

KEYNOTE ADDRESS
TENTH REGIONAL SEMINAR ON GOOD GOVERNANCE FOR SOUTHEAST
ASIAN COUNTRIES

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I. INTRODUCTION

At the outset, I would like to say that it is really a great honour and privilege for me to be given an opportunity to deliver the keynote address in the presence of such honourable guests, learned experts and distinguished participants gathered here in Yogyakarta for this meaningful occasion. UNAFEI is truly grateful as to the efforts made by all those who have been involved in the planning, preparation and implementation of this Tenth Regional Seminar on Good Governance. I would like to express special thanks to the staff members of the Attorney General's Office of the Republic of Indonesia and the Corruption Eradication Commission, KPK, for their tremendous job of co-hosting, as well as their kindness and hospitality. I am really happy to be here in this peaceful, cultural city.

Each year, the purpose of this seminar is to discuss and share with each other experiences, information and insights about investigation, prosecution and prevention of corruption cases.

This year, under the umbrella theme "Contemporary Measures for Effective International Cooperation", we are focusing on four discussion topics:

1. International cooperation in generating leads;
2. Best practices for international cooperation in investigating corruption cases;
3. International cooperation in the trial of corruption cases; and
4. International cooperation relating to asset recovery.

Thus the discussion is expected to cover various stages in the investigation of corruption cases, from a very early stage of investigation where officials start working based on leads they obtain, through the more advanced stage of collecting evidence that will be admissible in court and relevant and credible enough to obtain a conviction with proper punishment, to the possible final stage where you try to repatriate the proceeds of corruption that are located overseas.

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This morning, as one of the keynote speakers, I would like to share my thoughts and experience on the investigation, prosecution and trial of crimes involving transnational elements. As I am already approaching sixty, and therefore not very familiar with the leading edge technology, I will focus more on how to effectively utilize the conventional system of international cooperation, especially mutual legal assistance,

But before going into the main part of my presentation, I would like to talk briefly about my professional background, so that you can better understand my perspective on international cooperation this morning.

My background is prosecution. I started my career as a public prosecutor in 1987, starting in the Tokyo District Public Prosecutors Office. In 1990, I went to Vienna to join the Crime Prevention and Criminal Justice Branch of the United Nations Office at Vienna, the predecessor of the United Nations Office on Drugs and Crime (UNODC). My work in Vienna included assisting in the intergovernmental negotiation to establish the Commission on Crime Prevention and Criminal Justice, which presently meets every year in spring in Vienna. I went back to Japan in 1992 and worked in the Chiba District Public Prosecutors Office. In 1995, I was dispatched to Brussels, Belgium, to work as the legal attaché in the Japanese Mission to the European Union. My main task was to follow the then developing EU scheme on international cooperation in criminal matters. In 1997, I went back to Tokyo to work in the International Affairs Division, Criminal Affairs Bureau of the Ministry of Justice. My job included processing various mutual legal assistance and extradition requests, both incoming and outgoing, and the negotiation of several international instruments, such as the United Nations Convention against Transnational Organized Crime, and the mutual legal assistance treaty between Japan and the United States. In 2000, I went back to prosecution and worked in Tokyo and Oita, a nice region on Kyushu Island. In 2003, I was transferred to the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), and worked first as professor and then as deputy director. In 2007, I joined the UNODC as a senior legal expert of the Terrorism Prevention Branch and worked in its regional office in Bangkok, Thailand. I went back to Japan in 2009 and became a professor at the University of Tokyo, and taught its law school students practical criminal procedure. In 2013, I again joined the prosecution and worked as a prosecutor at the Tokyo High Public Prosecutors Office, as director of the Trial Department of the Tokyo District Public Prosecutors Office, as a prosecutor at the Supreme Public Prosecutors office, and as the Chief Prosecutor of the Saga District Public Prosecutors Office, which is located on Kyushu Island. In April of this year, I came back to UNAFEI as its Director.

So in short, I have been going to, from and between actual prosecution business and international cooperation matters. Now I would like to proceed to the main part of my presentation: international cooperation.

II. PURPOSE OF INTERNATIONAL COOPERATION

The notion of “international cooperation” is very broad. Meetings and courtesy or study visits of anti-corruption agencies, and international seminars such as the present

one are also forms of international cooperation. However, this morning, I would like to focus on one aspect of international cooperation, i.e., cooperation among national agencies to collect, or to assist in collecting, information or evidence useful for the investigation of specific cases, or to recover, or to assist in recovering, the assets or proceeds of crime. Here I said “information or evidence”, deliberately omitting the word “perpetrator”. My intention is to set aside the question of extradition, which involves many different issues, and to concentrate on the issues of mutual legal assistance and, to some extent, asset recovery. However, most of the points I am making this morning will also be applicable to extradition procedure. Thus, when I say “international cooperation” in my remarks this morning, I am using this term in this narrow sense.

