

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

MUTUAL LEGAL ASSISTANCE, EXTRADITION AND RECOVERY OF PROCEEDS OF CORRUPTION IN ASIA AND THE PACIFIC

Frameworks and Practices in 27 Asian and Pacific Jurisdictions

Thematic Review – Final Report

Australia – Bangladesh – Cambodia – P.R. China – Cook Islands – Fiji Islands
Hong Kong, China – India – Indonesia – Japan – Republic of Kazakhstan
Republic of Korea – Kyrgyz Republic – Malaysia – Macao, China – Mongolia
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Abbreviations and Acronyms

ACA	Anti-Corruption Agency Malaysia
ADB	Asian Development Bank
AFP	Australian Federal Police
AG	Attorney-General (Australia)
AGC	Attorney General's Chambers (Malaysia; Singapore)
AGD	Attorney-General's Department (Australia)
AGO	Attorney General's Office (Thailand)
AIJMACM	Act on International Judicial Mutual Assistance in Criminal Matters (Korea)
AMACM	Act on Mutual Assistance in Criminal Matters (Thailand)
AMLA	Anti-Money Laundering Act (Malaysia; Philippines)
AMLC	Anti-Money Laundering Council (Philippines)
ASEAN	Association of Southeast Asian Nations
ASEANPOL	ASEAN Chiefs of National Police
APGML	Asia/Pacific Group on Money Laundering
CAA	Confiscated Assets Account (Australia)
CCP	Code of Criminal Procedure (India)
CDSA	Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Singapore)
CIS	Commonwealth of Independent States
CJD	Criminal Justice Division of the Attorney General's Chambers (Singapore)
CNP	Cambodian National Police
CPC	Criminal Procedure Code (P.R. China; Kazakhstan; Kyrgyzstan; Vietnam)
CPIB	Corrupt Practices Investigation Bureau (Singapore)

CPL	Criminal Procedure Law (Mongolia)
CrPC	Code of Criminal Procedure 1898 (Pakistan)
DOJ	Department of Justice (Hong Kong, China)
ETA	Extradition and Transfer Act 2001 (Palau)
FIU	financial intelligence unit
FJD	Fijian dollar
FOO	Fugitive Offenders' Ordinance (Hong Kong, China)
FRACD	Foreign Relations and Cooperation Department of the Ministry of Justice and Home Affairs (Mongolia)
HPC	Higher People's Court (P.R. China)
ICAC	Independent Commission Against Corruption (Hong Kong, China)
IAD	International Affairs Department of the Attorney General's Office (Thailand); International Affairs Division of the Ministry of Justice (Japan); International Affairs Division of the Attorney General's Chambers (Malaysia)
IMF	International Monetary Fund
Interpol	International Criminal Police Organization
KPK	Corruption Eradication Commission (Indonesia)
LCP	Law on Criminal Procedure (Cambodia)
LIAIORM	Law for International Assistance in Investigation and Other Related Matters (Japan)
LJCCM	Law of Judicial Cooperation in Criminal Matters (Macao, China)
LMLACM	Law on Mutual Legal Assistance in Criminal Matters (Indonesia)
MACMA	Mutual Assistance in Criminal Matters Act (Fiji; Malaysia; Palau; Papua New Guinea; Samoa; Singapore; Sri Lanka; Vanuatu)
MLPCA	Money Laundering and Proceeds of Crime Act 2001 (Palau)
MIS	Minister of Internal Security (Malaysia)
MJC	Minister for Justice and Customs (Australia)
MLA	mutual legal assistance in criminal matters
MLACMO	Mutual Legal Assistance in Criminal Matters Ordinance (Hong Kong, China)

MLAT	mutual legal assistance in criminal matters treaty
MLHR	Minister of Law and Human Rights (Indonesia)
MoFA	Ministry of Foreign Affairs (Japan; Thailand)
MoI	Ministry of Interior (Pakistan; Thailand)
MoJ	Ministry of Justice (Japan)
MOJHA	Ministry of Justice and Home Affairs (Mongolia)
MOU	memorandum of understanding
NAB	National Accountability Bureau (Pakistan)
NAO	National Accountability Bureau Ordinance (Pakistan)
NZD	New Zealand dollar
OECD	Organisation for Economic Co-operation and Development
OECD Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OCSC	Office of the Chief State Counsel (Philippines)
PMLA	Prevention of Money-Laundering Act 2002 (India)
POCA	Proceeds of Crime Act (Australia; Fiji; Korea; Papua New Guinea; Samoa; Vanuatu)
PPO	Public Prosecutor's Office (Macao, China)
RMP	Royal Malaysian Police
SFO	surrender of fugitive offenders (Hong Kong, China and Macao, China)
Southeast Asian MLAT	Treaty on Mutual Legal Assistance in Criminal Matters signed by member countries of ASEAN
SPC	Supreme People's Court (P.R. China)
VND	Vietnamese dong
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
USD	United States dollar

Foreword

The deterrent effect of criminal law against corruption depends on the effectiveness of law enforcement. As people and assets cross borders with ever greater ease, law enforcement increasingly depends on international cooperation to gather evidence and apprehend fugitives to bring the corrupt to justice. Effective international cooperation is also crucial to recovering the proceeds of corruption.

Obtaining MLA from other countries has been identified in the Asia-Pacific region and beyond as one of the biggest obstacles to any fight against corruption that aspires to be effective. As early as May 2005, the then 27 member countries and jurisdictions of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific identified strengthening MLA and extradition frameworks as a priority of common concern. The 5th Regional Anti-Corruption Conference for Asia-Pacific in September 2005 dedicated a workshop to the topic. In March 2006, the Initiative conducted a high-level technical seminar on "Denying Safe Haven to the Corrupt and the Proceeds of Corruption" and in May 2006 the Initiative's 27 members began an in-depth thematic review on mutual legal assistance, extradition and the recovery of proceeds of corruption. The report, which reflects findings of this thematic review, was adopted in September 2007 by the Steering Group at its 10th meeting. It is published in the present volume.

The Initiative's thematic reviews serve different purposes: They take stock of existing frameworks and practices to inform officials in the Initiative's member countries about policies in the Asia-Pacific region; they highlight strengths and weaknesses of existing regulatory models, policies, and practices; they provide policymakers with recommendations to strengthen existing frameworks; and they outline policy options to implement these recommendations. Their publication allows policy-makers, anti-corruption practitioners and other stakeholders to better understand member countries' and jurisdictions' progress with implementing international standards and to effectively combat corruption in the Asia-Pacific region.

This review of MLA, extradition and assets recovery frameworks is based on the ADB/OECD Anti-Corruption Action Plan for Asia-Pacific and its underlying international instruments, primarily the UN Convention Against Corruption (in particular Chapters IV and V) and the OECD Convention and Revised

Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions. The purpose of this review, conducted pursuant to the methodology developed in 2005 in the framework of the Initiative's first thematic review, was to take stock of MLA, extradition and asset recovery systems in place to facilitate cooperation between countries and jurisdictions in the Asia-Pacific region and beyond and study the capacity and effectiveness of these systems.

The review was conducted by a team of reviewers composed of several international experts. These reviewers were Alan Bacarese, Senior Asset Recovery Specialist, International Centre for Asset Recovery, Basel Institute on Governance; Sylvia Grono, Assistant Director, Criminal Assets, Commonwealth Director of Public Prosecutions, Australia; Bernard Rabatel, Avocat Général at the Court of Appeals of Lyon, France; and Jean-Bernard Schmid, Investigating Magistrate, Financial Section, Geneva, Switzerland.

In preparation for the review, member governments provided the Secretariat with responses to a standard questionnaire and responses to a supplementary questionnaire, which contained specific questions about the systems in place in each member country and jurisdiction to facilitate MLA, extradition and assets recovery. Members also submitted relevant legislation and regulations, statistical information and government publications. The Secretariat reviewed these materials and also performed extensive complementary research to complete the information submitted by governments. Based on this, the Secretariat prepared a preliminary report on these matters which was discussed and adopted by the Steering Group at its 9th meeting in November 2006 and subsequently published in January 2007. In September 2007, the Steering Group discussed and adopted an expanded version of the report which included country-specific reports along with recommendations.

This detailed Thematic Report on Mutual Legal Assistance, Extradition and Assets Recovery in Asia-Pacific reflects findings of the Steering Group as of September 2007 and is the result of collective efforts of many individuals. In addition to the international experts who acted as reviewers, the Secretariat of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific is especially grateful to the following experts who provided advice and participated in the review: Charles Caruso, then Regional Anti-Corruption Advisor for the American Bar Association Asia Law Initiative; Rita O'Sullivan, Senior Counsel, Office of the General Counsel, Asian Development Bank; and Kimberly Prost, then Chief, Legal Advisory Section, Division of Treaty Affairs of the UN Office on Drugs and Crime. The Secretariat is also very grateful to the following organizations for their valuable comments on the earlier drafts of the Report: the Asia-Pacific Group on Money Laundering, the Commonwealth Secretariat, the United Nations Office on

Drugs and Crime, the OECD Secretariat, and experts from countries that are members of the OECD Working Group on Bribery and who have contributed their expertise in the course of the review. The Secretariat also expresses its sincere gratitude to the member governments of the Initiative and their delegates in the Steering Group for their active participation in the review and for their efforts in providing comprehensive and detailed information, and for involving their national experts in the conduct of this review. The Report was prepared at the OECD Secretariat, Anti-Corruption Division, Directorate for Financial and Enterprises Affairs, by William Y.W. Loo, Legal Analyst, under the supervision of Frédéric Wehrlé, Coordinator Asia-Pacific with the assistance of Joachim Pohl, Project Coordinator, Anti-Corruption Initiative for Asia-Pacific.

The findings, interpretations, and conclusions expressed in this report do not necessarily represent the views of ADB's Board and members or those of the OECD and its member countries. ADB and OECD do not guarantee the accuracy of the data included in this publication and accept no responsibility whatsoever for the consequences of their use. The term "country" in this report refers also to territories and areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever concerning the legal status of any country or territory on the part of ADB's Board and members and the OECD and its member countries.

