject to appeal;
- the person in respect of whom, or in relation to whose property, the order was made received notice of the proceedings and had the opportunity of defending the proceedings; and
- the enforcement of the order in Hong Kong, China would not be contrary to the interests of justice.

The Secretary for Justice may also apply to the Court of First Instance for an order prohibiting dealing in property (restraint order).²⁴ The court will make an order if it is satisfied that:

- proceedings have been instituted in a place outside Hong Kong, China,
- the proceedings have not been concluded, and
- either an external confiscation order has been made in the proceedings or there are reasonable grounds for believing an external confiscation order may be made in them.

An order restraining dealing in property may also be obtained where the court is satisfied that proceedings are to be instituted in a place outside Hong Kong, China and it appears that in those proceedings an external confiscation order may be made.

Accordingly, it is important that a request to Hong Kong, China seeking to register an external confiscation order or to restrain dealing in property should also contain the above information, as applicable, so that application can be made to the court for the necessary orders on behalf of the requesting place.

To simplify proof of evidentiary matters, the ordinance allows for proof of certain facts by a certificate (Section 30(1) on certificate) issued by the appropriate authority of the requesting place.²⁵ In particular, such a certificate shall be admissible as evidence of the facts stated. The facts that can be proven by the certificate are as follows:

- a proceeding has been instituted and has not been concluded, or that a proceeding is to be instituted, in the place;
- an external confiscation order is in force and not subject to appeal;

- all or a certain amount of the sum payable under an external confiscation order remains unpaid in the place, or that other property recoverable under an external confiscation order remains unrecovered in the place;
- any person has been notified of any proceeding in accordance with the law of the place; or
- an order (however described) made by a court in the place has the purpose of
 - I. recovering, including forfeiting and confiscating
 - (i) payments or other rewards received in connection with an external serious offense or their value;
 - (ii) property derived or realized, directly or indirectly, from payments or other rewards received in connection with an external serious offense or the value of such property; or
 - (iii) property used or intended to be used in connection with an external serious offense or the value of such property; or
 - II. depriving a person of a pecuniary advantage obtained in connection with an external serious offense.

In addition, a statement contained in the document that purports to have been received in evidence or summarizes evidence given in proceedings in a court in a place outside Hong Kong, China is admissible as evidence of any fact stated therein if duly certified.²⁶ A document is duly certified if it purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong, China concerned, or by or on behalf of the appropriate authority of the place.

The Ordinance also allows for proof of foreign court orders if the order bears the seal of the court in the place outside Hong Kong, China or is signed by any person in his capacity as judge, magistrate, or officer of the court in the place outside Hong Kong, China.²⁷ Certified copies may also be put as proof if the copy purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong, China concerned, or by or on behalf of the appropriate authority of the place.²⁸

Processing of Asset Recovery Requests in Hong Kong, China

The Mutual Legal Assistance Unit of the International Law Division, Department of Justice, discharges the responsibilities of the Central Authority in Hong Kong, China for the purpose of MLA in criminal matters.²⁹

Foreign authorities may seek advice from the unit on the preparation of requests to Hong Kong, China, and draft requests may be forwarded to the unit for comment, to ensure compliance with Hong Kong, China's statutory requirements.

All requests for legal assistance under the Ordinance, including asset recovery cases, should be addressed to the Secretary for Justice, who is the head of the Department of Justice. It is not necessary for requests to be sent through the diplomatic or consular channel.³⁰ Instead, requests may be sent directly to:

The Mutual Legal Assistance Unit
Department of Justice
47/F High Block
Queensway Government Offices
66 Queensway
Hong Kong, China
Fax number: +852 2523 7959

Upon receipt, the request will be assigned to the counsel within the MLA unit.³¹ The MLA counsel will acknowledge receipt of the request and obtain the appointment of a law enforcement officer to assist in its execution. This will be an officer from the Hong Kong Police, Customs, and Excise Department or the Independent Commission against Corruption, depending on the nature of the case under investigation or prosecution. They are all "authorized officers" under the ordinance.³²

Should the request, on review, fail to meet the minimum legal standards for processing under the ordinance, or should additional information or clarification be required, the assigned counsel will give the necessary feedback to the requesting jurisdiction so that remedial action may be taken before the request proceeds.

Once the request is in a form that can be lawfully processed, notice is given to the Office of the Commissioner of the Ministry of Foreign Affairs that is based in Hong Kong, China. Under the Ordinance, the Central People's Government may give instructions in the case on the grounds that if the instructions were not complied with, the interests of the People's Republic of China in matters of sovereignty, security, or public order would be significantly affected.³³ In urgent cases, for example, where restraint orders are required at short notice, this notification procedure will be expedited.

The Secretary for Justice formally authorizes the execution of the request. His power has been delegated to a law officer (International Law), and an MLA

counsel is responsible for obtaining this internal clearance before execution of the request proceeds.

Upon authorization by the Secretary for Justice, the law enforcement officer assigned to help in executing the request will commence background inquiries. In asset recovery cases, the officer may informally inquire with banks and other institutions named in the request to verify—as far as possible—the accuracy of the information contained in the request concerning the named/numbered bank accounts and other properties held by or on behalf of named persons or entities. In some cases, Hong Kong, China's and overseas law enforcement officers may work together on the case before the formal request for assistance is made, thus ensuring greater certainty and accuracy of the information contained in the request.

Restraint Orders

If a restraint order is sought, an MLA counsel will draft the necessary application to the Court of First Instance and will work with the law enforcement officer to prepare an affidavit or information in support of the application. The request for assistance will not be exhibited to the application to court, but the law enforcement officer's affidavit filed in court will set out all relevant details drawn from the contents of the request as appropriate. If a Section 30(1) certificate or copies of foreign orders have been provided by the requesting place, these will be exhibited to the affidavit in support of the application.

Once the papers have been prepared and filed, a hearing can be obtained at short notice and within a matter of days. The application is heard *ex parte* (i.e., without the defendants' knowledge or participation) and the MLA counsel will seek the order from the court. If the court is satisfied that the necessary statutory conditions for the making of the order have been met and that it is appropriate to do so, it will issue the order.³⁴

The initial restraint order is an interim order for a limited period only, adjourned to some date in the future (the return date). This is to enable time to serve the restraint order and related papers on the defendants and other persons affected by the order (e.g., banks). In most cases involving international requests for asset recovery, the defendants are located abroad and often reside in the requesting place. A period of about 2 months is usually allowed to effect service. If more time is needed, then the time may be extended. The MLA counsel will forward the papers to the requesting jurisdiction and require that an affidavit of service be provided in return within the stipulated period.

At the return date, a proof of service of the order on the defendants and other affected parties will be provided to the court. The defendants or affected parties may attend or be represented and oppose the continuation of the restraint order. Should these persons not appear, the court will usually grant the continuation of the restraint order "until further order of the court." This is an order for an indefinite period and it continues to run while the proceedings in the requesting jurisdiction are being completed and a final forfeiture or confiscation order is obtained.

Should any other party appear on the return date and contest the proceedings, the court will hear the arguments and decide whether to maintain the restraint order or discharge it. Depending on the nature of the arguments raised on any defended application, the MLA counsel may require more information or assistance from the requesting place to best present its case in court.

The defendants are entitled to apply for legal expenses and living expenses³⁵ from property under restraint in Hong Kong, China, although Secretary for Justice ensures, as far as possible, that this right is not abused. The defendants will usually be required to provide an affidavit of means to disclose all properties worldwide and, in cases where foreign law does not permit the withdrawal of legal fees from restrained assets, this may be a factor the court will also consider in deciding whether to grant any such relief.

Depending on how long it would take the requesting jurisdiction to obtain final confiscation or forfeiture orders, the restraint orders may be maintained for a number of years in Hong Kong, China. Should a property subject to a restraint order require active management (e.g., apartments operating under lease arrangements), the court may appoint a receiver to manage the property pending further order of the court.³⁶

Registration and Enforcement of Forfeiture/Confiscation Orders in Hong Kong, China

Once a final forfeiture or confiscation order has been obtained, a request may be sent to Hong Kong, China to register and enforce the order. Again, a mutual legal assistance (MLA) unit counsel will work with the law enforcement officer assigned to draft the necessary application to the court and other related papers. The law enforcement officer will sign an affidavit, based on the contents of the request.

It is highly recommended that at the registration and enforcement stage, the appropriate authority of the requesting place provide a Section 30(1) certificate certifying the following matters, adapted as necessary:

- an external confiscation order is in force and not subject to appeal;
- all or a certain amount of the sum payable under an external confiscation order remains unpaid in the place, or that other property recoverable under an external confiscation order remains unrecovered in the place;
- any person has been notified of any proceeding in accordance with the law of the place; or
- an order, however described, made by a court in the place has the purpose of
 - recovering (including forfeiting and confiscating)
 - (a) payments or other rewards received in connection with an external serious offense or their value;
 - (b) property derived or realized, directly or indirectly, from payments or other rewards received in connection with an external serious offense or the value of such property; or
 - (c) property used or intended to be used in connection with an external serious offense or the value of such property; or
 - depriving a person of a pecuniary advantage obtained in connection with an external serious offense.

Originals or certified copies of the final confiscation or forfeiture orders should also be included in the request.

The MLA counsel will apply to the Court of First Instance to register the external confiscation order, usually on an ex parte basis. Then, notice of the registration must be served on the defendants and other affected parties. They will have a fixed period within which to apply to the court to set aside the registration. If no such steps are taken, the MLA counsel will apply further to enforce the external confiscation order.³⁷

This may be done by appointing a receiver to sell realizable property,³⁸ or in cases where only funds in bank accounts are involved, an order may be obtained directing payment into court.

Sharing of Recovered Assets

Hong Kong, China does share recovered assets. The standard provision on sharing in Hong Kong, China's bilateral agreements provides that proceeds confiscated shall be retained by the requested party unless otherwise agreed

upon between the parties. This allows for a presumption that the assets will remain with the requested party but provides for flexibility and sharing on a case-by-case basis.

Once funds are realized at the enforcement stage by the receiver or otherwise, they must be paid to the Court of First Instance. The registrar of the court will hold the funds for a period of 5 years pending an application by or on behalf of the government of a “prescribed place” for sharing.³⁹ “Prescribed places” are places with which Hong Kong, China has prescribed “arrangements for mutual legal assistance”⁴⁰ under the Ordinance, that is, arrangements which have been made the subject of an order under the Ordinance⁴¹ All of Hong Kong, China’s bilateral agreements for MLA in criminal matters have been made the subject of orders under the ordinance, so a legal mechanism exists to share with such places. An order is also being made under the Ordinance to apply the United Nations Convention against Corruption (UNCAC) to enable sharing or repatriation of recovered assets with other parties to the Convention in accordance with Convention obligations.⁴²

If a foreign jurisdiction does not have a bilateral agreement with Hong Kong, China or is not a party to a relevant multilateral agreement that has been applied under the Ordinance, there is no statutory basis for sharing. Jurisdictions are encouraged to enter bilateral agreements for MLA with Hong Kong, China because, among other things, these agreements contain asset-sharing mechanisms which may not otherwise be available to requesting parties.

Hong Kong, China has a record of sharing assets with foreign jurisdictions in cases of substantial value, mostly drug cases to date.

Checklist for Effective Cooperation in Asset Recovery Cases

Set out below are some suggestions for effective cooperation with Hong Kong, China in relation to requests for assistance in asset recovery cases:

- Contact the law enforcement level directly and early to obtain as much relevant information as possible and to verify existing information. In Hong Kong, China the Joint Financial Intelligence Unit may be contacted directly. Details are available at: www.jfiu.gov.hk.
- Contact the MLA unit, International Law Division of the Department of Justice early. The unit will advise on draft requests by fax or e-mail. It will also give advice on how best to forward a pending request, taking into account the needs of the requesting place.
- Ensure that there is identifiable property in Hong Kong, China to be restrained or confiscated. Hong Kong, China’s authorities cannot act

on a request that does not identify a particular property. Moreover, show and establish the relationship between that identified property and the defendants. If the property is held by third parties, the basis upon which one seeks to confiscate this property in the proceedings must be made clear.

- Be clear about the status of the proceedings in one's jurisdiction. If proceedings that may lead to a confiscation or forfeiture order have not yet been instituted, the proceedings to be instituted should be described and give a time-frame for institution of those proceedings. If proceedings have already been instituted, a description of the nature of those proceedings and the stage reached to date should be provided.
- Provide a clear summary of facts, of the matters under investigation, and include all other required items in the request (see Contents of Request aforementioned). To assist in proving evidential matters, use Section 30(1) certificate as appropriate and provide copies of the relevant court orders.
- Once the request is ready to be sent, send it direct from the requesting central authority to the central authority of Hong Kong, China, namely, the MLA unit. It is not necessary to send the request through the consular or diplomatic route, which may cause delay.
- Be sure to send the request with sufficient time for action to be taken. If action in one's jurisdiction is due to go covert at any time (thus putting the property in Hong Kong, China at risk of movement or dissipation), please allow sufficient lead time for Hong Kong, China to process the request and apply to a court for the necessary restraint orders. Coordinated action can be facilitated through the MLA unit.
- Once funds have been restrained in Hong Kong, China, continue to actively litigate the proceedings in one's jurisdiction. Restrained funds cannot be realized in Hong Kong, China and paid across until one has obtained a final forfeiture or confiscation order in one's jurisdiction.
- Prior to sending a request for registration and enforcement of one's confiscation or forfeiture order is obtained, ensure that the order is final (not subject to appeal) and that all persons affected by the order were given notice of the proceedings prior to the order becoming final to enable them to defend it.
- Once an order has been registered and enforced in Hong Kong, China and the funds paid in court, consider an application for asset sharing. The request for sharing should be made to the MLA unit and it should set out reasons for the sharing and the proposed amount. This request

should be made early and, certainly, within 5 years of the funds being paid in court in Hong Kong, China.

Conclusion

Hong Kong, China is a major financial center. The Department of Justice regularly processes requests for MLA in criminal matters in relation to the production of bank records for the tracing of funds and other property. It also regularly applies to the courts for restraint orders and to register external confiscation/forfeiture orders in relation to property in Hong Kong, China at the request of foreign jurisdictions.

Hong Kong, China has the necessary constitutional and legal framework in place to enable it to enter international agreements and relationships under its own name: Hong Kong, China. It can participate in relevant international organization and initiatives and can enter into relevant bilateral agreements. Multilateral agreements to which the People's Republic of China is a party may also be applied to Hong Kong, China.

The Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 provides a purpose-built framework to provide MLA, including asset recovery.

The legal framework is reinforced by a proactive Central Authority: the Mutual Legal Assistance Unit, International Law Division of the Department of Justice. The Unit aims to provide a "one-stop-shop" service. It acts as the Central Authority to receive requests from abroad and obtain the necessary internal authorizations for requests to proceed. A counsel in the unit reviews the request and makes the necessary applications to court in conjunction with law enforcement officers to secure execution. The unit conducts on-going litigation in relation to international asset recovery cases and liaises with foreign counterparts to ensure satisfactory outcomes.

Thus, the necessary legal and operational framework exists in Hong Kong, China for the processing of requests in asset recovery cases. Foreign jurisdictions are encouraged to work with the relevant authorities in Hong Kong, China on a case-by-case basis to achieve desired results.

Jurisdictions that do not have existing bilateral agreements for MLA in criminal matters with Hong Kong, China are encouraged to enter negotiations for such agreements.⁴³

NOTES

- 1 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 1984. Beijing, 19 December.
- 2 Article 31 provides: The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions.
- 3 The Basic Law of the Hong Kong Special Administrative Region (SAR) of the P.R. China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the P.R. China on 4 April 1990, effective as of 1 July 1997.
- 4 Article 13 and all subsequent references to articles of the Basic Law may be found in the Basic Law. Available: www.legislation.gov.hk
- 5 Constitutional challenges to the validity of arrangements for international agreements between Hong Kong, China (a non-sovereign entity) and other sovereign states have been mounted in the appellate courts in both Australia and the United States in the extradition context post 1997 reversion : Attorney-General (Cth) v. Tse Chu-Fai (1998) 193 CLR 128; US v. Cheung, 213 F.3d 82. For a discussion of the issues raised, see : Judicial Independence: Attorney General (Cth) v. Tse Chu-Fai, *Australian Law Journal*, Volume 74, page 707. October 2000. In both jurisdictions, the challenges were ultimately unsuccessful.
- 6 A full list of all multilateral treaties applicable to Hong Kong, China is available at: www.legislation.gov.hk/choice.htm#mf
- 7 A full list of all bilateral agreements between Hong Kong, China and other parties is available at: www.legislation.gov.hk/choice.htm#bf
- 8 The Ordinance is available at: www.legislation.gov.hk
- 9 Section 10, Mutual Legal Assistance in Criminal Matters Ordinance (MLAO).
- 10 Section 12, MLAO.
- 11 Section 15, MLAO.
- 12 Section 23, MLAO.
- 13 Section 27, MLAO.
- 14 Section 31, MLAO.
- 15 Section 2, MLAO.
- 16 Endnote 15.
- 17 Endnote 15.
- 18 See section 8 MLAO in particular. Additional information may be required depending upon the nature of assistance sought.
- 19 Section 5(1), MLAO.
- 20 Section 5(4) MLAO.
- 21 Section 5(2) MLAO.
- 22 Section 5(3), MLAO.
- 23 Endnote 13, Section 28, and Schedule 2, MLAO.
- 24 Endnotes 13 and 23.

- 25 Section 30(1), MLAO.
- 26 Section 30(2)&(3), MLAO.
- 27 Section 29(1), MLAO.
- 28 Section 29(2), MLAO.
- 29 The Secretary for Justice, who heads the Department of Justice, is named as the Central Authority in all of Hong Kong, China's bilateral agreements for MLA in criminal matters. The MLA unit of the International Law Division has operational responsibility within the Department to act as Central Authority.
- 30 The authorities in Hong Kong, China appreciate that in some cases it will be a requirement of the requesting jurisdiction to submit its formal request through the consular/diplomatic route. In such cases, the request should be sent through the consular representative of the requesting jurisdiction in Hong Kong to the MLA unit.
- 31 The unit has approximately 10 lawyers who are specialists in processing requests for MLA in criminal matters, surrender of fugitive offenders (extradition), and transfer of sentenced persons. Counsels in the unit are also involved in negotiating bilateral agreements between Hong Kong, China and other jurisdictions in the same subject areas, and carry out policy and advisory work for other government bureaux and departments concerning international criminal law issues and related initiatives affecting Hong Kong. The unit is headed by deputy law officer for MLA.
- 32 Endnote 15.
- 33 Section 34, MLAO.
- 34 Section 7 of Schedule 2, MLAO; Order 115A, Rules 13–14, Rules of the High Court, Cap. 4.
- 35 Order 115A, Rule 14(1), Rules of the High Court, Cap. 4.
- 36 Section 7(7) of Schedule 2, MLAO.
- 37 Order 115A, Rules 4–9, Rules of the High Court, Cap.4.
- 38 Section 9 of Schedule 2, MLAO; Order 115A, Rules 17–18, Rules of the High Court, Cap. 4.
- 39 Section 10(7) of Schedule 2, MLAO.
- 40 Endnote 15 for relevant definitions.
- 41 Section 4, MLAO.
- 42 The MLA in Criminal Matters (Corruption) Order. The Order is currently before the legislature for scrutiny.
- 43 An approach to discuss the possibility of negotiations may be made in the first instance to a law officer of the International Law Division or to a deputy law officer (MLA), Department of Justice.

Chapter 5

Case Study «Ferdinand Marcos» (Philippines)

Ferdinand E. Marcos (Philippines): A Case Study

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Mandate of the Republic of the Philippines to Recover Ill-Gotten Wealth

The mandate of the Republic of the Philippines to recover the ill-gotten wealth of former President Marcos, his relatives, friends, and business associates is provided under Executive Order No. 1, signed by former President Corazon C. Aquino on 28 February 1986, through the creation of an agency called the Presidential Commission on Good Government. The mandate also provides for an adoption of adequate measures to prevent the occurrence of corruption.

On 12 March 1986, Executive Order No. 2 was also signed, freezing all assets and properties of the Marcoses, their close relatives, subordinates, business associates, dummies, agents, or nominees, pending the outcome of appropriate proceedings in the Philippines to determine whether such assets or properties were acquired by such persons through improper or illegal use of funds belonging to the republic. This order also authorized the Philippines to request and appeal to foreign governments wherein any such assets or properties may be found, to freeze them and prevent their transfer, conveyance, and encumbrance pending the judicial proceedings in the Philippines.

Efforts to Recover Ill-Gotten Wealth in Foreign Countries

Pursuant to Executive Orders No. 1 and 2, the Republic of the Philippines investigated the alleged ill-gotten wealth of the Marcoses and their business associates in the Philippines and in foreign countries. This report discusses only the major events in the recovery efforts in the US and in Switzerland, the only countries where the Philippines succeeded in recovering some Marcos assets.

Results Obtained in the United States

The Marcos assets sought to be recovered in the US was conservatively estimated to be ranging from USD600 million to USD1.5 billion. However, from 1986

up to 2006, the Presidential Commission on Good Government has recovered some real estate properties, such as the Olympic Tower Apartment, Pendleton Drive property, the Cedars, Summit Drive Beverly Hills, Lindenmere estate, and the Makiki Heights property. It failed to recover the four New York buildings in Manhattan, namely, 40 Wall Street, Crown Building, Herald Center, and the building located at 200 Madison Avenue. But the court awarded a lump-sum amount to the Republic of the Philippines in an administrative settlement after it allowed bank creditors to foreclose the properties as they were heavily mortgaged. It also recovered some jewelry, and various silverware, paintings, antiques, and works of art, which were later auctioned on various dates, as well as cash in Sanwa Bank and some shares of stocks in California Overseas Bank and Redwood Bank. Based on available records, the total value of the assets recovered in the US is less than USD50 million.

Obstacles encountered and lessons learned in the US recovery efforts were

- incomplete data on the scope and extent of the looting made by the Marcos administration;
- inability/reluctance of some banks holding Marcos accounts to immediately disclose the accounts;
- failure of the Philippine Government to initiate civil actions to recover the assets and properties of some relatives and associates of Marcos;
- injunction orders did not direct the banks to disclose the amount and status of the deposits subject of the order;
- difficulty in locating known Marcos associates privy to the Marcos transactions;
- difficulty in establishing and then untangling the paper trail of Marcos' overseas assets, and reluctance of foreign governments to cooperate in the recovery efforts;
- real estate properties were heavily mortgaged;
- settlement agreement with Imelda Marcos;
- absence of a mutual assistance agreement on criminal matters;
- Statute of Limitations;
- acquittal of Imelda Marcos in the RICO case;
- competing claims made by third party claimants over the Marcos assets; and
- lack of technology for faster coordination/communication between authorities.

The Marcos case was not a simple case of theft but rather a complex, intricate, and systematic plunder of the government's coffer. The nonavailability of complete data on the scope and extent of the looting made by the Marcos

administration made the initial recovery efforts of the Republic of the Philippines extremely difficult. Other than the documents left by the Marcoses in Malacañang and information that some volunteer groups gave, the Government had to practically reconstruct, and piece together various information obtained from financial institutions, government agencies, and other sources, bearing in mind that the probative value of the evidences must be able to stand judicial scrutiny.

US monetary authorities were uncooperative in disclosing the financial transactions of the Marcoses. It now appears that the monetary assets deposited in nine major US banks holding 82 accounts of the Marcoses covered by injunction—the details of which are not known to the Republic of the Philippines—are probably still in the custody of the banks concerned, legally beyond the reach, control, and disposition of the Philippines, the Marcoses, and anti-money-laundering agencies.

The injunction restraining the Marcoses and the banks from transferring assets held in almost all major banks in the US did not carry with it a duty and responsibility on the part of the banks concerned to disclose to the Philippine authorities or to the US courts the amount and, more importantly, the status of the deposits subject of the order. These are legally protected information under the US Bank Secrecy Law.

Some co-racketeers, namely, Fe Roa Gimenez and Gliceria Tantoco, who were privy to the transactions of the Marcoses, were unindicted because their whereabouts cannot be ascertained.

Difficulty in providing the paper trail of Marcos' overseas assets and the reluctance of foreign governments to cooperate in the recovery efforts were the primary reasons for the failure of the Philippines to identify and recover the entire Marcos' hoard in the US. Ownership of these overseas properties was legally structured and designed to conceal the interest of the Marcoses. Usually, the properties were owned by an offshore corporation which, in turn, was owned and controlled by Panamanian corporations. Ownership of these corporations are embodied in bearer shares, and the holders of these bearer shares controlled the corporations which held title to the properties.

The four New York buildings in Manhattan—40 Wall Street, Crown Building, Herald Center, and the building located at 200 Madison Avenue—were heavily mortgaged. However, the court awarded a lump-sum amount to the Philippines in an administrative settlement after it allowed bank creditors to foreclose the properties.

The Aquino administration failed to forge a mutual assistance agreement on criminal matters with the US Government. The Mutual Legal Assistance Treaty in Criminal Matters with the US became effective only in November 1996.

The Philippine Government's effort to recover ill-gotten wealth is not barred by prescription. In the US, the Statute of Limitations is strictly observed. The death of former President Marcos has considerably affected the outcome of the criminal and civil cases in the US. Imelda Marcos was acquitted in the criminal indictment by the grand jury despite overwhelming evidence presented by the prosecutors. Her defense counsel succeeded in depicting her as "a poor widow who knew nothing of her husband's activities."

One lesson learned in the recovery of the Marcos assets abroad is that the competing claims made by third party claimants over Marcos' deposits complicated the legal issues. These authorities should have given the Philippines its sovereign discretion to make a legal determination as to the validity of the claims and the entitlement, if any, of various claimants to the Marcos assets, after said assets have been reconveyed to the Government, in which case, the venue of their claims would have been the Philippine courts. This would have expedited the resolution of various competing claims against the Marcos deposits and the incurring of unnecessary expenses would have been avoided. As it stands now, foreign courts allow and adjudicate the merits of attachment proceedings and interpleader cases filed by other claimants over assets that have been already declared by Philippine courts to be ill-gotten and therefore forfeited in favor of the Government.

Results Obtained in Switzerland

The assets sought to be recovered in Switzerland were estimated to be worth USD1 billion. From 1986 to 2006, however, the Philippines was able to recover only (i) the USD2 million deposits of the Philippine Sugar Commission deposited at the United Overseas Bank of Geneva in 1989, (ii) the USD16 million deposits of Roberto S. Benedicto with Credit Suisse in 1990, and (iii) the USD356 million Marcos deposits, which later grew to USD658 million because of interest, for a total of only USD374 million, in principal deposits.

