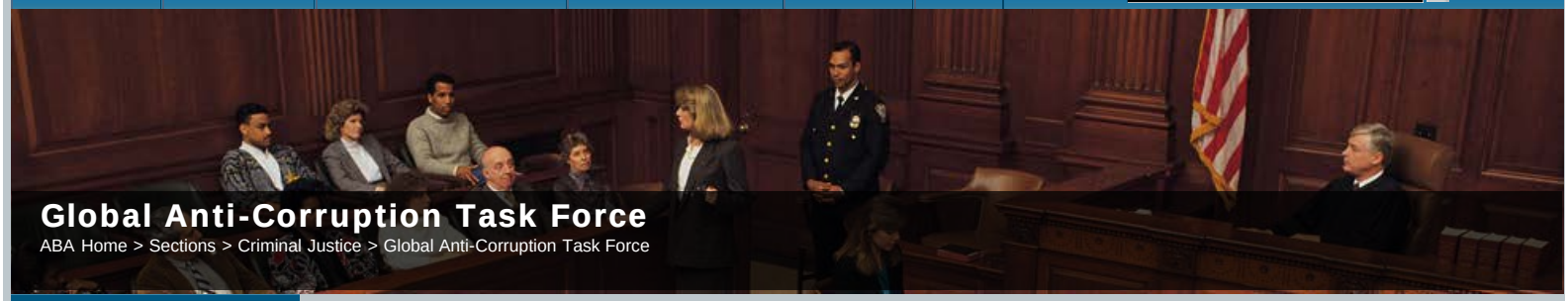

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Insights from the Trenches

Going Global: Political Corruption Investigations and Reciprocal Cooperation Under the UN Convention Against Transnational Organized Crime

By Jason Pickholz, Esq.[i]

Introduction

Imagine that tomorrow morning, as you approach the building where you work, you notice United States law enforcement agents conducting a search and seizure. Upon taking a closer look, you realize that they are accompanied by investigators from a foreign country. You watch as the agents carry off your company's computers and files for the foreign investigators to take back to their own country.

Such international cooperation is not yet routine, but it is becoming more prevalent. Its genesis can be traced back at least ten years, to the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (the "Convention").[ii] The Convention is an ambitious and commendable attempt to achieve a multi-national consensus on the criminalization of certain conduct, including corruption, and the codification of rules for cross-border cooperation in law enforcement investigations on a global level. Yet as the Convention becomes more widely utilized, and more widely recognized by those outside of the law enforcement community, issues concerning the implementation of its provisions will inevitably arise, especially where the implementation of its terms is expressly subjected to the vagaries of the laws of each separate signatory nation.

Criminalizing Corruption Under the Convention

The title of the Convention can be misleading in terms of scope, because an "organized criminal group" can consist of as few as three people acting in concert with the aim of committing one or more "serious crimes." A "serious crime," in turn, is defined as conduct punishable by a maximum prison sentence of four or more years.[iii] Conceivably, such a definition could cover most felony offenses under U.S. law, though the crime must be "transnational" in nature.[iv] In addition, the Convention contains specific articles directly addressing "Corruption."[v]

The anti-corruption provisions of the Convention state that each signatory nation "shall" adopt legislation and other measures to criminalize the direct or indirect promising, offering, giving of "an undue advantage" to a public official, or solicitation of, or acceptance of the same by a public official, in order that the public official act or refrain from acting in the exercise of his or her official duties.[vi] The "undue advantage" can be for the benefit of the public official "or another person or entity." The Convention also states that signatory nations "shall" criminalize participation as an

accomplice in public corruption.[vii]

In addition, the Convention sets forth "measures against corruption" that each signatory nation "shall" take.[viii] While including qualifying language such as "to the extent appropriate" and "consistent with its legal system," the Convention requires signatory nations to adopt legislative, administrative or other "effective measures to promote integrity and to prevent, detect and punish the corruption of public officials."[ix] Further, each signatory nation is required to take measures to ensure "effective action" by its authorities in preventing, detecting, and punishing corruption, and to provide such authorities "with adequate independence" to deter the "exertion of inappropriate influence" in the performance of their anti-corruption duties.[x]

Sovereign Independence

As is often the case with any attempt to reach international consensus, there is a delicate balance to be achieved between sovereign independence on the one hand, and rigorous global standards on the other. Among other things, the Convention states that a signatory nation shall, "to the greatest extent possible within its domestic legal system," adopt measures to process requests from foreign signatories seeking the confiscation and seizure of the proceeds of serious crime, or property, equipment or other instrumentalities used in or destined for use in the perpetration of the crime, with a view to giving effect to the requests.[xi] When two or more nations are investigating the same conduct, the nations shall "as appropriate" consult with each other to coordinate their actions.[xii]

The Convention affirms that the descriptions of the predicate offenses, legal defenses, and other controlling legal principles are reserved to the domestic law of "a" party to the Convention, and that the prosecution and punishment of such offenses shall be done in accordance with "that law."[xiii] There is no explanation of whether this refers to the law of the country requesting assistance or to the one providing it. The Convention further states that nothing therein entitles one nation "to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law."[xiv] It does not say what is permissible when those functions are not reserved "exclusively," or what is to be done when the domestic law of a country precludes something, but its sitting government nevertheless permits it in a particular case ostensibly in deference to the terms of the Convention or by resort to some other law or legal theory.

