

Chapter 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

International cooperation under the United Nations Convention against Corruption

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Multilateral Conventions for International Cooperation

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

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

Overview of UNCAC Provisions on International Cooperation

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

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

Extradition under the UNCAC

Fundamental Provisions Concerning Extradition

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

General Provisions Concerning Extradition

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

Dual Criminality in Extradition

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

Extradition of Nationals

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

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

Grounds for Refusing Extradition

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

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

MLA under the UNCAC: A Mini-Treaty

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

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

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

MLA and Dual Criminality: A Provision Born of Controversy

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

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

Types of Assistance

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

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

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

Central Authority

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

Form and Content of a Request

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

Execution of a Request

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

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

Grounds for Refusing MLA

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

Asset Freezing, Confiscation, and Recovery

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

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

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

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

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

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

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

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

Miscellaneous Provisions

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

Conclusion

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