Obstacles encountered and lessons learned (Switzerland):

1. Delay in the Filing of the Federal Act on International Mutual Assistance on Criminal Matters Act Request

In April 1986, the Philippines filed a formal request for mutual assistance with the Federal Office for Police Matters in Switzerland, pursuant to the IMAC

against the Marcoses and their business associates. The petition requested the Swiss authorities to (i) ascertain and provide information as to the location of the assets, the names of the depositors and the banks involved, and the amounts involved; and (ii) freeze the assets to preserve the values and prevent the transfer of the assets. The filing of the petition was intended merely to extend the provisional freeze order blocking the Marcos assets. The original petition was considered defective by the Swiss authorities because it did not ask for the penal prosecution of the persons involved and for the transfer of funds, but only to safeguard its right over the Marcos deposits. This request likewise was considered an "indeterminate and generic" report since it did not contain sufficient information for the Swiss authorities to determine whether the persons mentioned in the request participated in the offenses alleged to be committed by the Marcoses or whether they were only beneficiaries to justify the transfer of funds.

Philippine authorities and Swiss lawyers hired by the Government during the initial years of the recovery effort were not familiar with the IMAC law such that they failed to discuss and provide evidence to demonstrate the cycle of criminal activities of the Marcoses and their business associates—the fundamental requirements for the immediate grant of assistance. Likewise, they initially failed to communicate and/or explain satisfactorily the nature of the civil and criminal cases, and the jurisdiction of the Philippine courts and administrative bodies in relation to the conduct of investigation of said cases. This omission considerably delayed the disposition of the Marcos case.

It was only on 21 December 1990 that the Swiss Federal Court ordered the transmission to the Philippines of the Swiss banking documents of the Marcos deposits in Geneva, Zurich, and Fribourg, Switzerland, subject to the condition that cases for the forfeiture of these deposits be filed within 1 year therefrom, failing which, the freeze of the assets will be lifted. In said ruling, the Marcos deposits would only be remitted to the Republic upon fulfillment of the following conditionalities:

- that there be final convictions against Mrs. Imelda Marcos,
- that she be accorded due process of law, and
- that her rights under the Swiss Federal Constitution and under the European Convention on Human Rights and Fundamental Freedoms be safeguarded.

2. Difficulty under Swiss Banking Laws in 1986 as regards Disclosure of Financial Dealings with Banks

The Swiss Federal Banking Commission authorities issued the freeze on the Marcos deposits at 6:00 pm of 24 March 1986, or 26 days after the Marcoses fled to Hawaii. On 25 March 1986, the Swiss authorities officially declared the freeze

on the assets. During this crucial period between 26 February until 24 March 1986, the Marcos assets can be re-documented or transferred to other depository banks. Because of the delay in filing the request of the International Mutual Assistance on Criminal Matters Act in 1986, some Marcos funds were possibly transferred to other banks, considering that the transfer of cash assets can be done in a matter of seconds because of our highly computerized world. The noncash assets can be done immediately thereafter. Timely and prompt action of the concerned authorities in filing a petition for mutual assistance is therefore very important.

In 1986, the banking laws of Switzerland were primarily designed to protect the banks and their clients making the disclosure thereof extremely difficult even to the Swiss authorities who regulate these banks, and foreign governments requesting assistance. Only in 1995 did Swiss authorities modify their banking laws.

Concealing ownership of trust companies, fiduciary, foundations, *Anstalten*, trading companies, shell companies, anonymous trading companies, etc. is a legal profession in Switzerland, making it difficult to trace beneficial owners of various fund transfers.

Applying the Provisions of the United Nations Convention against Corruption in the Recovery of Marcos' Ill-Gotten Wealth and Assets: Recommendations

1. Issuance anti-corruption policies sanctioned by the UN Convention against Corruption (UNCAC): Formulation of effective anti-corruption policies as now provided under the provisions of UNCAC.
2. Revision of Statute of Limitations: Providing a longer period of prescription within which to start proceedings.
3. Freezing, seizure, and confiscation of assets: Amendment of bank secrecy law to enable faster freezing, seizure, and confiscation of illegal assets.
4. Extradition: Extradition provisions under UNCAC allowing extradition even in the absence of a formal extradition treaty will facilitate prosecution of fugitives and plunderers.
5. Mutual legal assistance: Affidavits, sworn statements, and depositions could have been obtained and used to strengthen the cases against the principal defendants under a mutual legal assistance arrangement.
6. Law enforcement cooperation: Establishment of law enforcement agencies closely cooperating with one another for better coordination.
7. Prevention and detection of transfers of proceeds of crimes: Mandatory requirements on the verification of the identity of

customers, determination of the identity of beneficial owners of funds, and monitoring of accounts would have discouraged the Marcoses, including their trustees and nominees, from depositing funds with foreign financial institutions through dummies.

8. Training and technical assistance: Capacity building for investigators and prosecutors.

Chapter 6

Case Study «Sani Abacha» (Nigeria)

General Sani Abacha—A Nation's Thief

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Nigeria under Abacha

On 10 June 1998, General Sani Abacha died. As with the death of President Kennedy, I can remember exactly where I was when I received the news. I read it in *USA Today* when I was having breakfast in a hotel in Columbia, Maryland. I was there to see my cartographer: we were working together on the largest case ever to come before the International Court of Justice (ICJ) in The Hague involving Nigeria's land and maritime boundary with Cameroon. Five years previously, in 1993, Abacha had seized power from his military predecessor, Ibrahim Babangida, in a bloodless coup. The effect of that takeover was to deny office to Nigeria's newly elected President, Chief Moshood Abiola, the victor of the first democratic elections to be held in Nigeria for 15 years. One of Abacha's first moves was to jail Abiola: he was never released during Abacha's rule and, by a sad irony, died in jail on the eve of his release just 2 weeks after Abacha's death. The boundary case had been started by Cameroon in The Hague in March 1994 as the result of a major influx of Nigerian troops on the Bakassi peninsula, an area of mangrove swamps and fishermen and allegedly huge oil reserves, which had taken place in December 1993. While the Nigerian Government portrayed it as a move to protect the residents of Bakassi who were almost 100% Nigerian, Cameroon saw it as an invasion of their sovereign territory.

Throughout the period of Abacha's rule, the case before the ICJ was proceeding, an outward indication that Nigeria would observe the rule of international law, rather than go to war against her neighbor. In Nigeria, however, things were different. The rule of law had little place in the scheme of Abacha's government. Political imprisonment and torture and summary execution were commonplace. Abacha imprisoned Nigeria's present President, Olusegun Obasanjo, in 1995 and sentenced him to death. In a dramatic move, Transparency International made Obasanjo President of their organization. This move, together with Obasanjo's international reputation—he was a member of the Commonwealth Eminent Persons Commission which visited South Africa on a ground-breaking fact-finding mission investigating the evils of apartheid—was probably one of the factors that prevented the death sentence from being carried out. The lesser-known activist, poet, and politician, Ken Saro-Wiwa, was

not so fortunate. His execution in 1997 sparked waves of protest around the world. The execution was carried out on the eve of the Commonwealth Leaders' Conference in Sydney, Australia. Abacha and his ministers were refused entry to the conference and Nigeria was suspended from the commonwealth and became a pariah state.

The Looting

These were the events that the world knew about. Not so well known was the fact that, back at home, Abacha and his family were systematically looting the nation's oil wealth and further impoverishing a country endowed with some of the world's largest hydrocarbon reserves. Nigeria earns about USD10 billion per annum from her oil sales. She has an estimated population of 133 million, almost as many people as the whole of the rest of Sub-Saharan Africa put together. Yet while adult literacy is around 70%, the average wage remained below USD1 a day, universities struggled to pay teachers, the supply of power was intermittent, medical care was nonexistent for the majority and, greatest of all ironies, in the closing years of Abacha's rule, Nigeria had to import petroleum because her refineries had grinded to a halt because of lack of capital investment. Nigeria's external debt was USD30 billion. Out of the USD3 billion a year earned by Nigeria's oil, it was reckoned that the Abacha family helped themselves at the rate of between USD0.5 billion and USD1 billion dollars a year for the 4.5 years of his rule. This looting and the mismanagement of the country clearly had a devastating effect not only on Nigeria's economy, but also on her morale.

The news of Abacha's death in June 1998 brought unrestrained joy to the majority of the population, even though he was immediately replaced by a new military ruler, General Abdulsalami Abubakar. However, this was a different military ruler. Within a week of his taking on the mantle of leadership, he announced that he intended to bring back democratic rule to the country. With breathtaking speed, the Constitution was overhauled, electoral colleges were set up, and arrangements pushed ahead for elections to be held across the country in the nation's 36 states. Elections for local governments, State government, House of Representatives, Senate and, most importantly, the presidency, were all held in short order. Frantic efforts were made to produce a viable voters' roll and, by the end of March 1999, the three sets of elections had been held, with Olusegun Obasanjo the clear winner in the presidential race. His party, Peoples' Democratic Party, had a small majority in the House of Representatives where five other parties were also represented. International observers found the elections to have been reasonably free and fair. Obasanjo was inaugurated on 29 May 1999. In April 2003, for the first time since

independence in 1960, there was a successful democratic transfer when Obasanjo was returned for a second term.

Further elections in April 2007 have produced a new leader, Umaru Yar Adua. The fairness of the election has been heavily criticized by the European Union and other foreign observers. The President-elect, however, is on record as being committed to continuing Nigeria's fight against corruption.

That fight has been transformed by the creation in 2003 of the Economic and Financial Crimes Commission and its supremely able and effective Chairman, Nuhu Ribadu, whose term of office was extended for a further 4 years in April 2007.

The First Steps to Recovery

By the time of Abacha's death, widespread corruption was known to have existed in the country and that he and his family had profited hugely from his period in office. General Abubakar took immediate steps to have the leading members of the family, including Maryam Abacha, the widow, and Mohammed, the oldest surviving son, placed under house arrest, together with those associates who had assisted the looting process, such as Abubakar Attiku Bagudu and Ismaila Gwarzo, the former National Security Adviser. Abacha's eldest son, Ibrahim, had died in a mysterious plane crash on an internal flight 2 years previously. Bagudu was Mohammed's righthand man and Gwarzo was one of the main conduits through which state assets were purloined.

The new government passed a piece of legislation, known as Decree 53, which offered an amnesty to public officials coming forward and disclosing information about looted assets and surrendering those assets. Mohammed Abacha and Bagudu disclosed the whereabouts of some USD670 million and UK£50 million. These assets were largely held in Swiss accounts and arrangements were made through the Swiss authorities for these sums to be paid to the account of the Central Bank of Nigeria held at the Bank of International Settlements in Basle, Switzerland.

The Ajaokuta Proceedings

At this time also, a Swiss businessman, Nessim Gaon, whose interests included the Noga Hilton Hotels in Geneva and Abuja, started proceedings in the Commercial Court in London for the recovery of sums in excess of USD100 million claimed to be his share in the proceeds of sale of debt purchased from the Russian Government, which had financed the construction of Nigeria's

largest single white elephant, the Ajaokuta Steel Plant. This steel plant was started in the 1970s as one of many ambitious projects started on the back of Nigeria's newly found oil wealth, which followed the worldwide hike in oil prices decreed by the Organization of Petroleum Exporting Countries in 1973. A monster project, it had been designed to provide the majority of Nigeria's likely steel requirements for years to come. The plant covered an area the size of a small town and was to employ thousands. Construction took place over 15 years at Ajaokuta in Kogi state but by 1998, not a single meter of steel had rolled out of the plant. The site was derelict when Abacha died; only now are efforts being made to revive the project by the Mittal steel group. In an effort to cut their losses, the Russians started selling off the debt due on the plant to anyone who was prepared to take it on. Mr. Gaon bought a chunk, as did the Abachas. The Abachas purchased their share through a company called Mecosta. They then proceeded to sell the debt back to the Nigerian Government for twice the sum they bought it for, taking payment partly in cash and partly in Nigerian par bonds. Mr. Gaon claimed that he was cheated out of the profit that he should have made on his share and sued the Abachas and the Government. The Government cross-claimed against the Abachas to recover the cash it had paid out on purchasing the debt, amounting to some DM330 million.

After a trial that was initially supposed to take 2 weeks but lasted 6 months, Mr. Justice Rix produced a 350-page judgment. Parts of the judgment were appealed in June 2003, the fifth anniversary of Abacha's death. Rix's judgment was upheld.

Following Rix's judgment of February 2001, Nigeria was paid the DM330 million, bringing total recoveries by the end of 2001 to nearly USD1 billion.

Ajaokuta Fallout

The Ajaokuta proceedings were important in a number of ways. As a result of their becoming so protracted and convoluted, a considerable amount of evidence was given on both sides. In particular, evidence was given by Peter Gana, an Assistant Commissioner of the Nigerian Police, who was appointed by Major-General Abdullahi Mohammed, national security adviser to the Abubakar Government, as head of the special investigation panel set up to probe the looting. Gana was able to point to some methods Abacha used to extract cash from the Government. In particular, he cited what has become known as the security votes monies (SVM) method. SVM was a ruse used by Abacha in cahoots with his national security adviser, Gwarzo. Gwarzo used to write letters to Abacha requesting payment of sums of money to meet "urgent" national security needs. Some 30 of these letters were written over a 3-year period, from 1995 to 1998. The

sums requested started with reasonably modest amounts—the first letter requested a mere USD800,000. Toward the end, however, the requests became much more significant, the highest being nearly USD200 million. The Central Bank was then constrained by order of the head of state to make available huge sums in cash or by way of transfer through the banking system. The monies extracted from the Central Bank amounted to nearly USD2 billion. The vast majority was taken out by transfers, although USD50 million was paid out in travellers checks, ostensibly to meet the overseas expenses of officials and ministers travelling on government business. It was quite common for ministers to travel with blocks of unsigned cheques amounting to several hundred thousand dollars.

Also important in the Ajaokuta proceedings was the evidence, or lack of it, given by Mohammed Abacha and Bagudu. At the time of the hearing on the Ajaokuta Steel Plant, Mohammed Abacha was held in Kiri Kiri Prison in Lagos. He was held there in connection with charges brought against him concerning the assassination of Kudirat Abiola, Abiola's chief wife, who was shot dead in her car at a Lagos roundabout in 1993. Rix J ordered that testimonies be taken from Mohammed Abacha in prison and counsel for the parties travelled to Lagos and obtained videotaped evidence. Bagudu, who was living openly in London at the time, gave his evidence in person before the Court. Because of the sums involved in the Ajaokuta proceedings, it had become relevant for the claimants to know where the defendants might hold assets and the provenance of those assets. Rix J characterized the responses given by Mohammed Abacha and Bagudu as "evasive."

On the other hand, the judge accepted the evidence given by Peter Gana as being "honest." The evidence given by Mohammed Abacha and Bagudu established a pattern that continued throughout the legal proceedings for the recovery of the loot. That pattern only disclosed the existence of assets already known to the authorities. The evidence was manifestly incomplete and Mohammed Abacha refused to give further evidence that might incriminate himself. (In the US, this would be characterized as taking the Fifth Amendment).

Proceedings in Switzerland

On 29 September 1999, acting on information gathered by Peter Gana's special investigatory panel, a letter was written to the authorities in Switzerland requesting seizure of funds belonging to Nigeria, believed to be held by banks in Switzerland, in accounts opened by members of the Abacha family and their associates. Within 2 weeks, Magistrate, Zechin of Geneva¹ had issued orders that resulted in the freezing of some USD670 million in various Swiss accounts. Zechin's action was swiftly followed by action in Luxembourg and Liechtenstein that

resulted in a further USD700 million worth of accounts being frozen. The action by the authorities in these three states resulted in the freezing of the largest “pot” of money so far identified in the Abacha saga.

In a press interview given on 29 May 2003 (the date of President Obasanjo's re-inauguration as President) to the *Los Angeles Times*, Mohammed Abacha claimed that all the monies seized by the authorities were the proceeds of legitimate family business enterprises. When asked to explain further, he said that it would take him 3 days to do so. Mohammed Abacha did have the equivalent of 3 full days to explain those legitimate business enterprises in the Ajaokuta proceedings. They could probably be summarized in just 3 minutes. If there was a grain of truth in them, he would be in the Forbes 500 as one of the world's most successful businessmen. One of the Abacha moneymaking enterprises was claimed to be an airline called Selcon. This “airline” chartered aircraft to fly Nigerian pilgrims on the annual Hajj to Mecca from Northern Nigeria. As such, it performed a legitimate and useful function, albeit from a near-monopoly position. However, the profits alleged by Mohammed Abacha to have been generated by that enterprise would make the shareholders in many legitimate airlines green with envy.

Despite the patent implausibility of their client's evidence, some of the most well-known lawyers in Switzerland exerted strenuous efforts to have the freezing orders set aside, efforts which caused long delays in the Swiss courts. The Abacha lawyers were also engaged in strenuously resisting the transmission of information gathered by the Swiss authorities to the authorities in Nigeria to assist in the bringing of criminal prosecutions there against the wrongdoers—a pattern repeated in other jurisdictions.

When it became apparent to the Nigerian Government that the legal process of releasing and repatriating the funds held in Europe was going to be long, drawn-out, and expensive, they resolved to bring matters to a swift conclusion by striking a settlement with Mohammed Abacha. The main elements of the settlement soon became known in the world's press. They were, in effect, that Mohammed Abacha, Bagudu et al were to release the USD1.3 billion frozen by the authorities in Switzerland, Luxembourg, and Liechtenstein and, in return, the Abacha family would be allowed to keep USD100 million. That sum was said to represent the top end of what might have been earned by the Abachas from legitimate business enterprises. President Obasanjo said that this was one of the hardest decisions he had had to make during his presidency. Overall, however, he justified it as being the quickest means for Nigeria to recover a substantial part of the sums lost. Authorities in Switzerland, Luxembourg, and Liechtenstein announced to the press in April 2001 that a settlement had been negotiated.

While these negotiations were going on, Mohammed Abacha was still being held in prison on the Kudirat Abiola charges. In May 2001, however, the Federal High Court in Abuja ruled that he had no case to answer on the Abiola charges, which to the court appeared to be based purely on circumstantial evidence: by this it is thought the court meant Mohammed did not fire the fatal shots himself. Mohammed Abacha was released and immediately proceeded to his home city of Kano in Northern Nigeria where he was greeted with adulation by many Abacha supporters. He and his family continued to be under house arrest, but he was free to issue statements to the press and he continued to fight Government's attempts to recover the looted funds. Almost as soon as he was released, he announced that he was not going to sign the proposed settlement agreement. Simultaneously he was visited by Mohammed Buhari, the military leader who had overthrown the last civilian government before Obasanjo's election, that of Shehu Shagari, which was toppled in 1983. Buhari had announced that he was going to run against Obasanjo in the 2003 presidential race; he emerged as the leading opposition candidate. In the event, he polled about half the number of votes that Obasanjo won. There can be little doubt that Mohammed Abacha would have welcomed the election of Buhari with the opportunity to negotiate a more favorable deal. That did not happen, however, and the Obasanjo government continued to grapple with the problem during its second term. In the meantime, in April 2003, the Supreme Court in Switzerland delivered a long and detailed judgment rejecting the appeals lodged by the Abachas, citing some six grounds on which they sought to have the previous decisions of the Swiss courts overturned.

However, notwithstanding the views expressed by the Swiss judges, the Supreme Court made it clear that it expected the Government of Nigeria to treat Mohammed Abacha with proper consideration and in accordance with his human rights. In particular, if he is subjected to further incarceration, Switzerland's ambassador to Nigeria is to be permitted to visit him in his prison at any time to ensure that he is not being subjected to human rights abuses. He is to have full and free access to his lawyers for him to continue to fight his legal battles. In fact, that access has never been denied.

The Supreme Court initially imposed one further condition before any funds could be repatriated to Nigeria—that courts in Nigeria should give final judgment to the effect that these funds belong to the State of Nigeria. However, this was subsequently lifted.

In February 2005, however, nearly 6 years after Magistrate Zechin commenced his investigation, the Federal Supreme Court in Switzerland ruled that USD480 million be returned to Nigeria. A further USD70 million was to remain in Switzerland pending determination of its ownership, and USD10 million was to

be paid into an escrow account, one of the signatories being the Nigerian Government.

However, even after the Supreme Court had ruled, it took several months, and some acrimonious exchanges between President Obasanjo and the Swiss Government, before actual payment was made under the supervision of the World Bank.

Proceedings in the United Kingdom and Jersey

Mutual Legal Assistance

Shortly after President Obasanjo's election in 1999, Nigeria delivered a letter of request to the authorities in England under mutual legal assistance (MLA) legislation, sometimes called The Harare Scheme. In May 2001, 2 years later, the Home Office was still asking Nigeria to remedy certain technical defects which they perceived in Nigeria's letter of request. The Home office had taken action, but none of the fruits of the inquiries made by the Home Office were available to Nigeria. It was not until late 2001 that the Home Office announced that they were ready to take action on the letter of request.

As soon as they did so, the lawyers for Mohammed Abacha and Bagudu applied to the English courts for judicial review of the Home Secretary's decision to help Nigeria. Judicial review is a process whereby decisions by the executive can be challenged in the courts. Judgment was handed down in October 2001; it backed the decision of the Home Secretary and the various bodies concerned, such as the Serious Fraud Office and the National Criminal Investigation Service, were able officially to proceed with their work. Once an investigation is complete the next step is for the requested authority—in this case the Home Office—to announce that it is ready to transmit the evidence gathered to the authorities in the requesting country. Again, under English procedure, it is possible for the targets of the investigation to challenge this second decision by the Home Secretary and take that decision for judicial review once more. That duly happened and it was not until the end of 2004, 5 years after the initial request was made, that United Kingdom (UK) authorities were able to release the evidence they had gathered. The purpose of transmitting evidence under MLA proceedings is to enable the requesting country to pursue criminal proceedings against wrongdoers in its own jurisdiction. This sort of delay makes the pursuit of such proceedings even more difficult.

A recent survey found that 85% of the judiciary in Nigeria are corrupt. The average salary of a High Court judge in Nigeria is less than USD1,000 per month. It

does not take great imagination to see the possibility that those who can afford to spend millions of dollars on the lawyers representing them may also have the wherewithal materially to affect the decisions of the court. Thus far, the Abacha lawyers have proved adept in obtaining some extremely surprising decisions in Nigeria's lower courts, which have had repercussions well beyond those courts.

Jersey

The approach of the English authorities sharply contrasts that in Jersey. The UK does not include the Channel Islands. Offshore financial centers, such as Jersey, Guernsey, and the Isle of Man, have their own regimes and have in the past, attracted much criticism for providing havens to dubious operators. That, however, has changed radically. Dramatic evidence of this change is provided in the Abacha case.

Several hundred million pounds worth of Abacha assets were frozen on the Island of Jersey. The Jersey authorities concluded that those assets represented the proceeds of serious money-laundering offenses. (The Swiss reached a similar conclusion back in 2000 when they indicted several of the malefactors).

The Jersey authorities took effective action, which will be described elsewhere. The next sections will describe how matters have proceeded.

Money Laundering

Whether as a result of the MLA request or of its own volition, the Financial Services Authority (FSA), the body responsible for overseeing efforts to curb money laundering in the UK, commenced its own investigation. The Swiss authorities had started their investigation before the end of 1999. The information they obtained must have indicated the participation of banks operating out of the City of London. It would be surprising if the Swiss authorities had not discussed this with the UK authorities. Perhaps that was what spurred the FSA into action.

At all events, the FSA published a press release in March 2001 divulging the following information:

- 23 banks had been the subject of their investigation.
- In 15 of the banks investigated, money-laundering compliance checks had "left a lot to be desired."
- A total of USD1.3 billion was found to have passed through British banks.
- 98% of that money went through the 15 banks whose money-laundering compliance regime was substandard.
- In total, UK financial institutions made over 30,000 suspicious transaction reports (STRs) to the National Criminal Intelligence Service in 2001. This

figure rose to nearly 100,000 in 2003 and is projected to reach 200,000 in 2004. (N.B. These figures do not show how many STRs were linked to the Abacha investigations.)

The press release said that none of the defaulting banks could be named owing to protection given to them under UK banking acts. Thus, banks were not named and shamed and UK authorities did not undertake prosecutions despite receiving all those STRs.

The Nigerian Government found it extremely difficult to believe that the UK authorities were in any way serious about pursuing money-laundering activities in the City of London. Invisible exports, which comprised largely the activities of the City of London, are a huge contributor to Britain's balance of payments.

However, the Abacha affair undoubtedly pricked the conscience of the UK Government. In June 2000, the Department of Overseas Development set up a corruption committee in the House of Commons that heard evidence from all sectors of the financial services industry and members of the Nigerian Government. The report of the committee came up with some startling revelations about the disparate nature of regulation in Britain and a chronic inability to take effective action in the face of abuses of the system, even those as flagrant as had been committed in the Abacha case. Parliament began considering legislation to streamline the whole system and to make it more effective.

Then on 11 September 2001, world terrorism struck its most devastating blow. The organization Al Qaeda and its financing became overnight a top priority for the US and all Western governments, including the UK. The Proceeds of Crime Act (POCA) achieved royal assent on 24 July 2002 and the money-laundering provisions came into force in February 2003. POCA had done much to transform the landscape: naming and shaming of banks for money-laundering offenses became a reality. Hefty fines of banks were also a reality. However, much remained to be done. Over 50 separate police forces were in the UK. The force responsible for the area where the offense was committed had to investigate the offense. There was no central authority to carry out such investigations. Under then current legislation, there was no crime of corruption as such. This too is now being addressed as the result of the peer review carried out under the OECD Anti-bribery Convention.

All this action by the UK authorities, although belated, is to be welcomed. However, none of it will be of any real use unless the bodies concerned are given sufficient resources to carry out effective investigations. Furthermore, UK authorities need to finally prosecute persons within the jurisdiction, or even out of the jurisdiction, by means of extradition proceedings, to show that they mean business. Given the well-known reluctance of the authorities to prosecute cases where the

direct interests of the British taxpayers are not at issue, one still has to wait and see how far the reforms have gone. However, there are now real and encouraging signs of progress in both resourcing and cooperation with African countries in the wake of the G8 Initiatives, NEPAD, and the Commission for Africa's efforts.

In particular, a specialized anti-corruption unit has been established within London's Metropolitan Police. This unit is energetic and enthusiastic and has already achieved substantial success in a short period. In relation to Nigeria, for example, the unit's investigations have led to (i) the arrest in London of two Nigerian state governors (both of whom fled the UK rather than face criminal proceedings), (ii) the conviction and imprisonment of one of their associates for money laundering, (iii) the issuance of restraint orders against substantial bank balances deriving from corruption, (iv) the confiscation and return to Nigeria of cash exceeding GBP1 million seized from the governors, and (v) the availability of valuable evidence now being relied upon by Nigeria in civil proceedings to recover restrained assets. There has been significant cooperation between the Metropolitan Police and the Nigerian Economic and Financial Crimes Commission and, to the fullest appropriate extent, between the Metropolitan and Kendall Freeman as Nigeria's civil lawyers.

