

**Meeting of Experts on Cooperation with Respect to the Denial of Safe Haven to Corrupt Officials and Those Who Corrupt Them, Their Extradition, and the Denial of Entry and Recovery of the Proceeds of Corruption and Their Return to Their Legitimate Owners**  
**March 28-29, 2005**

**Remarks of Kathleen M Hamann, Attorney and Counselor at Law, Foley Hoag LLP**

**Difficulties and Challenges in Strengthening Cooperation in the Denial of Safe Haven to Corrupt Officials and Those Who Corrupt Them**

The hemisphere's agenda to combat corruption, in many ways, focuses largely on commitments of governments – long-term institutional changes that will reduce corruption across a number of sectors. The “No Safe Haven” commitment is different – rather than focusing on the behavior of governments, the No Safe Haven commitment seeks to influence the decisions of individuals. Lord Acton, a British historian, said over a hundred years ago that “Power tends to corrupt; absolute power corrupts absolutely.” Lord Acton was speaking of the individual choice - that as power grows, the power of the conscience declines and the ability to resist temptation is weakened. When we talk about no safe haven, we are talking about buffering the conscience - finding a way to reduce the temptations of power Lord Acton referred to, in the hopes of convincing individuals not to engage in corruption in the first place.

When we look at the examples that influence the decision to engage in corruption, there is little to dissuade individuals. The top ten most corrupt leaders, identified by Transparency International in March 2004 and mentioned earlier by Bill Gilmore, stole nearly \$58 billion dollars – approximately the gross national income of Peru in 2003. Of the ten on the list, five never faced any form of justice, three were indicted outside of their home countries (although only one, Pavel Lazarenko, was convicted, as discussed earlier by Stephen Baker), and two were prosecuted in their home countries. The message this sends is that there is a fifty percent chance of never being caught at all and a seventy percent chance that an individual who participates in corruption will get away with it without consequences.

That is why the No Safe Haven commitment is so important, and why so many countries have agreed to it – it changes the dynamic of the decision to engage in corruption by changing those percentages by decreasing the likelihood of escape and increasing the likelihood of prosecution. The Summit of the Americas is not the only organization to have committed to No Safe Haven – in the Declaration of Evian in June 2003, the G8 nations took up the commitment, as did the nations of the Asia-Pacific Economic Forum in November 2004. In total, 53 countries have subscribed to the No Safe Haven commitment. A question was asked this morning about what could be done to bring diplomatic and political pressure to bear on Japan to extradite former Peruvian President Alberto Fujimori, who stole an estimated \$600 million from his country. Japan, in the G8 and again in APEC, agreed to the No Safe Haven commitment. I submit to you that the follow-up mechanisms to these organizations, such as the Lyon-Roma group, provide an opportunity to bring pressure to bear on Japan for failing to live up to that commitment by harboring Mr. Fujimori. This is also true of France, the current home of Jean-Claude “Baby Doc” Duvalier.

The subject of my remarks this afternoon was to be difficulties and challenges of strengthening cooperation in the denial of entry to the corrupt. It is very difficult, however, to address international cooperation when there is so little information available. Before cooperation can be enhanced and deepened, information needs to be exchanged as to what legal regimes and structures exist to allow denial of entry so that authorities can determine how best to work together to fulfill the requirements of those structures, as immigration regimes vary greatly, from the simple to the highly detailed. For that reason, I will focus on the basic essential elements of a denial of entry regime, in the hope that this will enable increased dialogue as nations identify their mechanisms for denying entry to the corrupt and those who corrupt them.

There are three ways to deny safe haven to individuals, each more complex than the last. The means I will describe are in ascending order – you only attempt the latter means if the former means are unavailable or unsuccessful. These three are denial of entry, removal or deportation without extradition, and extradition. I will also briefly discuss the importance of making an environment hostile to those who are corrupt.

To illustrate my points, I will use the U.S. regime, implemented through Presidential Proclamation 7750, signed in Monterrey in January 2004, as an example, as it is the most readily available description of a no safe haven denial of entry mechanism. Although I will express several criticisms of this Proclamation and its implementation, I would note at the outset that the proclamation is a good effort to fill a gap in U.S. law until the legislature is able to act and it has had a wide and positive impact. The proclamation overall was an important policy initiative and a strong demonstration of the United States' seriousness about the No Safe Haven commitment, for which the U.S. government is to be commended. That said, it is not without its flaws and is ultimately a stop-gap measure and ultimately a legislative solution will be needed as no safe haven mechanisms evolve.

Starting, then, at the beginning. The first step is to deny entry to individuals before they ever enter a country, whether by denying them a visa or turning them away at a border or port. The systems for denial of entry vary wildly from one country to the next, and international cooperation is limited and generally informal. There are several elements every country needs in a denial of entry regime: first, of course, is the ability to deny entry in the first place, including procedures for denying admission at a border or port, denying a visa, or revoking an existing visa. Second, belief that an individual has participated in foreign corruption needs to be a basis upon which entry can be denied. Third, the regime must be applicable to dependents – those who have benefited from the corruption – as well as those who participated directly in the corruption. Ultimately, the system needs to be flexible enough to respond quickly to emerging situations but defined and transparent enough to prevent abuse.

