

Background paper (Case study group 1 'Marcos, Thursday 13:30 – 16:00)

## Transnational Bribery/Corruption Investigations: Some Practical Guidance on Improving Procedures for Mutual Assistance & Mutual Legal Assistance

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

### Mutual Legal Assistance or Mutual Assistance?

2. Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether informal mutual assistance would, in fact, meet their needs. It is often forgotten that the country receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously. Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.
3. Although no definitive list can be made of the type of enquiries that may be dealt with informally, some general observations might be useful. Variations from State to State, must, however, always be borne in mind.
  - If the enquiry is a routine one and does not require the country of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
  - The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained informally.
  - Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
  - A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness’s evidence is likely to be non-contentious.

- The obtaining of lists of previous convictions and of basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal way.
4. The extent to which countries are willing to assist with a formal request does, of course, vary greatly. In many cases, it will depend on a particular country's own domestic laws, on the state of the relationship between that country and the requesting State and, it has to be said, the attitude and helpfulness of those on the ground to whom the request is made. The importance of excellent working relationships being built up and maintained trans-nationally cannot be too greatly stressed.
  5. It is possible to draw up an indicative list of the type of request where a formal letter will be required:
    - Obtaining testimony from a 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 the contents of emails.
    - The transfer of consenting persons into custody in order for testimony to be given.
  6. Confusion can be avoided if prosecutors and investigators have regard for the limits of the conventions and treaties that relate to mutual legal assistance. In particular, it should be remembered that the regime of mutual legal assistance is for the obtaining of evidence; thus, the obtaining of intelligence and the locating of witnesses should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.
  7. It is often forgotten just how many types of evidence and other material may be obtained informally. For example, some countries have directories of telephone account holders available on the internet (although consideration will need to be given as to whether it is in a form that may be used evidentially).
  8. Sometimes a degree of lateral thinking is required. For instance, it might be quicker, cheaper and easier for the requesting country's investigators to arrange and pay for a voluntary witness to travel to the requesting country to make a witness statement, rather than the investigators themselves travelling to take the statement. Similarly, if the consent of the state in which a country's embassy is situated is obtained, witness statements may be taken by investigators at the requesting country's embassy.
  9. Taking matters one stage further, many States have no objection to an investigator of the requesting State telephoning the witness, obtaining relevant information and sending an appropriately drafted statement by post thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to assist the requesting authority and in circumstances where no objections arise

from the authorities in the foreign State concerned (from whom prior permission must be sought).

10. There are certain key considerations for a prosecutor when deciding whether evidence is to be sought by informal means from abroad:
  - It must be evidence that could be lawfully gathered under the requesting State's law, and there should be no reason to believe that it would be excluded in evidence when sought to be introduced at trial within the requesting State;
  - It should be evidence that may be lawfully gathered under the laws of the requested State;
  - The requested State should have no objection;
  - The potential difficulty in failing to heed these elements might be that (in States with an exclusionary principle in relation to evidence) such evidence will 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 any future request.

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

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

### **Formal Requests (Mutual Legal Assistance)**

12. In criminal matters, there is no universal instrument or treaty which governs the gathering of evidence abroad. However, the building blocks for formal requests are the conventions, schemes and treaties that States have signed and ratified. For instance, in the field of corruption investigations, the UNCAC makes specific provision for mutual legal assistance and the encouraging of international cooperation.
13. Prosecutors and judges making a formal request should always assert the international obligation of a requested State to assist where such an obligation exists by way of international instrument. Equally, the authority upon which the letter of request is written should also be spelt out. To give a practical example, the UK made a statement of good practice in accordance with Article 1 of the Joint Action of 29 June 1998 adopted by the Council of Europe, in which it declared that the UK Home

Office (Interior Ministry) will ensure that requests are in conformity with relevant treaties and other international obligations. Prosecutors generally need to take heed of any such declarations of such intent made by their own State and to take action accordingly.

14. Similarly the person making a request must take care to ensure that his or her own domestic law allows the request that is actually being made. For instance, a piece of domestic legislation might, in fact, disallow some requests or type of requests that many conventions, treaties or other international instruments would appear to allow. For some countries, the domestic legislation will have primacy. To make a request otherwise in accordance with domestic law in such circumstances will be to invite arguments for exclusion of evidence.
15. 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 instance, some countries have reserved the right to refuse judicial assistance when the offence is already the subject of a judicial investigation in the requested country. The key principle must be this: regard should always be given to the fact that a requested State will have to comply with its own domestic law, both as regards to whether assistance can be given at all and, if so, how that assistance is, in fact, given.

### **The Form of the Letter of Request**

16. The requesting authority should compile a letter that is a stand-alone document. It should provide the requested State with all the information needed to decide whether assistance should be given and to undertake the requested enquiries. Of course, depending upon the nature of those enquiries and the type of case, the requested State may be quite content for officers from the requesting State to travel across and to play a part in the investigation.
17. A problem that occurs in all jurisdictions in respect of both incoming and outgoing requests is that of time. A request may take weeks, sometimes months, and occasionally and unfortunately, years to execute. As soon as grounds emerge to make the request abroad and the need for such a request is clear, then the letter should be issued. It is important that urgent requests be kept to a minimum and that everyone involved in the process should appreciate that an urgent request is urgent and unavoidably so. If a request is urgent the letter should say so clearly and in terms that explain the reasons why.
18. The material conditions to be satisfied within the letter of request may be summarised as follows:
  - If the requested country requires an undertaking of reciprocity on the part of the requesting country, then this should be given. (In this respect, common-law countries are usually more restrictive than those with a civil code).