Civil Proceedings in England

All the foregoing has had to do with action or inaction by the authorities in different jurisdictions. In May 2001, the Nigerian Government decided to supplement its efforts on MLA by resorting to civil proceedings before the courts in London. There was clear evidence of money laundering on a massive scale taking place in British banks, and it was equally clear that hard information about that activity was still months and years away from being obtained through official channels.

In September 2001, an application was made to the Chancery Division of the High Court in London for disclosure by banks of accounts held in the name of the Abacha Associates and their corporate vehicles. The proceedings started with about a hundred defendants. That number was expected to grow. On 25 September 2001, the court made an order based on the *ex parte* application of Nigeria that named banks should disclose copies of bank statements and other information held by them, including account opening forms, know your customer information, debit and credit notes, internal bank memoranda regarding the operation of the accounts and the source of funds into them, and payment instructions. The precedent for making such an order is contained in a case named *Bankers Trust v Shapira*, where a liquidator of an English company had successfully obtained a similar order for pre-action disclosure. It has proved to be

a significant weapon in the armory of those who fight fraudulent activity through the civil courts.²

Action under a Bankers Trust application was taken without the knowledge of the account holders. In Nigeria's case, 6 weeks were to elapse before the proceedings went *inter partes*. During that time Nigeria obtained disclosure of accounts from about 20 banks and a whole mass of information. Orders were also made requiring Mohammed Abacha and others to serve affidavits disclosing their assets and disclosing what had happened to monies removed from Nigeria. This enabled Nigeria to apply increasing pressure on the defendants to make full disclosure of their assets worldwide. That process was put on hold while the Federal Government endeavored to reach a settlement with the Abachas, but it certainly a contributory factor in bringing them to the negotiating table.

Approximately USD50 million was frozen in the UK proceedings. For various reasons, the progress of the English proceedings on the initial disclosures has been slow since 2002, but the proceedings have been very important in opening up the case and forcing the disclosure of information which can be used in other jurisdictions.

Conclusions

The Abachas did not appear to feel any remorse for the damage they have wrought in Nigeria. In the interview with the *Los Angeles Times* referred to,, Mohammed Abacha was recorded to have said that it is the right of every Nigerian leader to look after his family.

The pursuit of the loot has been convoluted and complex, largely because of obstacles to progress existing in different jurisdictions, particularly the UK. There is, however, equally little doubt that the Abacha affair, combined with the events of 9/11, has brought about important changes in the drive against money laundering, and in particular the treatment of politically exposed persons. Transparency International's publication *Clean Money, Dirty Money* highlighted the abuses taking place worldwide and was an effort to ensure that the authorities did not lose momentum in their fight.

We now have the UN Anti-Corruption Convention. This is a very positive step in attempting to bring about worldwide reform in legislation designed to make it more difficult for the Abachas of this world to succeed.

NOTES

- 1 Zechin also went down to Kiri Kiri prison to take evidence. Subsequently, he had to resign from the case for having breakfast with Obasanjo, apparently contravening the code of conduct of the Geneva Bar.
- 2 The most notable example in recent years is that of the liquidators of the Bank of Credit and Commerce International (BCCI) who have, largely through civil action in the UK and other jurisdictions throughout the world, successfully tracked down over 70% of assets hidden and dissipated by BCCI. Although the liquidators have spent several hundred million dollars in legal and accountancy fees to date, they have increased the dividend payable to creditors from an initial forecast of 15–70%. It is difficult to foresee any Government in the world being prepared to spend that kind of money in pursuing and tracing assets worldwide on behalf of looted organizations or States. It is, however, a very striking example of the efficacy of well-resourced professional work in obtaining tangible results.

Chapter 7

Case Study «Vladimiro Montesinos» (Peru)

The Peruvian Efforts to Recover Proceeds from Montesinos's Criminal Network of Corruption

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Vladimiro Montesinos Torres, the de facto chief of intelligence and main advisor of former Peruvian President Alberto Fujimori (in office in 1990–2000) was the head of a corrupt network that penetrated most Peruvian State's structures, undermining all constitutional checks and balances through violence and corruption. Since November 2000, the Peruvian authorities introduced several reforms in the national legal system to prosecute their crimes, and devoted a huge amount of energy to localize and repatriate the proceeds of corruption. So far, assets valued at USD174 million were repatriated from the Cayman Islands, Switzerland, and the United States (US), while accounts valued at USD47 million remain frozen in Luxembourg, Mexico, and Panama and Switzerland.¹ The variety of jurisdictions and legal traditions from where the Peruvian authorities got cooperation to repatriate funds makes the Montesinos case an interesting account for our purposes.

In December 2005, the United Nations Convention against Corruption (UNCAC) came into force, and was ratified by 95 States. It is the first global binding instrument that seriously addresses the complexities of recovering corruption assets. The UNCAC not only declares that the return of proceeds of corruption to its country of origin is a fundamental principle of the treaty (Article 51). It also devotes the rest of its Chapter V (Articles 51–59) to homogenize best and new practices across the world.

In a preliminary effort to test to what extent these new international rules will improve the outcome of future asset recovery cases, this paper performs the following exercise. It summarizes the complexities and obstacles the Peruvian Government faced in repatriating the proceeds of Vladimiro Montesinos's criminal network, and sets some hypotheses on whether the same challenges would be eased by the entering into force of the UNCAC.

The paper is organized as follows. Section A summarizes the relevant features of the Fujimori decade and the many ways in which the Montesinos's criminal network operated during the 1990s. Section B highlights the legal developments introduced in the Peruvian legislation to improve the chances of efficiently prosecuting the crimes of Montesinos and his associates. Section C deepens into the legal proceedings and strategies taken by the Peruvian authorities to recover proceeds of corruption and other crimes, which were located in the Cayman Islands, Switzerland, and the US. Section D evaluates whether the legal avenues established by UNCAC would have facilitated such proceedings if they had been in force since the beginning of the proceedings, and suggests ways in which UNCAC provisions can help improve the outcomes of ongoing cases. Section E concludes.

Corruption under Fujimori

This section aims at introducing the reader into the facts of the case. We first summarize the main features of Fujimori's regime that made the spread of large-scale corruption possible. We then go into some schemes that show Montesinos's network in action, first as a bribe taker and then as a bribe giver.²

Montesinos's Power Accumulation

Vladimiro Montesinos Torres, the de facto head of the Peruvian national intelligence service (SIN) and main advisor to former President Alberto Fujimori (1990–2000), was the architect and manager of a wide-ranging web of official corruption and gross human rights violations, including involvements with the drug trade, the arms trade, extortion of high-profile entrepreneurs, and bribery of all kinds of public officials. Those beholden to him included judges, legislators, media barons, drug traffickers, captains of industry, and military leaders.

Montesinos's career showed a path of strong connections with serious crime, well before Fujimori's administration. As an army officer, his career milestones included being accused of stealing classified documents of the Peruvian army and being confined in military prison; being discharged from the Peruvian army on charges of treason; being accused of passing military secrets to the USA Government. After expulsion from the army, Montesinos carved out a niche for himself as a defense lawyer, representing drug traffickers—including well-known Colombian lords Evaristo Porras Ardilla and Jaime Tamallo—and army officers involved in covering and extorting tributes from the drug trade. His practice flourished because he had hundreds of contacts from his days as a closed advisor of the de facto government of Velazco Alvarado in the 1980s. He knew who to bribe to get a client out of jail, and which judges took payment for

a quick trial or an acquittal. When bribery did not work, destruction of evidence, including witness assassinations will surely do.³

In June 1990, Alberto Fujimori, a political outsider, captured 57% of the vote to Vargas Llosa's 34%. After 10 years of economically ruinous civilian rule, Fujimori capitalized on the general disgust with politicians who were incapable of curbing violent guerrilla groups⁴ and a penetrating drug trafficking in a virtually nonexistent legal economy.⁵ After the first and before the second round of voting in the elections, Montesinos approached Fujimori with transcripts from a wiretap that revealed that a Congressman was planning to institute legal proceedings against the candidate for property-related tax fraud. Three days later, Montesinos delivered a court resolution that postponed the case until after the election.⁶ Montesinos became Fujimori's personal legal counselor and, soon after Fujimori took office, his main advisor on security-related issues.⁷

Fujimori's drastic reformist approach toward the bureaucracy was an excellent opportunity for Montesinos's accumulation of power. In the second half of 1990 alone, Fujimori's administration dismissed 1,500 police officers for "unethical conduct"; another 400 followed in the first half of 1991. Montesinos ensured that his enemies were dismissed and his friends appointed as replacements. A similar process took place within the military. From 1990 to 1992, Montesinos set out to replace the military leadership with people he knew, preferably people who owed him favors. Montesinos also plotted against the authorities of the intelligence service and the Ministry of Defense, ensuring that their replacements would take orders from him.

With the intelligence and security forces under his control, Fujimori felt comfortable to handle the most urgent Peruvian problems. By November 1991, Montesinos had drafted, and Fujimori had promulgated, 123 decrees on terrorism and drug trafficking. Congress repealed the executive decrees and launched inquiries on the methods used to curb both narcotics trade and terrorism. Rumors of death squads conducted by Montesinos spread. In December 1991, tension between Congress and Montesinos reached its peak when Congress disapproved the promotion to lieutenant general of the intelligence services (former) director because, Congress said, Montesinos exerted undue influence. In Montesinos view, Congress posed "an obstacle to national pacification."⁸

In response, on 5 April 1992, Fujimori surprised domestic and international observers by staging a self-coup d'état. He abolished the Peruvian Government as it existed and established a "Government of Emergency and National Reconstruction." He dissolved the legislature and the judiciary, suspended the political Constitution, purged the Supreme Court, and placed the press under censorship. The Legislative Palace and the Palace of Justice were taken over

and closed. The chairs of both Houses of Congress, as well as other parliamentarians, were placed under house arrest. Well-known opposition leaders were arrested. Two news agencies were closed down and military personnel was dispatched to other media offices.⁹ Fujimori ruled by decree.

Right after the “self-coup,” Montesinos took over the judicial system. The Palace of Justice and the offices of the attorney general were closed. Ten soldiers stood guard while military intelligence agents went in by night and systematically ransacked the files. By the time they were done, one third of the nearly 30,000 files of active court cases had been removed, including those concerning Montesinos and Fujimori. In addition, files that could be useful for future blackmail were missing. Judges and prosecutors were removed en masse, starting with the dismissal of a majority of the Supreme Court judges.

On 9 April 1991, all members of the Constitutional Tribunal as well as members of the National Council of the Judiciary, the attorney general, and 134 magistrates were dismissed. The executive appointed their replacements and instituted a system of “provisional appointments” that was going to last until the end of the regime, virtually abolishing judicial independence. A close associate of Montesinos was appointed attorney general, serving in this capacity three times between 1992 and 2000. Finally, Fujimori’s administration instituted summary tribunals—courts where judges, wearing masks, typically handed down long prison sentences after very short trials. Other decrees allowed for use of evidence obtained by torture, for trying civilians before military tribunals, and for the appointment of provisional judges and prosecutors.¹⁰

Such was the state of public disillusion with the political system that Fujimori’s actions were supported by 75% of the population. A few months after the coup, Fujimori announced the capture of guerilla leader Abimael Guzman. Ten days after the capture, on 22 November 1992, Peruvians turned out to vote for a new constitutional Congress to replace the one Fujimori had dissolved. The President’s ratings were high—his government had broken the back of “Shining Path”—the biggest guerrilla group—restoring hope of a normal existence to millions of people. Fujimori’s economic policies had also driven inflation down from a rampant 60% a month in mid-1990 to a manageable 3.6% in October 1992.¹¹ The international business community supported Fujimori because he adhered to the neoliberal program of privatizing public enterprises and opened the economy to foreign investment in mining, fishing, and farming. Fujimori’s party won a solid majority in the new Congress. The body opened officially at the end of 1992 and would run until the presidential elections in 1995.

The picture completed with a constitutional reform at the end of 1993 that notably broke with a time-honored tradition in Latin America of single

presidential terms by allowing the President to seek a second 5-year term in office, a precedent that many other Latin American countries subsequently emulated.

Fujimori was reelected with 64% of the votes in 1995. Despite his prestigious opponent—well-respected Javier Perez de Cuellar, former Secretary-General of the United Nations—voters were apparently pleased by Fujimori's record so far. One anecdote illustrates how seriously Fujimori took the constitutional checks and balances during his second term. In June 1995, a judge challenged as unconstitutional a law granting amnesty to soldiers and police accused of human rights violations in 1980–1995. The law had been neither publicly announced nor debated, coming into force the day after it was presented to Congress and promulgated by Fujimori. To overcome the judge's scruples, Fujimori simply pushed a second law through Congress commanding the courts to obey.¹² The Court of Appeals declared the amnesty law constitutional and sanctioned the judge who had questioned it.

The 1993 Constitution also cleared the way for pro-market reform and a massive privatization process. When Fujimori took office, publicly owned enterprises controlled up to 20% of gross domestic product, 28% of exports, and 26% of imports. The State monopolized energy, oil, and telecom services; and accounted for 60% of the financial sector and 35% of the mining, fishing, and food industries. Fujimori sold 51 State-owned companies, cheap and fast.¹³ For the purpose of this paper, it is worth noting that one third of the revenues of the privatization process, estimated in more than USD1 billion, went directly to the budget of the ministries of interior and defense.¹⁴ This later on became an important under-the-table source of Montesinos money for his clandestine operations, as we will see in following sections.

Montesinos's Many Forms of Corruption

Montesinos enriched himself from many different sources. His options included:

Free Drugs-Trade Zones

Rumors about Montesinos's increasing contacts with drug traders were fluttering the whole decade. Probably the most notable account was the confession of Demetrio Chavez Pennaherrera, a drug dealer known as “Vaticano.” Under oath before a civil court, Vaticano said that, at least in 1991–1992, his drug ring had enjoyed the full protection of Montesinos. He claimed that he had paid Montesinos USD50,000 monthly through an intermediary for unhampered use of an airstrip to ship drugs to Columbia.¹⁵ Apparently, the

relationship had ended, and he had fled to Columbia, when Montesinos demanded double the amount and Vaticano could not afford it. Ten days after the confession, Vaticano returned to court and retracted his statements. His lawyer reported Vaticano was tortured in prison between the two contradictory statements.

Military and Police Pension Funds

From 1991 to 2000, the pension fund of the police and the army was a “black box” from where Montesinos embezzled public funds in different ways. For example, Montesinos’s front man Victor Venero Garrido and other associates used pension fund money and their own money to buy a majority interest in a Peruvian banking institution, Financiera del Sur (FinSur). Venero was in charge of seeking investments on behalf of FinSur and identified construction and real estate projects for the bank and pension fund to finance. He also controlled the construction companies which built those projects. The costs of the projects were inflated by an average of 25%. The board members at the pension fund automatically approved projects recommended by Venero, as several of them received regular kickbacks. In addition, Venero covertly formed and controlled several front companies used to broker loans from FinSur in exchange for kickbacks from borrowers. When some loans defaulted, Venero would purchase the busted projects at extremely low prices for resale at a profit. The congressional commission that investigated the case estimated the proceeds of these crimes at around USD300 million.

Bribes in Arms Trafficking to Ecuador, in an Armed Conflict with Peru

In 1995, in the middle of a Peruvian–Ecuadorian border conflict, Argentina illegally sold arms to Ecuador while Argentine President Menem offered himself as the mediator of the conflict. Montesinos, as chief of Peruvian intelligence, was informed and, instead of taking measures to protect Peru, is said to have asked a USD2 millions bribe in exchange for his silence.¹⁶

Overvalued Purchasing of Defense Equipment

Montesinos’s associates in defense armament set up more than 30 corporate vehicles in the Bahamas, Panama, and the Virgin Islands for mediating in the purchase of defense equipment. The funds for purchasing 18 MIG-29 and 18 SU 25 to Belarus plus three fighter-bombers to the Russian Federation were channeled through these companies. Bribes and commissions in these operations exceeded USD120 million.

Selling Arms to the Colombian Guerrillas

In 1999, using fake Peruvian official documents issued by Montesinos, a group of his associates bought 10,000 automatic rifles to the Jordan Government on behalf of the Peruvian Government. However, the arms were dropped from an airplane in flight in Colombian territory controlled by the guerrilla movement FARC (Fuerzas Armadas Revolucionarias de Colombia). In 21 September 2006, Montesinos was convicted to 20 years' imprisonment plus a fine of USD3 million for this crime.

The proceeds of those crimes were partially deposited or transferred outside Peru. Nonetheless, Montesinos set up several schemes to launder the proceeds and make the funds available in Peru for his personal or political use. For instance, he set up two companies called Institute of Specialized International Studies Inc. from where he received open transfers—and pay taxes—as if they were fees for academic presentations or consultancies. Montesinos and his associates also benefited from a regulation encouraging "repatriation of assets" that, as a fiscal incentive, did not ask for the origin of the money. The provisions were supposed to inject capital into the Peruvian economy after inflation was under control. However, Congress annually postponed it until the end of the regime.

Fujimori's Third-Term Plan: Montesinos's Shift to Bribe Giver

A third presidential term for Fujimori becomes a more tangible objective of Montesinos's activities since 1996. As an observer remarked:

... [t]here was no obvious heir apparent to Fujimori. There was no one who could guarantee future election victories and provide cover for the expanding array of criminal activities (extortion, money laundering, and arms trafficking) directed by Montesinos.¹⁷ From 1997 on, most of the administration's actions seemed to revolve around the goal of a third term.

It would not be easy. The 1993 Constitution simply forbids a third term. There was no public constituency for a longer presidency. The legal route to amend the Constitution would have required either a two-thirds congressional vote in two successive legislative sessions, or a national referendum followed by congressional ratification.¹⁸ Montesinos and Fujimori knew either approach would fail: Fujimori's majority in Congress was insufficient to pass a constitutional amendment, and a poll in January 1996 showed that the public opposed a third term. Another route remained: to undermine the autonomy of those organizations and institutions legally responsible for ensuring free and fair elections.

So, throughout 1998 and 1999, Montesinos stepped up his efforts to ensure that the administration controlled all key institutions associated with elections. Montesinos had, of course, been consolidating the administration's hold on Congress, the Supreme Court, the military, and other key players since 1990. For 1997–2000, however, an audiovisual record exists of Montesinos in action—videotapes he made of meetings in his office. The majority of the available tapes (thousands more may have been hidden or destroyed) chronicled meetings in 1998 and 1999 and provided a detailed account of how Montesinos conducted business during those years.¹⁹

A first step was to block the opposition's efforts for a popular referendum on a third term. By July 1998, despite considerable legal obstacles thrown in its way, the campaign had collected the required signatures. In addition, the National Elections Board—responsible for ruling on electoral matters—had declared that the law requiring congressional approval would not apply in this case, as it was passed after signatures started to be collected. As if democracy was a chess game, the videos showed Montesinos removing and appointing new members of the National Election Board, bribing the two—out of five—old members who did not respond to the government, producing a ruling against the referendum from an agency without authority to it, anticipating that the opposition would appeal that decision to the board—the competent authority—which, in its new integration, finally contradicted the previous ruling and required congressional approval for the referendum to be legal. On 27 August 1998, Congress voted 67 to 45 to block the referendum (the law required a minimum of 48 supporting votes for the referendum to proceed). Fujimori announced his candidacy and civil society groups filed 18 separate challenges, but the board rejected them all. Montesinos had won. The operation cost less than USD150,000 in bribes.²⁰

A second step was to control the media for the coverage of the campaign. Montesinos knew that this would not be as cheap as bribing judges, but he was not short of money to carry out his clandestine operations. During the regime, the intelligence service increased its budget by 50 to 60 times. By 2000, the official budget of the national intelligence service (SIN) amounted to around USD18 million, of which about a quarter went to operational costs and salaries, leaving more than USD13 million for Montesinos to spend. In addition, Montesinos requested under-the-table sums to his allies in the Ministry of the Interior and the military forces. Along the decade, only the SIN received more than USD66 million from these other government agencies. When he needed more, he requested contributions from his accomplices in other illegal businesses. As his principal front man testified before a congressional commission, Montesinos requested USD5 million from his associates when he decided to buy the media. Montesinos's

bookkeeper testified that in 2000 more than USD100 million was flowing into the SIN.

With all that unchecked money in his hands, Montesinos negotiated and signed formal contracts with the media owners. He first met with Jose Francisco Crousillat, chief executive officer and majority shareholder of America Television (Channel 4). The two men arranged that Channel 4 would support the reelection project. Over time, Crousillat received USD10 million for his station's reelection support.²¹

Similar contracts were signed with most privately owned TV channels. Frecuencia Latina (Channel 2) received USD3 million in a signed contract executed from November 1999 to April 2000, plus USD3,073,407 on December 1999 for an increase of capital that gave 27% of shares to Montesinos; Panamericana Television (Channel 5) received a USD9 million contract, plus USD350,000 handed by Montesinos to its owner in cash; Cable Canal De Noticias CCN received USD2 million for selling his shares to the Ministry of Defense in November 1999; Andina Television received USD50,000 to fire two opposing journalists. Montesinos also fixed judicial problems of Red Global (Channel 13) in exchange of firing popular commentator Cesar Hidelbrandt.²² The print media was somehow cheaper to buy. *Newspaper Expreso* (mainstream newspaper) received USD1 million in two installments, while several popular newspapers distributed around USD2.5 million between 1998 and 2000.

The final step took place between the first and second round of the votes. In the first round, Fujimori won 52 of the 102 seats in Congress, which denied him the decisive majority he had enjoyed in 1995–2000. To strengthen the administration's hand, Montesinos began what he termed the "recruitment operation."²³ His goal was to persuade, with economic incentives, both current Congressmen and candidates for Congress either to join Fujimori's party or to work secretly for Fujimori's reelection as "moles" from within their original parties.

At least 12 elected representatives received monthly bribes ranging from USD10,000 to USD50,000 between May and September 2000. When necessary, "campaign" contributions of one installment up to USD100,000 were added. The recruitment operation cost around USD5 million, a sixth part of the cost of buying the press.²⁴

Montesinos's unmasking came, ironically, only weeks after his plans of reelecting Fujimori and controlling the majority of Congress succeeded. In September 2000, one video showing Montesinos bribing a Congressman went public and the regime started to fall.

Ten days after the video went public, Montesinos was relieved of his duties and he fled out of the country. On 16 November 2000, Fujimori left for an Asia and the Pacific summit, but he headed to Japan, from where he tried to resign via fax. But Congress—finally in the hands of the opposition—refused to accept it. Instead, on 22 November 2000, a majority of legislators voted to remove Fujimori from office.

Montesinos was tracked down on 23 June 2001 in Venezuela, where he had undergone plastic surgery to alter his appearance. He returned to Peru as a prisoner, incarcerated in the same prison he had designed for Shining Path terrorist Abimael Guzman.

At the time this paper was written, he had been convicted in 13 different trials and will serve at least 20 years' imprisonment. He was also fined for more USD20 million. More than 70 trials are still ongoing, for charges ranging from drug and arms trafficking to embezzlement, from directing death squads to corruption.

Improving the Peruvian Criminal Legal System for Prosecuting Organized Crime and Systemic Corruption

The conditions in which Peruvian institutions were left by Fujimori's regime were, by far, the less appropriate to carry out independent inquiries against those suspected of having participated in, and benefited from, criminal acts. Most institutions were packed as early as 1992.

Unlike most corruption cases, Montesinos left an impressive record of (part) of his acts. Most of what was described under Section A.3. was on the tapes, which were soon available to the press, augmenting public pressure to prosecute him. In the videos were more than 1,000 individuals, many of them high-ranking public servants. Figure 1, elaborated with 110 videos found in Montesinos's house, gives a glance of the complexities of "reconstructing the truth"—the goal of Peruvian criminal procedure—in such a context.

Regardless of the institutional capture to which it was subjected, the Peruvian legal system itself was not equipped to confront a criminal network of such proportions. From the point of view of criminal law, in 2000, the Peruvian Criminal Code did not provide for detailed organized crime legislation capable of capturing the public-private nature of Montesinos's arrangements. Beyond classic definitions of bribery, embezzlement, and peddling on influence and illicit enrichment, there was almost nothing. Sanctions were not proportionate to the outrageous acts that the public was watching every night at TV news. Case law was almost inexistent, confirming a large tradition of tolerated public corruption.

For the same reason, the Peruvian preventive system was also very precarious, lacking precise definitions and administrative procedures for addressing conflicts of interests, incompatibilities, and other breaches of public duties.

From the standpoint of criminal procedure, the situation was not better. Peruvian Criminal Procedure Code belongs to the tradition of inquisitorial models of prosecution, as opposed to adversarial models. In this system, the criminal procedure is conceived as an official inquiry aiming at determining the truth. The whole procedure is structured and conceived as a unitary investigation. Prosecution is compulsory and cases can only be dismissed when there is no evidence that an offense has been committed. The concept of the guilty plea does not exist as such. Consequently, there are no plea bargains, not only because there are no guilty pleas but also because the truth cannot be negotiated and compromised.

Finally, no legal framework for inter-institutional collaboration among State agencies existed. Even more, as nobody knew who would be the next one broadcast in the news receiving money from Montesinos, evident distrust existed among State officials.

As early as November 2000, Peruvian authorities started to deal with the main deficiencies. While many other shortcomings have been addressed since then, we will summarize the four most important legal reforms adopted at the very beginning of the procedures.²⁵ A first step was to set up and specialized anti-corruption authorities, a specialization unknown to the Peruvian judiciary. Thus, an ad hoc prosecutorial office was first established to handle the high-profile cases. Ad hoc prosecutors were picked up from a well-respected law firm, who signed a contract with the Ministry of Justice. Almost simultaneously, a newly appointed attorney general set up a working team of specialized prosecutors, complemented by financial consultants and technical personnel from the National Police. A year later, the Transitional Council of the judiciary created a Special Criminal Court of Appeal and six anti-corruption courts of first instance to judge the cases. The creation of new specialized prosecutors and courts was a rational response to an increasing workload of complex cases, in a context in which many judicial authorities were under investigation.

A second important step, taken also at the beginning of the proceedings, was the adoption by law of a sort of plea bargaining mechanism available for investigations involving organized crime—"Law 27.738, on Effective Collaboration." Except from criminal bosses and constitutionally designated high-ranking public officials—subject to a specific constitutional procedure—members of the criminal organization facing the prospect of criminal charges were

encouraged to provide information in exchange for a mitigated sentence or immunity from prosecution.

The law on effective collaboration represents a highly innovative legal mechanism for Latin American criminal procedures. While several bargaining forms were adopted in Latin American criminal procedures²⁶ in the last two decades, they were more directed at lessening the court workload produced by the principle of "compulsory investigation" than to get information on criminal organizations.