The present document is current as of September 2007. While all reasonable care has been taken in preparing the report, the information presented may still not always be complete. In a continuously evolving legal environment, some of the information may already require updating.

Executive Summary

As with other regions in the world, the fight against corruption in Asia-Pacific has taken on an international dimension. Countries in this region increasingly need to gather evidence abroad and to seek the return of fugitives in corruption cases. Many also seek to repatriate proceeds of corruption that have been exported. Assistance is sought from countries both in and outside of the region. Extradition and mutual legal assistance (MLA) are therefore more important now than ever.

Asia-Pacific countries have adopted different types of legal frameworks to address the need for effective extradition and MLA in corruption cases. Some are based on bilateral treaties, of which there are at least 64 among member countries of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific. Members of the Initiative also have at least 117 and 69 bilateral extradition and MLA treaties respectively with Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. More recently, Asia-Pacific countries have placed greater emphasis on multilateral instruments. A growing number of countries have signed and/or ratified the United Nations Convention against Corruption. Three members of the Initiative are parties to the OECD Convention against the Bribery of Foreign Public Officials in International Business Transactions. Several countries are also signatories to the regional Treaty on Mutual Legal Assistance in Criminal Matters signed by member countries of ASEAN. In addition, Asia-Pacific countries have enacted domestic legislation that complements these treaty-based arrangements. For example, most member countries of the Initiative that are also part of the Commonwealth have designated other Commonwealth countries as extradition partners without treaties. Member countries of the Pacific Islands Forum have done likewise. In the absence of treaties or standing arrangements based on legislation, most countries will consider requests for cooperation on a case-by-case basis.

Whether based on treaties or legislation, these schemes of cooperation often appear sufficiently broad to cover most corruption and related offenses. For example, when the minimum penalty for the offense in the requesting state is a prerequisite for cooperation, the threshold is relatively low. Most countries only require the crime to be punishable by one year imprisonment in the requesting and/or requested state; this would cover most corruption and related offenses. As well, although many countries require dual criminality for extraditions and

MLA, most arrangements use a conduct-based definition of dual criminality which enhances the range of offenses eligible for assistance.

There are also commonalities among Asia-Pacific countries in terms of the grounds for denying international cooperation. Under many arrangements, an Asia-Pacific country may refuse cooperation that would impair its “essential interests”. Since that term is not well-defined, it is conceivable that a requested state may take into account factors such as considerations of public order, national economic interest, the potential effect upon relations with another state and the identity of the parties involved. This would in turn reduce the effectiveness of extradition and MLA. Similarly, almost all extradition arrangements and many MLA arrangements deny cooperation in cases involving political offenses, but the definition of such offenses is not always clear. To address this uncertainty, some arrangements expressly state that corruption can never constitute a political offense.

In terms of procedure, many schemes for cooperation in Asia-Pacific include features that expedite cooperation in corruption cases. To promote effective oversight and to maximize economies of scale, many members of the Initiative use central authorities to send, receive and handle requests for assistance. In urgent cases, some requested states will accept oral requests for assistance and/or communication outside normal channels. Several members of the Initiative also offer simplified means of extradition, such as endorsement of arrest warrants and extradition by consent. Others try to attain the same goal by reducing or eliminating evidentiary requirements so as to avoid protracted hearings. However, members report that these features may have reduced but have not eliminated delay in international cooperation.

In addition to streamlined procedures, several Asia-Pacific jurisdictions have taken practical measures to facilitate international cooperation. Some of the Initiative’s members have appointed liaison personnel to provide advice and to act as additional contact points. These measures could significantly improve the efficiency and effectiveness of international cooperation. Some members allow officials of a requesting state to attend the execution of MLA requests, which could prove useful in corruption cases that have complex financial aspects. Many members also state that they will accept requests for assistance in English, which could make it easier for a requesting state to seek cooperation.

In many respects, the framework in Asia-Pacific for tracing, seizing and confiscating proceeds of corruption is similar to other forms of MLA. The legal basis for doing so is found in many bilateral and multilateral treaties, as well as domestic legislation. Many of these arrangements were created recently. Some include fairly modern features to expedite assistance, such as allowing the direct

registration of foreign freezing and confiscation orders. Less common are provisions to share and repatriate confiscated assets. Most arrangements require the requesting and requested states to negotiate on a case-by-case basis and thus provide little guidance.

Several members of the Initiative are also reforming their frameworks for international cooperation. Australia has undertaken an extensive review and public consultation of its extradition and MLA legislation and announced major plans for reform in February 2007. Vietnam and Cambodia are considering draft legislation on extradition and MLA. In recent years, Nepal has expressed an intention to revise their extradition legislation. Indonesia has begun a review of its extradition and asset seizure legislation. As of September 2007, Thailand's legislature was considering a draft new Extradition Act and the Attorney General's Office was considering a draft MLA law.

Finally, although frameworks for international cooperation are largely in place in most members of the Initiative, they have not been used extensively in many instances. Most members have received relatively few incoming requests. In many cases, the number of outgoing request is even lower. Very few requests involve corruption offenses. Given the relatively low level of practice, it is difficult to thoroughly evaluate these frameworks' effectiveness in practice at this time.

Part 1
Mutual Legal Assistance,
Extradition and Recovery
of Proceeds of Corruption
in the Asia-Pacific Region—
a comparative overview

Introduction

Corruption in Asia-Pacific, like many other crimes, has taken on an international dimension in recent years. It is now common for corrupt public officials to hide or launder bribes or embezzled funds in foreign jurisdictions, or for them to seek safe haven in a foreign country. Bribers may keep secret slush funds in bank accounts abroad, or they may launder the proceeds of corruption internationally. Bribery of foreign public officials has also become a widespread phenomenon in international business transactions, including trade and investment, as well as humanitarian aid. Consequently, Asia-Pacific countries increasingly recognize the need for international cooperation to fight and repress corruption more effectively.

Extradition and mutual legal assistance in criminal matters (MLA) are two essential forms of such international cooperation. Extradition is the surrender by one state, at the request of another, of a person who is accused of or has been sentenced for a crime committed within the jurisdiction of the requesting state. MLA is a formal process to obtain and provide assistance in gathering evidence for use in criminal cases, transfer criminal proceedings to another State or execute foreign criminal sentences. In some instances, MLA can also be used to recover proceeds of corruption. Both extradition and MLA are indispensable means of international cooperation in criminal law enforcement.

The purpose of this report is to provide an overview of the legal and institutional framework for extradition and MLA in corruption cases in 27 of the 28 jurisdictions which have endorsed the Anti-Corruption Action Plan for Asia-Pacific of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific: Australia; Bangladesh; Cambodia; P.R. China; the Cook Islands; the Fiji Islands; Hong Kong, China; India; Indonesia; Japan; Kazakhstan; Korea; the Kyrgyz Republic; Macao, China; Malaysia; Mongolia; Nepal; Pakistan; Palau; Papua New Guinea; Philippines; Samoa; Singapore; Sri Lanka; Thailand; Vanuatu; and Vietnam. This report does not cover Bhutan which became the 28th member of the Initiative in September 2007 after the thematic review began.

That international cooperation is a priority for the Initiative's members is evidenced by recent policy development in this area. Australia has undertaken a review of its extradition and MLA legislation. Many Pacific Island states recently introduced new legislation in the area. P.R. China has also made significant efforts to seek the return of fugitive and assets in corruption cases. As of 2007, Vietnam and Cambodia are considering draft legislation on extradition and MLA. In recent years, Indonesia and Nepal have expressed an intention to revise their extradition

and asset seizure legislation respectively. As of September 2007, Thailand was considering a draft new Extradition Act, and a draft law on MLA was expected to follow.

This report is structured as follows. Sections I and II examine the legal basis and preconditions for rendering extradition and MLA. Section III considers some procedures and measures that facilitate international cooperation. Section IV focuses on the confiscation and repatriation of the proceeds of corruption, a subject which has received particular attention recently in Asia-Pacific.

I. The Legal Basis for Rendering Extradition and MLA

Asia-Pacific countries may seek or provide extradition and MLA in corruption cases through different types of arrangements, including bilateral treaties, multilateral treaties, domestic legislation and letters rogatory. A country may rely on one or more of these bases to seek or provide cooperation, depending on the nature of the assistance sought and the country whose assistance is requested.

A. Treaty-based Cooperation

The Initiative's members have created a network of extradition and MLA bilateral and multilateral treaties that may be used in corruption cases (see Annexes A to D for an overview). There are several advantages to treaty-based cooperation. A treaty obliges a requested state to cooperate under international law. Treaties usually contain detailed provisions on the procedure and parameters of cooperation, and thus provide greater certainty and clarity than most non-treaty based arrangements. Treaties may also provide for forms of cooperation that are otherwise unavailable.

Most members of the Initiative have passed domestic legislation to implement treaties that have been concluded. The complexity of these laws varies. At one extreme, many members have complete, standalone laws that describe the international cooperation process in detail, dealing with matters such as the channel of communication between the requesting and requested states, the types of assistance available, the procedure for executing requests and appeals, and the grounds for denying cooperation. By covering all facets of extradition and MLA, such laws can bring certainty, accountability and transparency to the process.

At the other extreme, some members have passed only brief provisions (typically in their criminal procedure law) that extend all measures available in domestic investigations to international cooperation. Some members have no legislation at all; they execute foreign requests by applying their criminal procedure laws or an applicable treaty with such modification as necessary. Having minimal or no implementing legislation enhances consistency between domestic and foreign investigations in terms of procedure and the types of measures that are available. On the other hand, the provisions dealing with domestic investigations have to be adapted ad hoc to international cooperation, which could lead to uncertainty. The scheme may also fail to address issues that arise in international cooperation but not domestic investigations, such as grounds for denying cooperation and channels of communication. The legal basis for executing foreign requests may also be unclear. As well, the absence of detailed legislation could impede the provision of assistance in the absence of a treaty. Direct application of treaties can also have shortcomings, since treaties generally do not cover matters such as how to apply for search warrants or to compel the attendance of a witness, or the avenues for appealing the decisions of judicial or law enforcement bodies.

