CHAPTER 7

Mutual Legal Assistance and Repatriation of Proceeds of Corruption

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A. Mutual Legal Assistance and Repatriation of Proceeds – Pakistan's Experience

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Large-scale criminal activities, and in particular corruption, seriously harm the sustainable social and economic development of states. Developing countries are the worst affected, as these countries face particularly severe forms of embezzlement of state funds.

Today, enhanced methods of travel and communication make it rather easy for criminals to shield themselves from justice by simply crossing national boundaries. For them, boundaries do not constitute obstacles; on the contrary, they render the criminals detection and prosecution more difficult and allow them to conceal the evidence and profits of their crimes.

Law enforcement authorities are bound by the principle of sovereignty, which precludes carrying out investigations on the territory of another state. Mutual legal assistance is thus an important mechanism through which states may help each other in the fight against international criminality. Under mechanisms of international legal assistance in criminal matters, the requested state executes on its territory an official act concerning a specific criminal case and forwards the results to the requesting state. Such assistance can take many forms: hearing witnesses; securing and transferring evidence, documents, objects and assets; search of premises and seizure of property and confrontation; and service of summonses, judgments and other court documents.

Pakistan's experience in fighting corruption

In Pakistan, corruption is deeply rooted in the social and political history of the region. In the 1990s, vocal and socially conscious activists clamored for

a ruthless purge of the "mafia" within the bureaucracy and for the accountability of predatory high-profile public figures. Taking power on 12 October 1999, the current Government decided to stem the rot and restore the people's shattered faith in the country.

Prompt measures were announced to improve matters, and accountability was given high priority in the envisaged reforms. On 16 November 1999, the National Accountability Bureau (NAB) was established as the spearhead of the accountability process. Pakistan's comprehensive National Anti-Corruption Strategy[40], published in 2002, takes into account that in the Pakistani milieu, corruption can only be eradicated through a multifaceted approach that includes poverty alleviation, improved literacy, and restructuring of the administration. Thus, the strategy not only relies on enforcement of coercive laws, but also addresses root causes of corruption through awareness raising and preventive measures. The anti-corruption strategy has been approved by the federal cabinet and is currently being implemented.

Immediately after the NAB was established in 1999, it started identifying prospective targets. The list of suspects for initial interrogation included rapacious public office holders, defaulting business tycoons and mercenaries operating in all echelons of the bureaucracy. The accountability process was thus unsparing and swift, gathering momentum with the passage of time.

Mutual legal assistance and international cooperation in the fight against corruption

Like other third world countries, Pakistan has particularly suffered from the embezzlement of funds by the political elite. The wealth looted by these criminals has been stashed in safe havens under cover of so-called bank secrecy norms and the abundant availability of offshore companies on the shelves of innumerable service providers. The sum of assets drained out of the economy through criminal activities by tax evaders and hardened criminals is still unknown.

Due to these circumstances, Pakistan is well aware of the importance of mutual legal assistance. On the giving side, the NAB has always extended its fullest cooperation to other states in line with the international requirements and standards for combating corruption. The country's commitment to the global drive against corruption is recognized by the community of nations.

[40] Documentation of the National Anti-Corruption Strategy can be found at: www1.oecd.org/ daf/ asiacom/countries/Pakistan.

Laws and procedures on mutual legal assistance are currently under review to bring them up to the standards of internationally recognized practices. A number of laws have already been passed and financial regulatory developments have taken place so that the country's internal corresponding apparatus is commensurate with the requirements of bilateral and multilateral agreements. The following examples demonstrate Pakistan's commitment to international mutual cooperation in judicial matters:

- Pakistan is cooperating with a number of foreign jurisdictions in combating corruption, money laundering and terrorist financing, including the United States of America, Canada, the United Kingdom (UK), Australia, Switzerland, Germany, Norway, Italy, and the United Arab Emirates, to name just a few;
- At present, Pakistan has bilateral extradition treaties with 26 foreign jurisdictions;
- Pakistan has been given an observer status in the Egmont Group of Financial Intelligence Units;
- Pakistan played a leading role in the sessions of the *ad hoc* Committee for the negotiation of the United Nations Convention against Corruption. Pakistan signed the Convention in Mexico on 9 December 2003;
- A number of memoranda of understanding are in the process of finalization with other jurisdictions to arrange for the bilateral exchange of information;
- Pakistan and the UK have formed a Joint Judicial Working Group to revise the current approach to issues like mutual legal assistance, extradition, terrorism and anti-corruption legislation;
- Pakistan is an active member of the Asian Pacific Group on Money Laundering and has been participating in all major conferences and workshops on money laundering, informal value transfer and counter-terrorism financing; and
- Pakistan is compliant with United Nations Resolutions Nos. 1267, 1333, 1390 and 1455.