Under the Peruvian regime, the negotiations take place between the defendant and the prosecutor in a specific procedure where the prosecutor enjoys real bargaining power and the competence to establish the terms of the negotiation. The granting of the benefit is conditional upon the positive result of procedural collaboration. The role of the judge is limited to examine whether the collaborator entered into the agreement freely and voluntarily and whether he was aware of what he was foregoing by agreeing to collaborate. There is no jurisdictional room for adjudicating the usefulness of the collaboration. If the agreement entails full exemption from sentence, the judge grants immediate freedom to the beneficiary and orders the cancellation of their legal records. If the agreement contemplates attenuation of sentence, the judge declares the criminal liability of the collaborator and imposes the corresponding sanction according to the terms of the agreement. In any case, the judge cannot change the terms of the agreement.²⁷

The hundreds of videos taped by Montesinos provided an important amount of information about corrupt participants and cash transactions, but they said nothing about where the money was hidden. The law on effective collaboration was the perfect complement for such a situation. While the videos were useful in identifying prospective collaborators, the new law was the key instrument for succeeding in recovering the proceeds. Prosecutors benefited from the information of more than 100 collaborators, including some prominent figureheads of Montesinos, his personal bookkeeper, several arm traffickers, and some media barons. The information provided by collaborators was key to freezing assets in foreign jurisdictions.

A third important step taken by Peruvian authorities was the adoption of measures related to securing the evidence. The Peruvian criminal procedure allowed for investigative measures once the legal proceedings had been instituted. Therefore, the fact that Montesinos's crimes were broadcast worldwide increased the risk of losing crucial evidence. In December 2000, Law 27.379 provided for exceptional prosecutorial powers, allowing prosecutors to require restrictive provisional measures before instituting criminal complaints. Therefore, a

prosecutor was able to apply for judicial orders aiming at preventive arrests, restrictions to leave the jurisdiction, search of houses and offices, seizure of documents, accounting books and private correspondence, measures restricting the transfer of property, lifting bank and fiscal securities, and broad powers for accessing information in the hands of public and private institutions. In 2002, the prosecutorial powers were extended to wiretapping communications in preliminary investigations.

A fourth remarkable improvement to deal with corruption involving high-ranking individuals took place on January 2001, when Congress passed Law 27.399²⁸, allowing the attorney general to initiate preliminary inquiries against high-ranking public officials that, according to the Constitution,²⁹ can only be accused by a permanent congressional commission and judged by Congress. In his preliminary inquiries, the attorney general was authorized to apply the preliminary measures established in Law 27.379 (see earlier discussion), with previous authorization of a Supreme Court judge. In addition, congressional investigative commissions, also created to investigate corruption, were similarly allowed to require the same measures if previously authorized by a member of the Supreme Court.

Getting the Money Back

This section provides a factual and technical analysis of the actions put in place to recover proceeds of corruption from Switzerland, the Cayman Islands and the United States. Each subsection first presents the facts of the case and then goes to the analysis on how the assets were located, frozen, forfeited, and repatriated.

Assets Returned from Switzerland

Location and Freezing of Assets

In spite of the fact that Swiss banks have been obliged to report suspicious transactions since 1997,³⁰ not until Montesinos's bribery of a Congressman was broadcast worldwide did the Swiss Money Laundering Reporting Office³¹ receive a suspicious transaction report from CAI Suisse Ltd. Bank, regarding assets connected to Montesinos. Under Swiss law, banks are obliged to freeze the reported assets for 5 working days.³² The acting examining magistrate of Zurich opened an investigation for suspected money-laundering activities and ordered the bank to hold the frozen assets. This first set of transactions amounted to USD48 million. A month later, Switzerland requested Peruvian authorities, through a diplomatic letter, to investigate the origin of the funds and invited Peru to

request for judicial assistance. It was November of 2000: Montesinos was a fugitive and no anti-corruption authorities in Peru could be trusted.

Before 19 December 2000, the Swiss magistrate had issued 19 orders to Swiss banks. Initial analysis showed that three major suspense accounts³³ had been used to distribute money transferred to Switzerland from Luxembourg, Peru, Russian Federation, and the US among several individuals, including Montesinos. International cooperation requests were sent to Luxembourg and the US. Other suspicious transactions were reported by Fibi Bank, and further investigations led to funds in Bank Leumi le Israel and the French bank Credit Lyonnais. Those banks reported 12 accounts, totaling USD22 million, under the names of General Hermoza Rios, Alberto Venero Garrido, Luis Enrique Duthurturu, and Victor Joy Way.

As soon as Peruvian authorities found evidence on the origin of the money, they submitted requests of mutual legal assistance. By June 2001, Peruvian authorities filed five different requests for assistance, containing information about the new accounts and the origins of the seized money. This information led to the discovery of new hiding proceeds. In total, Swiss authorities froze USD113 million.

Assets in Switzerland were located, thanks to the combined efforts of the Swiss anti-money-laundering system and the Peruvian rules adopted for prosecuting this case. The information got by the Peruvian authorities came from a combination of avenues, all of them opened by the laws introduced to fight this criminal network: bargaining with collaborators led to financial institutions that were obliged to lift bank secrecy in preliminary inquiries.³⁴

There were two different grounds for freezing assets in Switzerland. The assets reported by Swiss financial institutions were automatically frozen on grounds of money laundering. The assets discovered by the Peruvian authorities were frozen upon mutual legal assistance requests.

Swiss anti-money-laundering legislation provides for automatic freezing of assets related to a suspicious report. In other words, anytime a financial institution reports a transaction, it is obliged to freeze the amount for 5 working days. If, within that period, the authorities open a criminal case, the financial institution is notified and the assets remain frozen.

More than USD33 million remained frozen in Switzerland. The holders of some of these accounts challenged the provisional measures. At least in two instances the Swiss Supreme Court rejected the challenges, allowing Switzerland to continue granting assistance to Peru. In a first case,³⁵ ruled in 2003, the court upheld the freezing order based on the following:

- For providing assistance, including adopting provisional measures, it is enough for Peru to describe the facts under investigation. In the case, the description of the Peruvian investigation over illegal commissions obtained by public servants involved in purchasing defense equipment from the Russian Federation is enough for the Swiss authorities to control that the investigation is consistent. Requiring a more detailed description would run against the purpose and goals of the treaty.
- By the same token, the description of specific behavior or conducts carried out by those whose accounts had been frozen is not required. That would be a matter of further investigation.
- Dual criminality does not require identical legal description of offenses. On the contrary, the description of the facts is enough for evaluating whether they subsume under a criminal offense as described by the Swiss Criminal Code. To that extent, getting illegal commissions from government purchasing falls under description of corruption in the Swiss Criminal Code (Articles 322ter and quarter).
- Appellants also argued that Peru had not a legitimate interest in prosecuting the crime. Rather, they argued that if a bribe were in place, it would be the seller, the Russian Government, who will have a legitimate interest to recover it. The court ruled that the crime taken into account does not require an economic damage to the requesting State. Rather, it was a crime against ethical behavior in the conduct of public officials. To that extent, the requesting State proved a legitimate interest in pursuing the case.
- Against the challenge that the Peruvian investigation was politically biased, the court ruled that the appellants did not offer concrete facts to prove it.
- Finally, appellants required that, if the assistance is granted, the evidence must be conditioned to specific uses—the speciality principle. The court also ruled against this petition. Conditioning the evidence beyond what was agreed upon in the treaty would only be necessary if there was an indication that the Peruvian authorities would use the evidence for different purposes, which was not proved in the case.

In 2005, the Swiss Federal Court³⁶ rejected new challenges against another request of assistance from Peru, which led to the freezing order of accounts valued in USD6.5 million. *In obiter dictum*, the court highlighted that the assets remain frozen until the Peruvian authorities were in the position of issuing a final decision or the crime reached the statute of limitations, according to Peruvian laws. This may serve as an important precedent against lifting provisional measures while the victim country is still investigating the crime.

Forfeiture and Repatriation

The first return of assets from Switzerland to Peru consisted of USD77.5 million and took place on August 2002, less than 2 years after the case started. The return of assets had two different bases:

- Some collaborators agreed to waive their rights over their illicit money in favor of the Peruvian State in exchange for a reduced sentence. A general and an intermediary in arms dealings were among those that waived their rights for a total of around USD28 million.
- The rest of the money was returned upon clear evidence that it originated in illegal commissions in the purchase of defense equipment. In a decision issued on 12 June 2002, the Swiss magistrate assessed the evidence sent by Peru. She was satisfied with evidence showing that Montesinos received commissions on arms deliveries to Peru and had this bribe money paid to his bank accounts in Luxembourg, Switzerland, and the US and, at least in 32 transactions, each worth 18% of the purchase price. Montesinos also collected USD10.9 million in commissions on the purchase of three MIG29 planes, bought by the Peruvian air force from the State-owned Russian arms factory "Rosvoorouzhnie." In return, Montesinos used his position to ensure that certain arm dealers were given preference when these orders were issued. The decision was not appealed and has since come into force.

It is interesting to recall that, in the case of Switzerland, there were no forfeiture or confiscation orders, as there were no final decisions in any case. Once the Swiss magistrate acknowledged that clear and convincing evidence proved that the money proceeded from corruption, the Swiss inquiry on money laundering was dropped to give room to the repatriation stage. Thus, the repatriation effort from Switzerland was a sui generis one as it was neither based on criminal nor on civil forfeiture actions, but rather on waivers of those holding proceeds of corruption and on "clear evidence" that the money proceeded from corruption-related offenses—even when that fact was not supported by a criminal conviction.

As we will see later, the solution adopted by Switzerland was totally consistent with current provisions of the UNCAC, Article 57.3), which provides that, for returning proceeds of corruption confiscated upon international cooperation, the requested country can waive the requirement of a final judgment in the requesting country.

Spontaneous Cooperation

A highlight in this case was the use of a spontaneous cooperation mechanism. As described, the Swiss took the initiative of inviting Peru to request mutual legal assistance. While the bilateral agreement between Switzerland and Peru does not have a rule for spontaneous cooperation, the Swiss Federal Act on International Mutual Assistance in Criminal Matters, of subsidiary application provides:

A prosecution authority may spontaneously transmit to a foreign prosecutorial authority information or evidence that it has gathered in the course of its own investigation when it determines that the transmittal will permit the opening of a criminal proceeding or facilitate a pending criminal investigation.³⁷ (ICAM, Article 67).

Recoveries from the United States

Location of Assets

As early as November 2000, when Montesinos was still fleeing from Peruvian justice, Citibank New York filed two suspicious transaction reports concerning Victor Venero-Garrido, Montesinos's associate. Venero had asked the bank to withdraw nearly USD10 million and close the accounts. The reports were forwarded to agents of the Federal Bureau of Investigation (FBI) agents, who set up a sting operation to arrest Venero Garrido. Venero was able to withdraw the funds because the agents could not get an arrest warrant on time. They followed Venero up to his Miami apartment where he was finally arrested. The search of Venero's apartment led to documents that aided the FBI in identifying Montesinos's financial holdings in several countries.

Following that trail, the investigation led to another individual who, in the name of Montesinos, was trying to liquidate assets for USD46 million hold at the Pacific Industrial Bank branch of Miami. Another sting operation led to the arrest of this individual, another front man of Montesinos who, facing charges of extortion, entered into a plea bargaining. The bargaining led to the capture of Montesinos in Venezuela and his extradition to Peru where he was put in prison.

In this case, assets were again located, thanks to a suspicious transaction report (STR) filed by a financial institution, which was followed by a very effective investigation. At this point, it is worth noting that, according to US legislation, STRs are filed with the US Financial Crimes Enforcement Network (FinCEN), an agency that by 2000 was receiving around 250,000 reports a year.³⁸ It seems that, given the international importance of the case, US authorities were specifically attentive to Montesinos's movements. The obvious question for a victim country is

whether the same efforts will be put in place in a case of less international interest.

Freezing and Forfeiting Assets

The investigation of assets conducted by the US Attorney's Office for the Southern District of Florida—with help from its peer in California and the Asset Forfeiture and Money Laundering Section of the Criminal Division of the US Department of Justice—to restrain more than USD20 million related to Montesinos's figurehead, Venero Garrido.

With the cooperation of the Peruvian authorities, the assets were identified as proceeds of commissions and bribes taken by Venero in the fraudulent schemes he organized with the military pension fund. As described before, they consisted of real estate projects, usually overvalued by 25%, and of a set of front companies used to broker loans from the pension, in exchange for kickbacks from borrowers.

Freezing orders over the accounts and the apartment were presumably issued without a judicial warrant because, under US law, it is possible to seize property when it is made pursuant to a lawful arrest or search. In addition, the US authorities were in contact with Peruvian prosecutors. The fact that the case was publicly known helped the investigators rely on evidence that was informally transmitted.

The US investigation proved that a relative of Venero, who worked in a California-based financial institution, had helped him conceal more than USD20 million in the US. Funds in the Bank of Hacienda and Bank of America were tracked down. In addition, Venero's penthouse in Miami was seized.

The US Department of Justice filed two civil forfeiture actions—one in Miami and the other in California—for forfeiting the described assets. With information about the probable criminal origin of the assets, the US Department of Justice filed two different civil forfeiture actions. Civil forfeiture actions (USC title 18, 981-982) are in rem actions subjected to a balance of probabilities standard of proof. Moreover, as the actions were in rem—real or “against the assets”—and Venero was under arrest, it was highly probable that nobody showed up to confront the grounds for forfeiting the property.

Repatriation of Assets

Repatriations of assets to Peru were made based on a specific agreement signed between the US and Peru³⁹ on January 2004. Peru agreed to invest the money in anti-corruption efforts in exchange for the US transferring 100% of the

assets forfeited in the case. The statutory basis for the transfer under US law was the civil forfeiture rules, (Title 18, United States Code, Section 981(i)(1)) which authorizes the attorney general to transfer proceeds of money laundering to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.

Under US law, the attorney general enjoys discretionary authority to return assets confiscated by him based on the request for assistance concerning a corruption offense committed against another country, as long as the other country assisted in the proceedings leading to the forfeiture.⁴⁰ As forfeiture requires to establish the origins of the assets—even with the lowered standard of evidence required by civil or administrative forfeiture actions—the victim country will almost invariably help the US in the proceedings. The attorney general also has authority to restore property to victims, including foreign governments.⁴¹ The same flexible authority applies in cases in which the US is enforcing a foreign confiscation order, on behalf of a foreign country, as if it had been entered by a US court.⁴²

Assets Returned from the Cayman Islands

The repatriation of money from the Cayman Islands involved two different sets of transactions: (i) the funds held by the Pacific Industrial Bank that Montesinos was trying to recover while he was hidden in Venezuela, which were discovered by the Federal Bureau of Investigation in the investigation summarized supra; and (ii) money supposedly transferred from the Wiese Sudameris Bank in Lima to its headquarters in Grand Cayman. Both cases contain features worthy of analysis.

Location of Assets at the Pacific Industrial Bank

Montesinos's greed led to the discovery of funds in the Cayman Islands' Pacific Industrial Bank. After fleeing Peru and while being a fugitive of Peruvian justice, Montesinos tried to extort from the chairman of the Pacific Industrial Bank in Miami, US by forcing him to transfer USD46 million to Venezuela, where Montesinos was hiding.

In addition, Montesinos threatened the chairman that he will inform both the US and Peruvian authorities that the Pacific Industrial Bank (PIB) had been clandestinely operating in Lima for 10 years, under his protection. Indeed, the bank was captivating Peruvian funds without authorization from the Peruvian financial supervisor. Funds were usually not declared to the tax authorities and transferred to the Cayman Islands.⁴³

FBI investigators in Miami discovered the extortion and informed the Peruvian authorities. An anti-corruption Peruvian judge confirmed that the bank had no authorization for captivated funds, notwithstanding it was receiving deposits from the entourage of Montesinos. After being deported to Peru, Venero confirmed that Juan Valencia, another Montesinos associate, had deposited USD30 million in the Cayman's branch of PIB. Valencia was also a broker of the projects from the military pension fund. After several negative searches, the Peruvian authorities located the computers used by the clandestine bank and were able to track the transactions.

Facing severe penalties both in Peru and in the US, the authorities of the bank fully collaborated with the investigation. An audit of the bank revealed deposits of USD44 million in accounts connected to relatives of Victor Malca Villanueva—former Minister of Defense—Victor Alberto Venero, and Juan Valencia. Unlike the cases of Switzerland or the US, where due diligence performed by financial institutions led to the assets, the location of assets in the Cayman Islands the results of the US and the Peruvian investigations.

At this point, it is worth to note that, in June 2000, the Financial Action Task Force (FATF) had labeled the Cayman Islands as a noncooperative jurisdiction. As FATF reported, until the end of 2000, the Cayman Islands did not have a sound anti-money-laundering system in place. There was no legal requirement for customer's identification and record keeping. And even if financial institutions were to identify their customers, supervisory authorities could not, as a matter of law, readily access customers' information. In addition, the Cayman Islands lacked a mandatory regime for reporting suspicious transactions. Moreover, a wide range of management companies were unregulated. The Pacific Industrial Bank was created and had been comfortably operating under such relaxed rules.

Thus, by the time of the case under analysis, the Cayman Islands were under careful international monitoring and pressure to implement a sound anti-money-laundering system. Laws providing for customer due diligence, record keeping, and reporting of suspicious transactions to a newly created financial intelligence unit were soon enacted under FATF pressure. The new laws also deal with the power of the financial supervisory authority to monitor compliance with the regulations and sanctions for failure to report a suspicious transaction. According to a 2001 FATF report, the Cayman Islands had not only significantly increased the human and financial resources dedicated to financial supervision but also initiated an ambitious program for prohibiting shell banks and for identifying preexisting accounts.⁴⁴

Upon the findings of the audit of the bank, Peruvian authorities requested further assistance from the Cayman Islands' authorities.

Freezing and Returning Assets

The Cayman Islands did not have provisions for adopting provisional measures. An order of restraint could only be made where it was shown that proceedings were already instituted, which would lead to an outright confiscation order. However, the Peruvian request for lifting bank secrecy and freezing assets was creatively transformed *ex officio* into a criminal complaint of money laundering. Thus, instead of awaiting a judgment *in personam* from Peru, assets were restrained *in rem*, with the help of the newly created Financial Intelligence Unit.

Peruvian authorities then moved to offering the account holders reduced sentences in exchange for collaboration, including waiving their rights over the money. The money was finally returned to Peru upon waivers signed by the account holders. As in the case of Switzerland, in the repatriation of assets from the Cayman Islands, no criminal convictions or forfeiture orders were given.

Money is not always where the papers say it is.

The second set of transactions "repatriated" from the Cayman Islands relates to the Wiese Sudameris Bank. Montesinos enjoyed a privileged relationship with this bank. Two of his front men at the military and police pension fund frequently used the bank for their "projects." The chief executive officer of the bank appeared in several videos taped by Montesinos exchanging favors and advising him on how to hide his money offshore.⁴⁵ As soon as the law authorizing the lifting of bank secrecy in preliminary investigations was passed, the Peruvian newly designated anti-corruption authorities required the bank to release the bank records of several public figures.

The records showed several transfers to a Cayman Islands' bank called Wiese Sudameris International. The bank was not registered by the Financial Peruvian authorities as a branch or subsidiary of the Wiese Sudameris. In other words, it was another "undeclared" financial institution, owned by the same shareholders as the Peruvian institution. However, the Peruvian directors of Wiese Sudameris claimed not having any influence over the Caymanian bank to get the money back. Immediately, the then prosecutor of the Montesinos case traveled to the Cayman Islands, entered in direct contact with the Cayman authorities, and hired legal counseling with instructions to study the best legal avenue to get the money back. In the following months, several meetings

between the prosecutor and the Cayman attorney general and the director of the Financial Intelligence Unit took place.⁴⁶

Initially, the attorney general in Cayman took the same legal avenue adopted with regard to the Pacific Industrial Bank: a criminal complaint against Wiese Sudameris International for suspicions of money laundering. The Cayman Grand Court admitted the complaint and issued a freezing order, *in rem*, against accounts identified as belonging to Montesinos and his associates. After several months of financial analysis, however, it was discovered that the money was never transferred to Cayman.

The scheme was as follows: the money remained physically in Peru. In the papers, the money was transferred to the Cayman bank but, in parallel, the Cayman bank loaned the same amount of money to the Peruvian bank. In that way, the Peruvian individuals could enjoy their assets in Peru while the papers protected them from any inquiry. That was the case, for example, of some USD14 million belonging to General Malca Villanueva, former Minister of Defense at the time of the purchase of defense equipment from Belarus and of the initial real estate projects of the military pension funds. It took 1 year for the investigation to discover the scheme. Upon discovery of the fraudulent scheme, confiscation orders against the funds located in Lima were issued. Some USD33 million had been "repatriated" in that way.

In conclusion, it is worth noting that after the described cases, other governments tried to get the cooperation from the Cayman Islands similarly as the Peruvian Government did.⁴⁷ They, however, failed. As recognized by the Caymanian authorities:

...the outcome in the Montesinos matter must all the more be regarded as exceptional and there is currently being prepared draft legislation which will clearly spell out the Court's jurisdiction to enforce foreign *in rem* warrants in all matters involving the proceeds of serious crime.⁴⁸

The Cases in Light of the United Nations Convention against Corruption

This concluding section speculates whether the entering into force of the UNCAC would ease the described asset recovery actions, and whether it would help future actions.

Location and Detection of Assets

The two mechanisms envisaged by UNCAC for detecting assets in foreign jurisdictions were in place both at the Swiss and US cases. Article 14 of UNCAC requires State parties to have in place a comprehensive supervisory and regulatory system to prevent money laundering. Such a system must oblige financial institutions to know their clients, keep records, and report those transactions that are suspicious of being of criminal origin. In addition, to prevent transnational movement of proceeds of corruption, Article 52 of the UNCAC requires State Parties to make their financial institutions take appropriate measures to identify the beneficial owners of high-valued accounts and to enhance scrutiny over the accounts of politically exposed persons (PEPs), prominent public figures, their families, and close associates. The US adopted customer due diligence covering PEPs in 2001,⁴⁹ and Switzerland, in 2003.⁵⁰

Montesinos had hidden money in both jurisdictions at least since 1996. Reporting obligations are in place in both countries since 1998. The first obvious question is why the banks reported Montesinos only when the scandal went public. There are two possible speculations: either the banks only reviewed their files as the news appeared in the press, or the banks themselves felt facing legal risks only when the scandal took wide proportions.

In any case, a second, more important question is, what would have happened if Swiss banks reported Montesinos as early as 1998? For the sake of this exercise, one can speculate that, on the Swiss part, an investigation on money laundering would be opened and a request for assistance to Peru forwarded to determine the origins of the assets. However, in 1997, with Montesinos in power, one can be almost sure that Peru would not have been able to provide accurate information on the origins of the assets.

The precedent paragraph highlights an issue that is arising more and more in asset recovery cases, namely, how to manage the discovery of assets of high-ranking officials still in power. So long as financial institutions are becoming more and more conscious of the legal and reputation risks they face for holding proceeds of corruption, the frequency in which an acting public official is reported abroad augments. More and more financial centers are opening criminal cases on grounds of money laundering of foreign public figures or figureheads. However, when asking for cooperation, the cases are put at risk if the officials involved are still in power.

This poses a challenge for global policy makers, as to how to evolve from a few multibillion cases against “kleptocrats”—Abacha, Marcos, Montesinos—in the euphoria of a regime change to a much more regular, more ample, less-

prominent figures, less money-involved base of cases, within the same political regime.

With regard to domestic mechanisms for detecting assets, the most effective strategy of Peru was the offering of "effective collaboration" and the widening of prosecutorial powers. UNCAC also contemplated both mechanisms. Article 37 (1) of UNCAC requires state parties to

... take appropriate measures to encourage persons who participate or who have participated in the commission of any offense established in accordance with [the] Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

As mentioned before, the Peruvian system of effective collaboration, which proved most useful for recovering assets, is a total novelty in Latin American criminal procedural codes.

From a more general standpoint, developments in the area of money laundering, both in victim and recipient countries, will obviously increase the chances of detecting and locating proceeds of crime. While the paradigm is fully receipted by UNCAC, operators and practitioners of most developing countries have not yet internalized it as the main strategy for reducing acquisitive crimes. In many States, rather than a new paradigm with specific policy objectives—confiscation of ill-gotten gains—money laundering has been understood just as a new crime and subjected to the general principles regulating traditional criminal law. When a criminal investigation does not contemplate how to locate and freeze the proceeds to be subject to confiscation in its strategy from the very beginning, the risks of dissipation are extremely high.

With the Cayman Islands not yet a signatory to UNCAC, it is worth noting that, in addition to the anti-money-laundering system adopted upon blacklisting by the Financial Action Task Force, a program for withdrawing authorization to shell banks was implemented in 2001. As a result, banks and trust licenses decreased from 426 in 2001 to 291 in 2006. The banks that Montesinos used were shut down. Thus, the Cayman Islands now seem to be in a better position to identify assets of criminal origin.⁵¹

As for provisional measures, the automatic freezing mechanism established in Switzerland proved to be a very effective way of complying with

Article 31.2 of the UNCAC, which requires state parties to enable freezing of proceeds and instrumentalities of corruption and embezzlement.

International Cooperation with the Purpose of Confiscation

Peru requested assistance from Switzerland and the Cayman Islands. The Peruvian prosecutor traveled to both jurisdictions and held several meetings with authorities of both countries to be informed about the best legal avenues to get fast cooperation. In both cases, even when he was providing concrete evidence of the financial institutions, the authorities in the requested countries asked for concrete evidence involving the account holders or potential beneficiaries of the accounts that the Peruvian prosecutor was trying to freeze.⁵² In other words, what in the view of the Peruvian prosecutor was a solid case was a fishing expedition in the view of the authorities of the requested country.

In many jurisdictions, especially financial centers, the concept of fishing expedition does not usually take into account that there are many instances in which the evidence of a corrupt deal is not available in the victim country—think of a bribe paid by transferring funds between two jurisdictions different from the victim country—, notwithstanding there is enough rationale in requesting an investigation to that particular jurisdiction. Moreover, the financial transactions might only be untangled if cooperation is requested. While in this concrete case the Swiss Federal Supreme Court seems to have adopted an ample criterion,⁵³ many experienced practitioners coincide in pointing out that reasonably formulated requests have been denied under very strict and close concepts of fishing expeditions.

The entering into force of the UNCAC might help overcome these obstacles as, given the importance and extent of international cooperation, strict concepts of fishing expeditions will be difficult to reconcile with the terms of Article 55, which requires a duty to provide assistance “to the greatest extent possible.” Specifically, requesting States looking for a freezing measure must provide, in addition to the requirements of Article 46, 15, “a statement of the facts relied upon and a description of the actions requested and, when available, a legally admissible copy of an order on which the request is based (Article 55.3(c).”

A highlight of the cooperation granted by Switzerland to Peru was the use of spontaneous cooperation in accordance with its domestic law, notwithstanding the bilateral treaty was silent in that respect. Spontaneous cooperation is an important recommendation of UNCAC (Article 56) which, under the heading of “Special cooperation” encourages State parties

...to forward...information on proceeds of offenses established in accordance with [this] Convention to another State party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party [under this chapter of the Convention].