The U.S. Presidential Proclamation 7750 to suspend entry as immigrants or nonimmigrants of persons engaged in or benefiting from corruption covers most of these elements under a “reason to believe” standard, meaning that the proclamation can be applied absent conviction for a crime of corruption. Prior to its promulgation, foreign corruption was not grounds for denying entry into the United States (although some other provisions of U.S. law were used in cases where they were applicable to stop the corrupt from entering the United States). The U.S. can use the proclamation both to deny and revoke visas, and presumably to

deny entry at a border point. It applies to dependents. The largest problem with the proclamation can be found in Section 2, which states, “Section 1 of this proclamation [the provision denying entry] shall not apply with respect to any person otherwise covered by section 1 where entry of the person into the United States would not be contrary to the interests of the United States.” This renders the proclamation too discretionary and too open to abuse for political reasons. Additionally, implementation of the proclamation is cumbersome and makes it very difficult for the U.S. to respond quickly to emerging situations. So, the proclamation is, in effect, both too flexible and too rigid.

Should denial of entry not be possible, either because the individual was able to enter a country surreptitiously or because they were already present when the No Safe Haven regime was put in place, the next step in a regime is removal or deportation of an individual without an express request for extradition. Again, the availability of such mechanisms and their procedures varies greatly from one nation to another and, because it is considered an internal matter, international cooperation on removal and deportation is very limited. There are three essential elements: first, the ability under the law to remove or deport someone by rendering their presence in a country illegal after they have entered. Like denial of entry, this power should include dependents of the corrupt as well as the corrupt themselves. Second, participation in foreign corruption must be grounds for declaring someone to be present illegally. Third, sufficient resources and attention must be dedicated to removal or deportation of such individuals, particularly in large countries where they may be hard to find. In the event that an individual being removed or deported has a right to a hearing or other judicial process, the resources that will need to be dedicated to removal or deportation increase substantially.

In the case of Presidential Proclamation 7750, it is unclear in the first instance whether the proclamation provides for removal and/or deportation at all. If it does apply, it is uncertain as to what the legal standard for removal would be. In the U.S., given its size and the legal rights and appeals that are available to individuals facing removal or deportation, the idea of removing or deporting under the proclamation imposes a significant burden on the existing resources of immigration officials. It is unclear whether either the federal entities or their subsidiary offices

have committed the attention and support necessary to ensure that the corrupt currently present in the United States are ejected.

When removal without extradition is unavailable, the only remaining mechanism is extradition. I will touch only briefly upon extradition, which has been discussed in greater detail by other speakers. Extradition regimes are much more uniform among nations than those for denial of entry and removal, and international cooperation is much more advanced. However, a few essential elements of an extradition mechanism are worth noting. First, a country should be able to extradite those within its jurisdiction, including nationals, through an established procedure. Second, the extradition process should be understandable to other nations who would seek extradition – if the process is overly complex, nations will be unable to avail themselves of it. Third, if treaties are required by the domestic legal system in order to extradite, the treaties should provide for extradition on the basis of dual criminality rather than a list of specified offenses, so that the treaty can grow with changes in law. Multilateral treaties, such as the United Nations Convention Against Corruption, should be usable as a basis for extradition where they so provide. Last, an extradition regime needs to provide mechanisms for provisional detention to prevent the flight of individuals just as the noose is tightening. The REMJA is well seized of these issues, and undoubtedly international cooperation will continue to advance in this area under its auspices.

In addition to those issues discussed above, there are measures that a country can take to ensure that it will not be the chosen safe haven – laws that will make an environment too hostile for the corrupt to want to come there. For example, if the foreign individual can be prosecuted domestically for the actions they took overseas, such as when foreign corruption is a predicate crime to money laundering; when those who pay bribes are subject to sanction, such as under the Foreign Corrupt Practices Act or the OECD Anti-Bribery Convention. Beyond domestic legislation, countries that have good cooperation with domestic and foreign financial institutions and who participate in international financial investigation organizations, such as GAFISUD, CFATF, and the Egmont Group will be far less attractive to the corrupt. Most importantly, however, those governments that have dedicated resources and time to pursue the corrupt and

bring them to justice are those most likely to be avoided by those who are looking for a place to hide.

I have given you no answers. Each legal system must find its own answers, and a legal regime alone is not enough - it must be coupled with political will and resources. It requires practical implementation and international cooperation through information sharing.

This is not just an issue of bringing individuals home to face justice. It is not just about nations showing their intolerance of wholesale theft from the people who can least afford it. It is about reducing the incentive to steal in the first place. One of the key elements of any penal regime is deterrence. Deterrence comes when justice is both swift and reasonably certain – but without no safe haven, there is little to no chance of either swift or certain justice. That changes as nations make their countries more and more hostile to the corrupt, and changes the calculus each individual makes before they abuse the public trust. If there is no comfortable place to go, no way to enjoy the ill-gotten gains of their abuse or to benefit from their corruption of the system, if the light of justice shines everywhere, those who would corrupt or be corrupted might never succumb to the temptation of power.

For decades, officials have relied on their status to protect them at home and abroad from justice. Diplomatic passports, foreign ties, and overseas bank accounts have enabled a comfortable retirement abroad when things are too hot at home. We must take those assets away. Lord Acton said only that “Power *tends* to corrupt” - we can reinforce flagging morality in those who engage in power politics by creating an opposing tendency - “Corruption tends to end in prison time.” When the first temptation comes, instead of seeing a future of power and status, they will see a future without respect, where they are treated as mere criminals unwanted in any nation. Instead of a dreaming of a villa in the mountains, they will imagine only a jail cell. And instead of the freedom their stolen money would buy them, they will know that corruption buys only derision and the confines of justice.