1. Bilateral Treaties

Among the Initiative's members, there are at least 39 and 25 bilateral extradition and MLA treaties respectively that are in force. Many of the treaties were concluded recently. The Initiative's members also have at least 117 and 67 bilateral extradition and MLA treaties with Parties to the OECD Convention. However, many of the extradition treaties were inherited from the United Kingdom and are thus fairly old. Two members – Australia and Hong Kong, China – account for almost half of the MLA treaties with Parties to the OECD Convention.

Bilateral treaties have the advantage that they can be designed to meet the needs of the signatories. They are also easier to amend to meet future needs. On the other hand, negotiating treaties requires a significant amount of time and resources, which could limit the number of treaties that a country can negotiate.

2. Multilateral Treaties

In recent years, Asia-Pacific countries have increasingly resorted to multilateral treaties in international cooperation. This is likely a response to the cost and time required to negotiate bilateral instruments. The various members of

the Initiative are signatories to five multilateral conventions that provide MLA and/or extradition in corruption cases.

a. *United Nations Convention against Corruption*

A growing number of Asia-Pacific countries have ratified the United Nations Convention against Corruption (UNCAC), which came into force on 14 December 2005. As of September 2007, ten members of the Initiative have signed and ratified or acceded to the UNCAC: Australia; Bangladesh; P.R. China; Indonesia; Kyrgyzstan; Mongolia; Pakistan; Papua New Guinea; Philippines; and Sri Lanka. P.R. China has declared that the UNCAC applies to Macao, China. P.R. China has also declared that the UNCAC applies to Hong Kong, China. As of September 2007, subsidiary orders by the Chief Executive of Hong Kong, China under the relevant legislation to give full effect to the UNCAC provisions on surrender of fugitive offenders and MLA have been made and will come into operation in the near future. The Philippines has ratified the UNCAC but has declared that it does not take the Convention as the legal basis for extradition with other States Parties. Nine other members of the Initiative have signed the UNCAC but have yet to ratify: India; Japan; Korea; Malaysia; Nepal; Palau; Singapore; Thailand; and Vietnam.

The UNCAC requires States Parties to criminalize (or consider criminalizing) a number of corruption-related offenses, including the bribery of domestic and foreign public officials, and bribery in the private sector. In addition, it provides the legal basis for extradition as follows. First, offenses established in accordance with the Convention are deemed to be included in any existing bilateral extradition treaty between States Parties. States Parties must also include these offenses in any future bilateral extradition treaties that they sign. Second, if a State Party requires a treaty as a precondition to extradition, it may consider the UNCAC as the requisite treaty. Third, if a State Party does not require a treaty as a precondition to extradition, it shall consider the offenses in the UNCAC as extraditable offenses.

The UNCAC also provides a legal basis for MLA. States Parties are obliged to afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to the offenses covered by the Convention. If two States Parties are not bound by a relevant MLA treaty or convention, then the UNCAC operates as such a treaty. To deal with these cases, the UNCAC details the conditions and procedure for requesting and rendering assistance. These provisions are comparable to those found in most bilateral treaties.

b. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

Another relevant multilateral instrument is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). Three members of the Initiative (Australia; Japan; and Korea) are parties to the OECD Convention. As its title suggests, the OECD Convention requires its signatories to criminalize the bribery of foreign public officials in international business transactions. The OECD Convention is thus more focused than the UNCAC because it does not cover areas such as bribery of domestic officials, corruption in the private sector or bribery not involving international business transactions.

The OECD Convention contains provisions on both extradition and MLA. Bribery of foreign public officials is deemed an extradition offense under the laws of the Parties and in extradition treaties between them. As for MLA, a Party is required to provide prompt and effective assistance to other Parties to the fullest extent possible under its laws and relevant treaties and arrangements. A requested Party must inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request.

c. *Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty*

The third relevant multilateral instrument is the regional Treaty on Mutual Legal Assistance in Criminal Matters signed by member countries of ASEAN (Southeast Asian MLAT). Among the countries in the Initiative, Malaysia, Singapore, and Vietnam have signed and ratified the treaty. Cambodia, Indonesia, the Philippines, and Thailand have signed but not ratified it. The Treaty obligates parties to render to one another the widest possible measure of MLA in criminal matters, subject to a requested state's domestic laws. The Southeast Asian MLAT provides for many forms of MLA that are commonly found in bilateral treaties, such as the taking of evidence, search and seizure, confiscation of assets etc.

d. *United Nations Convention against Transnational Organized Crime*

The United Nations Convention against Transnational Organized Crime (UNTOC) could also be relevant in corruption cases. The following eight members of the Initiative have signed and ratified (or acceded to) the UNTOC: Australia; Cambodia; P.R. China; Cook Islands; Kyrgyzstan; Philippines; Sri Lanka; and

Vanuatu. (Malaysia has also ratified the Convention, but it has declared that it does not take the Convention as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation.) P.R. China has declared that the UNTOC applies to Hong Kong, China and Macao, China. Ten other members of the Initiative have signed but have not ratified the UNTOC: India; Indonesia; Japan; Kazakhstan; Korea; Nepal; Pakistan; Singapore; Thailand; and Vietnam.

The United Nations Convention against Transnational Organized Crime (UNTOC) is also relevant in corruption cases. As of September 2007, the following nine members of the Initiative had signed and ratified (or acceded to) the UNTOC: Australia; Cambodia; P.R. China; Cook Islands; Kyrgyzstan; Philippines; Singapore; Sri Lanka; and Vanuatu. Malaysia has also ratified the Convention, but it has declared that it does not take the Convention as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation. P.R. China has declared that the UNTOC applies to Hong Kong, China and Macao, China. Nine other members of the Initiative have signed but have not ratified the UNTOC: India; Indonesia; Japan; Kazakhstan; Korea; Nepal; Pakistan; Thailand; and Vietnam.

The UNTOC requires States Parties to criminalize bribery of their officials where the offense is transnational in nature and involves an organized criminal group. As for international cooperation, the UNTOC provides the legal basis for extradition and MLA in relation to offenses established in accordance with the Convention. It does so in the same manner as the UNCAC, i.e., by acting as a treaty between Parties States or by supplementing existing bilateral treaties and arrangements (see above).

e. *Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters*

Members of the Commonwealth of Independent States (CIS) have signed two multilateral Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters dated 22 January 1993 and 7 October 2002. The Conventions contain provisions that regulate extradition, criminal prosecution and MLA in criminal cases. Kazakhstan and Kyrgyzstan have signed and ratified both Conventions.

B. Non-treaty Based Arrangements

Though multilateral and bilateral treaties are useful, their negotiation can be costly and time-consuming. Practically speaking, it is not possible to enter into treaties with every country in the world. One means of overcoming these difficulties is to dispense with the requirement of a treaty as a precondition for cooperation.

1. Cooperation Based on Domestic Law

Several members of the Initiative have passed legislation to provide MLA and/or extradition to countries with which it has no treaty relations. Under these schemes, the legislation of the requested state usually prescribes the procedure for sending, receiving, considering and executing requests. The procedure is often similar to those in treaty-based schemes, though some additional conditions may apply. A country may designate a foreign state as eligible for receiving assistance, or it may consider each incoming request on a case-by-case basis.

Table 1: Selected Members of the Initiative with Legislation Allowing Extradition and MLA without a Treaty

Extradition		MLA	
Australia	Malaysia	Australia	Malaysia
Bangladesh	Pakistan	P.R. China	Palau
P.R. China	Palau	Cook Islands	Pakistan
Cook Islands	Papua New Guinea	Fiji	Papua New Guinea
Fiji	Samoa	Hong Kong, China	Samoa
India	Thailand	India	Singapore
Indonesia	Vanuatu	Indonesia	Sri Lanka*
Japan	Vietnam	Japan	Thailand
Kazakhstan		Kazakhstan	Vanuatu
Korea		Korea	Vietnam
Macao, China		Macao, China	

* Designated Commonwealth countries only

There are pros and cons to cooperation based on domestic legislation. Such schemes are often quicker and cheaper to implement than treaties. On the other hand, unlike treaties, domestic legislation does not create binding obligations under international law. A state which enacts such legislation has no international obligations to assist a foreign state. In the same vein, foreign states are not obliged to render assistance to countries which have enacted such legislation. In many cases, a requested state will cooperate without a treaty only if the requesting state provides an undertaking of reciprocity (see Section I.B.3). In practice, however, the absence of treaty-based obligations does not necessarily result in less cooperation.

2. Cooperation among Commonwealth Countries

Ten member countries of the Initiative are also members of the Commonwealth: Australia; Bangladesh; Fiji; India; Malaysia; Papua New Guinea; Samoa; Singapore; Sri Lanka; and Vanuatu. Because of their common law legal tradition, many Commonwealth countries have adopted alternate schemes for international cooperation based on domestic legislation rather than treaties. These arrangements have been consolidated into the London Scheme for Extradition within the Commonwealth (1966) and the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme) (1990).

These Schemes are not binding legal instruments or treaties *per se*. They are a set of voluntary arrangements which Commonwealth states are expected to implement. The Schemes must still be implemented by each Commonwealth country through domestic legislation. Not all have done so. For instance, Malaysia has not designated all Commonwealth countries as non-treaty based extradition partners. Papua New Guinea will extradite only to Commonwealth countries with which it has a treaty (unless the requesting state is a member of the Pacific Islands Forum).

3. Cooperation among Member Countries of the Pacific Islands Forum

Seven countries in the Initiative are also members of the Pacific Islands Forum: Australia; Cook Islands; Fiji; Palau; Papua New Guinea; Samoa; and Vanuatu. Most of them have agreed to extradite to one another through domestic legislation and without treaties. In most cases, extradition is implemented via a system of endorsement of warrants (see Section II.A.3).

4. Judicial Assistance and Letters Rogatory

Letters rogatory is one of the oldest means of seeking formal international assistance in criminal matters in Asia-Pacific. It remains useful today, particularly between countries with no MLA treaties. In its most traditional form, a letter rogatory is a request for assistance issued by a judge in the requesting state to a judge in the requested state. The process is founded upon the comity of nations and aims to enable judges in different jurisdictions to assist one another. In most instances, a judge may also be willing to issue letters rogatory on behalf of the police or a prosecutor to gather evidence for a case.