Finding in the course of investigation something which smacks of transnational elements is always a discouraging moment for investigators or prosecutors. In their view, which is not always wrong, obtaining evidence from beyond national borders is something which requires a lot of paperwork and advanced knowledge of international law and foreign language, at least English, and takes a very long time; all the efforts and time consumed are likely to be worth nothing, getting no positive result at all. Many otherwise competent investigators just stop thinking once they know that evidence is located outside their country.

In order to cope with crimes in this internationalized world, we have to change this mindset. At the same time, we should not be too naïve to believe that goodwill and hard work will solve all difficulties. We have to face the challenges arising from the difference of national laws and customs, and sometimes complex diplomatic issues.

In order to effectively investigate crimes with transnational elements, it is always a good idea to go back to the very basis and ask ourselves why and what we need from overseas.

In short, investigators and prosecutors try to obtain any of the following three: evidence; information; and/or assets.

We need evidence to prove specific crimes in the courtroom, and obtain punishment corresponding to the gravity of such crimes. It must be admissible in our courts under our national evidence law, and it must have material value to convince the court that each specific element of the crime required by our penal law exists beyond a reasonable doubt.

We need information that may lead us to start investigating some offences, or that may help us decide the course of the investigation. In many cases information is also essential in preventing future crimes.

As for the assets, I do not think any explanation is needed. However, repatriating the asset is the most difficult part.

Before taking steps to ask for international cooperation, we should be sure what we need: evidence, information or assets.

III. INFORMATION AND EVIDENCE

As I have just said, prosecutors need evidence to establish their cases. It should be admissible according to the evidence law, and it should have material value and credibility to prove the essential elements of the crime. In any country, prosecutors and investigators are working under natural instinct to collect as many items of evidence as possible. They have a big appetite for evidence. Those of you who are investigators but not prosecutors must have experienced some difficult times to meet the prosecutors' endless demands for more and more evidence to make your case.

However, when it comes to evidence outside your borders, it is sometimes necessary to follow the teaching of Zen: "***I am content with what I have***"¹, slightly revised as "*I am content with what I can get*". Or you may wish to follow a Latin proverb; "***Si non adsunt carnes, taricho contentos esse oportet***: *If you do not have meat, be satisfied with dried fish*". In developing strategies to prove the case in the courtroom, prosecutors should carefully study and evaluate all evidence they have, and logically construct an argument based on the evidence that is persuasive enough to convince the judges to render a conviction.

For example, in bribery cases, investigators and prosecutors interview both bribe takers and bribe givers. If a policeman brings an active bribery case (offering of a bribe) to a prosecutor without interviewing a bribe taker, the prosecutor will definitely ask the police to interview the bribe taker. In domestic investigation, it is unimaginable that the investigators bring charges against bribe givers without interviewing bribe takers. However, in cases involving bribery of foreign public officials, i.e., the bribe takers, "foreign" public officials, are usually residing in a foreign country. You have to resort to mutual legal assistance procedure in order to conduct the interview of the bribe takers, which is not always possible. Even in such cases, prosecutors might proceed to prosecute the bribe givers based on evidence they have obtained in their country, such as statements of bribe givers (confessions), financial records showing the flow of money, contract documents and statements of employees who engaged in the business transaction, and so on. However, prosecutors have to prove that the bribe takers were actually public officials of the foreign country, and to do so they need to obtain some documents from that country establishing that the bribe takers were in fact its public officials. But I think you can imagine that obtaining documents through mutual legal assistance is much easier than obtaining statements of bribe takers. In the presentation of my colleague Mr. Yamada tomorrow afternoon, you will see what Japanese prosecutors did in a similar situation.

Now moving on to the issue of information, there are several types of information in terms of how we make use of it. Some information lets us know something wrong is going on and there is a need for (sometimes urgent) action to prevent crime. Although obtaining and properly processing this kind of information is very important, we need

¹ There is a famous stone washtub in *Ryoan-ji* temple (famous for its stone garden) on which this dictum is engraved in Chinese characters.

special techniques and organization similar to intelligence gathering to deal with this issue, and I have to admit that I am not the best person to speak on this topic.