On the receiving end, Pakistan has had a particularly successful experience of seeking legal assistance from the UK and Switzerland. The execution of Pakistan's request for legal assistance by Switzerland in the case of Ms. Benazir Bhutto, former Prime Minister of Pakistan, and her husband, Mr. Asif Zardari, is a good example of this type of cooperation

In 1997, the Government of Pakistan requested legal assistance from the Swiss Government in various cases related to corrupt practices committed by Ms. Bhutto and Mr. Zardari. One of these requests related to allegations that

the accused had extended pre-shipment contracts with two Swiss companies with the intention of receiving illegal gratification; these extensions grossly violated applicable rules. The Swiss authorities passed immediate restraining orders on the funds identified by the Government of Pakistan in its request. It also designated an examining magistrate in the canton of Geneva to execute the request for mutual legal assistance. As of today, a substantial portion of the request has been executed and important evidence has been handed over to the Government of Pakistan. On the basis of the evidence gathered, the Attorney General of Geneva concluded that the use of off-shore companies and the holding bank accounts in Switzerland operated by the couple's Swiss attorney with the sole object of hiding their true identities were *prima facie* acts of money laundering under Swiss laws. The Swiss authorities consequently opened respective criminal prosecutions against Benazir Bhutto, Asif Zardari and their Swiss attorney.

In September 2002, the Government of Pakistan filed a request to be accepted as a "damaged Party" in the criminal proceedings for money laundering: in fact, the bribes paid by the pre-shipment inspection companies and the Swiss attorney were at the cost of the Government and people of Pakistan, and no recovery had been made. The Examining Magistrate accepted the Government of Pakistan as a damaged party and observed:

Pakistan has been directly damaged by the acts for which Benazir Bhutto [and] Asif Zardari were indicted... Had Benazir Bhutto acted loyally, she or her relatives would not have benefited from said amounts but Pakistan and there is no doubt that Benazir Bhutto's and her husband's behavior is criminally punishable in Pakistan… Pakistan was consequently directly damaged by the tort committed by Benazir Bhutto, Asif Ali Zardari and their Swiss attorney and as a consequence it was a victim of money laundering in Switzerland.

The Swiss attorney filed an appeal against the Examining Magistrate's order, but the appeal was rejected. In July 2003, both Bhutto and Asif Zardari were sentenced to six months' imprisonment (suspended). The verdict also ordered the confiscation and restitution to the Government of Pakistan of approximately USD12 million held in the name of offshore companies. All three accused filed the opposition in the Misdemeanors Court and challenged its competence to try the case. At present, the case is pending with the Attorney General of Geneva and his decision is expected shortly.

Although the Government of Pakistan is satisfied by the execution of its request for legal assistance and the cooperation with the Swiss authorities, the time it has taken for its execution must be considered as rather long; the request made in 1997 is still pending six years later.

Need for reform of mutual legal assistance procedures

Pakistan's experience clearly demonstrates weaknesses and areas where reform of the current framework and practices of granting legal assistance is needed. Such reform must encompass the preconditions and procedures of granting legal assistance as well as the commonly applied approach to repatriation of proceeds.

Typically, three aspects hamper the execution of requests for legal assistance:

- The absence of specific regulations on the granting of international legal assistance, and failure to identify a responsible central authority,
- The absence of uniform procedures for granting legal assistance, and
- Procedural impediments, such as requirements of dual criminality, reciprocity, predicate offenses and membership in global or regional forums.

As regards repatriation of proceeds, the commonly applied "conservative"—or reluctant—approach needs to be reviewed. The limits and the generally accepted grounds for refusing legal assistance are well understood; however, it must be borne in mind that reluctance in restoring embezzled funds to the affected country diminishes that country's chances for social and economic progress. Reluctance in restoring the funds also sends an unwanted message to the corrupt. It is therefore important that

- all assets gained through corruption and stored overseas be returned to the victim state;
- the return of assets to the affected state not be tied to political motives but based on judicially decided facts;
- no distinction be made between embezzled money/diverted state funds and the money arising from kickbacks and commissions; and
- repatriation of assets not be linked to the degree of preventive measures taken by the requesting state.

In spite of the large differences between legal systems and practices, nations of the world must agree on common principles for providing each other legal with assistance. The United Nations Convention Against Corruption will be a landmark in this endeavor.

B. Improving Procedures for Mutual Legal Assistance and the Repatriation of Proceeds of Corruption

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International bribery and corruption are transnational crimes and, as such, require investigators and prosecutors to gather evidence across borders. Equally, in a world of financial networks that may straddle many states, the mounting of a domestic corruption case will very often demand evidence from overseas. Against that background, the frameworks and procedures within which both formal assistance (referred to as "mutual legal assistance") and informal co-operation (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, this article identifies some real and practical difficulties and offers some solutions.

The question of jurisdiction

For a practitioner, it is artificial to look at issues of mutual legal assistance and mutual assistance without first commenting on the matter of competing jurisdictions in criminal cases that involve more than one country. To give an obvious example, if a prosecutor in London seeks to prosecute a case, elements of which took place in both the United Kingdom (UK) and in the United States (US) (and for which either country has jurisdiction) and the principal evidence is likely to come from the US, then the London prosecutor will be well advised to try to resolve the issue of jurisdiction before embarking upon what might be a long and demanding process to obtain US evidence and bring it before an English court.