There are drawbacks to letters rogatory compared to other frameworks of assistance. The scope of assistance available is generally much more restricted, e.g., often limited to service of documents or obtaining testimony and documents from a witness. This is particularly so if the requested state is a common law country where judges are generally not involved in an investigation. Letters rogatory may also be more cumbersome and time-consuming since it may involve applications to a court and/or transmission through diplomatic channels. Unlike a request under a treaty, a requested state has no obligation to assist.

Some members of the Initiative have legislation specifically regulating letters rogatory requests, sometimes found outside of statutes on MLA or criminal procedure: Hong Kong, China; Malaysia. To ensure consistency with formal MLA procedures, some Asia-Pacific countries now require all letters rogatory to be forwarded to an attorney general or minister of justice for execution in the same manner as a regular MLA request: Australia; Cook Islands; Fiji; Papua New Guinea; and Vanuatu.

C. MLA in Extradition Treaties and Legislation

One interesting feature is the inclusion of MLA features in some extradition arrangements in Asia-Pacific. Many extradition treaties and legislation permit the requested state to search for and seize evidence relevant to the corruption offense that underlies an extradition request. The requested state may then send the evidence to the requesting state, sometimes even if the person sought is not ultimately surrendered. Some arrangements go further by also allowing search, seizure and transmission of property acquired by the person sought as a result of the offense. These provisions could conceivably be used to recover the proceeds of corruption.

In addition to transmitting evidence and proceeds of crime, the India-Mongolia extradition treaty uniquely provides for MLA in general terms. The treaty requires the contracting states to afford each other "the widest possible measure of mutual legal assistance in criminal matters in connection with the offense for which extradition has been requested." However, the treaty does not provide any details on how this provision is implemented, such as the procedure for requesting MLA. It is also silent on the grounds for denying assistance. India and Mongolia could thus conceivably demand MLA under this provision even if it is not entitled to assistance under the India-Mongolia MLA treaty.

Table 2: Selected Extradition Legislation and Treaties in Asia-Pacific Which Permit Search, Seizure and Transmission of Evidence and Property Derived from Corruption and Related Offenses

Legislation			
Australia	India*	Malaysia*	Samoa
Bangladesh*	Indonesia	Mongolia	Singapore*
P.R. China	Kazakhstan	Pakistan*	Sri Lanka*
Cook Islands	Korea	Palau	Vanuatu
Fiji	Kyrgyzstan	Papua New Guinea	
Hong Kong, China	Macao, China	Philippines	
Treaties			
Australia-Hong Kong, China	Fiji-Thailand**	Indonesia-Philippines	
Australia-Indonesia	Hong Kong, China-India	Indonesia-Thailand	
Australia-Korea	Hong Kong, China-Indonesia	Japan-Korea	
Australia-Malaysia	Hong Kong, China-Korea	Korea-India	
Australia-Philippines	Hong Kong, China-Malaysia*	Korea-Mongolia	
Australia-Thailand**	Hong Kong, China-Philippines	Korea-Philippines	
Bangladesh-Thailand	Hong Kong, China-Singapore*	Korea-Thailand	
Cambodia-Thailand	Hong Kong, China-Sri Lanka	Korea-Vietnam	
P.R. China-Korea	India-Mongolia	Malaysia-Thailand**	
P.R. China-Mongolia	India-Philippines*	Philippines-Thailand	
P.R. China-Philippines	Indonesia-Korea		
P.R. China-Thailand	Indonesia-Malaysia		

* Transmission of evidence only

** Transmission of "stolen property" and evidence only

II. Legal Limitations and Preconditions to Cooperation

All legal frameworks for international cooperation in Asia-Pacific generally prescribe conditions for granting extradition or MLA. The following are particularly relevant in corruption cases.

A. Extradition of Nationals

Many Asia-Pacific countries may refuse to extradite their nationals in corruption cases. These prohibitions may be found in legislation or treaties. They may be mandatory or discretionary. Under some arrangements, when a country refuses to extradite because of nationality, the requested state may prosecute the person sought for the crimes in question. The decision to prosecute in place of extradition may be mandatory or discretionary. Where the decision is discretionary, the requested state may consider factors such as its interest in prosecuting the offense, its role in the investigation, the location of the evidence, and the severity of the possible sanctions. In some cases, prosecution may be conditional upon the request of the state seeking extradition and/or whether the requested state has jurisdiction over the crime.

Table 3: Selected Legislation and Treaties which Deny Extradition of Nationals

	Refusal to Extradite		Decision to Prosecute			
	Mandatory	Discretionary	Mandatory	Discretionary	Jurisdiction to Prosecute	Upon Request
Legislation						
Australia		x		x		
Cambodia	x			x		
P.R. China	x				x	
Cook Islands		x		x		
Fiji ²		x		x		
Hong Kong, China ¹		x			x	
Indonesia		x		x		
Japan ³	x					
Kazakhstan ³	x					x
Korea		x				
Kyrgyzstan	x					x
Macao, China ⁴	x			x		
Malaysia		x			x	
Mongolia	x					x
Palau ⁵		x	x			
Papua New Guinea ²		x		x		
Vanuatu		x				
Vietnam	x			x		
Treaties						
Australia-Hong Kong, China ¹		x		x		x
Australia-Indonesia		x		x		x
Australia-Korea		x		x		
Australia-Malaysia		x				x
Australia-Philippines		x		x		x
Australia-Thailand		x				
Bangladesh-Thailand		x				x
Cambodia-Thailand		x				x
P.R. China-Korea		x				x
P.R. China-Mongolia	x					x
P.R. China-Philippines		x		x		
P.R. China-Thailand		x				x
Fiji-Thailand		x				
Hong Kong, China-India ¹		x		x		
Hong Kong, China-Indonesia ¹		x		x		
Hong Kong, China-Korea		x				x
Hong Kong, China-Malaysia ¹		x		x		
Hong Kong, China-Philippines ¹		x		x		
Hong Kong, China-Singapore ¹		x		x		
Hong Kong, China-Sri Lanka ¹		x		x		
India-Mongolia	x		x			
Indonesia-Korea						
Indonesia-Malaysia		x			x	x
Indonesia-Philippines		x			x	x
Indonesia-Thailand		x			x	x
Japan-Korea		x	x			

Table 3: Selected Legislation and Treaties which Deny Extradition of Nationals (cont.)

	Refusal to Extradite		Decision to Prosecute			
	Mandatory	Discretionary	Mandatory	Discretionary	Jurisdiction to Prosecute	Upon Request
Korea-India		x				x
Korea-Mongolia	x					x
Korea-Philippines		x		x		
Korea-Thailand		x		x		
Korea-Vietnam		x				x
Malaysia-Thailand		x				
Philippines-Thailand		x			x	x
OECD		x	x			
UNCAC		x				x
UNTOC		x				x

- 1 For Hong Kong, China, the prohibition applies to nationals of P.R. China.
- 2 The prohibition does not apply when extradition is requested by a member of the Pacific Islands Forum.
- 3 Subject to treaty.
- 4 The prohibition applies to (1) nationals of P.R. China who are not resident in Macao, China, and (2) residents of Macao, China, unless extradition is sought by the country of the fugitive's nationality or is required by an applicable international treaty.
- 5 Mandatory prohibition for persons who may face the death penalty and who are of Palauan nationality or ancestry; discretionary prohibition in other cases.

Other factors may also come into play. As a matter of practice, Thailand will extradite its nationals only if required to do so under a treaty or if the requesting state provides an assurance of reciprocity (see Section I.B.3). As well, some Asia-Pacific countries will extradite a national for trial on the condition that the national will be returned to serve any sentence upon conviction. The legislation of the following countries contains such a provision: Cook Islands; Fiji; Papua New Guinea; and Vanuatu.

Finally, the India-Nepal Treaty (1953) stands out as an exception in its treatment of nationals: a requested state is only bound to extradite its nationals; the treaty does not apply to extradition of non-nationals.

B. Extradition and MLA Offenses—Severity and Dual Criminality

Most extradition and MLA arrangements in Asia-Pacific restrict cooperation to certain types of offenses. Whether a particular corruption offense qualifies for cooperation may depend on two criteria: first, whether the offense in question is sufficiently serious to justify international cooperation (severity); and

second, whether the conduct underlying the request for assistance is criminalized in both states (dual criminality).

1. Severity

The traditional approach in Asia-Pacific for implementing the severity criterion is to list the qualifying offenses in the relevant treaty and legislation. In other words, for cooperation to be given in a corruption case, the conduct in question must constitute one of the listed offenses. The list approach has its limits since it is sometimes difficult to categorize conduct into types of offenses. A list also may not cover new types of offenses that develop over time. Some extradition treaties in Asia-Pacific address this problem by providing discretion to extradite for an offense that is not on the list but which constitutes a crime in the requesting and requested states.

To overcome the disadvantages of the list approach, more recent treaties and legislation in Asia-Pacific adopt a minimum-penalty approach, i.e., the conduct in question must be punishable by a certain length of imprisonment. Others employ a hybrid approach: parties will cooperate only if the underlying offense falls within a list of crimes *and* is punishable by a certain minimum penalty.

Table 4: Selected Extradition Treaties and Legislation with a Severity Criterion

	List	Minimum Penalty	Hybrid
Legislation			
Australia ¹		x	
Bangladesh ²			x
P.R. China		x	
Cook Islands		x	
Fiji		x	
Hong Kong, China			x
India ⁴	x		
Indonesia	x		
Japan ⁵		x	
Korea		x	
Macao, China		x	
Treaties			
Australia-Hong Kong, China			x
Australia-Korea		x	
Australia-Indonesia ²			x
Australia-Malaysia		x	
Australia-Philippines		x	
Australia-Thailand ⁸	x		
Bangladesh-Thailand		x	
Cambodia-Thailand		x	
Legislation			
Malaysia		x	
Pakistan ²	x		
Palau		x	
Papua New Guinea		x	
Samoa		x	
Singapore (non-Commonwealth)	x		
Singapore (Commonwealth) ³			x
Sri Lanka (Commonwealth)			x
Thailand ⁷		x	
Vanuatu		x	
Treaties			
P.R. China-Korea		x	
P.R. China-Mongolia		x	
P.R. China-Philippines		x	
P.R. China-Thailand		x	
Fiji-Thailand ⁸	x		
Hong Kong, China-India			x
Hong Kong, China-Indonesia			x
Hong Kong, China-Korea ⁶			x

Table 4: Selected Extradition Treaties and Legislation with a Severity Criterion (cont.)