The second type of information tells us that we should consider starting an investigation of an offence that has not yet been discovered by the criminal investigators. Upon reading suspicious transaction reports furnished by the Financial Intelligence Unit (FIU), an investigator might consider gathering more information on certain high ranking officials for a possible bribery offence. After the initial investigation on this suspicious case, the investigator may be able to step into a more advanced stage of investigation, and, with some luck, may be able to prosecute and obtain a conviction.

When you hear the word “information”, usually you imagine the situation like the one I just mentioned above, and in most cases international exchange of these types of information is conducted outside the framework of mutual legal assistance.

However, during the course of the investigation of specific offences, when the investigators or prosecutors are focused on gathering evidence, they are also dealing with enormous amounts of information.

Here, let me introduce a hypothetical case, let’s call it the “Seasons Case”, to elaborate my point in a more illustrative manner.

The Seasons Case is a bribery case. Mr. Spring, a section manager of a construction company, Seasons Inc., offered USD 100,000 to Ms. Summer, director of the Ministry of Construction of the *Republic of Printemps*², in order to obtain favourable treatment in an airport construction project.

Ms. Christie, a prosecutor in *Printemps*, started the investigation on this case after receiving an anonymous telephone call. Ms. Christie had a very competent assistant officer, Mr. Poirot. A man who called himself R2D2 but refused to reveal his identity stated the following: Ms. Summer and Mr. Spring were meeting quite frequently in an Italian restaurant Il Risotto di Primavera³ until May 2015; Seasons Inc. succeeded in obtaining a contract with the Ministry of Construction worth USD 800,000,000; Ms Summer bought a nice villa (USD 80,000) in the *Kingdom of Fruehling*⁴.

After this phone call, Ms. Christie did a quick Internet search and found out that Mr. Spring and Ms. Summer did exist and worked in the respective company and ministry. Ms. Christie also learned that the webpage of the Ministry of Construction offered information on past and future procurement and bidding, and the investigator confirmed that Seasons Inc. actually obtained a contract as R2D2 had said.

Ms. Christie, after verifying also by Internet that Il Risotto di Primavera was

² French word for spring, and there is a famous department store chain using this as its name.

³ Italian word for spring.

⁴ German word for spring.

a very famous restaurant located in downtown *Printemps City*, sent Mr. Poirot to the restaurant to have a look at the reservation book. The owner said that he would let Mr. Poirot look at the reservation book but insisted that he could not produce the book to the authority without a court order. Mr. Poirot found that every month Mr. Spring reserved a room for three persons. The owner agreed to check the billing record, and it turned out that every time they had charged for three persons. Mr. Poirot, with the owner's permission, interviewed the restaurant employee who actually serviced the guests in the room. The employee clearly remembered that she served three guests, and upon seeing several photos, immediately identified Mr. Spring and Ms. Summer as two of the three. The waitress said that the third guest was a middle aged man, and from his behaviour she guessed that Mr. Spring was his boss.

After further investigation, Ms. Christie found out that the third person was Mr. Fall, who had been working for Mr. Spring at Seasons but had left the company three months ago, and presently resides somewhere in the *Republic of Ilkbahar*⁵.

Ms. Christie succeeded in finding the bank account of Ms. Spring. After obtaining its transaction records, she found out that USD 90,000 was transmitted to *Happyland Resort Inc.*, a real estate agency located in *Printemps*. *Happyland Resort* is known for assisting customers to purchase real estate and villas in *Fruehling*.

At this stage, you might guess that while Mr. Spring and Ms. Summer were meeting at *Il Risotto di Primavera* they discussed something about the construction contract and bribes might have been offered. Mr. Fall might know something about this deal. Furthermore, *Happyland Resort* might have helped Ms. Summer to acquire a villa in *Fruehling*, possibly by the bribe she had received from Mr. Spring.

Of course we all know that things do not go as smoothly as this in real life. But even in this very simplified case, Ms. Christie and Mr. Poirot acquired a lot of information. Some information guides them in new directions, where they found new clues on locating Mr. Spring and Ms. Summer. All criminal investigators are engaging in these kinds of activities every day, inside their own countries.

IV. COLLECTION OF INFORMATION AND EVIDENCE FROM SOURCES OTHER THAN THE AUTHORITIES AND OFFICIALS OF FOREIGN GOVERNMENTS

In the Seasons case, there are several international elements. Ms. Spring might have purchased a villa in the *Kingdom of Fruehling*, and Mr. Fall may be residing in the *Republic of Ilkbahar*.

⁵ Turkish word for spring.

