Memoranda of Understanding in the field of mutual assistance

The importance and benefits of a "soft" form of cooperation

1. Introduction

The new treaty strategy of the Federal Office of Justice (FOJ) in the field of international mutual assistance[1] provides that where it is not appropriate to conclude an international treaty in order to cooperate with a state, increasing use is being made of more informal cooperation instruments ("soft law"). The treaty strategy has chosen the term "Memorandum of Understanding (MoU)" for these non-legally binding bilateral instruments. There is nothing new to Switzerland in this form of cooperation in the field of mutual assistance. An MoU was concluded with Russia shortly after the collapse of communism,[2] because a more formal form of cooperation was not yet possible. Thus initial experiences were gained of bilateral agreements, which proved useful in later groundwork on the Council of Europe instruments.

Other departments have also used MoUs for some time. In some cases, these were used, as MoUs were originally intended[3], as "pre-contracts", in order to evaluate in a non-binding way, but nevertheless with a certain degree of formality, whether closer cooperation and further agreements were possible.[4]

The aim of this paper is primarily to define the MoU - and above all the form of cooperation behind it - in the context of international law and consider how this instrument can be of practical use in the field of mutual assistance (see Section 2 below). Lastly we consider what is needed to ensure that we benefit from these MoUs (See Section 3 below).

2. Importance of MoUs in international law

Even though an MoU is not legally binding in its effect, it is not irrelevant. If drafted in suitable terms, it can become *soft law*. This term covers instruments or standards that are not "the law" as such, but which are important enough within a legal frame of reference that they can still play a role.[5]

If a legal field is politically controversial, it may be advisable to resort to soft law: if concluding a binding international treaty is unrealistic, the question arises of whether soft law is preferable to the absence any regulations at all.[6] It may be worthwhile in such circumstances to cooperate without a formal agreement but by means of an MoU. In this way, the relationship between the states concerned can graduate to a new level: by concluding an MoU, the governments signal that they have decided to work more closely together and to discuss cooperation in the field in question in more detail. To give some impetus to this idea, it is important that MoUs are concluded at *ministerial level* - and not by civil servants. Beyond the symbolic importance of this, agreement can be reached, again in non-binding form, on certain formal procedures and on direct contacts between administrative units in both states. It is also worth bearing in mind that soft law that has proven its worth can ultimately be made binding.

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1 The Strategy for a network of state treaties in the field of judicial cooperation on criminal matters, approved by Federal Councillor Sommaruga on 12.04.2013.

2 Switzerland entered into an MoU on mutual assistance with Russia in 1994, before the state signed the European Convention on Mutual Assistance in Criminal Matters in December 1999.

3 The term MoU originates from Anglo-American business law, where pre-contracts are known as MoUs, especially in the field of corporate acquisitions. MoUs contain the key provisoinsof the subsequent contract in the form of non-binding declarations of intent.

4 For example, the MoU between the Federal Department of Economic Affairs and Brazil, signed by Federal Councillor Leuthard on 8.02.2007 and aims to create a bilateral economic committee in the short term, but in the longer term has the express aim of exploring the possibility of an economic treaty. See the press release at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=10738>, (available on 25.02.2013).

5 See SHAW MALCOLM N., International Law, 6th edition, Cambridge 2008, p. 117. The Helsinki Final Act of 1975, which founded the CSCE is an example of an international law instrument which, although not legally binding, had a strong influence on legal and political reality up to the collapse of communism and promoted the concept of universal human rights.

6 SHAW, loc. cit., p. 118 has observed that in the fields of economic and environmental international law, soft law arrangements are especially common, which is partly due to this factor.

This can be done either by concluding a formal treaty or act or by the soft law becoming established as international customary law[7].

Due to these advantages, and in particular the *negotiating flexibility* that governments gain, soft law-regulations have become more important in the past few years.[8] Recently, for example, Belgium and the Turkey signed an MoU in order to increase bilateral cooperation in criminal cases.[9] Switzerland also uses MoUs, for example in relation to armed forces relations, where cooperation is a particularly sensitive issue thanks to Switzerland's neutrality, but is nevertheless possible provided a certain degree of formality is applied.[10]

3. The use of MoUs in the field of mutual assistance in criminal matters

MoUs also have numerous advantages in relation to judicial cooperation in criminal matters. They provide Switzerland with an instrument that allows it to consider closer cooperation in this field in detail, without having to establish mutual rights and obligations beforehand. This also permits more flexible access to legal systems that differ substantially from the Swiss system, and which even apply very different constitutional and human rights standards. An MoU can thus be an initial step towards closer and more efficient cooperation in criminal cases[11]. The use of MoUs as a new instrument in the FOJ's treaty strategy must be understood in this context.

However, if an MoU is to prove useful to criminal law practitioners and not simply to be regarded as an instrument of symbolic and political value, two aspects are decisive:

1. The MoU should not limit itself simply to making political declarations, but should aim to make practical advances, such as direct contacts between central offices;
2. There must be general awareness of the MoU in Switzerland. Only if general public and practitioners are aware of the MoU's existence can it be of any value to them.

In relation to the first, *"practical" aspect*, the INTV in negotiations will always pay careful attention to the usefulness of entering into an agreement.

As far as the *awareness of* MoUs is concerned, the question of their *publication* is crucial. Ideally they would be published in the AS and SR. However, this is not possible, due to the statutory regulations on publication.[12]

MoUs that have come into effect are published in the Mutual Assistance Manual (Rechtshilfeführer - not available in English) (under the heading in the "Wichtigste Grundlagen" section). This allows practitioners direct access to the information. At the same time, MoUs also appear on the FOJ website in the section on "International Mutual Assistance In Criminal Matters ", under the heading "Bilateral instruments"[13] (not available in English),- in order to provide easy access for the general public and the media.

In order to increase awareness of MoUs even further among the general public, a press release is published when they are signed, together with a link to the text of the MoU.

4. Conclusion

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7 Soft law is an important indicator in this process of the element of opinio iuris.

8 SHAW, loc. cit., p. 118, with a reference to a study by the US State Department.

9 See Réunion ministérielle Belgique-Turquie, Bruxelles, Palais d'Egmont, 22 janvier 2013, Communiqué de Presse conjoint, abrufbar unter <http://countries.diplomatie.belgium.be/fr/pays_bas/newsroom/news.jsp?id=210291> (available on 25.02.2013).

10 See the information on the VBS website, at <http://www.vtg.admin.ch/internet/vtg/de/home/themen/internationale_kooperation/streitkraeftebeziehungen.html> (available on 25.02.2013).

11 See the example of Russia mentioned above (Fn. 2).

12 See Art. 3 para. 2 PublA with Art. 2 PublO.

13 Website at <http://www.bj.admin.ch/content/bj/de/home/themen/sicherheit/internationale_rechthilfe/rechtshilfe_in_strafsache/rechtliche_grundlagen.html> (available on 06.02.2013). The heading "Bilaterale Verträge" should probably be changed to "Bilaterale Verträge und MoUs".

Even if an MoU is not a binding agreement under international law, it has the inherent potential to herald a new era of formalised relations with a state. In practice, the instrument can lead to valuable progress being made, for example by making direct contact between central offices on mutual assistance matters possible. To achieve this, it must be made public and generally accessible. Above all, MoUs must be understood in their political context: they prepare the way for closer cooperation with states in the field of judicial cooperation in criminal matters. An initial step in the form of an MoU can lead to further steps being taken.

An MoU is ideal for such groundbreaking work: because it is not legally binding, it doesn't have the same depth as an international treaty, but precisely because of this, it can steer its way through waters that would otherwise be unnavigable.