	List	Minimum Penalty	Hybrid
Hong Kong, China-Malaysia ³			x
Hong Kong, China-Philippines ²			x
Hong Kong, China-Singapore ²			x
Hong Kong, China-Sri Lanka			x
India-Philippines		x	
India-Mongolia		x	
Indonesia-Korea		x	
Indonesia-Malaysia ^{2,3}	x		

	List	Minimum Penalty	Hybrid
Indonesia-Philippines ^{2,3}			x
Indonesia-Thailand ^{2,3}	x		
Japan-Korea		x	
Korea-India		x	
Korea-Mongolia		x	
Korea-Philippines		x	
Korea-Thailand		x	
Korea-Vietnam		x	

For treaties and arrangements that take the minimum penalty or hybrid approach, the minimum penalty threshold is one year except where noted. Whether an arrangement covers a particular corruption case will depend on the applicable penalty for the particular offense in question.

For treaties and arrangements that take the list or hybrid approach, the list includes corruption and related offenses except where noted.

- 1 Two years for Commonwealth countries, one year for others
- 2 List includes corruption offenses but not money laundering
- 3 List includes corruption offenses but not false accounting
- 4 Non-treaty states
- 5 Three years
- 6 Parties have discretion to extradite for crimes which can be granted in both states
- 7 Subject to treaty
- 8 List does not include corruption or related offenses, but the requested state has discretion to extradite for "any other crime for which, according to the law of both Contracting States for the time being in force, the grant can be made."

The severity requirement is generally more relaxed for MLA than for extradition in Asia-Pacific, ostensibly because MLA does not impinge upon an individual's liberty. Several bilateral treaties in Asia-Pacific do not impose such a requirement at all: Australia-Hong Kong, China; Australia-Korea; P.R. China-Thailand; Hong Kong, China-Korea; India-Thailand; Korea-Thailand. The legislation of some countries imposes the requirement only for more intrusive types of assistance. Hence, search and seizure is available in the following countries only if the underlying offense is punishable by at least 1 year imprisonment in the requesting state: Australia; Malaysia; Papua New Guinea; and Vanuatu. In Hong Kong, China, the requirement is 2 years. In the Cook Islands, the requirement is 1 year imprisonment or a NZD 5 000 (roughly USD 3 500) fine for all types of assistance. In Fiji, the threshold is 6 months or a FJD 500 (roughly USD 300) fine.

As with extradition, some MLA arrangements impose a severity requirement through a list approach (which includes corruption and related offenses): Hong Kong, China-Philippines; Singapore legislation. The Hong Kong, China-Singapore treaty permits a requested state to deny assistance if "the offense to which the request relates is not an offense of sufficient gravity."

2. Dual Criminality

Dual criminality is required in most extradition arrangements in Asia-Pacific. Thus, arrangements with lists of offenses generally require the conduct underlying an extradition request to constitute an offense on the list in both the requesting and requested states. Arrangements with the minimum-penalty approach require the subject conduct be punishable by the minimum penalty in both states. But there are exceptions. For instance, extradition between Malaysia and Singapore does not require dual criminality.

Some approaches to implementing the dual criminality test tend to be more restrictive, such as matching the names or the essential elements of the offenses in the two states. To avoid these problems, many treaties and arrangements in Asia-Pacific take a more modern, conduct-based approach. In other words, the question is whether the conduct underlying the extradition request is criminal in both states. The question is not whether the conduct is punishable by the same offense in the two states, or whether the offenses in the two states have the same elements.

Table 5: Selected Extradition Legislation and Treaties with a Conduct-Based Definition of Dual Criminality

Legislation			
Australia	Hong Kong, China	Pakistan	Singapore
Bangladesh	Indonesia	Palau	Sri Lanka
P.R. China	Japan	Papua New Guinea	Thailand
Cook Islands	Kazakhstan	Samoa	Vanuatu
Fiji	Macao, China		
Treaties			
Australia-Korea	P.R. China-Thailand	Indonesia-Korea	
Australia-Hong Kong, China	Hong Kong, China-India	Japan-Korea	
Australia-Indonesia	Hong Kong, China-Indonesia	Korea-India	
Australia-Malaysia	Hong Kong, China-Korea	Korea-Mongolia	
Australia-Philippines	Hong Kong, China-Malaysia	Korea-Philippines	
Cambodia-Thailand	Hong Kong, China-Philippines	Korea-Thailand	
P.R. China-Korea	Hong Kong, China-Singapore	Korea-Vietnam	
P.R. China-Mongolia	Hong Kong, China-Sri Lanka	UNCAC	
P.R. China-Philippines	India-Mongolia		

Like the severity requirement, dual criminality is less commonly required for MLA than extradition in Asia-Pacific. Some arrangements state that dual criminality is not required. Others require dual criminality but expressly give the requested state discretion to waive the requirement in certain circumstances. Some legislation is silent on dual criminality and hence does not necessarily preclude a requested state from considering this factor.

Table 6: Dual Criminality in Selected MLA Arrangements

	Not required	Mandatory	Discretionary	Silent
Legislation				
Australia			x	
P.R. China			x	
Cook Islands		x		
Fiji	x			
Hong Kong, China		x		
India				x
Indonesia			x	
Japan		x		
Kazakhstan	x			
Korea			x	
Kyrgyzstan				x
Macao, China ¹		x		
Treaties				
Australia-Hong Kong, China		x		
Australia-Indonesia			x	
Australia-Korea			x	
Australia-Malaysia				
Australia-Philippines			x	
P.R. China-Indonesia	x			
P.R. China-Korea			x	
P.R. China-Philippines			x	
P.R. China-Thailand			x	
Hong Kong, China-Korea		x		
Hong Kong, China-Philippines		x		
Hong Kong, China-Singapore		x		
Legislation				
Malaysia		x		
Mongolia				x
Pakistan		x		
Palau		x		
Papua New Guinea ⁴		x		
Samoa		x		
Singapore		x		
Sri Lanka		x		
Thailand ³		x		
Vanuatu		x		
Vietnam	x			
Treaties				
India-Korea			x	
India-Mongolia	x			
India-Thailand	x			
Indonesia-Korea		x		
Korea-Mongolia			x	
Korea-Philippines			x	
Korea-Thailand			x	
Korea-Vietnam			x	
OECD ²	x			
Southeast Asian MLAT			x	
UNCAC ⁴			x	
UNTOC			x	

- 1 Macao, China may waive the dual criminality requirement for extradition or MLA if the purpose of the request is to demonstrate "the illicit nature of an act" or "the guilt of an individual".
- 2 Dual criminality is deemed to exist whenever the offense for which MLA is sought falls within the scope of the treaty.
- 3 Subject to treaty.
- 4 Discretionary for coercive forms of MLA. For non-coercive forms of MLA, where consistent with the basic concepts of its legal system, a State Party must render assistance even in the absence of dual criminality.

Dual criminality could possibly be an issue for members of the Initiative that have not criminalized transnational bribery. Parties to the UNCAC and the OECD Convention are required to criminalize bribery of foreign public officials in international business transactions. States Parties to the UNTOC must also consider doing so. A state that has created this offense may thus prosecute its citizens for bribing an official of an Initiative's member. If the foreign state seeks cooperation from the Initiative's member but the latter has not created the offense of bribery of foreign public officials, then there is arguably no dual criminality. However, a conduct-based approach to dual criminality could address this concern. From

the requested state's perspective, the conduct in question is bribery of its own official (i.e., domestic, not foreign bribery), which is presumably a crime. The specific offense under which the briber is charged in the requesting state is irrelevant – as is whether this offense has the same elements as the domestic bribery offense in the requested state. In any event, because of a lack of practice, there may be uncertainties as to how the Initiative's members that have not criminalized foreign bribery would deal with this issue: Indonesia; Macao, China; Mongolia; and Thailand.

A similar issue could arise in cases involving “illicit enrichment.” This offense occurs when there is “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”. Many members of the Initiative have not criminalized “illicit enrichment” per se and it may be argued that these members could not cooperate in such cases because there is no dual criminality. However, a conduct-based definition of dual criminality may circumvent this problem, since the conduct that gives rise to the illicit enrichment may amount to an offense (e.g., accepting a bribe) that satisfies dual criminality. Nevertheless, because of a lack of practice, it is also not certain how the members of the Initiative that have not criminalized illicit enrichment will deal with these cases. Japan and Pakistan take the approach described above. Because of a lack of practice, Mongolia is unable to determine whether a conduct-based approach to dual criminality would alleviate any problems. Indonesia can provide MLA viz. illicit enrichment if there is proof that the enrichment arose from criminal activities and that “the subject conduct destroyed or harmed the public or society.”

Finally, dual criminality could raise obstacles when the target of an investigation is a legal person. Some countries do not recognize the criminal liability of legal persons and may thus refuse to cooperate in these cases. One method of addressing this problem is to rely on illegal conduct that was committed by a natural person in the case to satisfy dual criminality. Japan will take this approach. Thailand will handle these cases in the same manner as those involving natural persons. This problem would be alleviated in Macao, China if the requesting state indicated that the conduct underlying the request can be attributed to a natural person. In Indonesia, this issue is the subject of ongoing discussion.

C. Reciprocity

An assurance of reciprocity is a promise by a requesting state that it will provide the same type of cooperation to the requested state in a similar case in the future. Generally, extradition and MLA treaties in Asia-Pacific implicitly embody this principle. The Southeast Asian MLAT expressly requires reciprocity.