Reciprocal Cooperation – Practical Issues

The Convention states not only that signatory nations shall grant one another the "widest measure" of "mutual" legal assistance in investigations, but also that they "shall reciprocally extend to one another similar assistance . . . ."[xv] Yet, in comparison to the U.S., some nations may be more permissive in what they will allow their law enforcement authorities to do, and more restrictive in the rights that they afford to their citizens and residents.

Where the U.S. has requested or received certain latitude in conducting its own foreign investigations from such nations, the Convention could be read to require that the U.S give similar reciprocal assistance. Some U.S. law enforcement officials have interpreted this language to mean that the law of the cooperating country shall apply. But, in practice, imposing additional restrictions on the cooperation given to foreign authorities seeking to investigate conduct occurring inside U.S. territory could pose problems for the U.S. diplomatically, or lead foreign nations to be more reluctant to cooperate with transnational investigations by U.S. authorities. There is a risk of straining relations with, or even alienating, international law enforcement partners by asking for and/or receiving one level of cooperation, but then refusing the same level of cooperation when those partners seek reciprocal assistance.

Another issue could arise in terms of the rights of the entity or individual whose property is seized. The Convention ambiguously states that the domestic law of "a" or "the" signatory State applies. Interpreting the Convention as requiring application of the law of the cooperating nation makes sense from a sovereignty standpoint, but what if the property of a U.S. citizen living or working abroad is seized? The procedural laws of the cooperating country may apply to the physical search and seizure, but what are the implications for the constitutional rights of a U.S. citizen in the context of foreign actions initiated, supervised, and/or conducted in part by agents of the U.S. government? Under certain conditions, it might be unconstitutional for the U.S. government to even initiate a request under the Convention, such as where alleged "fruit of the poisonous tree" was used as the factual basis for the cooperation request submitted to the foreign government, even if the foreign government's own laws would have no problem with the use of the same factual information for evidentiary purposes.

Is the ensuing search and seizure to be considered conduct by the U.S. government subject to the U.S. citizen's constitutional or other rights, or is it conduct by the foreign government under its own constitution and laws thereby rendering the U.S. constitution inapplicable? How this issue is framed has far-reaching consequences. For example, if a U.S. citizen wanted to assert that their constitutional rights were violated, in which courts can they seek redress? Would the U.S. court say that the foreign country conducted the search and seizure under its own laws, and therefore call it a question for the foreign courts to resolve, while the foreign courts call it a question of U.S. constitutionality for the U.S. courts to resolve?[xvi]

Politically Charged Investigations

In a corruption investigation under the Convention, by definition the subject of the investigation is believed to have corrupted a *political* figure. Obviously there is a possibility of a foreign government refusing to cooperate in such an investigation where the outcome could potentially bring shame upon that nation's administration. Granted, both the U.S. Department of Justice and the U.S. Securities and Exchange Commission conduct U.S. Foreign Corrupt Practices Act investigations and prosecutions, and frequently rely on the cooperation of foreign regulators. But it is not a stretch to imagine that a foreign government might seek to block or limit cooperation with a U.S. investigation to avoid that investigation implicating one of its own party members or officials.

While such a refusal to cooperate may be frustrating in that it may effectively preclude a thorough investigation, the corollary raises a more ominous scenario. When a foreign government cooperates with the U.S. in conducting an investigation into the alleged "corruption" of a minority or opposition party member, how can it be determined whether that foreign government is engaging in genuine cooperation, as opposed to seizing upon an opportunity to allow the U.S. to discredit a minority or opposition member under the pretense of cooperation under the Convention? It does not take too much imagination to see the attractiveness and political utility of such approach: the foreign government avoids being blamed for unfairly going after the minority or opposition figure, it cites the U.S. investigation or its allegations against the U.S. defendant(s), and thereby either shames or discredits the minority or opposition member who was allegedly "corrupted" into resigning, losing some or all of his or her support base, or can now bring a prosecution of its own while claiming "it was not a political hatchet job, but look what the U.S. found so what else can we do?"