The outcome of future cases may be improved if recipient countries, specially financial centers, include in their domestic legislation proactive cooperation provisions and specific procedures allowing prosecutorial and appropriate regulatory and judicial authorities to forward information considered of interest for the purposes of Chapter V of the Convention to victim countries' authorities.

Returning Assets after Confiscation on Money Laundering Basis

The principle of returning confiscated proceeds of corruption is a significant departure from two established practices: (i) the practice according to which confiscated assets belong to the country whose courts have issued the confiscation order, and (ii) the practice of asset sharing.

When confiscating upon a foreign request or when enforcing a foreign confiscation order, the requested country is clearly acting on behalf of the requesting State. However, when confiscation is the consequence of a civil forfeiture action or of a domestic money-laundering investigation to which the victim country may not even be aware of, it is advisable to check whether legislation of all state parties have a general provision allowing the return of assets to the victim country.

While in the case of Peru all jurisdictions returned 100% of the assets in conditions of being repatriated, in the case of the US, the agreement signed conditioned the uses of the money. Given that the authority of the US attorney general is discretionary, a question arises with regard to cases where there are concerns about the integrity of the government seeking repatriation of the funds, disagreements with the other country on how to use the funds, or where transferring assets would be inconsistent with US efforts to remove other core obstacles to law enforcement cooperation with the country in question. This situation is addressed by UNCAC, Article 57, which set up less discretionary rules. Under Article 57.3, (i) in case of embezzlement of public funds or of laundering of embezzled public funds, there is an international obligation to return the assets; and (ii) in case of proceed of other offenses covered by the convention, return of assets is conditioned on the establishment of prior ownership or recognition of

damages. However, as Article 57.5 provides for case-by-case agreements for the final disposal of confiscated proceeds of corruption, which rules US authorities and other countries will use when confronted with the described situations remain an open question.

Specialized Bodies and Specific Legal Instruments in the Victim Country

The measures adopted by Peru to effectively prosecute the criminal organization show the necessity of specialized anti-corruption bodies, specialized competent bodies, as well as specific investigative and procedural mechanisms. While exceptional prosecutorial powers allowed for getting crucial information for requesting assistance, a fundamental part of the assets were recovered through waiver mechanisms got through effective collaboration.

Direct Means of Recovery

While Peru reorganized state structures, specifically its authorities, with competence over criminal proceedings, it does not seem to have devoted enough efforts to explore the possibility of using other civil ways for asset recovery.

The convention, Article 53, provides for direct means of recovery in both civil and criminal proceedings. As a plaintiff in a civil action (paragraph a), as a party claiming compensation or recovering damages caused by criminal offenses (paragraph b), or as a third party claiming ownership rights in a confiscation procedure (paragraph c), Article 53 ensures victim countries a range of legal remedies to initiate direct means of recovery. Prior ownership, damage recovery, compensation, and disposal of confiscated assets are different legal grounds for the victim state party to claim in the courts of the party to where the property in question was exported.

Therefore, victim countries should organize the necessary mechanisms for civilly and criminally standing before foreign courts. Though domestic legal counsel might be required in many instances, as a matter of law, it is advisable that state parties count on a designated authority for representing the State in asset recovery claims, these being a claim of prior ownership, the establishment of damages, a claim of compensation, or as a third party in a confiscation procedure conducted after a criminal conviction.

The counterpart of the precedent suggestion requires recipient countries to allow victim countries to have legal standing before their courts. In some cases, such as when claiming damages or compensation to convicted

offenders, a traditional concept of legal standing—for example, requiring showing of suffered injuries over protected, concrete, and particularized interests, and a close causal connection between the injury and the conduct complained of—may not satisfy the purpose of Article 53.

Concluding Remarks

The case of Montesinos is usually presented as a successful experience in asset recovery. At a glance, compared with other (in)famous cases, USD175 million from three different jurisdictions have been recovered in less than 3 years. Several factors contributed to that success.

First, the peculiarity that Montesinos videotaped his meetings made the case attractive to the international media, which in turn severely increased the risk of financial institutions. Bankers in Switzerland, the US, and Panama⁵⁴ reported transactions related to Montesinos while he was a fugitive. Second, several journalistic sources suggested special interest in the US to help Peru get rid of Fujimori and Montesinos. Whatever the reasons, the diligent efforts of the Federal Bureau of Investigation to capture Montesinos outside the US are eloquent in this regard. These two factors, which in my view were determinant to the success of the case, are very random and cannot be taken for granted for future cases. There is, nonetheless, a lesson to be learned: the greater the international attention and press coverage of the case, the greater the chances of getting initial information from foreign financial institutions. However, in many instances, this principle conspire against the investigation.

In addition, other factors contributed to the success of the case. The case benefited from the fact that the Financial Action Task Force (FATF) was pressing for reducing anonymity in offshore centers through the Non-cooperative Countries and Territories Initiative at that time. Jurisdictions where Montesinos operated—Bahamas, Panama, and the Cayman Islands—were at that time working hard to reverse their status. Though, as mentioned before, the disposition of the Cayman authorities might be changed after being de-listed from FATF, some 25 jurisdictions have excluded official corruption of their business of providing complete anonymity. Several steps have been taken toward reducing anonymity in the financial sector, including stringent provisions to identify the beneficial owner, enhanced scrutiny over politically exposed persons, enhanced scrutiny over corporate vehicles used as shell companies, prohibition of shell banks, and prohibition of denying cooperation on grounds of bank secrecy.

In addition, several international initiatives to increase knowledge, capacities, cooperation, and even help with case management in asset

recovery have proliferated in the last 5 years, all of them working closely to learn from each other and with the common goal of using UNCAC as a navigation chart. As mentioned, UNCAC not only facilitates traditional avenues for asset recovery by means of removing obstacles—e.g., relaxing dual criminality when providing assistance in noncoercive measures, Article 46.9—and homogenizing concepts—e.g., requisites for requiring assistance which circumscribes the lax concept of fishing expeditions. The treaty also has several innovative and still unexplored avenues for asset recovery, such as direct civil recovery of Article 53.a.

Taking that into account, and notwithstanding the aforementioned reasons, the case of Montesinos may also be regarded as a starting effort for asset recovery, if measured by the amount recovered vis-a-vis the scale of corruption described in Section A. This is, indeed, the case. Since its creation at the end of 2000, the Office of the Ad Hoc Prosecutor has obtained 107 convictions against 83 different persons, of which 17 had been extradited from 6 different countries. However, more than 200 investigations are still ongoing, including 40 extraditions from 14 different countries that are pending.

As described in Section C of this paper, most assets that Peru recovered are related either to bribes taken in arms contracts with Belarus and the Russian Federation or to money embezzled from the military and police pension fund. As described in Section A, Montesinos resorted to several other schemes of corruption. In addition, there is enough evidence of Montesinos bribing other people—from politicians to media owners. Most assets involved are believed to be outside Peru. Therefore, providing it do not interfere with defense rights. Peru has an enormous opportunity for using the new avenues envisaged by the UNCAC for recovering the proceeds of the massive corruption it suffered during the 1990s.

NOTES

- 1 Official figures of the Peruvian Ad-Hoc Prosecutorial Office for the Cases of Fujimori and Montesinos. Available: www.procuraduriaadhoc.gov.pe
- 2 This section is partially based on a case study prepared by Kirsten Lundberg, with the research assistance of the author, for the Case Studies Program on Public Policy Issues at the Kennedy School of Government, Harvard University. See *Robust Web of Corruption: Peru's Intelligence Chief Vladimiro Montesinos*, Kennedy School of Government Case Program, Case C14-04-1722.0.
- 3 On Montesinos's career, cf. Bowen, Sally, and Holligan, Jane, *The Imperfect Spy: The Many Worlds of Vladimiro Montesinos*, Lima, Peisa, 2003; Rospigliosi, Fernando. *Montesinos y las*

- fuerzas armadas: Cómo controló durante una década las instituciones militares.* Instituto de Estudios Peruanos (2000), Lima, Peru; Gorriti, Gustavo, Fujimori's Svengali; Vladimiro Montesinos: The Betrayal of Peruvian Democracy, *Covert Action Quarterly*, Summer 1994. Online summary available: <http://fortunecity.de/olympia/beckenbauer/30/gorriti.html>.
- 4 Between 1980 and 1990, reports put the number of violent incidents at 20,465, which left 18,997 dead and disappearances allegedly in the hands of the military forces. Cfr. Inter-American Commission on Human Rights (IACHR), Report on the situation of human rights in Peru, OAS, March 12, 1993. See: www.cidh.oas.org/countryrep/93PeruS&E/index.peru.htm
 - 5 In the 1980s, Peru was said to supply 60% of the coca market, which provided support for most of its rural economy. In parallel, the narcotics trade permeated Peru's political elite, its most powerful law firms, and its wealthiest families. Representatives from Huallaga Valley, where coca grows, had at that time open links to the drug world. An indicator of this situation is that from 1986 to 1991, there was only one criminal conviction on drug-trafficking charges. Cfr. Peru. Coca curiosities, *The Economist*, 31 August 1996, p.39.
 - 6 Gorriti, cit. in note 2.
 - 7 As reported by a declassified US State Department cable of 16 August 1990, titled "Man behind Fujimori's throne," in file with the author.
 - 8 Declaration of Montesinos before the investigations subcommittee of the Peruvian Congress, 20 December 2001. Available: www.agenciaperu.com.pe
 - 9 Inter-American Commission on Human Rights (IACHR). "Report on the situation of human rights in Peru," OAS, 12 March 1993. See: www.cidh.oas.org/countryrep/93PeruS&E/index.peru.htm
 - 10 See Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000 (Original: Spanish). Available: www.oas.org
 - 11 1992. 14 November. Peru's benevolent dictator. *The Economist*.
 - 12 Ibid. ["The dark side of the boom," *The Economist*]
 - 13 Cfr. Manzetti, L. 1999. *Privatizations South American Style*. Oxford: Oxford University Press; Ruiz Caro, Ariela, "Las privatizaciones en Perú. Un proceso con luces y sombras", in *Nueva Sociedad*, N° 207, January–February 2007, ISSN: 0251-3552. Also available online: www.nuso.org/upload/articulos/3410_1.pdf
 - 14 See the final report of the Comisión Investigadora de Delitos Económicos y Financieros (Congressional Investigative Commission on Economic and Financial Crimes), June 2002, available: www.congreso.gob.pe/comisiones/2002/CIDEF/index1a.html
 - 15 State Department cable, "Intelligence chief Montesinos accused of protecting drug traffickers," 6 September 1996.
 - 16 *La Republica*. 2001. 22 November, reproduced in www.aprodeh.org.pe/fujimori/corruccion/noticias/22nov2001iv.htm
 - 17 Catherine M. Conaghan. 2001. Making and Unmaking Authoritarian Peru. The North-South Agenda Papers #47. University of Miami, May.
 - 18 The 1993 Constitution allowed citizens to initiate referendums to change law or amend the constitution. In April 1996, Congress passed Law 26592 (reinforced by Law 26670) which required prior congressional approval for a referendum.

- 19 The Special Prosecution Office handling Montesinos's case classified the 720 tapes in its possession into three categories: private matters (affairs, indiscretions); criminal (bribes of private sector firms and individuals); and public interest (politics and the judiciary). The great majority of the public sector tapes concern the reelection effort.
- 20 National Election Board Members Alipio Montes de Oca received USD50,000 and Luis Serpa Segura USD45,000; Victor Castillo, President of the Supreme Court, USD35,000. Cfr. Mc. Millan, J. and P. Zoido. How to Subvert Democracy. Montesinos in Peru. Working Paper. Center for Democracy, Development, and the Rule of Law at the Stanford Institute for International Studies. Available: http://iis-db.stanford.edu/evnts/3823/Montesinos_0421.pdf
- 21 Cfr Transcript of Video 1200, 14 October 1998, Montesinos and Jose Francisco Crousillat; Transcript of Video 1347, 26 February 1999. Montesinos and Crousillat.
- 22 Cfr. Mc. Millan, J. and Zoido, P., cit in note 22.
- 23 Montesinos's declaration before the Subcommittee of Investigation of the Peruvian Congress, 20 December 2001. Available: www.agenciaperu.com/actualidad/2002/ene/vladi_com_estrada.htm
- 24 Mc. Millan, J. and Zoido, P., cit in note 22.
- 25 All the legal reforms adopted in relation with the investigation of corruption and organized crime can be consulted, in Spanish, at www.procuraduriaadhoc.gob.pe/marcolegal/index.php
- 26 For an analysis of this trend, cfr. Langer, Maximo. 2004. From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure. 45 *Harvard International Law Journal* 1–64 (2004); Langer, Maximo, Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery. *UCLA School of Law Public Law & Legal Theory Research Paper Series*, Research Paper No. 07-22 (2007).
- 27 Calderón Navarro , N. 2006. Fighting Corruption. The Peruvian Experience, 4 *J. International Criminal Justice*. 488, July.
- 28 Cfr. Law 27399 (13 January 2001). Available: www.procuraduriaadhoc.gov.pe
- 29 According to Article 99 of the Peruvian Constitution, the President, members of Congress, ministers, constitutional court judges, members of the Judicial Council, Supreme Court judges, superior prosecutors, the national Ombudsman, and the General Comptroller only can be accused by a Permanent Congressional Commission and tried by Congress for crimes committed while in office and until 5 years after leaving office.
- 30 Swiss Anti-Money Laundering Act of 1997, Section 9, reads as follows: "A financial intermediary who knows or presumes, on the basis of funded suspicion, that assets involved in the business relationship are related to an offence under Section 305bis of the penal code [money laundering], that they are proceeds of a crime, or that a criminal organization has a right of disposal over them...shall without delay notify the reporting Office for Money Laundering."
- 31 The Money Laundering Reporting Office is at the Federal Office of Police in Switzerland's central money laundering office responsible for receiving and analyzing suspicious activity reports in connection with money laundering and, when appropriate, forwarding them to the law enforcement agencies.
- 32 Swiss Anti-Money Laundering Act of 1997, Section 10, reads as follows:
A financial intermediary shall immediately freeze assets entrusted to him if they are linked to the reporting. It shall continue to freeze the assets until receipt of a decision by the

- competent prosecuting authority, but for a maximum of five working days from the notification of the reporting office. 3. For so long as assets are frozen, the financial intermediary shall not notify the persons concerned or third parties of the reporting.
- 33 Suspense accounts are temporary accounts in which entries of credits or charges are made until their proper disposition can be determined. They are just one type of omnibus or concentration accounts legitimately used by banks, among other things, to hold funds temporarily until they can be credited to the proper account. However, such accounts can be used to purposefully break or confuse an audit trail, by separating the source of the funds from the intended destination of the funds. This practice effectively prevents the association of the customers' name and account numbers with specific account activity, and easily masks unusual transactions and flows that would otherwise be identified.
- 34 It is worth noting that Peru did not enact anti-money-laundering legislation until 2002, so banks were not obliged to report suspicious transactions.
- 35 Swiss Federal Supreme Court, Case 1A.70/2003. Available (in German): www.bger.ch/it/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm
- 36 Swiss Federal Supreme Court, Case 1A.43/2005. Available (only in German): www.bger.ch/it/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm
- 37 Swiss Act on International Mutual Assistance in Criminal Matters, Article 67a.
- 38 Official figures of FINCEN for 2000–2001. By 2006, FINCEN reported receiving more than 1,000,000 reports. Cf. www.fincen.gov/sars/btn_8/sar_btn_issue8.pdf
- 39 The agreement was signed by then Secretary of State Collin Powell and Peruvian Foreign Minister Manuel Rodriguez, in the presence of Peruvian President Toledo at the Summit of the Americas, 2004. Cf. <http://www.state.gov/r/pa/prs/ps/2004/28114.htm>
- 40 Cf. 18 U.S.C. 981(i) and 18 U.S.C. 982(b)(1), through reference to 21 U.S.C. 853(i) referencing 21 U.S.C. 881(e)(1)(E).
- 41 Cf. 18 U.S.C. 981(e)(6).
- 42 Cf. 28 U.S.C.2467
- 43 This is a regular practice of foreign financial Institutions encouraging capital flight from developing countries. Under the facade of an office of representation, they capture and transfer funds to safe jurisdictions. The bulk is money of legal origin that left the country undeclared and consequently does not pay income taxes. But these structures are ideal places for laundering money.
- 44 Cf. FATF, NCCT 1999–2000 at www.fatf-gafi.org/dataoecd/56/43/33921824.pdf
- 45 See, e.g., Video 1790, taped on 11 November 1999. Available: www.aprodeh.org.pe/democracia/democracia2/c_op_18abr2001ix.htm
- 46 Phone interview with Jose Ugaz, former Prosecutor of the case (17 August 2007)
- 47 Cf., e.g., the decision of the Cayman Grand Court in the matter of Falcone, a case of bribery in arms purchasing from the Angolan Government, where cooperation requested from the French and the Swiss governments was refused on grounds of lacking of authority to enforce restraint orders unless proceedings had been instituted in the requesting country. Cit by Anthony Smellie, *Enforcement of Judgements in Practice*. Paper presented at the Forfeiting the Proceeds of Corruption Seminar, 2–5 May, Miami, USA.

- 48 Cf. Hon. Anthony Smellie. Enforcement of Judgements in Practice. Paper presented at Forfeiting the Proceeds of Corruption Seminar, May 2–5, Miami, USA. Mr. Smellie was speaking in his capacity as Chief Justice and Mutual Legal Assistance Authority of the Cayman Islands. Available: www.gov.ky/portal/page?_pageid=1142,1687439&_dad=portal&_schema=PORTAL
- 49 Cf. US PATRIOT Act, (HR 3162 RDS, 107th CONGRESS, 1st Session), 24 October 2001, Title III, Section 312.
- 50 Cf. Ordonnance de la Commission fédérale des banques en matière de lutte contre le blanchiment d'argent. Available: at www.admin.ch/ch/f/rs/9/955.022.fr.pdf (unofficial English translation available: www.kpmg.ch/library/pdf/20030401_MLO_SFBC.pdf)
- 51 Cf. Official figures provided by the Cayman Islands Monetary Authority, Banking Supervision Division. Available: www.cimoney.com.ky/section/regulatoryframework/sub/default.aspx?section=BK&id=62
- 52 Phone interview with Jose Ugaz, 17 August 2007 and e-mail exchanges with Sonia Nieto, current Peruvian prosecutor in charge of the asset recovery section, of 15 August 2007.
- 53 Swiss Federal Supreme Court, Case 1A.43/2005.
- 54 The Financial Intelligence Unit of Panama initiated a case for suspected money laundering upon receiving several reports from its financial institutions. Most accounts in Panama had been closed by the time the reports were made. Interview of the author with Maribel Cornejo Batista, anti-corruption prosecutor in Panama City, 5 August 2007.

Corruption and Criminal Organization: Peru's Experience

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The Peruvian case regarding the corruption during the government of former President Alberto Fujimori is very interesting to analyze and learn preventive measures to avoid similar situations.

One particular characteristic of the regime of former President Alberto Fujimori was that, in collusion with his former security advisor, Vladimiro Montesinos (who, far from solely being an advisor, ended up sharing the power), institutionalized in government a true criminal organization not only to obtain illegal profits but also to make sure they stay in the power, using corrupt activities as their best instrument to attract and keep followers.

When exercising control of almost all state organs—the executive, legislative, and judicial branches; Public Ministry; National Elections Jury; Constitutional Tribunal; Comptrollership; and the army, among others—Fujimori and Montesinos notably weakened, and in some cases eliminated, these organ's role to control the exercise of government. Consequently, corruption at all levels grew at magnitudes difficult to imagine, seriously weakening the institutions of the country, and inflicting serious damage on the medium and long term.

Therefore, we need to indicate that it is not possible to face this problem in isolation, since as we have seen in the Peruvian case, the organization structured for the service of and by corruption is involved in other crimes equally serious, such as crimes against humanity, illegal drug dealing, traffic of arms for terrorist groups, and others.

The magnitude of corruption at the high levels mandates building a special system, where not only judges, prosecutors, and the police are specialized in investigating and judging these facts, but also that other state entities (Comptrollership, Superintendence, Ministry of Education) are involved in the fight against corruption, and the private sector or the society (nongovernment organizations, media) coordinate efforts to avoid impunity, that is one of the main generators of corruption.

To be able to enjoy the illegally obtained profits, the criminal organization of former President Alberto Fujimori and his former advisor Vladimiro Montesinos, extended its activity to the financial sector. This enabled them to transform illegal profits into goods having legal appearance not only nationwide but also in the international system. To achieve this, some bad officials in the Peruvian financial system helped with the complicity of public institutions that were precisely in charge of fighting against assets laundering.

In Peru, after the first evidence of the existence of the criminal organization was disclosed and President Fujimori's escape, an anti-corruption system was instituted during the National Interim Government. Though its framework had some defects since it could not achieve its original objective of prosecuting the crimes committed by the corrupt regime of Fujimori and Vladimiro Montesinos, it was important and significant in the history of our country. It was the first time that—with all the guarantees of due proceedings—high officials of the State (former ministers, Representatives of Congress, magistrates from the judicial branch, officials of the Public Ministry, the Elections System, the Comptrollership, etc.) and high-ranking officials of the army were investigated and tried, and that the private sector who contributed and benefited from such criminal actions was also brought to justice. Thus, “important” representatives from the national entrepreneurial scenario were investigated and went through judicial proceedings.

At the same time as this system was set up, the Public Ministry issued a series of rules to improve the capacity of the institutions in charge of investigating the crimes. Among them is the Statute of Effective Collaboration, which provides that members of the criminal organization, except its top members, could appear before the Government Attorney's Office and provide information on other members of the organization and the perpetrated criminal facts, to equally contribute to the investigation to verify said information and, consequently, obtain the probative elements. In exchange, this “collaborator” received benefits, from exoneration of charges to reduction of legal punishment, without prejudice to restituting the profits he may have obtained from his participation in the illegal activities of said criminal organization. These agreements were recorded in documents subscribed with the prosecutor and are then evaluated by the judges, who, if found them pursuant to law, approve them through a final decision.

One component of said system was the Ad Hoc Prosecutor's Office, a government entity in charge of defending the interests of the State in the investigations and judicial proceedings on the crimes attributed to the members of the mentioned criminal organization. The office's main characteristic was that it could interact with different state entities, thus making it possible to collect the

information gathered from different sectors, so it is able to add the elements to the investigation as well as pertinent evidence for each case. Likewise, it intervened in the different proceedings of international judicial cooperation, such as extraditions, letters rogatory, and/or asset recovery proceedings.

This experience allows us to describe in detail the main modes of asset laundering that the criminal organization of Fujimori and Montesinos used.

Commissions Paid Abroad

One activity that provided the highest income to Vladimiro Montesinos Torres and his accomplices were the contracts for the acquisition of arms. This was verified in an effective collaboration proceeding, the final decision of which was the possible recovery of the money from Switzerland. This money that was frozen initially by Swiss Prosecutor Cornelia Cova had its origin in the payment of illegal commissions for 32 contracts of acquisition of war armament by the army and the Ministry of Interior of Peru.

In the proceedings, it was verified that during said acquisitions, suppliers paid a series of illegal commissions, which were deposited into international or coded accounts on behalf of offshore companies, whose real beneficiaries were Vladimiro Montesinos and the top members from the army who intervened in such acquisitions.

In the process of effective collaboration, “collaborators,” business people who acted as intermediaries in such acquisitions, described in detail how—after the prices of the armament and the amount of the commissions were established—the total amount was transferred from accounts of the Banco de la Nación del Perú (official Bank of the Peruvian State) to the coded accounts of offshore companies, but of which Montesinos and top members from the Army were titleholders. This appeared in the documents submitted by these collaborators to the Prosecutor’s Office in Peru.

It is worth mentioning that these accounts were frozen by Swiss authorities, especially by Prosecutor Cornelia Cova, on time. Once the effective collaboration process had concluded, the information had been verified and evidence had been obtained, it was clear that the money deposited in these accounts was in reality property of the Peruvian State, and the corresponding agreement was approved by decision issued by the Judges in Peru. Later the same Peruvian judges, through international cooperation requests, requested the authorities from the Swiss Federation, through Attorney-at-Law Cornelia Cova, to take into account the decision and the proceeding, and proceed to finally

confiscate the frozen amounts of money and send them to Peru under a due and regular proceeding.

Once the transparency of the proceedings was verified, the Swiss authorities finally ordered the repatriation of USD49.5 million from the accounts where Vladimiro Montesinos Torres and his wife were beneficiaries, and USD7 million from accounts on behalf of three condemned “collaborators.”

On the other hand, we must mention that a former commander-in-chief from the Peruvian army, who was accused and condemned for several corrupt acts, the same that is currently submitted to proceedings for human rights violation crimes (forced disappearance, torture, assassination), admitted his participation in corrupt acts relating to the acquisition of armament. The prosecutor's office, under the charge of Attorney-at-Law Cornelia Cova, which had made public the finding and freezing of accounts that were linked to said general.

Said commander issued waivers, before the judicial authorities of Peru, so that banking institutions in Switzerland, where the accounts were frozen, could proceed to transfer the corresponding amounts of money to Peruvian authorities. The Swiss authorities, once again, through Attorney-at-Law Cornelia Cova, verified the legality of said procedure, specially that said authorizations were granted freely and voluntarily by the mentioned official, to release the blocking of said accounts and allow the funds amounting to about USD20 million to be transferred to the accounts of the Banco de la Nación del Perú.

Use of Straw Men

While Vladimiro Montesinos Torres obtained big amounts of illegal profits—whether through the acquisition of goods and services from the State where he participated directly or indirectly, or through criminal actions perpetrated through the use of power—he had to determine what to do with said funds. Another mode he used to launder said money was through straw men who deposited big amounts of money in domestic financial institutions for which they acquired bank certificates in foreign currency to be paid to the bearer.

The straw men delivered these bank certificates to Montesinos, who then accumulated a significant amount to be directly or indirectly deposited in a local bank so that said amount can be transferred to an overseas account where said financial entity has a branch.

The last step of this operation consisted in splitting the funds. For this purpose, goods were acquired abroad, funds were deposited in accounts in financial paradises on behalf of off-shore companies.

A huge sum deposited in the Gran Cayman Islands was recovered because some straw men of Montesinos subscribed voluntarily—through effective collaboration proceedings or as a consequence of confessions, authorizations or waivers—for those amounts to be transferred to accounts of the Peruvian State at the Banco de la Nación.

Investment Funds

It is worth mentioning that judicial authorities and the Peruvian prosecutors recovered most of the money through the authorizations or waivers subscribed by the straw men of Montesinos. The money, denominated as “investment funds,” was transferred to the international financial system. This was developed in Peru by the Banco Pacific Industrial Bank, whose central office was in Panama, but had branches in several cities, such as Miami, Florida in the US. Most of Montesinos’s illegal money was transferred through this bank, thus avoiding national and international control systems, and finally being deposited in the Pacific Industrial Bank of Gran Cayman.