For non-treaty based cooperation, Asia-Pacific countries often require a requested state to expressly provide an assurance of reciprocity. The following countries require such an assurance before it will extradite without a treaty: P.R. China; Japan; Korea. For MLA, reciprocity is a mandatory requirement in the legislation of some jurisdictions and discretionary in others (see below). However, reciprocity may be required in a particular case even if the legislation in the requested state is silent on the issue. It is always open to the requested state to demand an assurance of reciprocity before acceding to a request for cooperation. For example, this is Thailand's general practice when extraditing an individual without a treaty.

Table 7: Selected Legislation which Requires Reciprocity for MLA without a Treaty

	Mandatory	Discretionary
P.R. China	x	
Hong Kong, China	x	
India	x	
Indonesia	x	
Japan	x	
Kazakhstan	x	
Korea	x	
Macao, China*	x	
Malaysia		x
Palau		x
Singapore	x	
Thailand	x	
Vietnam	x	

* Except where the assistance is for the benefit of an accused or a resident of Macao, China or where the assistance relates to a serious offense

D. Evidentiary Tests

Many extradition and MLA arrangements in Asia-Pacific also require a requesting state to produce some evidence of the alleged crime in order to receive cooperation. This requirement may derive from legislation or from a treaty. The amount of evidence required depends on the jurisdiction in question and the nature of cooperation that is sought. Assistance of a more intrusive nature generally requires more supporting evidence.

There are two common evidentiary tests for extradition in Asia-Pacific. Some countries impose the prima facie evidence test. In other words, there must be evidence which would justify a person to stand trial had the conduct been committed in the requested state. A number of extradition arrangements in Asia-Pacific impose a probable cause evidence test. In other words, there must be

"sufficient information as would provide reasonable grounds to suspect ... that the person sought has committed the offense."

Table 8: Evidentiary Tests in Selected Extradition Legislation and Treaties

	Prima Facie Case	Probable Cause		Prima Facie Case	Probable Cause
Legislation					
Australia (Commonwealth only)	x		Malaysia ²	x	
Bangladesh	x		Pakistan	x	
Cook Islands ¹	x		Palau ³		x
Fiji ¹	x		Philippines	x	
Hong Kong, China	x		Samoa ⁴	x	
India	x		Sri Lanka	x	
Indonesia	x		Singapore	x	
Japan		x	Thailand	x	
Korea		x	Vanuatu ¹	x	
Treaties					
Australia-Fiji	x		Hong Kong, China-Philippines	x	
Australia-Hong Kong, China	x		Hong Kong, China-Singapore	x	
Australia-Korea		x	Hong Kong, China-Sri Lanka	x	
Australia-Thailand	x		India-Nepal (1953)	x	
Bangladesh-Thailand	x		Japan-Korea		x
Cambodia-Thailand	x		Korea-India		x
P.R. China-Thailand	x		Korea-Mongolia		x
Fiji-Thailand	x		Korea-Philippines		x
Hong Kong, China-India	x		Korea-Thailand		x
Hong Kong, China-Indonesia	x		Korea-Vietnam		x
Hong Kong, China-Malaysia	x		Malaysia-Thailand	x	

1 Some Commonwealth countries only.

2 Subject to a relevant treaty.

3 Unless the requesting state applies the *prima facie* case test in its extradition hearings, in which case the *prima facie* case also applies to proceedings in Palau.

4 Except for certain designated Commonwealth countries.

The purpose of evidentiary tests in extradition schemes is to protect the rights and interests of an individual sought for extradition. By requiring some evidence of the underlying crime, an individual presumably will not be extradited based on groundless allegations or requests made in bad faith. On the other hand, the requirement of evidence is frequently cited as a cause for delay. Requesting states often have difficulty producing sufficient admissible evidence because of differences in legal systems and evidentiary rules. For instance, common law jurisdictions (e.g., Hong Kong, China) have reported that requesting states with civil law systems have had difficulties in meeting the *prima facie* evidence test. Furthermore, judicial hearings in a requested state to

determine whether an evidentiary test has been met (and appeals of the courts' rulings) can cause additional delay.

When evidentiary tests are used, the extradition process can be further prolonged if the person sought can also tender evidence to challenge the allegation that he/she committed the offense. The resulting inquiry could involve a lengthy examination of foreign law and evidence. The extradition process would become a trial in the requested state, rather than an expedited process to determine whether a trial should take place in the requesting state.

Members of the Initiative have taken different approaches on this issue. The legislation of some members expressly allows the person sought to tender evidence relevant to technical matters (e.g., identity) but not to challenge the allegations against him/her: Australia; Cook Islands; Fiji; Papua New Guinea; Thailand; and Vanuatu. Malaysia's extradition legislation provides the opposite: it obliges the extradition court to receive evidence tendered by the person sought to show that he/she "did not do or omit to do the act alleged to have been done or omitted by him." The legislation in other Asia-Pacific countries is more vague. For example, legislation in P.R. China, Samoa, Singapore, and Sri Lanka expressly allows the person sought to tender evidence without saying in relation to what issue. Similarly, the legislation of Japan and Korea allows a court to examine a witness and to order an appraisal, interpretation or translation. Additional regulations in Korea allow the Chief Judge of the Supreme Court to order the parties to the proceedings to submit additional materials. Yet, there is no indication on what issue must the evidence relate. Legislation in Bangladesh; India; Nepal; and Pakistan expressly permits the person sought to tender evidence, including evidence in relation to whether the offense in question is a political or an extradition offense. The legislation does not expressly exclude evidence beyond these areas.

To avoid difficulties posed by evidentiary tests, some extradition arrangements in Asia-Pacific require little or no evidence of the underlying offense (though information about the offense may still be necessary). A requesting state need only provide certain documents, such as a copy of a valid arrest warrant, materials concerning the identity of the accused and a statement of the conduct constituting the offense that underlies the extradition request. Evidence of the underlying crime is not necessary. The following extradition arrangements in Asia-Pacific take this approach: Australia (legislation, except certain Commonwealth countries); Australia-Indonesia; Australia-Philippines; Cook Islands (legislation, except certain Commonwealth countries); Fiji (legislation, except certain Commonwealth countries); Papua New Guinea (legislation); Samoa (certain designated Commonwealth countries only); Vanuatu (except certain Commonwealth countries). Jurisdictions that use a

system of endorsing warrants may also dispense with evidentiary tests (see Section II.A.3).

Evidentiary requirements are also sometimes imposed for MLA to prevent “fishing expeditions.” Nevertheless, like dual criminality and severity, evidentiary requirements are usually more relaxed for MLA than for extradition, particularly for less intrusive measures such as the taking of evidence or production of documents. For more intrusive measures such as search and seizure, the legislation in the following Asia-Pacific countries requires reasonable grounds to believe that evidence is located in the requested state: Australia; Cook Islands; Fiji; Hong Kong, China; Malaysia; Papua New Guinea; Samoa; Singapore; Sri Lanka; Thailand; and Vanuatu. In Palau, the test is whether there is probable cause to believe that evidence may be found. Japan requires the requesting state to indicate “the necessity of the evidence sought” when seeking compulsory measures such as search and seizure. The following MLA treaties also contain evidentiary tests for search and seizure: Southeast Asian MLAT; Hong Kong, China-Singapore; India-Thailand (a statement indicating the basis for the belief). Under the P.R. China-Philippines treaty, MLA may be refused if “the assistance requested lacks substantial connection with the case.”

E. Specialty and Use Limitation

Specialty (also known as speciality) is the principle that an extradited person will only be tried or punished by the requesting state for conduct in respect of which extradition has been granted, or conduct that is committed after his/her extradition. Most extradition arrangements in Asia-Pacific expressly require specialty but only Palau’s legislation specify how the requirement can be met (namely via an affidavit). For Thailand, the requirement can be satisfied in practice by an undertaking from the attorney general of the requesting state. Pakistan would accept assurances from the judicial or diplomatic authorities of the requesting state.

Table 9: Selected Extradition Legislation and Treaties which Require Specialty

Legislation			
Australia	Hong Kong, China	Malaysia	Singapore
Bangladesh	India	Pakistan	Sri Lanka
P.R. China	Indonesia	Palau	Vanuatu**
Cook Islands*	Korea	Papua New Guinea**	
Fiji**	Macao, China	Samoa	

...

Table 9: Selected Extradition Legislation and Treaties which Require Specialty (cont.)

Treaties		
Australia-Hong Kong, China	Fiji-Thailand	Indonesia-Philippines
Australia-Indonesia	Hong Kong, China-India	Indonesia-Malaysia
Australia-Korea	Hong Kong, China-Indonesia	Indonesia-Thailand
Australia-Malaysia	Hong Kong, China-Korea	Japan-Korea
Australia-Philippines	Hong Kong, China-Malaysia	Korea-India
Australia-Thailand	Hong Kong, China-Philippines	Korea-Mongolia
Bangladesh-Thailand	Hong Kong, China-Singapore	Korea-Philippines
Cambodia-Thailand	Hong Kong, China-Sri Lanka	Korea-Thailand
P.R. China-Korea	India-Mongolia	Korea-Vietnam
P.R. China-Mongolia	India-Nepal (1953)	Malaysia-Thailand
P.R. China-Philippines	India-Philippines	Philippines-Thailand
P.R. China-Thailand	Indonesia-Korea	

* Outgoing requests only.

** For extradition requested by non-Pacific Islands Forum countries.

The principle of use limitation is similar to specialty but applies to MLA. Under some MLA arrangements in Asia-Pacific, the requesting state may use information acquired under the arrangement only in the case or investigation referred to in the request for assistance.

Table 10: Selected MLA Legislation and Treaties which Impose Use Limitation for Incoming Requests

Legislation	Macao, China	Malaysia	Singapore
Indonesia			
Treaties			
Southeast Asian MLAT		P.R. China-Philippines	Indonesia-Korea
Australia-Hong Kong, China		Hong Kong, China-Korea	Korea-Mongolia
Australia-Indonesia		P.R. China-Thailand	Korea-Philippines
Australia-Korea		Hong Kong, China-Philippines	Korea-Thailand
Australia-Malaysia		Hong Kong, China-Singapore*	Korea-Vietnam
Australia-Philippines		India-Korea	UNCAC*
P.R. China-Indonesia		India-Mongolia	UNTOC*
P.R. China-Korea		India-Thailand*	

* Case-by-case basis

F. Grounds for Denying Cooperation

Almost all MLA and extradition arrangements in Asia-Pacific allow a requested state to deny cooperation on certain enumerated grounds. The following are some that could be relevant in corruption cases.

