

Chapter 2

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

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

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

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

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

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

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

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

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

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

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

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Need for Informal and Alternative Measures for Assistance

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

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

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

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

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

Channels of Informal and Alternative Measures for Assistance

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

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

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

Success Stories of FIU Cooperation

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Annex

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

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

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

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

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

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

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

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

Agreed as follows:

Article 1: Objectives

The objectives of the cooperation include:

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

Article 2: Areas of Cooperation

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

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

Article 3: Membership

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

Article 4: Technical Arrangement

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

Article 5: Confidentiality of Information

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

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

Article 6: Implementation Mechanism

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

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

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

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

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

Article 7: Amendment

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

Article 8: Entry Into Force

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

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

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

Off the beaten track: Alternatives to formal cooperation

Jean-Bernard Schmid

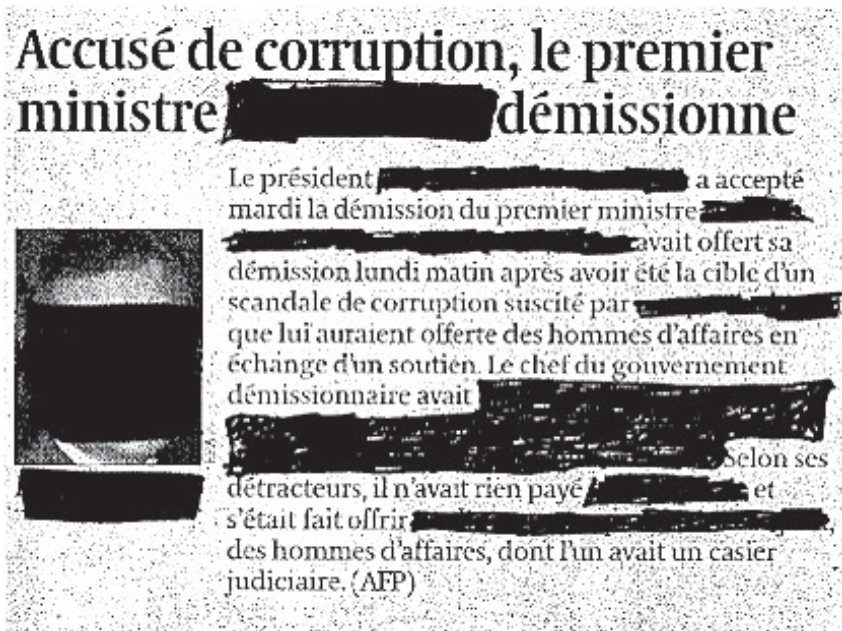
Investigating Magistrate, Financial Section, Geneva, Switzerland

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

The Press as a Source of Information

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

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



Translation:

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

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

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

Spontaneous Handing over of Information

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

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

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

Handing over Information via an MLA Request

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

Seeking the Voluntary Cooperation of a Private Party

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

Administrative Cooperation

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

Civil Procedures

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

Conclusion

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