The time has come to send out the requests for mutual legal assistance. OK, but request what? An interview of Mr. Fall and the confiscation and recovery of Ms. Summer's villa?

Of course, it is too early. Ms. Christie does not know Mr. Fall's address in *Ilkbahar*. She does not know whether Mr. Fall will cooperate with her or take sides with Mr. Spring and Ms. Summer. She also does not know whether Ms. Summer actually owns a villa in the *Kingdom of Fruehling*. Does she first request the *Ilkbahar* government to locate Mr. Fall or, the *Fruehling* government to initiate its own investigation on the location of the villa?

There is a famous saying: "**Charity begins at home**". One of the important maxims in the investigation of transnational crime is "**Investigation begins at home**". Before going beyond the border, we should do everything possible within our jurisdiction, starting, as Ms. Christie did, with an extensive Internet search.

Since Mr. Fall worked at Seasons Inc. in *Printemps*, it is very likely that he had friends and colleagues there. The first thing you can try is to identify these persons and ask them about Mr. Fall. Some of them might know his present address in *Ilkbahar* and/or other information concerning his whereabouts. Of course you should be careful in deciding whom to contact, as some person might tell Mr. Fall that the authorities are tracking him. But if you are lucky, you might find somebody who holds a grudge against Mr. Fall and is willing to offer quite a lot of information. It might turn out that Mr. Fall and Mr. Spring had some disputes and Mr. Fall would cooperate with investigators.

As for Ms. Summer's villa in *Fruehling*, the first place to go is the office of Happyland Resort in *Printemps*. Ms. Christie or Mr. Poirot can ask its manager or employees about the USD 90,000 transferred from Ms. Spring to Happyland Resort, and perhaps they can obtain some information, or even documentary evidence, related to the purchase of the villa and its whereabouts. If they are cooperative enough, they might obtain necessary documents from their counterparts in *Fruehling* and produce them to Ms. Christie.

After all, Ms. Christie may have to resort to a formal mutual assistance request. But having various information and evidence in advance will be very helpful in making a precise request to foreign authorities. Thus the maxim, **charity begins at home**.

V. MEASURES NOT RESORTING TO MUTUAL LEGAL ASSISTANCE

Now it is time to obtain information and evidence from overseas. And again, I would like to quote another maxim. This time it is not so prominent as the preceding ones, because I coined this motto: "**Do not use MLA unless you cannot dispense with it**".

This is especially true for gathering information, i.e., information that you do not intend to admit into evidence at trial. There are many channels for the inter-agency

exchange of information already in existence. For example, if Ms. Christie is not so lucky to find somebody in her country to provide the whereabouts of Mr. Fall in *Ilkbahar*, she may wish to try the Interpol channel (since Ms. Christie is a prosecutor, she might have to ask her police colleagues to contact Interpol). Information concerning the transmission of the money from *Printemps* to *Fruehling*, and something about *Happyland Resort* and the villa, may be obtained through the network of Financial Intelligence Units (FIUs).

Apart from these channels, you can consider using your personal network. If Ms. Christie or Mr. Poirot know some policemen or prosecutors in *Fruehling* or *Ilkbahar*, they can always ask for informal assistance by a phone call or e-mail correspondence, and they might be happy to provide you with relevant information (but not evidence).

VI. MUTUAL LEGAL ASSISTANCE

After utilizing all the measures mentioned above, at last Ms. Christie has to go through the formal mutual legal assistance (MLA) process.

It is usually the prosecutor in charge of the case who drafts the request for MLA, in our hypothetical case, Ms. Christie. However, MLA requests should be signed by the chief of the agency (such as the chief prosecutor of a prosecutors' office), processed through the Central Authorities of the requesting and requested states, and forwarded to the agency in the requested state who actually conducts the necessary activities to collect evidence. Therefore, after drafting the request, Ms. Christie has to take it to her boss and ask him/her to sign it.

Here, again, permit me to present another maxim: ***“Let your boss sign the MLA request at the very last stage”***.

Notwithstanding Ms. Christie's outstanding professional competence, it would be impossible to draft a perfect request by herself. The request should meet all the conditions under national legislation of the requested state, and the investigation to collect evidence contained in the request should also follow their domestic laws. I repeat this since it is a very important point when it comes to mutual legal assistance. The request should meet all the conditions under the national legislation of the requested states, and the investigation to collect evidence contained in the request should also follow their domestic laws. Perhaps you may not be happy about it, but this is the situation we have to live with. Collection of evidence to answer the MLA request should follow the national legislation of the requested state.