Practitioners sometimes conclude that lawyers and legal academics in the field of international law are very good at describing jurisdiction and its underlying principles (e.g., so-called "protective" and "passive personality" principles). They are accomplished at establishing the extent of a state's criminal jurisdiction, but are weak at determining the best jurisdiction (the *forum conveniens*) for the criminal process. Moreover, the traditional academic approach has stopped short of describing those factors that would form the determination process.

Very few international instruments determine jurisdiction and the appropriate venue for a particular type of case: the Cybercrime Convention, the Convention on Offenses and Certain Other Acts Committed Onboard Aircraft, two conventions relating to pollution of the sea by oil, and perhaps one or two more.

Domestic law offers sharp relief to the international uncertainty: on the whole, a state will seek to provide some clarity about the extent of its jurisdiction; it may have clearly defined laws with explicit extra-territorial effect, such as the extra-territorial jurisdiction established by signatory states to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to enable them to prosecute their nationals and companies for acts of corruption committed entirely abroad. Some states limit the assistance they will give to another state on a matter if they have a jurisdictional claim or interest of their own, while others will not, of course, extradite their own nationals. Little, indeed perhaps nothing, in the UK's domestic law, nor indeed in many other states' laws, addresses when and how states should "negotiate" with each other as to jurisdiction. That gap perhaps needs to be plugged. The resolution of jurisdictional problems will very often mean that issues of mutual legal assistance are also resolved.

The inherent difficulty that underlies both jurisdictional and mutual legal assistance problems is the existence of so-called "inapproximate" regimes, i.e., the lack of commonality between legal systems. Even within a small geographical area, for instance Western Europe, one is struck by the legal variance among states, from the inquisitorial to the adversarial, from the common-law to the civil code. With that legal variance go different investigative and prosecutorial systems.

When should the issue of jurisdiction be addressed? At the start of the investigation or inquiry? Before assessing the prospects of conviction? After the nature of the case has been shaped and possible admissibility issues dealt with? At a mid-point?—By whom? With whom? Police and intelligence agencies? Prosecutors? Judge/Magistrate? Government? A combination of two or more?—And how? By meetings? Joint written agreement?—What are the

difficulties? Investigators and prosecutors perhaps instinctively local? Decisions outside normal expectations? Language problems?

How can jurisdictional issues be resolved? Is there a practical set of criteria? Where are most of the witnesses? Who has the most effective laws? Who has the most effective confiscation laws? Where will there be less delay? Who can best deal with sensitive disclosure issues? What about costs? Where did the harm or result take place? Where was the offender when offending and when captured? Where is the victim?

At present, no satisfactory model exists for deciding the *forum conveniens*, even though cases where there is parallel jurisdiction are commonplace. A real potential exists for no one's initiating a prosecution, the wrong country prosecuting, or for two countries getting in each other's way.

Mutual legal assistance/mutual assistance

Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether informal mutual assistance would, in fact, meet their needs. It is sometimes forgotten that the country receiving the request might welcome an informal request that can be dealt with efficiently and expeditiously. Prosecutors must ask themselves whether they really need a formal letter of request to obtain particular evidence. The extent to which countries are willing to assist without a formal request does, of course, vary greatly. In many cases it will depend on their 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. My experience and that of my colleagues is that colleagues in other countries will usually do all they can to help.

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

- If the inquiry is a routine one and does not require the country of whom the request was 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 part companies, may very often be obtained informally.

- Potential witnesses may be contacted to see if they are willing to assist 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 non-contentious.
- The obtaining of lists of previous convictions and of basic subscriber details from communications service providers that do not require a court order may also be dealt with in the same way.

In the same way, one can set out the types of instances where a formal letter will be required:

- Obtaining testimony from a non-voluntary 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 contents of e-mail; and
- The transfer of consenting persons into custody in order for testimony to be given.

Confusion can be avoided if prosecutors have regard for the limits of the conventions and treaties that relate to mutual legal assistance. It should be borne in mind that the regime of mutual legal assistance is for the obtaining of evidence. Thus, the obtaining of intelligence and the locating of suspects or fugitives should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.

With some lateral thinking, it should be possible to increase the areas in which evidence may be obtained informally. For example, some countries have directories of telephone account holders on the Internet (although consideration will need to be given to whether it is in a form that can be used evidentially). Sometimes it may be quicker, cheaper and easier for the requesting country's police to arrange and pay for a voluntary witness to travel to the requesting country to make a witness statement, rather than for the police officers themselves to travel to take the statement. Similarly, with the consent of the state in which the embassy is situated, witness statements may be taken by officers at the requesting country's embassy.

Taking matters one stage further, many states have no objection to an officer of the requesting state telephoning the witness, obtaining relevant information and sending it by post in an appropriately drafted statement for

signature and return. Such a method can only be used, of course, as long as the witness is willing to assist the requesting authorities and no objections arise from the authorities in the foreign state from which prior permission must be sought.

