

Chapter 5

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

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

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

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

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

Australia's approach to international cooperation concerning proceeds of corruption

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

International Action against Corruption

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

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

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

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

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

How Can Countries without Domestic Infrastructure Recover Proceeds of Corruption?

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

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

Case Study

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

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

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

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

Civil Forfeiture in Australia

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

A “Task Force” Approach

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

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

Lessons Learned

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

Jean-Bernard Schmid

Investigating Magistrate, Financial Section, Geneva, Switzerland

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

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

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

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

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

The role of forensic accounting in MLA concerning proceeds of corruption

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

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

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

The most important topics covered in the training program are:

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

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

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

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

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