There will be a lot of other things, such as work practices of the requested states, which might affect the actual execution of the request for mutual legal assistance. Even in this Internet age, and with all the skills you may have on the language of the requested states, just reading their legislation will not be enough to write a request that would be one hundred percent acceptable to the Central Authority of the requested state.

Let's go back to Ms. Christie's hypothetical case.

If Ms. Christie asks her top boss to sign the request document after finalizing the document by herself, the Central Authority of her country, *Printemps*, may find some legal problems and send the document back for re-drafting. Or, if she was lucky and the request reaches the requested state, *Ilkbahar* for example, it is very, I repeat, "very" likely that its Central Authority will find problems and come back with an answer that they cannot accept the request as it is.

For example, *Ilkbahar* might say that they cannot conduct the interview of Mr. Fall, which Ms. Christie had requested, because Mr. Fall is presently under the investigation of the *Ilkbahar* authority and contacting him might jeopardize their investigation. However, they might be kind enough to inform Ms. Christie that they have obtained, from some other person, a note written by Mr. Fall which states that he was with Mr. Spring at Il Risotto di Primavera when Mr. Spring handed cash to Ms. Summer, and might propose that if *Printemps* asks for this note instead of the interview, they might be able to provide a copy. Now Ms. Christie has to make a decision. Please remember the Latin dictum on meat and dried fish. Should she be happy with the note (dried fish) instead of Mr. Fall's interview (meat), or should she wait until *Ilkbahar* officials' investigation of Mr. Fall reaches a certain stage and they are ready to honour her request for his interview? It all depends on how much time and other relevant evidence Ms. Christie has. She has to decide whether she needs the fish or the meat. After all, any investigator will definitely want to add the note to the request.

The *Ilkbahar* authority might otherwise find that the request lacks some legal elements required by their domestic law and tell *Printemps* that they cannot provide assistance unless the request is revised to add some more contents to meet the conditions.

In such case, Ms. Christie has to revise the request and ask her boss to sign it again. And if she continues to work in this way, there is a good chance that she has to repeat this exercise many times. I think you can imagine that, each time Ms. Christie enters the office of her top boss, she will be feeling more and more uneasy.

In order to avoid this unpleasant situation, we should do whatever we can to ensure that the formal request goes as smoothly as possible. Therefore, informal consultation with your Central Authority, and perhaps through this office, with the Central Authority of the requested state is instrumental in writing a good request. After finishing her first draft, Ms. Christie should send the draft to the Central Authority of *Printemps*, which will be asking her a lot of questions and proposing revisions of its texts. Then the *Printemps* Central Authority will be sending a revised draft to the *Ilkbahar* Central Authority, which will be doing the same thing. After a lot of work and a bit of luck, *Ilkbahar* would say they are happy with the request and ready to accept it formally. This is when Ms. Christie should go to her boss and get the letter signed. Hence my maxim: "***Let your boss sign the MLA request at the very last stage***".

Now, I would like to share the experience of my most successful MLA request. This was a cocaine smuggling case and not bribery, but I believe the process I followed

in this case may be helpful to show that, if things go well, MLA can be conducted quite quickly. Please note that although this is a real case I dealt with, I am using pseudonyms in my presentation.

(LA Case)

It was in 1993. I was thirty-five years old and working at the Chiba District Public Prosecutors Office. Chiba is the region where Narita International Airport is located, and naturally, we were dealing with many drug trafficking cases through this airport.

On a hot summer day, 29 August 1993 to be specific, I received a phone call from the secretary of the Chief Prosecutor of our office to immediately report to his office. Sitting there were the Chief Prosecutor, Deputy Chief Prosecutor, Director of the Criminal Investigation Division, and a senior prosecutor. The Chief Prosecutor told me that he wanted me to travel to Los Angeles as soon as possible, and the senior prosecutor gave me the following reason:

- A Mr. East was arrested on 9 July 1993 when he arrived at Narita Airport from Los Angeles, carrying with him about 80 grams of cocaine;
- Mr. East, an employee of a famous Japanese publishing company West Shoten⁶ Co. Ltd, was prosecuted on cocaine smuggling charges on 19 August 1993. He was a staff member of the photography section of West Shoten;
- From the beginning of the investigation, Mr. East admitted that he tried to smuggle the cocaine, but first he insisted that it was for his own use. However, at the later stage, Mr. East told police investigators and the senior prosecutor in charge of this case the following story:

Actually, Mr. East tried to smuggle the cocaine for his employer, Mr. West, president of West Shoten, who was also a famous film producer and haiku⁷ poet;

Mr. East had been smuggling cocaine for Mr. West many times for many years (at least thirty times starting from 1987);

Each time, Mr. East was instructed by Mr. West himself to purchase cocaine from Los Angeles. Under Mr. West's approval, Mr. East prepared the company's internal papers for overseas travel and for advance payment of approximately USD 10,000. According to these papers, the purpose of the trips was to meet a Mr. North, an entertainment industry consultant, to obtain the latest information concerning the American film industry, and the money was for the commission to Mr. North;

Actually, the purpose of Mr. East's travel to Los Angeles was to see Mr. North

⁶ *Shoten* is a Japanese word for "bookstore".

⁷ A Japanese poem of seventeen syllables, in three lines of five, seven, and five, traditionally evoking images of the natural world (Oxford Dictionary of English, Second Edition, Revised)

and to buy cocaine from him. Mr. North had nothing to do with the collection of information on the film industry;

Mr. East kept a diary, in which he entered when he met Mr. West in his Tokyo office, or Mr. North in Los Angeles.

- Since Mr. East's statement was corroborated by the entries in his diary, the Chiba Prefectural Police informed the Chiba Prosecutors Office that they wanted to arrest Mr. West;
- Considering that the statement of Mr. East was credible, corroborated by the diary entries and also by his travel records, the Prosecutors Office agreed to the arrest of Mr. West, which was to take place on 29 August, the very day I was called into the Chief Prosecutors Office. Since Mr. West was a celebrity figure in Japan, this information had been kept only among key officers in the Police and Prosecution, and I, a rather junior prosecutor (six years of experience at that time), was kept outside the circle.
- Considering the social and financial status of Mr. West, the Chief Prosecutor expected that Mr. West, with the help of the best defence lawyers in Japan, would deny the charge and do his utmost to challenge the credibility of Mr. East as a witness for the prosecution. Therefore, the Chief Prosecutor wanted additional corroboration: the statement of Mr. North that corresponds to what Mr. East said.

Against this backdrop, my mission was to obtain a written statement, preferably an affidavit, of Mr. North before the conclusion of the investigation against Mr. West. Our reasonable guess was that the court would grant his pretrial detention until 19 September.

I was assigned this mission because I had been involved in a separate drug smuggling case in the previous year and succeeded in obtaining several items of evidence from Los Angeles, and by travelling there to consult with the LA authorities, I had established good working relations with them.

After coming back from my Chief's office, I immediately made a telephone call to Inspector Suzuki of the Chiba Prefectural Police. In the previous year, Inspector Suzuki and I travelled together to Los Angeles for the mission I just mentioned, and he also had very good working relations with the Los Angeles law enforcement officers.

Apparently Inspector Suzuki had received similar instructions from his boss, and our telephone conversation went quite smoothly. We agreed that while Inspector Suzuki would contact our colleagues in Los Angeles, namely the Los Angeles Police Department (LAPD), the Los Angeles County Attorney's Office and the Federal Bureau of Investigation (FBI) Los Angeles Office, I would start drafting an MLA request and contact our Central Authority, the International Affairs Division of the Criminal Affairs Bureau of the Ministry of Justice.

I finished the first draft on the same day, and sent it to the Central Authority by

facsimile (in those days e-mail services were not available in our offices). The officers in the Central Authority were very cooperative. Prior to my contact, the Deputy Chief Prosecutor of the Chiba Office had already talked with the Director of the Central Authority, asking him to afford utmost assistance in urgently processing the request. The officials in the Central Authority (they are selected from among competent prosecutors) asked me to provide additional information, and based on that, suggested some changes to my draft. After revising the draft, they sent it (again by facsimile) to our legal attaché in our embassy in Washington (who was also from the prosecution).

Our legal attaché in turn went to the US Central Authority in the Department of Justice, and showed them the draft MLA request for comments. After some informal consultation between Washington, Tokyo and Chiba, we managed to finalize the MLA request which met all US concerns.

In the meantime, Inspector Suzuki talked with his counterparts in Los Angeles. They were very quick to locate Mr. North. They suggested that they contact Mr. North and see whether he is willing to provide a statement, and upon our agreement, they did so. Mr. North at least agreed to see us, both American and Japanese officers in Los Angeles, and our friends in Los Angeles told us that they would provide assistance once the formal request reached them. Both the Central Authority in Washington and Los Angeles authorities also agreed that Inspector Suzuki, my assistant officer and myself would travel to Los Angeles and be present at the interview of Mr. North.