The superintendent of bank and insurances of Peru authorized the Pacific Industrial Bank to open a representation office in our country to promote and develop services linked to credit cards, but not to raise funds.

This prohibition, nevertheless, was eluded by the representatives from the banking entity, with the tacit approval of the control authorities. For this, companies Promotora Bancal S.A. and Bancambios were incorporated. These companies raised funds through an investment program. These big sums were supposedly charged to the credit cards, but were really fund transfers to the coded accounts—or accounts on behalf of offshore companies—of Montesinos and some members of the criminal organization at the central offices of Pacific Industrial Bank of Gran Cayman. These sums were the same monies transferred to Gran Cayman through the banking market defined by the representation of the PIB. This mode allowed Montesinos and other members of the criminal organization to avoid the control systems not only in Peru but also in other countries, since they used indistinctly the offices of said entity to triangle the transferences with final destination to Gran Cayman.

We must note that Vladimiro Montesinos was a fugitive from justice and hid in Venezuela due to the arrangements he made with officials of the Pacific Industrial Bank, so that the funds could be transferred for him to have access to

the same. Montesinos even threatened the representatives from that bank. These tape-recorded these conversations and recounted to the US federal authorities. The US Department of Justice, through the Federal Bureau of Investigation (FBI), did the corresponding investigations, and finally arrested José Guevara Chacón in Miami, when he appeared at the offices of the Pacific Industrial Bank as representative of Vladimiro Montesinos.

Because of this intervention, and thanks to the information provided by said José Guevara, it was possible to establish that Montesinos was hiding in Venezuela. This allowed arrangements to be made between the FBI authorities and the Peruvian police to locate, arrest, and finally deport Vladimiro Montesinos to Peru.

The judicial and prosecuting authorities of Peru intervened, in 2001, investigated the offices of the Pacific Industrial Bank in Lima, and found information that allowed to establish said mode of money transfer to launder illegally obtained assets. An important amount of money that was in accounts abroad was subsequently returned to Peru.

The “Loan“ Scheme to Circumvent Control Mechanisms of the International Financial System

Another mode that Vladimiro Montesinos and some members of his criminal organization used to avoid the control measures in the international financial system could be called the “loan” scheme. Officials from a bank incorporated in Peru that had a branch in Gran Cayman Islands implemented this scheme.

This modality consisted in that Montesinos or any other member of his criminal organization entered in contact with said banking entity, the same that in turn was representative in Peru of a bank incorporated in the Gran Cayman Islands (with which it was linked). In merit of this “representation”, the officials of the Peruvian Bank made that Montesinos and other individuals involved in his network, subscribe agreements, according to which the latter opened accounts at the Gran Cayman Bank, giving big amounts of money, the same that were consigned as deposits in said accounts.

The Peruvian Bank transferred these deposits to an account at a Bank of New York City, US, from where they were then transferred, again, to the accounts of the branch Bank located at Gran Cayman. This way they avoided the control systems of Peru—since the money delivered by Montesinos and his straw men were not recorded in any accounts linked to them in the Peruvian financial system—and the control system of the US—since said deposits transferred to an

account that said Peruvian Bank had in his name in a New York City bank did not leave any trace or record whatsoever that may link these corrupt people.

Finally, these amounts of money were apparently transferred to the branch of the Peruvian bank in the Gran Cayman Islands to the accounts that Montesinos and his straw men had opened on behalf of offshore companies.

What is interesting of this system is that in the agreement was a clause in very, very small letters and in English through which the person making the deposit authorized the Gran Cayman Bank to give the Peruvian bank the total amount of the deposits in loan—hence the mane of the scheme—, recording the same money as a global credit granted by the foreign bank. The money never left Peru, since the transfers to New York and Gran Cayman were solely nominal, as proven by the authorities of Gran Cayman when they intervened in the accounts of the bank located in the Caribbean.

Upon acknowledgment of this mode, the prosecutor's office requested judicial authorities to freeze and confiscate the money that was in the Peruvian bank, the money having been transferred to accounts of the State in the Banco de la Nación del Perú, and recovering more than USD32 million as a result of the illegal activities of said criminal organization.

“Ant” Transfer System to Avoid a Paper Trail

Sources and coinciding circumstantial evidence have allowed us to establish that the former President, despite Vladimiro Montesinos, did not use the Peruvian financial system for his asset laundering and was very cautious with respect to the use of straw men in the international financial system.

This explains why the assets from his criminal activities have not yet been located. It is worthwhile to note that from the investigations of the Peruvian authorities, the huge difference, for instance, between the income declared by Alberto Fujimori before becoming President and during his tenure, could have been established, with the assets detected abroad and the lifestyle that he, his family, and other direct relatives had. For instance, the four children of the former President were educated in US universities. He could not demonstrate the origin of the money required to pay for their studies, housing or food in the US.

On the other hand, there exist judicial proceedings against former ministers and other officials for corrupt actions perpetrated—as acquisition of goods and buildings—throughout the Peruvian territory where probative elements directly linking the former President to said crimes existed.

A main aspect that impeded to make further investigations was that Peru did not count with the Financial Intelligence Unit incorporated to the Egmont Group, therefore it was not possible to exchange information regarding asset laundering. Additionally, Peruvian legislation had established the offense of money laundering solely for the predicate offense of illegal drug dealing. Only in late 2002 was the legal body of laws modified to extend the assumptions of asset laundering as a product of other crimes.

Notwithstanding the aforementioned, all circumstantial evidence tells us that one mode that the former President used to avoid financial controls was the "ant" system. He took advantage of the frequent official trips he made as President of the Republic, and those made by his relatives and closest relatives, such as his sisters, nephews, and brother-in-law who was appointed Peruvian ambassador to Japan, to transport the money, avoiding customs controls, and to deposit in the account of offshore companies at financial paradises. Since he did not use bank transfers, he left no paper trail, thus avoiding financial controls and making money tracing more difficult.

Total recovered money exceeds USD174 million.

A Special International Cooperation Case: Victor Alberto Venero

Victor Alberto Venero was one of the main partners and straw men of Vladimiro Montesinos in his corruption network. He is being prosecuted for paying millions of commissions to the former advisor in exchange for being selected in diverse fraudulent biddings to purchase weapons and for the misuse of funds of the military and police pension fund, the institution in charge of securing the payment of pensions to the members of the Peruvian army and the national police when they retire. Within the framework of the investigations of Vladimiro Montesinos, the federal authorities of the US located millionaire accounts in the name of Venero, who was also arrested in the city of Miami, State of Florida.

Upon communication of such arrest, Peruvian authorities planned the corresponding extradition request, along with the probative elements that demonstrated Venero's participation in the activities of the criminal organization headed by Montesinos. This is why US authorities issued the corresponding preventive arrest order.

At the same time, the authorities of the Federal Prosecutor's Office of South Florida, using the information gathered by the agents of the US Federal Bureau of Investigation, requested and succeeded in having the Venero funds frozen, thus preventing him from dispose the same.

During the extradition process, Venero appeared before the Justice and acquiesced to the request set forth by the Peruvian State. Such request was admitted by the Federal Justice, who provided that Venero be handed over to the judicial authorities of Peru. Likewise, Venero subscribed an agreement with the federal prosecutor's office of South Florida where he accepted the illegal origin of such assets.

With such agreement, the representatives of the federal prosecutor's office filed a judicial complaint for the confiscation of the frozen monies, a process that concluded with the decision ordering that the same be handed over to the US Federal Government.

After this, the governments of the Peru and the US agreed that in regard to the confiscated goods, and the US Government handed over to the Peruvian Government about USD20 million.

The interesting part of this proceeding is that Venero was involved in a series of illegal acts and "businesses" along with Vladimiro Montesinos, which affected diverse sectors of the government and other Institutions in charge of managing the funds for the retirement pensions of members of the Peruvian army and police. In this sense, it was not possible, as in the other cases, to establish what amount of the monies deposited in the US accounts of Venero those that were frozen corresponded to each institution. However, it could be established, both with the evidence submitted and with Venero's own confession before the North American authorities, such assets came from the public funds of Peru.

This permitted that, within very little time and observing the guarantees of due process, the US federal authorities, in constant coordination with the Peruvian authorities, froze the assets and, after proving the illegal origin of the same, proceeded to repatriate them to Peru. This sent a clear message of their commitment to the fight against the laundering of assets and to prevent the North American financial system to be infiltrated or used by criminal organizations.

Nestor Rojas Godinez

Nestor Rojas Godinez was a straw man of Victor Alberto Venero. He appeared as Venero's partner and legal representative in diverse companies that the latter incorporated to participate in different illegal real estate businesses with the military and police pension fund, all this with Vladimiro Montesinos's consent. These contracts produced significant incomes to the prejudice of the military and police personnel, both retired and active, since the funds and assets of the pension fund were seriously affected.

Nestor Rojas, following indications of Victor Alberto Venero, opened US accounts in the banks of the State of Florida where he deposited large amounts of money owned by Venero, which were the product of the illegal businesses aforementioned. These funds, when discovered, were also frozen by the federal authorities.

When Venero was arrested, and according to the agreement he entered with the authorities of the federal prosecutor's office of South Florida, he recognized that he was the true titleholder of the funds frozen in the accounts opened by Rojas Godinez.

In merit of such information, authorities from the US Department of Justice filed a complaint to confiscate the frozen funds—a process that is the same as Venero's—which resulted in the handing over of such assets to Peru.

It is worthwhile highlighting that, thanks to these actions, Peru was able to recover approximately USD20 million.

As it can be appreciated from the foregoing, the Peruvian anti-corruption authorities—through cooperation with authorities of Grand Cayman, Luxembourg, Mexico, Switzerland, and the US—were able, to identify and freeze approximately USD240 million. Of this amount, about USD175 million have been repatriated through international cooperation, notably:

- a) Execution of decisions dictated in the course of efficient collaboration processes, in which not only the illegal origin of the frozen assets was identified but also even the acquisitions of the Peruvian State that originated the same.
- b) Execution of orders or authorizations to transfer assets, issued by the titleholders of the immobilized or frozen accounts, which were confirmed by the competent authorities of the different countries.
- c) Confiscation or loss of domain proceeding, established by competent US authorities, of funds deposited in banking institutions in such country, coming from criminal acts and subsequent delivery of such assets to Peru.

Chapter 8

Asset Recovery—Needs and Priorities in Asia and the Pacific

Legal Obstacles to Effective Law Enforcement in Corruption Cases

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The perpetrator of a wrongdoing should be punished and the victim of the wrongdoing compensated. This paper assesses how far this principle is carried out in law enforcement against corrupters.

Numerous criteria can be used to measure the effectiveness of law enforcement in corruption cases. This paper sticks to the basic role of law in using the criteria. Accordingly, the law enforcement in corruption cases will be deemed effective, if it results in appropriate sentences being imposed upon corrupters and adequate compensation being given to the State as the victim that suffers financial or economic loss caused by corruption.

Many obstacles hamper the effectiveness of law enforcement in corruption cases. This paper discusses only one kind of them, namely, the legal obstacles or the ones that emanate from or relate to law provisions to be enforced in corruption cases. At the end of the discussion, this paper tries to describe some submissions aimed at removing these obstacles for law enforcement in corruption cases being more effective.

Lenient Sentences

Observing the practice of criminal law enforcement against corrupters in the People's Republic of China, we have to admit that our courts tend to impose lenient sentences upon our corrupters. While in P.R. China a number of corrupters have been executed to death, in Indonesia no corrupter has been imposed with death penalty, even though, like Chinese law, Indonesian law allows death penalty to be imposed upon corrupters under certain aggravating circumstances (Article 2, paragraph 2, of the Law on the Eradication of Corruption).

The law also allows the court to impose life sentence on anyone convicted of having committed corruption. So far, the number of corrupters that have been imposed with life sentence can still be counted by fingers. The tendency to impose lenient sentences is found not only in the ordinary courts (like the district

court) but also in the special court established by law to adjudicate corruption cases that are investigated and prosecuted by the Corruption Eradication Commission.

The leniency of sentence is extended by the corrupt practices in prison administration. Rumors say that by paying a certain amount of money to prison officers, a rich inmate, like a convicted corrupter, may have good accommodation in prison. He can occupy an air-conditioned room, communicate by hand phone, watch good TV programs, and leave his cell at times.

Judging from any sentencing theory, lenient sentences in corruption cases are unacceptable. From a retribution theory standpoint, a lenient sentence is not compatible to the grave injurious effect of corruption; from a preventive theory view point, a lenient sentence has no deterrent effect; and from a corrective theory point of view, a lenient sentence is not adequate to educate a convicted corrupter to become a law-abiding citizen. Hence, the practice of imposing lenient sentences on corrupters should speedily be terminated.

Lenient Substitute Sentences

Indonesian law states that the judgment in a corruption case may contain an order to the defendant (corrupter) to pay for compensation to the State (Article 18, paragraph 1 sub b of Indonesian Law on the Eradication of Corruption). The failure to fulfill this order is threatened by a substitute imprisonment sentence.

Article 18, paragraph 3, of the Indonesian Law on the Eradication of Corruption states that the maximum substitute imprisonment sentence is the same as the maximum imprisonment sentence threatened for corruption acts. This means that Indonesian law allows a judge to impose imprisonment sentence for life or for 20 years on a corrupter who fails to fulfill the judgment for paying compensation to the State. However, so far we have never found a judgment that imposes imprisonment sentence for life or for 20 years on a corrupter as the substitute sentence for the failure to pay for the compensation. Most corrupters are imposed with substitute imprisonment sentence for less than 5 years.

The effect of this practice is detrimental to the effort to secure adequate compensation for the State as the victim of corruption. Lenient substitute sentences imposed on corrupters for their failure in paying compensation to the State do not encourage convicted corrupters to fulfill their legal obligation for compensating the financial or economic loss of the State.

Nonenforcement of Certain Law Provisions

The Law on the Eradication of Corruption contains a good provision that can be used to confiscate corrupter's assets to secure the adequate compensation for the State. Article 38B obligates a corrupter defendant to explain the sources of his assets that are not written in the indictment filed by the public prosecutor. If the defendant fails to show the lawful sources of these assets, the court should deem the assets as having come from corruption, so that the judge has every right to order the confiscation of the assets. To facilitate the enforcement of this provision, paragraph 5 of this article obligates the presiding judge to open a special court session aimed at examining the lawfulness of the sources of the corrupter defendant's assets. Though this provision has come into force since the enactment of Law No. 20 of 2001 on 21 November 2001, no court has ever enforced this article.

Article 38B of the Law on the Eradication of Corruption is not the only law provision that is never enforced. The following are examples of such kinds of law provisions:

- Article 1100 of the (Indonesian) Civil Code states that any debt of a dead individual is inherited by his or her heir(s). A corrupter who has not fully compensated the State for the loss it suffers because of the corruption should be considered a debtor. Accordingly, by virtue of Article 1100 of the Civil Code, the debt falls to the heirs upon the death of the corrupter. So far no lawsuit has been filed against any corrupter's heirs to force them to fulfill their legal obligation as the heirs of a dead corrupter who had not yet fully compensated the State's loss because of the corruption he committed during his life.
- The enforcement of this provision is useful to handle the cases of corrupters who are unwilling to compensate the loss suffered by the State. Convicted corrupter Andrean Waworuntu, for example, has clearly stated that he is unwilling to pay for the compensation. "There is no need for me to pay for the compensation, because I have been imprisoned for life," says Mr. Waworuntu (see *KOMPAS* daily, 23 August 2007, p. 5). To impose the substitute imprisonment sentence upon Mr. Waworuntu as stated by Article 18, paragraph 3, of the Law on the Eradication of Corruption is also impossible, since Mr. Waworuntu has been imposed with life sentence. The only possibility left in handling this case is, accordingly, to implement Article 1100 of the Civil Code that demand the payment of the compensation to Mr. Waworuntu's wife and child(ren) upon Mr. Waworuntu's death.
- Supreme Court Regulation No. 1 of 2000 states that a debtor of a debt amounted at Rp1 billion or more can be locked in certain premises, if

he has no good intention of paying his debt. Imprisonment is 6 months and can be extended for another 6 months by order of the court. So far no debtor has been locked in enforcing this Supreme Court regulation.

- The obstacle to implement this regulation in corruption cases is caused by the narrow interpretation of the meaning of "debtor." A debtor is interpreted as someone who borrows some money from another. Accordingly, a corrupter cannot be categorized as a debtor of the State since he never borrows money from the State.
- We should use a wider interpretation in this regard. A debtor means everyone who has not fulfilled one's financial obligation. Hence, a corrupter who has not yet fully compensated the State's loss is also a debtor, so that the provisions in Supreme Court Regulation No. 1 of 2000 can be enforced on him and his heirs.
- Article 3, paragraph 2, of Law No. 1 of 1995 on Limited Liability Company states that a shareholder can be held personally responsible if he is involved in an unlawful act committed by his company. Though many company directors, managers, or employees have been convicted in corruption cases, no lawsuit has been filed against shareholders in implementing Article 3, paragraph 2, of the Law on Limited Liability Company.

At least in theory we may say that had Article 38B of the Law on the Eradication of Corruption, Article 1100 of the Civil Code, Supreme Court Regulation No. 1 of 2000, and Article 3 of the Law on Limited Liability Company been implemented in practice, the enforcement of law provisions aimed at confiscating assets in corruption cases to secure the compensation of State's losses would have been more effective.

Incomplete Law Provisions and Contradicting Ones

Article 38B of the Law on the Eradication of Corruption is a kind of incomplete law provision. This provision obligates only a corrupter defendant to explain the lawful sources of his assets. This is different from the provision of Article 18, paragraph 1, of the old law on the eradication of corruption (Law No. 3 of 1971), which imposed the same obligation not only on a corrupter defendant, but also on his spouse(s), kid(s), and every person as well as legal entity who is related to the corrupter. Admittedly, this old provision, too, had never been enforced in practice when Law No. 3 of 1971 was still in force.

Law provisions in the Civil Code relating to the transfer of a debt from a dead debtor to his heirs are also incomplete. Article 1057 of the Civil Code allows

an heir to refuse to accept the inheritance of his predecessor. This refusal results in the heir being freed from both the assets and the liabilities of his dead ancestor. Accordingly, an heir of a dead corrupter will be freed from the obligation to compensate the State's loss, if he uses his right under Article 1057 of the Civil Code by refusing to accept the inheritance from the dead corrupter.

The provisions of the Civil Code relating to the refusal to accept an inheritance are incomplete, because there is no provision regulating under what condition the court is allowed to refuse the petition of refusal to accept an inheritance. It is unfair for the court to grant the petition of a corrupter's heir to refuse the inheritance, if the petitioner has many assets whose values are excessive if compared with his lawful sources of income. Accordingly, we need the enactment of law provisions obligating an heir of a dead corrupter to explain the lawful sources of his assets before the court, if he files a petition to refuse the inheritance. The failure to show the lawful sources of the assets should result in the court rejecting the petition.

Our law provisions relating to the transfer of debt to the heirs are also contradicting. While under Article 1100 of the Civil Code the liability of a dead corrupter to pay for compensation to the State is fully transferred to the corrupter's heirs, the Compilation of Islamic Law provides partial liability, wherein an heir is liable to pay his predecessor's debt only at the same amount of the value of the inheritance that the heir receives from his predecessor.

Law provisions on the petition to review the final and binding judgment are also contradicting. The provision in the Code on Criminal Procedures states that the review petition can be filed only by a defendant or his heir, but the provision in the Law on Supreme Court states that any party in a legal case is eligible to file a petition to review the final and binding judgment.

Incomplete and contradicting law provisions are detrimental to the efforts to conduct effective law enforcement in corruption cases, because these provisions confuse law enforcers.

The Flight of Assets

In many corruption cases, the effort to seize the assets of a corrupter to secure the compensation for the State financial or economic loss fails because the assets have been transferred to other persons or have been hidden abroad. This fact does not justify law enforcers to give up. A financial intelligence unit should be established and worldwide cooperation among financial intelligence units organized. The goal of these activities is to trace the whereabouts of all assets directly or indirectly linked to corruption cases.

If a corrupter's asset is still located in Indonesia but the ownership of the asset is transferred to another person, a lawsuit should be filed in an Indonesian court aimed at annulling the transfer of the asset's ownership and confiscating it to secure the compensation for the State. If the asset is located abroad, especially in states with the Common Law system, the petition for Mareva Injunction and Full Discovery Order should be filed in a relevant court in that State.

Many states have ratified the United Nations Convention against Corruption (UNCAC) and the convention has also entered into force. Accordingly, in our efforts to secure the compensation for the State's losses as result of corruption, we can implement the provision of Article 53, paragraph (b) of UNCAC that states:

Each State Party, in accordance with its domestic law:

- (a) ...
- (b) Take such measures as may be necessary to permit its Court to order those who have committed offences established in accordance with this Convention to pay compensation or damage to another State Party that has been harmed by such offence.

The provisions of Article 31, paragraph 1, subparagraph (a) of UNCAC is also beneficial for our efforts in this regard. This provision states:

- 1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable the confiscation of:
 - (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds.

Accordingly, if a corrupter's asset is located in a State that has ratified the UNCAC, a petition or lawsuit can be filed either to the government of the State where the asset is located, or before the relevant court of the State, demanding for the issuance of order or judgment obligating the corrupter to pay for the compensation to the injurious State as well as threatening the confiscation of the corrupter's asset. This kind of petition or lawsuit is justifiable under Article 54, paragraph 1, subparagraph (c) of UNCAC that states:

Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

- (a) ...

- (b) ...
- (c) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property **without a criminal conviction** in cases in which the offender cannot be prosecuted by reason of death, flight or absence or other appropriate cases. *[emphasis added]*

Admittedly, to enforce the provisions of UNCAC on the confiscation of corrupters' assets is also not free from obstacles. The wording of the convention does not secure the immediate implementation of its provisions, since their enforcement is subject to the provision of the domestic law governing the State where the convention is to be enforced. Consequently, a provision of the convention cannot be enforced in a State, if its domestic law does not allow such enforcement. In this case, the provisions of the domestic law should be amended or modified first prior to the enforcement of the convention's provision.

Submissions

Observing the legal obstacles hampering the effective enforcement of law provisions in corruption cases as discussed earlier, the following are the writer's submissions:

1. More severe sentences should be imposed on corrupters. Imprisonment for less than 10 years should become history. In the future, statistical data should show that the average of sentences imposed in corruption cases are not less severe than those imposed in narcotic or drug trafficking cases. Whereas the effectiveness of severe sentence in preventing corruption is still debatable, severe sentences produce a certainty, namely, public acceptance that the sentences in corruption cases are appropriate if compared with the grave injurious effect caused by corruption.
2. The substitute sentence imposed on a corrupter for failure to pay compensation to the State should also be more severe than those imposed so far. The substitute sentence for failing to pay compensation to the State of Rp100 billion or more should be lifetime imprisonment. The court judgment should clearly state that a certain amount of payment for the compensation (say, 50%) results in the change of the life sentence into imprisonment for 20 years. The judgment should also state that the payment of compensation to the State for a certain amount results in the reduction of the period of the imprisonment sentence. This practice encourages convicted corrupters to perform his obligation to compensate the State's financial or economic losses.

3. The practice of providing lenient treatment in prison for corrupter inmates should be abolished. Tight official and social supervision on the treatment of prison inmates should be conducted to ensure that the treatment of corrupter inmates is the same as the treatment for pick-pocket inmates. This practice prevents corrupters from undermining imprisonment sentences.
4. Certain provisions of law that so far have not been enforced should be implemented in practice. Article 38B of the Law on the Eradication of Corruption should be enforced by obligating a corrupter defendant to explain the source of every asset he owns. Failure to show the lawful source of the asset should result in the asset being considered to have been derived from corruption and, hence, should be confiscated. Article 1100 of the Civil Code should be enforced by filing a lawsuit against the heir of a corrupter who has not yet compensated the State's loss until the corrupter's death. Article 3, paragraph 2, of the Law on Limited Liability Company should be enforced by filing a lawsuit against the shareholders of a limited liability company, if the company is involved in a corruption case. Supreme Court Regulation No. 1 of 2000 should be enforced by filing a petition to the court to lock anyone who is legally obliged to compensate the loss of the State because of corruption, if he has no good intention to fulfill his obligation. These practices support the effort to secure the compensation for the State's financial or economic loss.
5. Incomplete law provisions should be completed, whereas contradicting law provisions should be harmonized. We should have law provisions obligating the heir of a corrupter to show the lawful sources of his assets; considering the assets to have been derived from his predecessor's corruption if the lawful sources cannot be identified; and rejecting the petition to refuse the inheritance that is filed by a corrupter's heir who fails to show the court the lawful sources of his assets. We should have law provisions stating that the debt of a corrupter because of failure in fully paying the compensation to the State is transferred in full to the corrupter's heir, even though the value of the inheritance he receives from the dead corrupter does not meet the amount of the compensation the dead corrupter had to pay.
6. UNCAC provisions should be implemented in cases where corrupters' assets are located in States that have ratified the convention. In these states, the provisions of the convention can be used as the legal basis for filing the lawsuit or petition aimed at having the assets

confiscated and the ownership of the assets transferred to the State where the corruption takes place.

In non-ratifying States, a lawsuit aimed at confiscating the assets can be based on the doctrine stating that the provisions of a worldwide ratified convention (like UNCAC) should be regarded as “the general principles of law recognized by civilized nations,” and that the court is obliged to enforce not only written law provisions, but also unwritten ones like “the general principles of law recognized by civilized nations.”

7. Efforts have to be taken to have domestic law provisions that support the enforcement of UNCAC provisions.

Conclusion

As discussed at the beginning of this paper, to punish the perpetrator of a wrongdoing and to compensate the loss suffered by the victim of the wrongdoing is the basic role of law. The failure to impose appropriate sentences on corrupters and the failure to compensate adequately the State as its victim is, accordingly, the failure to materialize the essential role of law in corruption cases.

To correct this failure, people tend to opine that the main factor of the failure is the incorrect or incomplete law provisions. Accordingly, it is necessary to enact new law that amends incorrect law provisions and completes the incomplete ones. Experience has taught us that the enactment of new law requires a long and expensive legislative process.

Experience has also taught us that legal precedents are also effective in correcting the incorrect law provisions as well as in completing the incomplete ones. The Mareva Injunction, for example, is not a product of a new law (legislation) but a product of a court precedent.

Court precedents are found in court judgments. This does not necessarily mean that other legal professionals, like public prosecutors, government attorneys, or advocates play no role in producing court precedents. In many cases, court precedents are initiated by public prosecutors and government attorneys or advocates prior to these being found in court judgments.

In relation to the confiscation of assets in corruption cases, we may say that Indonesian law allows the confiscation of the following assets:

- assets that emanate from corruption,
- assets that belong to a corrupter,
- assets that belong to any person who is linked to a corruption case,
- assets that belong to any legal entity who is involved in a corruption case,

- assets that belong to a corrupter's heir, and
- assets that belong to a shareholder whose company is involved in corruption case.