Another danger in an overzealous deployment of the Convention by the U.S., without appropriate checks and balances, is that foreign signatories may seek to do the same and may submit an unwelcome request for reciprocal assistance from the U.S. in connection with their own investigations, which the U.S. might then be hard pressed to deny. For example, a foreign government might use a purported "investigation" under the Convention as a cover for discrediting a U.S. political figure. If the request for cooperation in relation to a corruption investigation arises under the Convention, the foreign government would technically be investigating the alleged corruption by its own citizen or a related corporation of a "public official". This could conceivably be a public official of the country where the foreign individual or corporation is situated, *i.e.*, the country from whom the assistance is sought. This is because it is more likely that that person or corporation (or its local affiliate) would be seeking to "corrupt" an official in the jurisdiction where they are located or do business. For example, a foreign nation wishing to discredit a vocal U.S. Senator could "investigate" one of its own corporations that has operations in the U.S. Where a foreign country seeks U.S. assistance under the Convention to seize evidence against one of the foreign country's citizens or corporations living or doing business in the U.S., there is a possibility that they have already determined to find "proof" of "corruption" against a U.S. official regardless of the facts. Even where there is no hidden agenda, in a quest to prosecute its own citizen or corporation, the foreign country's investigation could recklessly or inappropriately implicate a U.S. political figure.

While allegations of corruption could be fabricated without resort to the Convention, an investigation under the Convention with the cooperation of one or more other nations, and especially with the cooperation of the public official's home country, could lend more public credibility to the allegations against the public figure. If the U.S. authorities overzealously employ the Convention to seek cooperation for their own investigations, without appropriate checks and safeguards, they could conceivably have a difficult time dealing with or denying reckless or even malicious requests for cooperation from other signatory nations without being accused of hypocrisy or facilitating a cover-up.

Few would argue that it is improper for the U.S. to investigate a U.S. corporation or U.S. citizen believed to have engaged in political corruption at home or abroad, or to assist a foreign nation in connection with its own legitimate investigation. But to simply say that the rest "is not our problem" over-simplifies reality. The U.S. consistently holds itself to the highest standards of conduct, as is exemplified by its extensive federal securities laws, its early enactment of the FCPA during the 1970s and heightened standards of conduct imposed on its military personnel, to name but a few. Those high standards should not be compromised in the interests of "expediency," or in reaction to a particular economic environment. Already, despite the aforementioned self-imposed high standards, the United States has on occasion been accused, often unfairly, of improperly meddling in foreign politics and affairs, and by playing by one set of rules in pursuit of its own objectives while imposing a different set of rules on others. While it may not be possible to anticipate every potential or hypothetical ramification, where the U.S. is initiating actions that have the potential to be manipulated with significant collateral consequences, it should consider procedures or "checks" designed to illuminate and/or minimize the possibility of having its own investigations or cooperation compromised or manipulated.

Conclusion

It is beyond the scope of this article to speculate as to what particular laws, rules, procedures, or safeguards should be adopted by any particular country. However, it is posited that those rules and procedures need to be transparent, and must be applied fairly and objectively to all people and entities, both domestic and foreign. By way of example, one of the most significant factors contributing to the growth of the U.S. economy in the twentieth century was the passage of the federal securities laws in 1933, 1934, and 1940, combined with a vigorous government agency charged with enforcing them, through fair and objective courts with established procedures accessible to everyone. Such a system gave domestic and foreign businesses alike the confidence to invest in the U.S. markets, secure in the knowledge that they would be subject to the same rules as everyone

else, with equal access to fair and impartial courts to redress grievances. The implementation of a similar system in connection with multi-national criminal investigations may go a long way toward inspiring confidence in U.S. law enforcement investigations both domestically and abroad. It may even begin to inspire increased cooperation from foreign individuals and corporations, secure in the knowledge that the Convention, and the U.S. implementation of it, will be conducted in an open and transparent manner, with the same rules and procedures applicable to everyone, and with their rights protected through fair and impartial courts accessible to everyone.

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[ii] Other sources of authority for international cooperation in law enforcement investigations can be found in mutual legal assistance treaties between the United States and individual foreign countries ("MLATs"), Memoranda of Understanding between the Securities and Exchange Commission and foreign securities regulators ("MOUs"), extradition and other treaties, and regional treaties and organizations such as Eurojust in the European Union.

[iii] Convention, Article 2.

[iv] Id. at Article 3.

[v] Id. at Articles 8-9.

[vi] Id. at Article 8 ¶ 1.

[vii] Id. at Article 8 ¶ 3.

[viii] Id. at Article 9.

[ix] Id. at Article 9 ¶ 1.

[x] Id. at Article 9 ¶ 2.

[xi] Id. at Article 13.

[xii] Id. at Article 15 ¶ 5.

[xiii] Id. at Article 11 ¶ 6.

[xiv] Id. at Article 4 ¶ 2, Article 12 ¶ 9.

[xv] Id. at Article 18.

[xvi] While it may be possible, it would seem less likely that the individual would bring an action against either his or her own government, or the government of the country of his or her own residence, in an international court or tribunal. The more likely avenue, at least of first resort, would seem to be the courts of one country or the other, seeking to have the court interpret its own constitution or laws in his or her favor and precluding use of the seized evidence or granting some other remedy.

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