Certain prerequisites should be borne in mind when evidence is sought by informal means from abroad:

- It should 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 by the requesting state;
- It should be evidence that may be lawfully gathered under the laws of the foreign state;
- The foreign state should have no objection; and
- The potential difficulty in failing to heed any of these elements might cause (in states with an exclusionary principle in relation to evidence) that evidence to be excluded. In addition, but of no less importance, 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 future requests. The rule must be to ensure that any informal request is made and executed lawfully.

A consideration of informal assistance should not overlook the use to which informal assistance can be put in order to pave the way for a later, formal request. It may, for instance, be possible to narrow down an inquiry in a formal letter of request by first seeking informal assistance. By way of example, if a statement is to be taken from an employee of a telephone company in a foreign country, informal measures should be taken to identify the company in question, its address and any other details that will assist and expedite the request. It should not be overlooked that a global expectation 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 for mutual legal assistance

It is sometimes forgotten that the building blocks for formal requests are the conventions, schemes and treaties that states have signed and ratified. Reference should always be made within the body of the letter of request to whichever of those apply, preferably at the very outset. It hardly needs to be said, but the international obligations of a requested state to assist need to be

asserted, as indeed does the authority upon which the letter of request is written. To give a practical example, the 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 Home Office (Interior Ministry) will ensure that requests are in conformity with relevant treaties and other international obligations. Prosecutors need to take heed of any such declarations of intent made by their own state and take action accordingly. Similarly, care must be taken by the requesting authority to ensure that its own domestic law allows the request that is actually being made. For example, a piece of domestic legislation in the UK, the Criminal Justice (International Co-operation) Act 1990, disallows some requests or types of requests that many conventions, treaties or other international instruments would appear to allow. However, for the UK prosecutor, the domestic Act has primacy. To make requests otherwise than in accordance with the domestic law would be to invite arguments for exclusion of evidence.

Prosecutors and prosecuting authorities are recommended to make early contact with 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 in fact be given. For example, some countries that signed the 1959 European Convention on Assistance in Criminal Matters 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 whether assistance can be given at all and, if so, how that assistance is given.

The form of the letter of request

It is recommended that the requesting state 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 in and play a part in the investigation.

A problem that occurs in the UK in respect of both incoming and outgoing requests is that of time. Requests may take weeks, sometimes months and, occasionally and unfortunately, years to execute. As soon grounds emerge to make the requests abroad and the need for such requests is clear, then the letters 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.

A fundamental difficulty is often overlooked: different states have different ways of presenting evidence. The whole purpose of the request is to obtain usable, admissible evidence. That evidence must therefore be in the form appropriate for the requesting country, or as near as possible to that form as circumstances allow. It should be made clear by the requesting state 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.

As an example: if a UK prosecutor simply made a request to the US for a witness to be interviewed and a statement taken, the product of that exercise might take a number of forms:

- A witness might be asked by the local authorities in the US to respond in writing to written questions, either in the form of an unsworn declaration under penalty of perjury, or an affidavit;
- The witness might be interviewed and make an informal, nonverbatim statement, which might or might not be signed; or a formal written statement or affidavit might be prepared;
- The testimony of the witness might be summarized in oral questioning, with the witness and US authority each signing the written version; and
- The witness might have been questioned after taking an oath and giving a formal statement or deposition, which would be reflected by a typed verbatim transcript.

Many states will allow the evidence to be taken in the way that the requesting state has set out in the letter of request. Treaties 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, provide examples to the requested state.

Delays are sometimes caused and problems created when a request is made for a suspect to be interviewed. It must be made clear that the suspect is regarded as, indeed, a suspect. Generally the request must state the reasons for that belief and indicate the terms under which he or she is to be interviewed. Of course, those terms will only be adhered to if allowable in the requested state. It must be remembered that different jurisdictions allow for the interviews of suspects to take place in different ways. For instance, some jurisdictions will allow or insist upon tape-recording; others will not. If extradition is contemplated as at least a possibility, the letter of request should say so—unless

there is good reason to believe the suspect will flee if he or she gets to hear about the risk of being extradited. Ideally, the questions to be asked in the interview should be set out as an annex to the letter of request. A problem sometimes arises when it is assumed that a police officer or a prosecutor in the requested country will be present to ask the questions. In some jurisdictions it might well be an examining magistrate or judge who asks the questions in a courtroom in the absence of any investigator. If the questions cannot be set out, then at least the subject matter should be.

A second common problem is a request for search and/or seizure. Essentially, as much information as possible about the location of the premises, etc., should be provided. It must be remembered that different jurisdictions set a different threshold. Search and seizure is a powerful weapon for investigators. It should always be assumed that the requested state will only be able to execute a request for search and/or seizure if it is demonstrated that reasonable grounds exist to suspect that an offense has been committed and that there is evidence on the premises or person concerned; the letter of request should consequently set out these reasonable grounds. It is generally not enough simply to ask for search and seizure without explaining why it is believed that the process might produce evidence. For requests to Europe, it is good practice to have written regard to the core principles of the European Convention on Human Rights, namely necessity, legality and proportionality. Interference with property and privacy in European countries is now frequently justified only if there are pressing social reasons such as the need to prosecute criminals for serious offenses. Search and seizure of property following a formal request are allowable in most states and should present few problems, if the above guidelines are followed. However, searching the person and taking fingerprints, DNA or other samples may have less chance of success in some jurisdictions; it can still be requested, however.