As discussed, the confiscation of previously mentioned assets to secure adequate compensation for the State—the victim in corruption cases—is hampered by certain legal obstacles. Law enforcement agencies are tasked to remove these obstacles by either drafting new laws or initiating court proceedings that will effectively remove such obstacles.

The Status Quo and Challenges the People's Republic of China Faces in Developing International Cooperation on Asset Recovery

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The Government of the People's Republic of China (P.R. China) signed the United Nations Convention against Corruption (UNCAC) in 2003. In October 2005, the Standing Committee of China National People's Congress reviewed and approved UNCAC, which formally came into effect in P.R. China in December of that same year. UNCAC institutes five mechanisms including international cooperation and assets recovery, which set up legal basis and cooperation structure for P.R. China in international cooperation on recovery of assets derived from corruption. With support from the United Nations, P.R. China initiated the International Association of Anti-Corruption Authorities (IAACA) in April 2006. In October 2006, the first annual conference and general meeting of IAACA was held in Beijing. IAACA includes anti-corruption authorities of different countries as its members and aims at effectively implementing UNCAC and establishing platform for international cooperation on anti-corruption.

Presently, P.R. China is developing various methods and channels for international legal assistance to push forward international cooperation on recovery of assets derived from corruption.

Taking Active Part in Conventions and Multilateral Treaties and Constructing Basis on International Cooperation on Recovery of Assets Derived from Corruption

Conventions and multilateral treaties, as international laws and legal resources of domestic laws of member states, are both foundations in promoting sustainable development of international judicial cooperation and basis in establishing international or regional mechanisms on judicial cooperation. P.R. China has joined nearly 100 such international conventions and treaties, such as

the International Code of Conduct for Public Officials, United Nations (UN) Declaration against Corruption and Bribery in International Commercial Transactions, and UN Convention against Transnational Organized Crimes. According to these conventions and multilateral treaties, the law enforcement agencies in P.R. China are actively engaged in international cooperation on recovery of assets derived from corruption.

P.R. China internally appointed special departments and agencies in charge of international liaison for implementing these conventions, such as the Supreme People's Procuratorate, the Ministry of Foreign Affairs, the Ministry of Justice, etc. P.R. China is integrating its domestic resources and taking consideration of all liaison agencies to establish fast internal coordination mechanisms to tackle legal assistance requests efficiently.

Speeding Up Ratification and Implementation of Bilateral Treaties and Agreements to Promote Concrete Cooperation

P.R. China has signed criminal or civil assistance treaties with 57 countries and extradition agreements with 28 nations. Many articles of these treaties or agreements mention return of proceeds of crimes, and deferment of return and non-infringement on the interests of third party with regard to recovery of assets. For example, the agreement between P.R. China and the US on Mutual Legal Assistance in Criminal Matters regulates such assistance methods as collection of evidence and seizure. Treaties between P.R. China, Canada, and the Russian Federation on mutual legal assistance also stipulate that one member party, on the request of another, should transfer the proceeds of crimes to another. Extradition treaties between P.R. China, Kazakhstan, Romania, Russian Federation, and Thailand and prescribe transfer of proceeds of crimes as well. All these articles provide legal basis for mutual practice in the recovery of assets derived from corruption. Moreover, the Supreme People's Procuratorate of P.R. China has signed over 80 cooperation agreements or memorandums with prosecution agencies of other countries to create direct cooperation for recovering assets derived from corruption.

However, P.R. China still did not take full advantage of these treaties or agreements. For example, the number of legal assistance requests that P.R. China put forward to the US is much less than those rendered by the States. P.R. China needs to strengthen potency of practice in implementing the treaties to establish more stable and effective cooperative relations with other countries.

Strengthening Law Enforcement Cooperation through Direct Cooperation in Asset Recovery

P.R. China in recent years successively convened the Prosecutors General Conference of Shanghai Cooperation Organization, China-ASEAN Prosecutors General Conference, Asia-Europe Meeting Prosecutors General Conference, signed joint declarations, formed conference schemes or regional cooperation mechanisms, and laid foundation for direct cooperation among anti-corruption agencies. To effectively implement UNCAC provisions with support from the UN, P.R. China initiated the International Association of Anti-Corruption Authorities (IAACA) in April 2006. IAACA includes the anti-corruption authorities of different countries as its members and aims at establishing a platform for international cooperation in anti-corruption. As for bilateral cooperation, Sino-US joint liaison group meetings on law enforcement are convened annually to provide a face-to-face opportunity for law enforcement agencies from both sides to focus such issues on criminal case assistance and recovery of assets derived from corruption.

Enhancing International Cooperation in Anti-Money–Laundering to Curb the Transfer of Assets Derived from Corruption

The transfer of corrupt assets has close ties with money laundering. Investigating and jamming transfer channels of money are critical to recovering assets derived from corruption. The most important function of an anti-money–laundering scheme is to scrutinize and investigate the method and process of money laundering and to seize the proceeds of crimes. Enhancing international cooperation in money laundering will facilitate international cooperation on recovering assets derived from corruption. P.R. China will actively participate in international organizations in money laundering and try to join the working group for combating the financial action of money laundering, more as a formal member than an observer. Formal implementation of anti-money–laundering law in P.R. China on 1 January 2007 will prevent and detect money laundering more effectively.

Broadening Case Assistance Channels and Using Multiple and Flexible Cooperation Methods

There are no fixed models for international judicial cooperation, and P.R. China is still in the preliminary stage of developing such model. P.R. China will proceed from actual conditions to enhance international cooperation and case

assistance, and to broaden cooperation channels. Through case assistance, the country could accumulate useful experience, promote efficient communication, and create new cooperation models. According to statistics, most corrupt assets had been transferred to Australia, Canada, the US, and other countries. P.R. China should, under the structure of international conventions or treaties, innovate multiple and flexible cooperation methods for international cooperation on recovering these assets derived from corruption.

To further consummate internal coordinative and international cooperative mechanisms and to adapt to demands of international conventions or treaties, P.R. China will institute the following reforms in legislative and structural fields:

- 1) Revising some of the current laws and enacting new legislations as legal bases for the foundation of international cooperation for recovering assets derived from corruption.
 - a) Enact criminal assistance law besides extradition and anti-money-laundering laws.
 - b) Revise P.R. China's criminal procedural law so that if corruption suspects flee abroad, litigation procedure on confiscation and seizure of corrupt assets could be possible even without court trials or judgments for the offense.
 - c) Consummate laws to protect bona fide third parties. When confiscating or returning concerned property, the competent authorities should issue proper notice to the third parties who might have interests in the property and set a reasonable period for objection. This rule conforms with international standards and helps enhance international cooperation.
 - d) Recognize the validity of judgments made by foreign courts under the principle of equity of judiciaries. Recognition of validity of judgments made by foreign courts under domestic laws or through bilateral or multilateral treaties conforms with the spirit of UNCAC and will benefit P.R. China in international cooperation on recovering assets derived from corruption.
- 2) Using flexible, multiple, and reciprocal ways to prevent transfer of corrupt assets and to seize and make reasonable disposal of assets derived from corruption.
 - a) Consummate real-name banking deposit system and declaration of public servants income system. Establish and perfect the reporting systems on big transactions and implement compulsory reporting systems on special and suspicious transactions to strengthen scrutiny of financial agencies on money transfer.
 - b) Article 57 (5) of UNCAC says "Where appropriate, States Parties may also give special considerations to concluding agreements or mutually acceptable agreements, on a case-by-case basis, for the

final disposal of confiscated property.” As for seized property resulting from anti-money–laundering activities, the international common practice is to cooperate and share. P.R. China will proceed from actual property sharing and join as soon as possible treaties on asset sharing with other countries.

- 3) Setting up internal joint meeting coordination mechanisms composed of different domestic departments and agencies.

Developing international judicial cooperation needs participation from various departments or agencies and such indispensable cooperative methods as diplomatic channels, request for legal assistance, police cooperation, prosecutorial cooperation, cooperation in anti-money–laundering investigations, recognition and enforcement of foreign judgments, etc. International judicial cooperation usually encounters such difficulties and obstacles as conflict of laws, treaties, or states polices. As for a case assistance, interruption or delay in international cooperation is possible. P.R. China will establish an internal joint meeting coordination mechanism on recovery of corrupt assets and develop it into an efficient and integrated one to be able to adapt to the demands of international judicial cooperation.

Implementing the United Nations Convention against Corruption—Making Technical Assistance Work: the German UNCAC Project

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The international community has strengthened their efforts to implement the UN Convention against Corruption (UNCAC). The German UNCAC project responds to short-term and longer-term needs of partner countries and directly contributes to effecting Chapter VI of the convention in the context of bilateral and multilateral development cooperation. Ownership as exercised by partner countries is encouraged either ad hoc or with a longer-term focus on strategically important measures, which contribute to governance reform. Such initiatives further contribute to broaden the base for applying the UNCAC in development cooperation in a way that they respond to country-specific approaches and, at the same time, creating learning and feedback loops nationally and internationally.

The project is innovative in its approach: It promotes UNCAC as a universal anti-corruption instrument, which in turn contributes to de-politicizing the combat against corruption. It furthermore facilitates practical and strategic initiatives for compliance according to requests and priorities with the aim of generating best practices.

The project is contemporary in its context: It addresses anti-corruption in the policy dialogue through the UNCAC provisions; it links anti-corruption to governance and adds to the ongoing domestic debate and to international networking.

Context

Germany has long been an active partner during the negotiation process up to being among the first signatories of the UNCAC in December 2003.¹ Complementing the promotion of the convention at the level of the United

Nations, European Union, and the G8, Germany has initiated a special facility to support the implementation of the UNCAC in development cooperation.²

The Federal German Ministry for Economic Cooperation and Development (BMZ) has commissioned the German Technical Cooperation (GTZ) to implement the German UNCAC project. The project has an explicit focus on technical assistance and information exchange, and contributes to give effect to the provisions of Chapter VI of the convention.

Objective

The project promotes some key provisions of the UNCAC. It aims at supporting the capacity of developing countries and countries in transition to prevent and combat corruption as well as to help them meet their needs implementing convention principles.

Systemic institutional change of a prophylactic nature is promoted, in which individual responsibility and the political will to change on the part of the partner institutions are essential prerequisites. Rules and norms for the public sector, active involvement of civil society in monitoring public services, and denouncing bribery, as well as public ethics that can also be extended to the private sphere are starting points in this context. The prime focus of the project is contributing to mainstreaming the convention in development cooperation.

Approach

Following from ongoing technical assistance projects and programs, particularly in the governance context, which focuses on participation of society in decision making and access to services, transparency of the State, and accountability of decision making institutions and individuals, assistance can be provided along ongoing programs and projects of German development cooperation. All initiatives under the UNCAC project are related to the specific context of partners at the level of national countries and international institutions. The project's country-specific activities not only complement efforts of the United Nations Office on Drugs and Crime (UNODC)³ in its capacity as secretary to the convention but also link with regional initiatives, such as the ADB/OECD Anti-Corruption Initiative Asia and Pacific; cooperate with the OECD Govnet (Network on Governance)⁴; partners with the U4 Anti-Corruption Resource Centre⁵ and the Basel Institute on Governance⁶; and support activities of Transparency International.

For the convention, this means that development cooperation can take action in areas where it is already well established, i.e., where the intensity and continuity of cooperation at the micro, meso, and macro levels is contributing to reform. For the UNCAC project, it means that, because of the complexity of corruption and prevailing budget restrictions, particularly relevant themes and appropriate measures are supported.

The approach chosen is pragmatic. It constitutes a best practice. It aims at supporting the creation of a critical mass of initiatives and results in supporting the implementation of UNCAC at various levels. In this way, the UNCAC project complements UNODC's own efforts and demonstrates what technical assistance, as stipulated in Chapter VI of the convention, can achieve.

Core Themes

Which are the core themes specified by the convention, and what are the options of the technical assistance in the short and medium term? If the preventive measures listed in Chapter II of the convention are to take priority in cooperation, this is because they form the essence of ongoing technical assistance projects in the field of governance. They also mark the boundary to potential contributions on criminal prosecution including asset recovery, which are other important core themes required by Chapters III and V of the convention. Prevention, criminalization, and law enforcement together create the prerequisites to recover stolen assets.

In practical work, the focus is on prevention as expressed in Chapter II. However, in view of strengthening capacities to deal with corruption under the provisions of Chapter VI, the project also responds to the request of partner institutions for criminalization and law enforcement, mutual legal assistance, and asset recovery. From 2005 until mid-2007, 20 pilot initiatives had been supported directly in relation to German development cooperation through national or international partners.

Mainstreaming

UNCAC serves as true mainstreaming instrument.⁷ Echoing the successive loss of reservation to address corruption as a core topic in the policy dialogue, the comprehensiveness of the convention offers firm basis and unique opportunities to bring anti-corruption on the development agenda. GTZ operates 67 country offices worldwide. The German UNCAC project challenges its decentralized structure to generate experience, channeling knowledge according to demand by partner countries, and bringing this knowledge into the

policy dialogue. A large number of German technical assistance initiatives address UNCAC either explicitly or implicitly.⁸ Examples are found in GTZ-supported governance projects and programs in democratic governance, public administration reform and rule of law, public finance management and public procurement (Articles 5–10 and Chapter III); private sector development (Article 12); civil society involvement (Article 13); and in specific initiatives for the promotion of integrity pacts (Article 8), judicial reform (Article 11 and Chapter III), and asset recovery and mutual legal assistance (Chapters IV and V).

Implementing UNCAC in development calls for regional and international cooperation. To this end, the project—in close cooperation with the U4 Anti-Corruption Resource Centre (U4)—initiated an UNCAC resource page at the web portal of the center, which serves as primer for development practitioners. The U4 UNCAC resource page contributes to mainstreaming anti-corruption in technical assistance.⁹ Additionally, it accommodates the results of a broader study in selected countries on how processes of creating national anti-corruption policy frameworks as stipulated in Article 5 of the convention are organized.

Legal and development practitioners are expected to use the assessment and recommendations to promote initiatives for creating national anti-corruption policies and strategies. Finally, the results of the study will be used to facilitate the implementation of UNCAC in terms of promoting a methodical approach and of contributing to the working groups established by the 1st Conference of States Parties on the review of the implementation of UNCAC and on technical assistance. The outcome of the study, expected to generate a best practice, also complements the efforts of the UN Office on Drugs and Crime.

The UNCAC project serves German development policy. Its advisory activities vis-à-vis the Federal German Ministry for Economic Cooperation and Development broadens the scope for making UNCAC the main international anti-corruption instrument in German development cooperation. The expertise generated is used in the policy dialogue with African, Asian, and Latin American partner countries. In this regard, the project contributes to Chapter VI of the convention in a broader context.

The project is engaged in the activities of the OECD/DAC Govnet where anti-corruption, in the context of promoting governance, is an effort for bringing harmonization of funding agencies in development cooperation forward. Support is also made available to regional initiatives such as the Pan-African forum against corruption of February 2007 or the cooperation with the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. Regional cooperation offers opportunities for a needs-based support to partner countries. At the same time, such initiatives allow to direct German development

cooperation more specifically toward anti-corruption in partner countries of the region. With the ratification of the UNCAC by most partner countries, corruption is no longer a taboo theme.

Advocating Compliance

The ratification of the UNCAC requires adapting national legislation (legal compliance) and enacting effective implementing regulations (full compliance). As a first initiative for promoting legal compliance, the project had responded to the request of the Indonesian Corruption Eradication Commission to support a gap analysis or compliance review. This Initiative, which started in late 2005 and was completed prior to the 1st Conference of States Parties (COSP), complemented the Indonesian ratification process. In parallel, a legal compliance review was done in Colombia, but in a different way.¹⁰

The Indonesian gap analysis¹¹ compares national anti-corruption laws and initiatives with the provisions of the UNCAC. The analysis was drafted in a consultative process involving national stakeholders and, at a certain point of time, international expertise. The process explicitly took note of the requirements of the Paris Declaration in terms of ownership, which lay with the Corruption Eradication Commission. The Indonesian team of experts was supported at a stage where the gap analysis was already completed with an exclusive view on the national legislation by a team of international experts. The dialogue resulted in a broad reflection on the assessment vis-à-vis international state of the art and subsequent adjustments according to what the Indonesian expert team considered appropriate. The consultative process, which was the main component of the German contribution, further aimed at a broad follow-up, which has been established and which is expected to bring full compliance forward. The present initiatives serve Indonesia's preparations for the 2nd COSP.

Conceptually, the core of the gap analysis or compliance review is an assessment of the legal, procedural, and practical consequences of the ratification of the UNCAC. The results promote national law-making processes, especially the hands-on implementation of measures targeting prevention and the control of corruption at the national and regional levels. The approach complements the efforts of the working group on the review mechanism of the convention and the self-assessment checklist in particular. In this regard, the gap analysis in itself and the process in particular are considered best practice.

German development cooperation remains engaged with the Indonesian Corruption Eradication Commission (KPK) through a number of additional activities, which include the development of a public administration service act, integrity pacts in the public administration, a knowledge center in the KPK, and

advanced training in asset recovery for KPK personnel. All activities are part of a broader governance engagement in the bilateral development cooperation. In fact, one could conclude that the gap analysis has accentuated and triggered a chain of follow-up activities for implementing the UNCAC.

Political corruption is one core impediment to governance. A potentially innovative and new initiative to measure transparency in party and campaign funding is the CRINIS project of Transparency International.¹² It directly addresses Article 7 of the convention. The initiative, which was developed and tested by Transparency International in Latin America and which is to be further tested in African and Asian countries for broader application at a later stage, is supported by the German UNCAC project. CRINIS is a diagnostic tool for benchmarking transparency and accountability in political finance. The tool evaluates the levels of transparency built into current national legislation and political financing practices of political parties and candidates during election campaigns, as well as the financial activities of parties in nonelection years. It has the capacity to detect weaknesses and strengths in a given country's system. It serves awareness raising and advocacy for political parties, electoral authorities, corporate donors, voters, and other key national and international stakeholders. The CRINIS index¹³ allows for a thorough evaluation of the current situation in each country under review and for comparisons between countries. It helps identifying and sharing best practices. Application of the tool produces recommendations for reform.

International Initiatives

In addition to mainstreaming anti-corruption in German bilateral development cooperation through UNCAC and specific support for compliance at the country level, the project addresses international cooperation. The U4 partnership, which serves as kind of institutionalized interface between policy provisions as agreed upon by the OECD development ministers, is considered pivotal for transferring messages to the operational level. Cooperating with the UN Office on Drugs and Crime (UNODC), wherever this is feasible, is considered tremendously beneficial for bringing field experience into the working groups established by the Conference of States Parties.

The recent establishment of a formal cooperation with the secretariat of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific¹⁴ underlines the commitment of German development policy to broaden the scope that the convention offers. The project facilitates the work of the secretariat for its work program 2007/2008 and contributes to linking the work of the OECD Anti-Corruption Division with that of Govnet's Anti-Corruption Task Team. The ADB/OECD Anti-Corruption Initiative is considered instrumental in bridging the

outcome of policy dialogues and the field level. The 10th Steering Group meeting of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific to be held in early September in Indonesia is an occasion to address this issue.

The Steering Group meeting is to be followed by an international seminar on asset recovery organized for the Initiative by the Indonesian Anti-Corruption Commission in cooperation with UNODC, the Basel Institute on Governance and sponsored by Germany, the Asia Foundation, the Australian Agency for International Development (AusAID), the Swedish International Development Cooperation Agency (SIDA), and the US Department of State. The German UNCAC project stands ready to sponsor similar events for African and Latin American countries in 2008, thereby responding to the increasing need for supporting capacities in partner countries for asset recovery and mutual legal assistance.

A functioning and independent judiciary, or more contemporary, rule of law, in addition to an efficient public administration and an active dialogue between the State, civil society, and business is one of the core conditions for public and private investment. The Bangalore Principles for Judicial Conduct, which directly address Article 11 of the convention, are responding to the demand for judicial reform and integrity of the judiciary as one of the basic principles of democratic governance. The Judicial Group on Strengthening Judicial Integrity, an informal group of chief justices and senior justices worldwide, developed principles on judicial integrity, which took off in Bangalore, India, in February 2001. The principles are designed to guide judges and to offer the judiciary a framework for regulating their conduct.

On request of the UN Office of Drugs and Crime (UNODC), the German UNCAC project has been supporting the process of bringing the Bangalore Principles into the mainstream by funding the compilation of a commentary, contributing to revising the principles according to comments from member states and drafting procedures for effective implementation.¹⁵ The project further advocates German-funded projects in law reform and rule of law to apply the principles. The Bangalore Principles have a sound potential for development cooperation, possessing the capacity to be transferred 1:1 to projects of bilateral and multilateral development cooperation in law and justice. Germany, in addition, supports UNODC's judicial integrity program, where the principles are considered a key instrument.

Capacity Development

Capacity development, together with the fight against poverty, is at the center of German technical cooperation.¹⁶ Conceptually, both link up to the

promotion of democratic reform and governance in all sectors, which ultimately involves preventing corruption. Yet it would be unrealistic to assume that, without directly addressing the issue as one of the fundamental impediments in development, progress in combating corruption will be achieved. The UNCAC project observes an increasing demand for anti-corruption expertise, general and specific know-how, and response to specific requests from partner institutions. This requires additional training capacity and engaging staff in a dialogue on how to make use of anti-corruption knowledge. Additionally, networking within German development organizations as experienced in GTZ's established anti-corruption network of practitioners needs to be continuously fuelled with new and innovative information.

The project supports UNCAC-related initiatives organized by the UN Office of Drugs and Crime in response to the resolutions of the first Conference of States Parties, such as the expert conference in Montevideo in May 2007, efforts to bring asset recovery forward, facilitate technical assistance, and the review process. In addition, it encourages and sponsors bilateral country activities, such as anti-corruption education by the anti-corruption commission of Sierra Leone in context with postconflict rehabilitation (Articles 6, 7, 8); governance reform in Ghana (Chapter II); the creation and dissemination of a Guide Book on the Prevention and Combating of the South African Anti-Corruption Act (Articles 5, 7, 8, 13); stock-taking of the engagement of nongovernment organizations in anti-corruption in Arabic countries (Article 13); or strengthening the capacity of, for example, the Indonesian Corruption Eradication Commission and explicitly addressing UNCAC provisions (Articles 6, 10, 36).

In Kenya, the project cooperates with the GTZ Programme for Good Governance Support. This program sustains and supports an online whistleblower corruption reporting system at the Kenyan Anti-Corruption Commission¹⁷ since mid-2006. The system allows citizens to report corruption cases anonymously. This practice directly reflects on Articles 8, 13, and 33. The system responds to information, and creates material for investigation and prosecution at a certain time. It guarantees absolute anonymity to the person reporting a corruption case. The positive results with this information system—in fact, a best practice—should encourage other anti-corruption commissions to establish similar structures.

Capacity development for asset recovery as laid down in Chapter V of the convention, being one of its fundamental principles and an important issue for developing countries where state budgets were plundered, is supported on a selective base. The project joins an international asset recovery capacity development initiative led by UNODC, INTERPOL, and the International Asset Recovery Centre in cooperation with U4 partners, the US, Switzerland, and others.

Through the International Asset Recovery Centre, the project funds and facilitates an advanced training program for investigators and prosecutors from Indonesian law enforcement agencies. This Initiative is related to the aforementioned 10th Steering Group meeting of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific and the international seminar on asset recovery.

In addition to country-specific and international activities, capacity development needs to be dealt with by development organizations themselves. The principles for joint donor action in anti-corruption of the OECD-Development Assistance Committee, the national compliance initiatives of the OECD Anti-Bribery Convention, similar initiatives of the anti-corruption conventions of the Council of Europe, and finally of the UN are binding provisions. In this respect, the project has been active in bringing the potential of these anti-corruption instruments, on the in-house agenda of German aid institutions. This in turn triggered a higher demand for base and advanced staff training, to which the anti-corruption training facilitated by the U4 Anti-Corruption Resource Centre contributes, requests for advisory services and making corruption a case for project planning and design and a consideration for policy planning of GTZ and BMZ. Capacity development in the end reflects learning processes that contribute to improved knowledge of German development organizations.

NOTES

- 1 Available: www.bmz.de/cgi-bin/search.pl?sprache=en&query=Corruption
- 2 The term UNCAC Project describes this German technical assistance initiative Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ). Available: www.u4.no/projects/project.cfm?id=688
- 3 Available: www.unodc.org/unodc/en/corruption.html
- 4 The Paris Declaration on Aid Effectiveness (2005) in its statement of resolve requests the international donor community for joint and coordinated action in anti-corruption as expressed through the three principles of the Development Assistance Committee, which are well linked to the provisions of Chapter VI of the UNCAC.
- 5 The comparative advantage of U4 lies in the platform it provides for its six partners and through them. It can best be described as being based on particular themes, including dialogue with parliaments, parties, partner organizations, civil society organizations, and the private sector. Available: www.o4.no
- 6 The Basel Institute on Governance is an independent nonprofit institution devoted to interdisciplinary research and policy advice in the areas of public, corporate, and global governance. Combating corruption has been a particular focus for many years. Available: www.baselgovernance.org/icar/
- 7 Mainstreaming refers to making UNCAC and its potential for promoting governance known to practitioners and legal experts and supporting its provisions according to country-specific need.

- 8 Eschborn. 2007. *Supporting the Implementation of the United Nations Convention against Corruption: What Technical Assistance Can Do. Examples from South Africa, Ghana, Indonesia, and Latin American Countries*. Available: www.u4.no/projects/project.cfm?id=688
- 9 International Cooperation Workshop on Technical Assistance for the Implementation of the United Nations Convention against Corruption Montevideo, June 2007, U4 Background Paper. Available: www.u4.no/pdf/?file=/themes/uncac/documents/technical-assistance-background-paper.pdf
- 10 The differences in performing gap analyses or compliance reviews are demonstrated in a recent working paper: Eschborn. 2007. *A Comparison of Compliance Reviews based on the UN Convention against Corruption: Indonesia, Colombia, Cameroon, and Germany.*, Available: www.u4.no/projects/project.cfm?id=688
- 11 Available: www.kpk.go.id/modules/news/index.php?lang=indonesia
- 12 CRINIS is a Latin term and stands for "ray of light." This is a joint project from Transparency International and the Carter Center to promote transparency and accountability in political financing in Latin America.
- 13 The index is a composite indicator consisting of up to 140 parameters grouped according to a set of main criteria for political transparency. The index measures transparency through the evaluation of records. It does not provide a ranking but shows on a scale the state of legislation, procedures, and practice. Available: www.transparency.org/regional_pages/americas/crinis
- 14 Available: www.oecd.org/pages/0,2966,en_34982156_34982385_1_1_1_1_1,00.html
- 15 Available: www.unodc.org/unodc/corruption_judiciary.html
- 16 Capacity development was GTZ's annual theme for 2007. Available: www.gtz.de/en/17870.htm
- 17 Available: www.kacc.go.ke/default.asp?pageid=62

The Role of Donors*

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Until recently, policies relating to tackling international financial crime and development were worlds apart. This Chapter seeks to illustrate that recent changes in both policy areas are bringing the two worlds closer together.