1. Essential and Public Interests

Several jurisdictions in Asia-Pacific deny cooperation that would prejudice their "essential interests." The meaning of essential interests is not always well-

defined, but may include sovereignty, security and national interests. It could also include the safety of any persons or an excessive burden on the resources of the requested state.

Asia-Pacific extradition arrangements refer to "essential interests" in different ways. Some treaties permit the denial of extradition which affects the interests of the requested state in matters of defense or foreign affairs: Hong Kong, China-Malaysia; Hong Kong, China-Singapore. Under the extradition legislation of Hong Kong, China, the government of P.R. China may instruct the Chief Executive of Hong Kong, China to take or not take an action in an extradition case on grounds that P.R. China's interest in defense or foreign affairs would be significantly affected. Korea's legislation broadly states that its Minister of Justice may deny extradition "to protect the interests" of Korea. For extradition to non-Pacific Islands Forum countries, Fiji, Papua New Guinea and Vanuatu will consider "the national interest ... including [their] interests in effective international cooperation to combat crime." The OECD Convention also requires that investigation and prosecution of bribery of a foreign public official shall not be influenced by "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

The same issue may arise with MLA. Many treaties and legislation may deny the provision of MLA that would prejudice the sovereignty, security, public order, national interests, essential interests or "public interest." The treaties and legislation usually do not give precise meaning to these terms.

Table 11: Selected MLA Legislation and Treaties in which Essential Interests Are Considered

Legislation			
Australia	Korea	Mongolia	Sri Lanka
Cook Islands	Kazakhstan	Palau	Thailand
Fiji	Kyrgyzstan	Papua New Guinea	Vanuatu
Hong Kong, China*	Macao, China	Samoa	Vietnam
Indonesia	Malaysia	Singapore	
Treaties			
Southeast Asian MLAT	P.R. China-Philippines		Indonesia-Korea
Australia-Hong Kong, China*	P.R. China-Thailand		Korea-Mongolia
Australia-Indonesia	Hong Kong, China-Korea*		Korea-Philippines
Australia-Korea	Hong Kong, China-Philippines*		Korea-Thailand
Australia-Malaysia	Hong Kong, China-Singapore*		Korea-Vietnam
Australia-Philippines	India-Korea		UNCAC
P.R. China-Indonesia	India-Mongolia		UNTOC
P.R. China-Korea	India-Thailand		

* MLA may be denied if cooperation impairs the essential interests of Hong Kong, China or the sovereignty, security or public order of P.R. China.

The concept of essential interests could affect the effectiveness of international cooperation. The lack of a clear definition allows a requested state to consider a wide range of factors when deciding whether to cooperate. International instruments such as the OECD Convention have recognized that the investigation and prosecution of corruption cases can sometimes be affected by “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.” If a requested state includes these factors as part of its essential interests in deciding whether to cooperate with another state, then the effectiveness of extradition and MLA could suffer.

Thailand has elaborated on the definition of “essential interests.” The concept involves, in corruption cases, a consideration of factors such as “the extent of the damage caused, the number of victims, and whether it affects the sovereignty, security or national interest of the requested state.”

Thailand also has a special procedure for dealing with incoming and outgoing MLA requests that may affect its essential interests. Thailand’s MLA legislation creates a special Board comprising representatives from the Office of the Attorney General, the Ministries of Defence, Foreign Affairs, Interior and Justice, and up to four other “distinguished people.” The Board advises the central authority in considering and determining whether the rendering of MLA would affect Thailand’s “national sovereignty or security, crucial public interests, international relation, or relate to a political or military offense.” Disagreements between the Board and the central authority are resolved by the Prime Minister.

2. Political Offenses

Most, if not all, Asia-Pacific jurisdictions deny extradition for political offenses or offenses of a political character. Although the concept of political offenses is found in many arrangements, there is no precise definition since the concept is applied on a case-by-case basis. What is clear, however, is that the issue could conceivably be raised in some corruption cases, despite international opinion to the contrary (e.g., see Article 44 of the UNCAC).

Table 12: Selected Extradition Legislation and Treaties which Allow Denial of Cooperation for Political Offenses

Legislation				
Australia	Fiji*	Korea	Pakistan	Singapore
Bangladesh	India	Macao, China	Palau	Sri Lanka
P.R. China	Indonesia	Malaysia	Papua New Guinea*	Thailand
Hong Kong, China	Japan	Nepal	Samoa	Vanuatu*

* Where the requesting state is not a member of the Pacific Islands Forum.

Table 12: Selected Extradition Legislation and Treaties which Allow Denial of Cooperation for Political Offenses (cont.)

Treaties		
Australia-Korea	Fiji-Thailand	Indonesia-Malaysia
Australia-Hong Kong, China	Hong Kong, China-India	Indonesia-Philippines
Australia-Indonesia	Hong Kong, China-Indonesia	Indonesia-Thailand
Australia-Malaysia	Hong Kong, China-Korea	Korea-India
Australia-Philippines	Hong Kong, China-Malaysia	Korea-Mongolia
Australia-Thailand	Hong Kong, China-Philippines	Korea-Philippines
Bangladesh-Thailand	Hong Kong, China-Singapore	Korea-Thailand
Cambodia-Thailand	Hong Kong, China-Sri Lanka	Korea-Vietnam
P.R. China-Korea	India-Nepal (1953)	Malaysia-Thailand
P.R. China-Philippines	India-Philippines	Philippines-Thailand
P.R. China-Thailand	Indonesia-Korea	

Table 13: Selected MLA Legislation and Treaties which Allow Denial of Cooperation for Political Offenses

	Mandatory	Discretionary		Mandatory	Discretionary
Legislation					
Australia	x		Macao, China	x	
Hong Kong, China*	x		Papua New Guinea	x	
Indonesia	x		Singapore	x	
Japan	x		Sri Lanka	x	
Korea		x	Thailand		x
Malaysia	x		Vanuatu	x	
Treaties					
Australia-Hong Kong, China	x		India-Korea		x
Australia-Indonesia	x		India-Thailand		x
Australia-Korea		x	Indonesia-Korea	x	
Australia-Malaysia		x	Japan-Korea		x
P.R. China-Indonesia		x	Korea-Mongolia		x
P.R. China-Korea		x	Korea-Philippines		x
P.R. China-Philippines		x	Korea-Thailand		x
P.R. China-Thailand	x		Korea-Vietnam	x	
Hong Kong, China-Korea	x		Macao, China	x	
Hong Kong, China-Philippines			Southeast Asian MLAT	x	
Hong Kong, China-Singapore	x				

* Also applies to assistance through letters rogatory.

Some members of the Initiative elaborated on the meaning of "political offense." The concept in Pakistan does not cover "a politician or a person having held or holding political office [who] misuses his/her authority or indulges in corruption, and if the case is proven in a court." Vietnam will not cooperate if the purpose of a prosecution in the requesting state is to eliminate a political opponent. In Hong Kong, China, judicial decisions provide further guidance.

To deal with the uncertain application of political offenses, the UNCAC and the Australia-Philippines MLA treaty provide a “negative” definition by stating that corruption and related offenses can never be political offenses. Palau’s definition of political offenses likely excludes most cases of corruption: political offenses means “any charge or conviction based on a person’s political beliefs or affiliation where the conduct involved does not otherwise constitute a violation of that country’s criminal laws.”

Obligations under multilateral instruments may also affect the application of the political offense exception. For instance, the Australia-Korea and Japan-Korea extradition treaties state that the concept of political offenses does not include “an offense in respect of which the Contracting Parties have the obligation to establish jurisdiction or extradite by reason of a multilateral international agreement to which they are both parties.” It is arguable that this would include the offense of bribery of foreign public officials under the OECD Convention, to which Australia, Japan and Korea are parties. Other arrangements contain similar provisions and may have similar effect on parties to other multilateral instruments such as the UNCAC.

Table 14: Selected Extradition Legislation and Treaties which Exclude the Political Offenses Exception Due to Obligations under Multilateral Instruments

Legislation					
Australia	Fiji	Korea	Macao, China	Papua New Guinea	Vanuatu
Treaties					
Southeast Asian MLAT		Hong Kong, China-Korea		Korea-India	
Australia-Hong Kong, China		Hong Kong, China-Sri Lanka		Korea-Mongolia	
Australia-Korea		Hong Kong, China-Philippines		Korea-Philippines	
Australia-Malaysia		Japan-Korea		Korea-Thailand	

3. Double Jeopardy/On-going Proceedings and Investigations in the Requested State

Many extradition and MLA arrangements in Asia-Pacific refer to the principle of double jeopardy. A requested state will deny cooperation if the person sought has been acquitted or punished for the conduct underlying the extradition request. Under some arrangements, cooperation may also be denied if there are on-going proceedings or investigations in the requested state concerning the same crime. In some rare instances, some Asia-Pacific countries may refuse extradition if it has decided not to prosecute the person sought for the conduct underlying an extradition request; a conviction or an acquittal by a court is not required.

Table 15: Selected Legislation and Treaties which Deny Extradition on Grounds of Double Jeopardy and/or Concurrent Proceedings

Legislation				
Australia	Indonesia	Kazakhstan	Pakistan	Singapore
Bangladesh	Hong Kong, China	Kyrgyzstan	Palau	Sri Lanka
P.R. China	Japan	Macao, China	Papua New Guinea*	Thailand
Fiji*	Korea	Nepal	Samoa	Vanuatu*
Treaties				
Australia-Korea**		Fiji-Thailand		Indonesia-Thailand
Australia-Indonesia**		Hong Kong, China-India		Japan-Korea
Australia-Malaysia		Hong Kong, China-Korea		Korea (legislation)
Australia-Philippines		Hong Kong, China-Philippines		Korea-India
Australia-Thailand		Hong Kong, China-Singapore		Korea-Mongolia
Bangladesh-Thailand		Hong Kong, China-Sri Lanka		Korea-Philippines
Cambodia-Thailand		India-Mongolia		Korea-Thailand
P.R. China-Korea**		India-Nepal (1953)		Korea-Vietnam
P.R. China-Mongolia		India-Philippines		Malaysia-Thailand
P.R. China-Philippines		Indonesia-Korea		Philippines-Thailand
P.R. China-Thailand		Indonesia-Malaysia		

* For non-Pacific Islands Forum countries.