Corruption cases and cases with an international dimension may well have sensitive aspects of a commercial nature, with respect to national security, etc. It may be the case that sensitive information will have to be included in a formal request for assistance. Addresses of prospective witnesses and other information that could be exploited by criminals, organized crime or those otherwise corrupt may well need to form part of the request. Such issues must be borne in mind when the request is drafted, along with the fact that the system for obtaining mutual legal assistance, globally, is inherently insecure.

The risk of unwanted disclosure may be a greater or lesser depending on the identity of the requested state. The risks of unwanted disclosure must be weighed in the balance. Duty-of-care issues to those affected may arise. It may sometimes be that a generalized letter that leaves out the most sensitive

information may be enough to allow the request to be executed. Instances have certainly occurred in the UK where a rather vague letter has been supplemented by a senior police officer or lawyer providing an oral briefing to the judicial authorities involved. In such circumstances, it is advisable to discuss the issues in advance with a representative of the requested state. In essence, though, if contentious material is sought or coercive powers requested, chances are high that sensitive material will need to be set out in the request. 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 if it can be executed by the requested state without requiring sensitive information to be disclosed. It should be noted that the Harare Scheme of the Commonwealth makes specific provision for confidential material to be kept confidential.

To conclude, incoming letters of request for mutual legal assistance in the UK would be examined as to the following elements:

- Assertion of authority by the sender of the letter;
- Citation of treaties and conventions;
- Assurances;
- Identification of defendant/suspect;
- Present position;
- Charges/offenses under investigation;
- Summary of facts;
- Inquiries to be made;
- Assistance required; and
- Signature.

C. Mechanisms for Gathering Evidence Abroad[41]

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Corruption cases very often have a transnational character: the briber and the person receiving the bribe are from different countries, and assets are transferred via several financial centers that are located in still other countries. Therefore, in investigating and prosecuting corruption cases, international legal assistance is often the key to success. Such legal assistance covers both the taking and handing over of evidence, and the confiscation and repatriation of the illicit assets. However, a defective legal framework, numerous material conditions, and often lengthy procedures render these operations difficult. Therefore, a clear view of the legal framework, provisions, conditions, and formal procedures is crucial to the success of requests for international legal assistance, the collection of evidence abroad, and the repatriation of the proceeds of corruption. Informal contacts may also help in hurdling the difficulties that formal procedures entail.

Legal framework of international legal assistance

In criminal matters, no universal treaty governs the gathering of proof abroad. Only model treaties of this kind exist, prepared under the auspices of the United Nations.[42] However, many international conventions on specific offenses contain provisions requiring signatory countries to grant each other mutual assistance at an international level, as, for instance, article 9 of the

[41] Published in: Asian Development Bank/Organisation for Economic Co-operation and Development, Effective Prosecution of Corruption, Asian Development Bank: Manila, 2003.

[42] Model Treaty on Mutual Assistance in Criminal Matters (MTMA) adopted in 1991.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[43] However, such provisions often remain rather general, leave room for differing interpretations or approaches, and contain little detail as to how the promised mutual assistance is to be provided.

In addition to multilateral treaties, there exist many bilateral agreements, exchanges of letters, or simple declarations of reciprocity in this field, which, however, again usually contain only undertakings in principle. Finally, several countries have adopted internal legislation regulating international mutual assistance.[44] Such legislation may not derogate from binding rules in treaties or international conventions and applies without reservation only if the assistance is requested by a country to which the requested country is not bound under an international treaty.

When no treaty, convention, or bilateral agreement exists between the requesting and the requested country, the provision of assistance is not mandatory but still possible. The requested country usually requires an undertaking of reciprocity on the part of the requesting country. In this respect, common law countries are usually more restrictive than civil law countries.

Material conditions for international legal assistance

Regardless of the legal basis underlying a request for legal assistance, such assistance is granted only if the following material conditions exist. First, a general prerequisite for mutual legal assistance is the criminalization of the act in both the requesting and the requested country (dual criminality rule). The assistance must relate to criminal proceedings properly so-called, i.e., proceedings against the perpetrators of an offense under ordinary law. While the dual criminality rule seems clear and easily applicable, it entails serious obstacles to gathering evidence abroad. This is particularly true in cases of corruption, because countries have developed the necessary legislation criminalizing bribery and corruption to varying degrees. Most countries, for instance, have not criminalized private-to-private corruption, and even bribery of foreign public officials does not constitute a criminal offense in some countries. Nowadays, however, this latter loophole is covered, at least in those countries that have implemented the 1997 OECD anti-bribery convention.