The relationship between asset recovery and development policies

In the past, development policies were focused on project support: the assumption was that direct interventions would eventually have a spill-over effect and promote development in general. In reality projects often failed for a number of reasons, including their strict adherence to timeframes, a lack of coordination and the fact that they were donor rather than country-owned. In 2005, with this experience in mind, the ministers of all the OECD Development Assistance Committee (DAC) countries, as well as a large number of countries of the South, adopted the 'Paris Declaration on Aid Effectiveness'. This Declaration offers a new framework for development policies based on 'ownership, harmonisation, alignment, results and mutual accountability'. According to this approach, the partner countries themselves are in the driving seat (ownership) and donors should base their overall support on partners' national development strategies (alignment). Harmonisation implies that donors work together in their development efforts, thus avoiding overlap and promoting mutually reinforcing policies.

In practice, this new approach shifts the emphasis from project to programmatic or general budget support. Donors give financial support for the implementation of partner countries' own poverty reduction strategies, while at

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the same time entering into a policy dialogue. In this context, sound public financial management is essential. Without it, the partner government lacks the planning and control necessary to implement its poverty reduction strategy. It is not surprising, therefore, that public financial management is a priority area in most policy dialogues.

From here it is only a small step to the fight against international financial crime. In his recent book,¹ Raymond Baker points to the enormous crime-related capital movements from developing countries to the industrialised world. He makes a distinction between capital movements related to crimes such as drugs and human trafficking, capital movements related to corruption and capital movements as a consequence of unfair transfer pricing policies of multinational companies.

From a development perspective, it is hard to fathom that the monetary value of these South-North flows is greater than the total development budget. After all, money that leaves the country as a consequence of crime, by definition cannot be used for the development of the country concerned and serves solely the interests of the individuals concerned.

Given that today, donors rely on the strategies developed by partner countries themselves, they can no longer afford to ignore crime-related capital movements. However, whenever these issues are raised in the policy dialogue between donors and partner countries, the latter point to the fact that the proceeds of crime are kept, not in their own banks, but in the banks of the industrialised countries. It is thus clearly a matter for the international community at large to ensure that the proceeds of crime are channelled back to the countries of the South.

This, in a nutshell, is what has created the recent focus of development specialists on the fight against international financial crime. The development community has every interest in seeing that these resources are returned to partner countries, so that they can be used for development purposes. Moreover, it may negatively affect public perception of aid effectiveness, if this aspect is neglected.

How to bridge the gap?

It is one thing to become aware of a problem; it is quite another to solve it. When Development ministers turn to their colleagues in the departments of Justice and Finance, their response is generally one of support for the fight against financial crime, not only because of its implications for development, but also because the criminal networks extend beyond the South to the industrialised

countries themselves. They normally add, however, that in order to fight such crime, and repatriate the proceeds, countries of the South need to seek international legal assistance, for which there are clear rules. In practice, their legal systems often lack the quality, and the resources, to use such (costly) procedures.

This can result in deadlock: if the countries of the South are unable to engage in international procedures for the recovery of stolen assets, firstly, the assets will never be repatriated and secondly, international crime will continue to grow.

Development policies have a key role to play in helping to break this vicious circle: good governance is a cross-cutting theme in development and includes a well-functioning legal system. Whether through the policy dialogue in the case of budget support, or through direct support for specific programmes or projects, donors are increasingly involved in initiatives aimed at good governance. By supporting the development of the legal sector, donors can help to improve the basis for international assistance: for example, the integrity of the judiciary is essential for the value of the request for international legal assistance, since in order to avoid abuse of these procedures, the underlying ruling must be sound and impartial.

This way, not only is there a development interest in better international co-operation to fight international financial crime, but the ministries of Justice and Finance, who by definition take an active interest in this area, can also benefit from development efforts, if they lead to better quality requests for international legal assistance.

United Nations Convention against Corruption

The United Nations Convention against Corruption (2003) (UNCAC) has brought the two worlds of development and the fight against international financial crime even closer. The Convention provides a comprehensive framework for combating corruption. Its Chapter on asset recovery brings together a number of specific provisions aimed at facilitating international co-operation in this area. The Convention is not confined to the legal setting, but explicitly calls for technical assistance to help countries in international asset recovery procedures.

In the run-up to the first Conference of the States Parties (COSP), held in Jordan, in December 2006, the Netherlands advocated a two-pronged approach for making progress in this area. First, it recommended that steps should be taken to exchange best (and worst) practices in the field of

international legal assistance procedures aimed at the recovery of stolen assets, and to increase the quality of requests for such assistance (e.g. through support for the legal sector of partner countries). Secondly, in support of the above long-term strategy, it proposed that a mechanism be created to provide countries in need of assistance with the appropriate legal and other technical expertise to help them use international legal procedures. This should help countries in the short-term.

The Netherlands submitted a proposal to the COSP (Jordan 2006) for a Trust Fund, to be used to pay for the necessary expertise. Although the idea itself was relatively straightforward, the rules of implementation were more complicated, particularly with regard to: the selection criteria for offering assistance in individual cases; and the safeguards for ensuring that the assets, once recovered, would indeed contribute to development of the country concerned and not be stolen and transferred abroad again.

During the informal consultations that preceded the COSP, the principal elements of the Dutch proposal received wide support, although many delegations had questions about the modalities. Occasionally, there was still evidence of a clash of the two worlds: 'why should the industrialised countries support rich lawyers to use international asset recovery procedures against themselves?' As discussed above, however, this point of view is now obsolete, since today both worlds agree on the importance of the fight against international financial crime and effective international procedures are essential in this respect. Moreover, even if in practice legal and technical experts did benefit from the fund, it is hoped that by centralising the hiring of legal and other expertise, it should be possible to lower the costs, as law firms interested in appearing on the roster of experts would do so for a modest fee. The fund could therefore be helpful in lowering the fees of the experts concerned.

The COSP (Jordan, December 2006) did not, in the end, adopt the Dutch Trust Fund proposal for a number of reasons, including: doubts over whether it could succeed in countries where the longer term structural issues of the overall quality of the legal system had not been addressed; and the issue of whether the requesting state should provide guarantees for the proper use of the recovered assets.

However, in May 2007, discussions held at a seminar on asset recovery organised by the International Centre for Asset Recovery (ICAR), revealed a general consensus that the provision of legal and other technical expertise to carry international procedures, *did* meet the short-term needs of many countries of the South. Against this background, the United Nations Office on Drugs and Crime (UNODC) developed a proposal for a pilot programme, which is part of

the Stolen Assets Recovery (StAR) Initiative, set up jointly by UNODC and the World Bank.² It is largely based on the initial Dutch proposal and foresees the establishment of a fund to run a programme that provides technical and legal expertise to assist countries in recovering their stolen assets. The advantage of it being cast in the form of a pilot programme is that participating donors – the Netherlands Government has already committed a total of USD 2.5 million to the programme for 2009 and 2010 – and receiving countries can evaluate whether the expertise provided in fact helps asset recovery procedures and whether the idea of organising such assistance centrally is cost-effective.

Conclusion

It remains to be seen how far the involvement of the development community in the fight against international financial crime will go. In a speech at the international conference on 'Improving Governance and Fighting Corruption, New Frontiers in Public-Private Partnerships' (March 2007), organised by the OECD, the World Bank and the Belgian Government, the Minister for Development Co-operation of the Netherlands, Bert Koenders, emphasised that progress in the fight against corruption and other forms of financial crime depended on the international community joining forces. It is essential that the industrialised world and the countries of the South work closely together: strong working relations between forensic and other experts in the South and the North are required, as is assistance to the countries of the South to build a well-functioning legal system and to bring international asset recovery procedures to a successful close. I remain hopeful that now that the two worlds of crime-fighters and development specialists have met, they will continue to strengthen their co-operation and that, before long, international asset recovery procedures will become more effective. UNCAC provides an excellent legal framework: a framework that can be developed further by legal experts and development specialists working together. The first signs are positive: I am therefore optimistic that during the second COSP, to be held in Bali, in January 2008, further progress will be made.

NOTES

- 1 Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System, Raymond W. Baker, Wiley, 2005.
- 2 See: <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf>.

Closing Remarks: Building Trust and Developing Capacity to Strengthen the Implementation of the United Nations Convention against Corruption

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The last 2.5 days have been very rich and enlightening. Therefore, it would be presumptuous on my part to try to summarize the very interesting presentations and discussions that took place.

What I thought I would do instead is share with you what I am taking away from this seminar. I will start with some thoughts that came to mind during those 2.5 days, and some thoughts that preceded this seminar and were reinforced and confirmed by it.

I will start with the very topic of this seminar, “Mutual Legal Assistance,” which, with your permission, I would like to approach from the broader perspective of international cooperation in criminal matters.

What I am taking away from this seminar is a strong desire to make international cooperation in criminal matters a day-to-day affair and make it work as part of daily life, especially for practitioners. I have heard—and this is one of the thoughts with which I came here, which the seminar strongly reaffirmed—that there is an urgent and pressing need to build trust and confidence. That is a noble cause. However, the question is: how do we do that? Many speakers emphasized that we need to pay attention to central authorities, especially for mutual legal assistance. Others stressed that we also need to build and sustain informal networks. I think what we need to do is to make a conscious effort to overcome prejudice and preconceived notions. If we are going to build trust, if we are going to build confidence, this, I would suggest, must be the very first step. And if we manage to take that step, or even as part of taking that step, we must engage, consult, and discuss. We must explain before we complain, as my friend Bernard Rabatel said. This would be the most important thought that I am taking away. We must all work together to make this happen. It is not going to

happen overnight. It will take time, but we must start. But I am optimistic because I see a strong desire to succeed shared by everyone.

In addition to building trust, we must also build capacity. And how do we do that? We must invest. And when I say invest, I address this remark to everyone: We must invest to the limit of our ability. We must invest in people, in institutions, in education, and in relationships. Not all of those require money. But I think it is a shared and common responsibility. We cannot expect everything to come in the form of technical assistance. We must match technical assistance with our own investments, of course, within the inevitable limits imposed by levels of development and by competing priorities. But we must all invest in those key elements: people, institutions, education, and relationships.

Let me come now to another set of thoughts that I took away, those broader than international cooperation. When we started the negotiations for the United Nations Convention Against Corruption (UNCAC), it was beyond my wildest dreams that the day would come that we will have a panel of distinguished friends and colleagues like Nicola Bonucci and Dedo Geinitz who would speak about this convention in such a laudatory way. Yet the day has come, and I am gratified and grateful. It is far better for them than for someone like me to say those things because it means that we have achieved something with this convention after all.

This brings me to the next thought: it is important to make UNCAC part of our lives. And how do we do that? I would say start in a simple way.

First of all, read it. Read its words, but read its spirit as well. Read all of it, not just one part. The convention has been constructed to function as an integral whole. One of its key characteristics is its equilibrium, the balance with which it has been built: one part reinforcing the others and vice versa.

Next step: understand it. Try to understand and appreciate its vast potential. Nuhu Ribadu yesterday gave us a glimpse of its vast potential. He said that as soon as he started implementing the convention, his life and the life of his country changed. Let us try to do the same in other countries of the world. We must also understand the context in which the convention was developed and in which it operates. We live in a complex world. There are political exigencies and priorities, and it would be silly to ignore them; we must take them into account in everything we do. We must also take into account the history of the convention, how it came into being. And there were here colleagues from the Organisation for Economic Co-operation and Development and other organizations that gave us an idea of what happened and what led to the convention. We must all understand the importance of this history and the importance of the context.

Third step: implement it. Here we must do several things both at the political and at the practical levels. We must sustain the priority that it enjoys. We must also understand that by keeping this priority high, we will also be raising expectations. It would be equally important to make sure that these expectations remain realistic. In the 2 years since the convention came into force, I have worked with a number of countries (many represented in this room including our host), which have made tremendous progress, have taken bold steps, and have overcome enormous difficulties. The work of Nuhu Ribadu is only one example. Yet, I would hazard to say that 6 or 7 out of the 10 articles that appear in the press about the situation of corruption in those countries are negative. Why? Because the expectations are higher than the achievements. We need to make sure that those expectations are tempered. We must also inject a level of realism in what we can expect and what can be achieved. We must invest in implementation, in the same token and in the same manner as investing in international cooperation. That investment applies across the board and is not completely a matter of technical assistance. It has to come from everyone.

Fourth step: insist on what I would call vertical implementation. Nicola Bonucci mentioned this morning the importance of taking what he called the proactive approach, not just focusing on legal provisions but going beyond. I could not agree with him more. I think it is important to look at the convention in its entirety, also in terms of its provisions that whatever political reason during the negotiations did not assume a mandatory formulation. Nevertheless, they play a very important role.

Fifth step: embrace it. Embracing the convention means overcoming prejudice and inertia. That will be a special challenge. I hear very often representatives of what one would call wealthier States or developed countries saying that the convention did not really change anything. My answer to that is, if everything was all right, we would not need the convention. We must overcome that notion that everything is perfect; we do not need to do anything because of the convention. All of us have to do something. So we must really embrace the convention fully and try to embrace change at the same time. Change can be forced on us or we can shape it. I would suggest it is better to shape it than to have it imposed on us. Earlier today someone said: "Oh, but this is not a priority for me." And the first thought that came to my mind is: I hope it does not become a priority because of a crisis.

Finally, nurture it. And that is extremely important. I was particularly grateful for the questions raised this morning about what the Conference of the States Parties to the convention will do and what it can usefully recommend. But for the conference to function, we must support the intergovernmental process. We

must respect the governmental process. It works in its own ways. It is a meeting of minds coming from different parts of the world with different priorities and different levels of comfort. We must consider all those; they are equally important no matter where they come from. And we must understand the intergovernmental process. We must help others understand it, work in it, and work with it. This is how we perceive our function as the Secretariat of the conference.

Those are very briefly the thoughts that I am taking away. Allow me to conclude by the organizers of the seminar and the other institutions that participated. I can assure you, it is a pleasure to have partners. And I am grateful to all the donors who have embraced this effort with generosity, patience, and confidence.

Thank you all for your attention and your participation.

Appendixes

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Seminar agenda

Wednesday 5 September 2007

13:00 – 14:00 **Opening and Keynote Addresses**

Welcoming Remarks

Taufiqurrahman Ruki

Chairman, Corruption Eradication Commission of Indonesia

International Cooperation to Combat Bribery

Patrick Moulette

Head, Anti-Corruption Division, OECD

UNCAC: An Innovative Legal Framework for Asset Recovery

Kuniko Ozaki

Director, Division for Treaty Affairs
United Nations Office on Drugs and Crime

Indonesia and the UNCAC Review Mechanism

Amien Sunaryadi

Vice Chair, Corruption Eradication Commission, Indonesia

Global efforts to fight bribery and corruption are underpinned and promoted by international instruments and initiatives, most notably by the recent UN Convention against Corruption (UNCAC) as well as the pioneering OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD anti-bribery convention). These instruments particularly emphasizes mechanisms to facilitate mutual legal assistance in corruption matters and testify to the importance of international cooperation for a successful fight against corruption. The OECD anti-bribery convention requires that bribes and the proceeds of bribery be subject to seizure and confiscation. Asset recovery is a basic principle of the UNCAC, which consequently dedicates an entire chapter to procedures and conditions for the seizure, confiscation, and repatriation of assets, the implementation of which is generally considered of utmost importance in today's global efforts against corruption.

Of additional relevance to the Asia and Pacific region, the ADB/OECD Anti-Corruption Action Plan for Asia and the Pacific, which supports the implementation of UNCAC and the principles of the OECD Anti-Bribery Instruments, also underscores the importance of bilateral and multilateral cooperation in investigations of corruption.

This session seeks to assess the role of international instruments as facilitators for international legal cooperation and outlines the standards that state parties to these instruments are required to implement.

14:00–14:30 Group photo and coffee break

14:30–15:45 **Legal and Institutional Challenges in Mutual Legal Assistance**

Chair: **Dr. Maria Gavouneli**
Vice-Chair, OECD Working Group on Bribery

Marita van Thiel

Public prosecutor, National Coordinator for Corruption Investigations,
National Public Prosecutor's Office, Netherlands

MLA and Asset Recovery in Asia and the Pacific: Overview of Trends

William Loo

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

Self-Assessment under UNCAC Provisions Relevant for Requesting and Providing MLA and Asset Recovery

Prof. Dr. Romli Atmasasmita

Professor of International Criminal Law, University of Padjajaran, Indonesia

The effective and prompt provision of mutual legal assistance in criminal and civil proceedings is central to the struggle to investigate and successfully prosecuting cases of corruption. However, as desirable and simple a proposition this is, serious legal and practical impediments often hamper legal assistance despite the increasing number of international treaties and bilateral arrangements that exist across the world.

Mutual legal assistance is still often declined based on a lack of dual criminality despite the best efforts of international conventions and MLA schemes to promote a culture of broad interpretation. Furthermore, even when requesting States attempt to comply diligently with the demands of the requested State or comply fully with the criteria of the relevant treaties, there may still be serious institutional or structural problems such as a lack of expertise in either the requesting or requested states, inadequately funded central authorities, or simply a genuine lack of will to assist in the investigations being conducted. These problems are neither restricted to one geographical area of the world nor to developing-versus-a-developed-world phenomena. These problems can often be found in some of the most advanced legal traditions in the world.

This session shall first attempt to identify, from the perspective of a practitioner, what obstacles stand in the way of effective and prompt MLA, including how new provisions of UNCAC can help in overcoming these obstacles. It will then proceed to outline how Asia and Pacific jurisdictions respond to these challenges, based on a thematic review that the members of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific conducted in 2006/2007. Finally, the session will look in particular at the mechanisms available for MLA and asset recovery in Indonesia and at results from Indonesia's 2006 UNCAC compliance review in this regard.

15:45–17:00	<p>Formal and Informal Paths to Obtain International Legal Assistance</p> <p>Chair: Bernard Rabatel Avocat Général, Court of Appeals of Lyon, France</p> <p><i>Formal Procedures: Experience from Thailand</i></p> <p>Torsak Buranaruangroj Chief Provincial Public Prosecutor, International Affairs Department Office of the Attorney General</p> <p><i>Combining Formal and Informal Mechanisms: Ways for Speeding up MLA</i></p> <p>Jean-Bernard Schmid Investigating Magistrate, Geneva, Switzerland</p> <p>There are a number of ways in which requests for information to other countries can be made, namely, assistance by way of a letter of request, mutual legal assistance, or through an informal request for assistance, i.e., mutual assistance. The extent to which countries are willing to assist without a formal request varies from country to country, and is dependent in many cases on their own domestic laws, how good the relations are between the respective countries and even the attitude and opinions of those in the relevant agencies. If there are good working relationships, then often people will do what they can to assist. It is impossible to definitively list the types of inquiries that can be made informally but, as a general rule, if the inquiry is routine and does not require coercive powers, it may well be possible to make them without a formal letter of request. Where such inquiries can be undertaken through this mechanism, this should be encouraged to save time if nothing else. However, great care should be taken to ensure that using informal means to secure assistance does not legally jeopardize the information so received.</p> <p>This session shall explore the circumstances in which some investigations can be advanced rapidly through efforts to seek international assistance through informal and formal means. The session shall also carefully consider the pitfalls of seeking informal assistance and when assistance through the more formal channels needs to be sought.</p>
19:00	<p>Dinner hosted by the Corruption Eradication Commission (KPK) of Indonesia</p>

Thursday 6 September 2007

09:00–10:15 **Tracing, Freezing, Confiscating, and Repatriating the Proceeds of Corruption**

Chair: **Andrew Boname**

Regional Anti-Corruption Advisor, American Bar Association-ROLI, Asia Division

Sylvia Grono

Assistant Director, Criminal Assets, Commonwealth Director of Public Prosecutions, Australia

Theodore S. Greenberg

Senior Financial Sector Specialist, Financial Market Integrity Unit, Financial and Private Sector Development Vice-Presidency, World Bank

Alan Bacarese

Senior Asset Recovery Specialist, Basel Institute on Governance

Mal Nuhu Ribadu

Executive Chairman, Economic and Financial Crimes Commission
Nigeria

The tracing, freezing, confiscating, and repatriating the proceeds of corruption is not a new concept. For example, the OECD anti-bribery convention requires that bribes and the proceeds of bribery be subject to seizure and confiscation. The expedient growth of international treaties, banking regulations, and conventions in this area and notably the coming into force of UNCAC give a new impetus to this area and will be instrumental in further improving and facilitating these processes.

For example, today, domestic seizure and confiscation is more and more often executed without a prior criminal conviction or a money-laundering process recognizing the unlawful nature of the property. Furthermore, UNCAC now makes available other mechanisms, particularly the civil process. However, considerable problems associated with both the criminal and civil techniques remain, such as banking secrecy, jurisdictional issues and parallel proceedings, what to do with materials obtained in criminal proceedings, and the dilemma of repatriating the proceeds of corruption to some states.

This session shall explore the criminal and civil routes available to investigators and prosecutors in what is a technically difficult and complex area. The session shall highlight some principal considerations necessary to navigate through this area. Particular attention will be paid to the real and significant developments that UNCAC provide to investigators and prosecutors and how best to use these new tools.

10:15–10:30 Coffee break

10:30–12:00	<p>Seizure, Confiscation, and Repatriation of Assets: Practices in Financial Centers</p> <p>Chair: Dimitri Vlassis Chief, Crime Conventions Section, Division of Treaty Affairs, UNODC</p> <p><i>Requirements in Switzerland</i></p> <p>Pascal Gossin Chief of Section for International Legal Assistance, Federal Department of Justice and Police, Switzerland</p> <p><i>Requirements in Hong Kong, China</i></p> <p>Wayne Walsh Deputy Principal Government Counsel, International Law Division, Department of Justice Hong Kong, China</p> <p><i>Singapore's practice for seizure, confiscation, and repatriation of assets</i></p> <p>Ang Seow Lian Assistant Director, Corrupt Practices Investigation Bureau (CPIB), Singapore</p> <p>A very significant proportion of the world's proceeds of bribery either ends up or makes its way through the main international financial centers. It is thus increasingly vital to have access to these financial centers and to possess a working knowledge of how they operate and how best to make inroads into their legal and institutional practices so that effective and directed requests can be made to seize, confiscate, or repatriate those proceeds as quickly as possible.</p> <p>The session shall attempt to navigate through some seemingly impenetrable complexity of some of the world's leading financial centers and to offer insights into how best to achieve both rapid and effective seizure, confiscation, and repatriation of looted assets.</p>
12:00–13:30	Lunch
13:30–16:00	<p>Case studies (3 parallel groups)</p> <p>Practical experience often reveals unexpected difficulties as well as solutions to overcome these difficulties. Three studies of high-profile cases that have been handled in various jurisdictions in the past decade will outline practical solutions to recover assets from both the perspective of the requesting and the receiving States. In particular, the case study groups will seek to assess what tools provided by UNCAC will help countries in the future, similar cases to overcome the challenges identified in the three discussed cases.</p>

Group 1: "Ferdinand Marcos" (Philippines)

Case presenter: **Jean-Bernard Schmid**

Investigating Magistrate, Geneva, Switzerland

Discussant 1: **Merceditas N. Gutierrez**

Ombudsman, Republic of the Philippines, represented by:

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Discussant 2: **Martin Polaine**

Consultant, Legal and Constitutional Affairs Division – Criminal Law Section, Commonwealth Secretariat

Rapporteur: **Arvinder Sambei**

Head, Criminal Law Section, Legal and Constitutional Affairs Division, Commonwealth Secretariat

Group 2: "Sani Abacha" (Nigeria)

Case presenter: **Pascal Gossin**

Section Chief MLA, Federal Department of Justice and Police, Switzerland

Discussant 1: **Mal Nuhu Ribadu**

Executive Chairman, Economic and Financial Crimes Commission Nigeria

Discussant 2: **Timothy Daniel**

Partner, Kendall Freeman

Rapporteur: **Alan Bacarese**

Senior Asset Recovery Specialist, Basel Institute on Governance

Group 3: "Vladimiro Montesinos" (Peru)

Case presenter: **Guillermo Jorge**

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Discussant: **Theodore S. Greenberg**

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Rapporteur: **Marita van Thiel**

Public prosecutor, National Coordinator for Corruption Investigations, National Public Prosecutor's Office, Netherlands

16:00–16:30 Coffee break

16:30–17:00 **Reports from Case Study Groups, Discussion of Lessons Learned**

Chair: Gretta Fenner
Director, Basel Institute on Governance

Speakers: Rapporteurs from Case Study Groups

Friday 7 September 2007

08:00–09:45 **Cooperation to Recover Proceeds of Corruption: Needs and Priorities for Asia and the Pacific under UNCAC and Other International Anti-Bribery Instruments**

Chair: **Edi Pratomo**

Director General for Legal and Treaties Affairs-Ministry of Foreign Affairs, Indonesia

Planning Ahead: Needs Assessment for Indonesia's Upcoming MLA and Asset Recovery Proceedings

Yoseph Suardi Sabda

Director for Civil Cases, Attorney General's Office, Indonesia

Recovering Proceeds of Corruption: Steps Taken and New Challenges in P.R. China

Guo Mingcong

Director of the International Judicial Cooperation Department
Supreme People's Procuratorate, P.R. China

Making UNCAC, the OECD Anti-Bribery Instruments and Other Global Anti-Corruption Tools Operational

Nicola Bonucci

Director, Legal Directorate, OECD

Implementing the UNCAC – Making Technical Assistance Work: The German UNCAC Project

Dr. Dedo Geinitz

Deutsche Gesellschaft für Technische Zusammenarbeit (GtZ), Germany

Building on the experience of experts from across the world, this session will carefully consider the next steps for countries of Asia and the Pacific to bring the UNCAC and tools that other international instruments provide firmly within the armory of investigators and prosecutors, and to promote their use in investigations into transnational bribery cases.

This session will seek to define concrete steps that countries from the region would need to take to operationalize the central concepts of the UNCAC and of other relevant instruments, and will assess the supporting role that regional processes such as the ADB/OECD Anti-Corruption Initiative play in this endeavor. The session shall look, in particular, at the work being undertaken in Indonesia and P.R. China as two examples from the region.

09:45–10:00 Coffee Break

10:00–11:00 **Panel discussion on key outcomes of the seminar, and closing**

Co-chair: **Gretta Fenner** and **Kathleen Muktan**
Basel Institute on Governance / ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

Dimitri Vlassis
Division of Treaty Affairs, UN Office on Drugs and Crime

Dr. Maria Gavouneli
Vice-Chair, OECD Working Group on Bribery

Said Fazili
Second Secretary Political Affairs, Royal Netherlands Embassy in Jakarta, Indonesia

Closing: **Taufiequrahman Ruki**
Chairman, Corruption Eradication Commission of Indonesia

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