- A prerequisite for some States is the criminalisation of the act in both the requesting and requested State (the dual-criminality rule). This should therefore be addressed within the letter.
  - The assistance must relate to criminal proceedings (whether at an investigative stage or after court proceedings have begun) in the strict and accepted sense; that is to say, an investigation or proceedings against the perpetrators of a criminal offence under ordinary law.
  - Although it need not be specifically asserted within the letter, a prerequisite for formal assistance is the guarantee of a fair trial and respect for the fundamental rights laid down in the “International Covenant on Civil and Political Rights” (ICCPR) within the legal system of the requesting country.
  - Some requested countries may require an assertion that the request does not relate to fiscal, political or military misdemeanours.
  - The letter must contain a description of the facts which form the basis of the investigations/proceedings. Such a description must be as detailed as possible and should indicate in what way the evidence being sought is necessary.
  - If the requesting and requested State is each a party to a multilateral or bilateral agreement, then the international instrument concerned should be referred to and prayed in aid.
19. Although a request is executed by a competent judicial authority of the requested country in accordance with its own laws and its own rules and procedures, very often it will be possible for the requesting authority to make an express request that the requested country apply the requesting country’s rules of procedure. If such a request is available to the requesting authority, advantage should be taken of it. The reason is obvious. A fundamental difficulty, often overlooked, is that different States have different ways of presenting evidence. The whole purpose of a request is to obtain useable, admissible evidence. That evidence must therefore be in a form appropriate for the requesting country, or as near as possible to that form as circumstances allow. It should be made clear, therefore, by the requesting country 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.
20. Further to the above, instruments may contain a provision to the effect that the method of execution specified in the request shall be followed to the extent that it is compatible with the laws and practices of the requested State. If in doubt, the requesting authority should provide examples of what is required to the requested authority.

### **Particular Problems Experienced in Mutual Legal Assistance Sought in Corruption Cases**

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

22. In some States the person in respect of whom the request for mutual legal assistance is made, is able to appeal against the sharing of evidence with the requesting country. When such an appeal is available it may well cause lengthy delay. In those European Countries which have traditionally enjoyed favourable tax and banking conditions, for instance Liechtenstein and Switzerland, an appeal avenue is available in relation to the disclosure of information on financial position etc. In those countries, in addition, institutions such as banks may have similar rights of appeal.
23. Requests for confiscation, repatriation of proceeds of crime and extradition have traditionally caused particular difficulty. The UNCAC has addressed these issues in detail and has provided fresh obligations. However, it is still the case that no internationally binding legal instrument sets out a comprehensive mandatory regime for the repatriation of assets.
24. Search and/or seizure generally can be problematic. Essentially, the authority making the request should be careful to provide as much information as possible about the location of the premises etc. But it must be remembered that different jurisdictions set different thresholds. Search and seizure is a powerful weapon for investigators. It must be assumed that the requested State will only be able to execute a request and search/seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offence has been committed and that there is evidence on the premises or person concerned which goes to that offence. These “reasonable grounds” should be specifically set out within the letter therefore. Generally, it will not be enough simply to ask for search and seizure without explaining why it is believed the process might produce evidence. For a request within Europe, it is undeniably good practice to have written regard to the core principles of the European Convention on Human Rights, namely necessity, proportionality and legality. Interference with property and privacy in European countries is now frequently justified only if there are pressing social reasons such as the need to prosecute criminals for serious offences. Even if all these factors are addressed, it may well be that the searching of the person and taking of fingerprints, DNA other samples will have less chance of success in some jurisdictions.
25. As corruption becomes increasingly sophisticated and transnational, and as more and more cases involve a link with organised crime, it may well be that there are extremely sensitive aspects to an investigation. Nevertheless, it may be that that sensitive information will have to be included in a formal request for assistance in order to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by criminals, organised crime or those who are otherwise corrupt, needs to be weighed in the balance. In reality, the system for obtaining mutual legal assistance, globally, is inherently insecure. The risk of unwanted disclosure will be greater or lesser depending on the identity of the requested state. When considering the matter, those making the request must have regard to duty of care issues which arise for them. Sometimes, difficulties can be avoided by the issuing of a generalised letter which leaves out the most sensitive information but provides enough detail to allow the request to be executed. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance; in other words, a request that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed.

27. If one was to put together a checklist for the requester on what must be included within the letter of request it would include the following:

- An assertion of authority by the sender of the letter;
- Citation of relevant treaties and conventions;
- Assurance (i.e. as to reciprocity, dual criminality etc);
- Identification of defendant/suspect;
- Present position re the investigation/proceedings;
- Charges/offences under investigation/prosecution;
- Summary of facts and how those facts relate to the request being made;
- Enquiries to be made;
- Assistance required;
- Signature of the sender.

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