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[43] Also relevant in this context: Convention against Torture (New York 1984), Convention against the Taking of Hostages (New York 1979), Conventions on Drugs (New York 1961 and Vienna 1988), Unidroit Convention on Stolen and Illegally Exported Cultural Objects (Rome 1995), and Convention for the Suppression of the Financing of Terrorism (New York 1999).

[44] Such as Switzerland, Luxembourg or Liechtenstein.

Legislation on money laundering also remains largely deficient in many countries.

Another major difficulty in this respect is the diversity of definitions of corruption in different countries. This is particularly evident in the area of public administration. Many societies consider the giving of bribes in exchange for services by public officials legitimate or at least acceptable. In fact, it is sometimes difficult to distinguish between obtaining a favor (which is punishable by law) and having a right recognized (which is not punishable).

A second prerequisite for the provision of mutual legal 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 in the legal system of the requesting country.

Some countries, notably Switzerland, refuse to assist in fiscal proceedings. The request for assistance may also be rejected if the proceedings concern political or military misdemeanors or if the granting of assistance constitutes a problem for public order or the higher interests of the requested country. This type of difficulty often arises when the case concerns bribery in relation to the sale of weapons.

Contrary to what is often believed, however, bank secrecy provisions cannot be used to deny a request for mutual assistance. Diplomatic immunity is also a frequent defense in corruption probes involving diplomatic or military envoys and attachés. However, in Switzerland, for instance, diplomatic immunity provisions do not apply to private economic activities and, therefore, also cannot be used to justify denying a request for mutual assistance.

Procedure of acquiring evidence abroad

If the material conditions for legal assistance are met, the request for assistance has to be issued in writing by a judicial or administrative authority with criminal jurisdiction in the requesting country. A request from a parliamentary or governmental authority is not admissible.

The request must contain a description of the facts behind the proceedings. This description must be as detailed as possible and must indicate in what way the evidence being sought is useful or necessary. In principle, the requested country does not verify the truthfulness of this description. However, common law countries are usually more demanding in this respect and often require proof of the alleged facts.

The request must also set out, in as detailed a manner as possible, the nature and object of the proof sought abroad. Requesting undefined proof ("fishing expeditions") is not admissible.

If the two countries concerned are parties to a convention or treaty authorizing direct correspondence between their judicial authorities, the request is sent directly to the competent judge or magistrate of the requested country. Otherwise, the request is made through the intermediary of central offices (if such exist) or diplomatic channels.

The request is executed by the competent judicial authority of the requested country in accordance with its own rules of procedure. If the requesting authority makes an express request, it may sometimes be allowed to apply the rules of procedure of the requesting country. In theory, the requesting judge may participate in the taking of evidence, but this is often difficult for practical reasons, such as lack of resources. After having gathered the evidence sought, the judge or magistrate from the requested country communicates it to the requesting authority through the same channel that was originally used to make the request.

In a great number of countries, the person in respect of whom the request for mutual assistance was made is allowed to appeal against the sharing of evidence with the requesting country. Such appeals may cause considerable delays in the provision of gathered evidence. For example, in several European countries—particularly in some that are considered "tax havens" such as Liechtenstein, Luxembourg and Switzerland—national legislation relating to international legal cooperation offers defendants in corruption cases many opportunities to appeal against judicial decisions that would disclose information on their financial status. Defense lawyers, of course, frequently have a vested interest in seeing judicial processes extended. Finally, banks can also readily appeal against the decision to transfer the documentation, and litigation regarding such matters can drag on indefinitely. These possible reasons for delays in the procedure may mean that, while authorization to provide requested information to a foreign authority may be granted within a relatively short period of time, the requesting party might not actually receive the requested documents for several years.

Confiscation and repatriation of proceeds, extradition, and proceedings against third parties

A widely discussed issue in mutual legal assistance in corruption matters, in particular in the context of the negotiations of the United Nations Convention Against Corruption that took place in 2002–2003, is the confiscation and repatriation of the proceeds of corruption, and extradition and proceedings against third parties. At present, no internationally binding legal instrument concerns the repatriation of funds, in particular.

If ever funds are repatriated these days, the reasons are usually more political in nature than based on legal obligation. The assets are transferred only under the additional condition that the repatriated funds are not likely to end up in the pockets of other corrupt agents in the requesting country. Occasionally, funds are returned to banks or other private entities rather than claimant governments, as, for instance, the funds that had been confiscated by Swiss officials at the behest of the Nigerian Government in the Abacha case and the Philippine Government in the Marcos case. In the Abacha case, the funds were sent directly to the Bank for International Settlements, which considered them a partial payment for outstanding loans from the Nigerian Government. In the Marcos case, the Swiss authorities and the Philippine Government agreed that approximately USD500 million would be returned to Manila on the condition that an independent court would administer the equitable distribution of the funds.

As for extradition, permits to arrest and extradite suspects from other countries are usually very difficult to obtain, especially if these persons are nationals of the requested country.