All of this was done in a few days. After finalizing the MLA request, the Chief Prosecutor signed the document and we sent it to our Central Authority. The Central Authority sent the document to the Ministry of Foreign Affairs, and at the same time asked them to formally process this document as soon as possible. The Central Authority in Washington made a similar request to the State Department (at that time we had not concluded a Mutual Legal Assistance Treaty with the US, and we had to go through diplomatic channels).

While my assistant officer and I were busy processing the MLA request, my colleagues in the Chiba Office worked very hard to have our official passports and US visas issued promptly, and to book a plane to Los Angeles.

Inspector Suzuki, my assistant officer Mr. Takaoka and I left Narita on 9 September, and arrived at Los Angeles International Airport on the same day. There we were met by the officials from the LAPD, the FBI and the LA County Attorney's Office and immediately had a meeting, which turned out to be very encouraging. Mr. North agreed to come to the LA County Attorney's Office the next day and also agreed to speak about his interaction with Mr. East. He agreed that we, the Japanese officers, could be present there. The US officials agreed that the interview should be conducted in Japanese (Mr. North was a Japanese national with permanent resident status in the US, and two of the American officials were fluent in Japanese because they were second generation Japanese Americans). US officials also agreed that I could directly ask questions to Mr. North with their permission and presence.

The next day, 10 September, Mr. North appeared at the LA County Attorney's Office on time. The interview went very smoothly. After being advised of his right against self-incrimination, Mr. North quite frankly answered our questions, and his answer basically matched what Mr. East had said. At the end of the interview Mr. North agreed to sign an affidavit that reflected the contents of his oral statement. We called in a notary public and the affidavit was completed. All of this took less than five hours. With the permission of the US side, I facsimiled the copy of the affidavit to the Chiba Office (The original was to be processed through formal channels).

Thus my mission was completed on the second day of my stay in Los Angeles. I was thinking that the Director of the Criminal Investigation Division should be very happy to see the copy of the affidavit I facsimiled. However, the next day I received a phone call from him and he instructed me to ask several additional questions to Mr. North. Prosecutors' appetite for evidence never stops. Therefore, I asked our US colleagues for an additional favour, and made an argument that the new questions should be regarded as covered by the original MLA request and thus no further request was needed. They were kind enough to agree to this (after consulting their Central Authority), and we met Mr. North again two or three days later.

While we were in Los Angeles, we interviewed another person, Mr. South. Mr. South was a film entertainment consultant who had had some business with West Shoten. We wanted to make sure that he had nothing to do with the money Mr. East was carrying to Los Angeles, and we succeeded in obtaining his written statement to that effect. We did not need his affidavit because his statement was just for purposes of impeachment in case Mr. South suddenly appeared at trial as a witness for defence and testified that it was actually Mr. South, not Mr. North, who had been receiving the commission from West Shoten and what Mr. East had been saying was not true. Of course, we did not forget to include the interview of Mr. South in our original MLA request.

During the execution of our request, we knew that some of the money for cocaine had been transmitted to Mr. North's account in a certain bank in Los Angeles. We wanted to confirm that the money was coming from West Shoten. But bank records were not included in our original MLA request, and there was no way to read the wording of the request to argue in good faith that it covered bank records. Then our American colleagues decided to use their own investigative authority (cocaine trafficking is naturally also an offence in the US) to order the bank to produce related records by way of subpoena. They said that they may be able to provide the bank records to us upon receiving a new request which clearly asks for them.

Mr. West was prosecuted on 19 September 1993.

Later at the trial of Mr. West, the prosecutors requested the court to admit the affidavit as evidence against Mr. West. They argued that under Subparagraph 3, Paragraph 1 of Article 321 of the Code of Criminal Procedure, the affidavit should be admissible as evidence. The provision states that a person's written statement is admissible 1) if a person cannot testify before the court because, *inter alia*, he/she is residing outside Japan, and 2) if the statement was made under circumstances which

assure that the statement was especially credible. In practice, documents that are deemed admissible under this provision are called “*Subparagraph 3 documents*”⁸ by legal practitioners, criminal law scholars and law school students. It is quite natural that the defence attorneys vigorously argued against the prosecutors’ assertion that the affidavit of Mr. North should be admitted as evidence under this provision.

Since Mr. North was living in the US with permanent resident status and had no intention to come back to Japan, there was a reasonable basis to meet the first condition. However, the prosecutors had to prove the second condition. In order to do so, I went to the courtroom as a witness for the prosecution and testified about all the steps we took in Los Angeles and Mr. North’s attitude during the interview. This was to show that his statement had been made under circumstances which assure that the statement was especially credible.