Banks through which money has been laundered are increasingly being held legally culpable for what they should have known about these transactions. It has become far more difficult nowadays for banks to simply claim that it is not their responsibility to scrutinize the activities of their clients. For example, over the past few years, five Swiss bank employees have been sentenced and two banks in Switzerland have been facing serious penalties in civil cases stemming from the billions of dollars in assets secreted in that country by the Abacha family.

Corruption-specific obstacles to international legal assistance

Sometimes the requested legal assistance is never provided, despite the fact that all formal and material conditions exist. This happens particularly often in investigations involving influential politicians, and the reasons are manifold.

First, as noted above, public figures and political parties, even under indictment, have special powers, particularly within the public institution under their control. They may try to use these means to prevent evidence from being found or handed over. Governments and lawmakers are sometimes the very people involved in corrupt practices, either personal or political reasons. Significant progress is therefore difficult to achieve, unless the legal authorities are granted genuine independence and effective instruments to investigate the perpetrators of these practices that the lawmakers themselves define as being criminal.

Even judges do not always have enough independence vis-à-vis the executive power, nor— at times—the necessary integrity or courage. Corrupt magistrates abound who are more interested in "carrying out orders" or advancing their careers than in concluding investigations. Judges are frequently accused of being an instrument of political parties or individual members of the government or—in the case of international mutual assistance—of the government as such in its foreign affairs strategy. Such accusations discredit the investigation, even when they are completely unfounded.

Alleged "national interests," such as the need to safeguard the country's economy against foreign competition, protect employment, etc., are often cited in defense of corrupt acts. The accused persons cynically justify corrupt acts as being perpetrated for the well-being of the citizens or for the economic wealth of a country.

Last but not least, the financial strategies used to camouflage a corrupt act or the profits derived from it have become increasingly sophisticated, and neither prosecutors nor judges always have the instruments needed to uncover them. Financial intermediaries have specialized in these strategies and are able to eliminate paper trails. The systematic use of offshore or other shell companies render camouflage ever more effective. Furthermore, getting legal authorities in fiscal havens to collaborate in legal investigations is often difficult. It is even more difficult when lawyers and other professionals, who can oppose the judge because of secrecy provisions, or people who enjoy immunity (heads of state, diplomats) are used as financial intermediaries. The judiciary is powerless before this type of privilege.

Informal networks

Considering the legal and practical difficulties encountered when seeking legal assistance through formal procedures, informal remedies merit specific attention.

While informal contacts between prosecutors and law enforcement officials from different jurisdictions are unfortunately not very efficient, it is actually not unethical in the least to establish personal contacts with counterparts abroad. In international cases, meetings between investigating magistrates are common, as are meetings between attorneys. Obviously, informal networks and contacts cannot replace the formal procedure of requesting and obtaining legal assistance. However, informal discussions between colleagues from different jurisdictions can be very useful in determining who is best suited to perform what duties in regard to a multi-jurisdictional line of inquiry, and what could be the best investigative approach. This method also can do much to help

resolve or minimize the types of problems inherent in translation needs or protocol differences, such as how best to word formal requests for information. Experience indeed shows that prosecutors can demand and receive evidence relevant to criminal proceedings from their foreign counterparts much faster when informal networks are working well. Close informal links can even sometimes be the only truly practical way to move an investigation forward. In countries where decisions involving international assistance in prosecutions can be made at the nonfederal level, close ties with authorities in regional, provincial, or cantonal positions can also be useful, as these authorities can often act much faster than their counterparts at the national level.

Conclusions

Nothing prevents magistrates or other authorities from entering into direct contact with a foreign jurisdiction to demand information about the best way to collect evidence (what form the request should take, to whom it should be sent, etc.). Where relevant, the central authority of the requested country is usually willing to provide this type of information.

Certain conventions provide for the possibility of spontaneous communication to the foreign judge or magistrate of any information that could be useful to the proceedings.[45] As a possibility, this option exists even in the absence of any specific convention. Actual evidence, however, cannot be transmitted, since this would normally contravene mutual assistance regulations. But most other types of information collected in independently established investigations could be exchanged freely.

As far as international bribery is concerned, the requested judge or magistrate, upon learning of the implication of its own country's citizens, should open his/her own proceedings. For instance, if the requested country is concerned only because its financial center was used, its authorities should open their own proceedings for money laundering (the most frequent and fatal mistake in money laundering is to launder money from different illegal activities through the same account). In both cases, it can be highly useful for the investigating authorities of the two countries to define a common strategy, notably as regards the exchange of necessary evidence.

When the person against whom proceedings are brought in a certain country lives abroad, the proceedings may be delegated to the country of residence. In

[5] For example the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg 1990).

such a case, all the evidence gathered is included in the case file that is transferred to the investigating authority abroad. In the context of bribery, this allows, for example, the transfer of all the documents concerning money laundering carried out in this third country to the country in which the corrupt official lives.

If an act of a corrupt public official has caused material damage to the country concerned, the latter may ask to join as a civil party in the proceedings abroad for the crime of money laundering. In such a case, it will usually have access to the foreign acts of procedure.