The Chiba District Court admitted the affidavit as evidence, stating that it can be regarded as a Subparagraph 3 document, and on 12 June 1996, sentenced Mr. West to four years of imprisonment. However, please note that the most important incriminating evidence was the testimony of Mr. East. The affidavit worked as corroborating evidence.

Naturally, Mr. West appealed, and his defence attorneys again argued, among others, that the affidavit was not an admissible Subparagraph 3 document. On 1 March 1999, the Tokyo High Court rendered a judgement dismissing the appeal. Mr. West appealed again to the Supreme Court of Japan, which on 31 October 2000 rendered a decision dismissing the appeal. In its decision, the Supreme Court explicitly endorsed the High Court’s decision to admit the affidavit under the Code of Criminal Procedure.

As you have seen, I succeeded in obtaining the affidavit of Mr. North twelve days after I was instructed to do so. Although there were a lot of lucky elements, I think my experience serves as one example to show that things can sometimes go quite well even in the twentieth century, without e-mails or an MLAT.

It is my view that the following factors, which are not exclusive, contributed to the success of this operation:

- Good working relationships had already been established between the officers of Los Angeles and Chiba;
- Central Authorities of both countries were very cooperative;
- Japan had a legal attaché in Washington;
- Informal consultation had been done before the finalization of the MLA request; and last but not least,
- US permitted our travel to Los Angeles and we could be present at the execution of

⁸ *San-go shomen*, in Japanese.

our request.

VII. INVOLVEMENT OF JUDGES

One of the reasons why I could get the affidavit of Mr. North so quickly was without doubt because Mr. North agreed to speak. If he did not, and if we did not want to give up on obtaining his statement, we would have had to find ways to compel him to appear before a judge.

In several cases, especially those relating to coercive measures, there is no way to avoid the involvement of judges.

Here comes the last maxim in my address this morning: “*Judges are independent*”. They do not take instructions from anybody, including administrative agencies. They are bound only by their constitution and laws. This means that the spirit of cooperation and goodwill among officials of requesting and requested states has limits in achieving the goals of international cooperation in criminal matters. The judges in the requested state may make decisions not to afford assistance that is *in their view* against their laws. The situation might not change even in cases where the head of state of the requested state agrees to afford assistance. Judges do not take instructions from presidents or prime ministers.

I hate to say this, but every time I speak about international cooperation I feel the need to emphasize this point. I repeat again: cooperation and good will between prosecutors and law enforcement officials have some limits. In some cases, in order to have your request go through, you need persuasive arguments, under the law of the requested state, to convince judges. You may not like this situation, but it is a fact of life we have to live with.

One of the most important jobs of prosecutors is to make convincing arguments to persuade their judges to take decisions favourable to them. They should be professionals in this skill. Therefore, if you want to ask for mutual legal assistance which inevitably involves judges, the first person to seek advice from is the prosecutors in the requested state. They know all the conditions for taking certain coercive measures under their national legislation, and will advise you on what kind of information and/or evidence is needed to make a good argument before judges. Thus it is highly advisable to post prosecutors in the central authority.

Before concluding my remarks on the involvement of judges, I want to invite your attention to the fact that extradition and asset recovery are the fields where judges play an essential role. We should be well prepared to collect all necessary information and evidence and seek professional advice from the prosecutors of the requested state.

VIII. LEGAL FRAMEWORK

I said judges are independent. But they are bound by the laws of their country. Therefore, in order to effectively carry out a request for mutual legal assistance, you have to have good legislation which clearly states what can and should be done. The wording of the law should be clear and unambiguous enough to leave no room for judges to decide otherwise.

Having a good legal framework is also important when you want to seek assistance from foreign governments. If your legislation does not allow you to take certain measures, you cannot ask foreign states to do the same thing. International cooperation works in the spirit of reciprocity, and if your legislation prevents you from reciprocating, you had better forget asking for the assistance from the beginning. *Charity begins at home.*

IX. CONCLUSION

This is all I wanted to say this morning. Notwithstanding my remarks on judges and the legal framework, I would like to stress that the spirit of cooperation and human networking that allows frank and prompt informal consultation is the most important element in successful international cooperation in criminal matters, including our fight against corruption.

I believe that this seminar will definitely contribute to the development of such a network of experts, and I look forward to participating actively in all the programmes of this important meeting.

I thank you for your attention.