The confiscation of the proceeds or instruments of corruption plays a major role in combating corruption. For this purpose, autonomous procedures may be opened in any country to which such financial proceeds have been traced.

A hypothetical concrete case for training

In 1995, the Ministry for Economic Affairs of Briberyland decided to replace entirely its obsolete information technology equipment. After receiving bids from a number of foreign companies, the ministry's administrator awarded the contract to the American firm Smith Corp. for an amount of USD75 million. The new information technology environment was installed in March 1996, and the ministry paid Smith Corp. the agreed amount.

In April 1996, the public prosecutor of Briberyland received a letter from the Indian company Delhi Corp., which had also bid for the contract. Delhi Corp. informed the public prosecutor that Smith Corp. had been awarded the contract because it had paid commissions. It gave the name of "John", an employee in the ministry, as the person who had received these payments.

The public prosecutor initiated an investigation of John, which showed that he enjoyed a lifestyle above what his government salary could possibly provide. However, no suspicious funds were found in the only bank account that John held in Briberyland. But during a search of John's house, the police did discover the business card of a representative of the BSA Bank in Zurich, Switzerland.

After sending letters rogatory to the Swiss authorities, the public prosecutor learned that John did not, in fact, have an account at the bank. However, his name did appear as having signatory authority over an account opened by a registered company, Fraud Ltd., headquartered in Nassau, Bahamas, with the BSA's subsidiary in Geneva, Switzerland. The beneficial owner of this account was an individual known as "Pablo", an independent foreign exchange broker

A hypothetical concrete case for training (continued)

operating in Briberyland. This account had been opened in January 1996. In March of that year, it had been credited with a sum of USD7.5 million from a New York law firm. A few days later, USD4 million had been transferred to a bank in London and USD3 million to a bank in Luxembourg.

Informed of these facts, the public prosecutor of Briberyland sent letters rogatory to London and Luxembourg. The replies to these letters brought to light the following:

- The recipient account in London belonged to Oxy Inc., headquartered in the British Virgin Islands. Pablo was the beneficial owner of this account. Since the account had been opened in 1990, large cash amounts, from different origins, had been deposited and had later been transferred abroad. The account currently contained USD10 million.
- The recipient account in Luxembourg had been opened in the name of John's wife. A sum of USD3million had been the only deposit made to this account. This sum had not yet been touched.

The public prosecutor of Briberyland decided to question Pablo, who admitted that accounts had been opened in Geneva and London and said that he had made these accounts available to some of his customers in Briberyland to enable them to avoid domestic taxes.The public prosecutor then asked John and his wife to come in for questioning. However, the prosecutor then received news that the Justice Ministry had promoted him to the position of chief judge in another city, effective immediately. A colleague known to be close to those in power, and to have no interest in prosecuting bribery-related offenses, replaced the prosecutor. In fact, the new public prosecutor closed the case without further investigation.

Before leaving his post, the former public prosecutor of Briberyland had contacted his Swiss, British and Luxembourg colleagues with whom he had dealt regarding the letters rogatory connected with his investigation, in order to inform them of the situation.

In the meantime, John and Pablo had hired lawyers in Geneva, London and Luxembourg. Arguing that the case had been closed in Briberyland, the lawyers contacted the banks to request that the balance of the accounts be transferred to two separate accounts opened in two different banks in Singapore. Before making the transfers, BSA Bank in Geneva contacted the local prosecutor,

A hypothetical concrete case for training (continued)

who decided to initiate his own criminal proceedings for the crime of money laundering.

The prosecutor of Geneva ordered the seizure of the account of Fraud Ltd. in the BSA's Geneva branch. He then sent mutual assistance requests to authorities in London and Luxembourg, in which he asked that the accounts of Oxy Inc. and of John's wife be frozen, and that all documentation concerning these accounts be handed over to him. He also sent letters rogatory to Briberyland in order to obtain a copy of the closed investigation file.

The authorities in London and Luxembourg met these requests, but the new public prosecutor of Briberyland took no action whatsoever regarding the case.

After analyzing the bank documents received from London, the prosecutor of Geneva observed that a significant portion of the amounts transferred from the account of OXY Inc. had been transferred to an account with the FRITZ Bank in Vaduz, Liechtenstein. After sending letters rogatory, it came to light that this account had been opened in the name of a private company, BRIBY S.A., headquartered in Cyprus. The documents completed when the account was opened had been signed by a lawyer in Vaduz and by the administrator from the Ministry for Economic Affairs of Briberyland.

The prosecutor of Geneva again sent letters rogatory to Briberyland, confirming his initial request, explaining what had been discovered in Vaduz and asking to question the administrator. The new public prosecutor of Briberyland merely replied that the account of BRIBY S.A. had been opened at the request of the state and that the funds belonged to Briberyland. The prosecutor of Geneva was asked to stop investigating these funds.

Through unknown sources, the press of Briberyland had been informed of the Swiss request. Articles were published that raised questions about the decision to stop the criminal proceedings initiated in Briberyland.

Training question:

What further steps do you think might be taken in this hypothetical case in each of the countries concerned by the events described above?