** May also refuse extradition if requested state has decided "in the public interest to refrain from prosecuting the person" for the offense in question.

Table 16: Selected Legislation and Treaties which Deny MLA on Grounds of Double Jeopardy

Legislation			
Australia	Korea	Papua New Guinea	Vanuatu
Hong Kong, China	Macao, China	Singapore	Vietnam
Indonesia	Malaysia	Sri Lanka	
Treaties			
Southeast Asian MLAT	Australia-Philippines		Hong Kong, China-Singapore
Australia-Hong Kong, China	P.R. China-Philippines*		India-Korea
Australia-Indonesia	P.R. China-Thailand*		Korea-Philippines
Australia-Korea*	Hong Kong, China-Korea		Korea-Vietnam
Australia-Malaysia	Hong Kong, China-Philippines		

* Discretionary ground of refusal.

Table 17: Selected Legislation and Treaties which Allow MLA to Be Denied or Delayed Because of On-going Proceedings in the Requested State

Legislation				
Cook Islands	Indonesia	Macao, China	Papua New Guinea	Thailand
Fiji	Malaysia	Palau	Singapore	Vanuatu
Treaties				
Southeast Asian MLAT		P.R. China-Philippines		Korea-Mongolia
Australia-Hong Kong, China		P.R. China-Thailand		Korea-Philippines
Australia-Indonesia		Hong Kong, China-Korea		Korea-Thailand
Australia-Korea		Hong Kong, China-Philippines		Korea-Vietnam
Australia-Malaysia		Hong Kong, China-Singapore		UNCAC
Australia-Philippines		India-Korea		UNTOC
P.R. China-Indonesia		India-Mongolia		
P.R. China-Korea		India-Thailand		

The issues of double jeopardy and concurrent proceedings could conceivably arise in corruption cases. For instance, a corrupt official who has sought safe haven in a foreign country could be prosecuted by that country for related offenses, such as laundering his/her ill-gotten gains. These foreign proceedings could impede a prosecution for corruption in the official's home country.

These issues could also arise in cases of bribery of foreign public officials such as those that fall under the OECD Convention and the UNCAC. A country which outlaws such conduct may prosecute an individual found in its territory for bribing an official of another country. Meanwhile, the country of the bribed official could also prosecute the same individual for bribery of its official. The result is concurrent proceedings against the briber in both states, which may prevent or delay extradition and/or MLA. If the briber is tried and convicted/acquitted in one of the two states, the doctrine of double jeopardy could further impede extradition and/or MLA. In these cases, Thailand may postpone rendering MLA if doing so may interfere with an on-going investigation and prosecution in Thailand. Hong Kong, China will decide whether to cooperate on a case-by-case basis, depending on factors such as the strength of the evidence and the location of the offense.

There may also be concurrent proceedings in transnational corruption cases when one country prosecutes the briber (for bribing a foreign public official) and a second country prosecutes its official (for accepting a bribe). If Malaysia prosecutes its official for accepting the bribe and the official is acquitted, then it may refuse to provide MLA to a country that prosecutes the briber.

4. Offense Committed Wholly or Partly in the Requested State

Some Asia-Pacific countries may also refuse extradition if the subject conduct constitutes an offense committed wholly or partly in their territory. In some cases, however, the requested state must undertake to prosecute the accused in place of extradition.

Table 18: Selected Legislation and Treaties which May Deny Extradition for an Offense Committed Wholly or Partly in the Requested State

Legislation			
Fiji ¹	Kazakhstan	Macao, China	Papua New Guinea ¹
Indonesia	Korea	Palau	Vanuatu ¹
Treaties			
Australia-Fiji	Bangladesh-Thailand	Indonesia-Philippines	Korea-Philippines
Australia-Indonesia	P.R. China-Korea ²	Indonesia-Thailand	Korea-Thailand
Australia-Japan ³	Hong Kong, China-Korea	Japan-Korea	Korea-Vietnam
Australia-Korea	Indonesia-Korea	Korea-India ²	Philippines-Thailand
Australia-Malaysia	Indonesia-Malaysia	Korea-Mongolia	

- 1 Where the requesting state is not a member of the Pacific Islands Forum.
- 2 Upon the request of the requesting state, the requested state must prosecute the accused in place of extradition.
- 3 For extraditions from Australia to Japan only.

Table 19: Selected Legislation and Treaties which May Deny Extradition for an Offense over which the Requested State Has Jurisdiction to Prosecute

Legislation		
Kyrgyzstan	Macao, China	
Treaties		
Cambodia-Thailand*	P.R. China-Mongolia	Hong Kong, China-Sri Lanka
P.R. China-Philippines*	Hong Kong, China-Indonesia	India-Mongolia*
P.R. China-Thailand*	Hong Kong, China-Malaysia*	India-Philippines*

* Requested state must in fact prosecute the person sought.

As with double jeopardy, this issue could arise in transnational bribery. A person who bribes a foreign official may have committed part of the offense in the requested state, e.g., by offering a bribe to the official over the telephone while in his/her home country and eventually delivering the bribe in the official's country. Other arrangements approach this issue from the perspective of jurisdiction, i.e., extradition may be refused if the requested state has jurisdiction to prosecute the offense.

Only Pakistan and Thailand have described how they will handle this ground of refusal in transnational bribery cases. Pakistan will decide whether to prosecute or extradite on a case-by-case basis, having regard to factors such as the importance of the case to Pakistan and the requesting state, the gravity of the crime and whether the requesting state would extradite to Pakistan under the same circumstances. Thailand had an international criminal case over which it had jurisdiction, but because it lacked evidence to prosecute. The Thai government extradited the suspects to face trial elsewhere.

5. Nature and Severity of Punishment

Some Asia-Pacific countries may refuse to cooperate in a corruption case if the offense is punishable in the requesting state by a severe penalty, such as death. Countries must also deny extradition where an accused may face torture or cruel and unusual punishment, which could conceivably be raised in death penalty cases.

Table 20: Selected Legislation and Treaties which Deny Extradition Because of the Death Penalty (Unless the Requesting State Provides Assurances)

Legislation				
Australia	Fiji ¹	Indonesia	Palau ²	Sri Lanka ³
Cook Islands ¹	Hong Kong, China	Macao, China	Samoa ⁴	Vanuatu ¹
Treaties				
Australia-Korea	Hong Kong, China-India		Hong Kong, China-Sri Lanka	
Australia-Hong Kong, China	Hong Kong, China-Indonesia		India-Mongolia ³	
Australia-Indonesia	Hong Kong, China-Korea ³		India-Philippines ³	
Australia-Malaysia ^{3 5}	Hong Kong, China-Malaysia		Indonesia-Philippines ³	
Australia-Philippines	Hong Kong, China-Philippines		Korea-Philippines	

- 1 Non-Pacific Islands Forum countries only.
- 2 Palau will not extradite its nationals or persons of Palauan ancestry regardless of whether the requesting state provides assurances.
- 3 Only if the requested state does not permit the death penalty for the same offense.
- 4 Only if the offense in question is punishable by death in the requesting state but not in Samoa
- 5 Not a ground for refusal *per se* but gives rise to mandatory consultation.

Table 21: Selected Legislation and Treaties which Deny Extradition Because of Torture or Cruel, Inhuman or Degrading Punishment

Legislation				
Australia ¹	Cook Islands ³	Hong Kong, China ²	Palau	Vanuatu ³
P.R. China	Fiji ¹	Macao, China	Papua New Guinea ³	
Treaties				
Australia-Indonesia		Australia-Philippines ⁴		

- 1 Australia's Extradition (Torture) Regulations, which cover extraditions to P.R. China and the Philippines, state that the Extradition Act applies subject to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 2 With reference to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 3 Where the requesting state is not a member of the Pacific Islands Forum.
- 4 With reference to Article 7 of the International Covenant on Civil and Political Rights.

Table 22: Selected Legislation and Treaties which Deny MLA in Relation to an Offense Punishable by Death

Legislation				
Australia ¹	Hong Kong, China ²	Indonesia	Macao, China ³	Vanuatu ¹
Treaties				
Australia-Indonesia ²		Australia-Hong Kong, China ²		Hong Kong, China-Korea ²

1 Unless there are special circumstances.

2 Discretionary ground.

3 Unless the requesting state provides adequate assurance that the penalty will not be imposed.

In the absence of legislation, certain members of the Initiative have policies to deal with international cooperation in death penalty cases. Mongolia will not surrender a fugitive to face the death penalty in corruption cases. Through its Minister of Justice, Japan may deny extradition on this ground, having regard to the proportionality between the offense, the penalty and human rights concerns. In P.R. China, Pakistan and Thailand, the death penalty is not a bar to extradition or MLA in corruption cases.

Many countries will cooperate in death penalty cases if the requesting state provides sufficient assurances that the penalty will not be imposed or carried out. Indonesia requires an assurance in the form of a sworn statement by the highest judicial authority in the requesting state, e.g., a supreme court. Hong Kong, China only requires an assurance by the central authority or consular representative of the requesting state. Japan will accept assurances from the judicial or diplomatic authorities of the requesting state. India's extradition legislation expressly states that it would not impose the death penalty against fugitives returned to India from a requested state that does not impose death for the same offense. For the Philippines, if another country refuses to cooperate in a corruption case on this ground, then the President may provide assurances that the offender would be pardoned.

6. Bank Secrecy

Investigations into economic crimes such as corruption will often require banking records as evidence. However, national banking legislation usually contains secrecy provisions that could prevent disclosure of banking records. To ensure that these provisions do not frustrate MLA requests, multilateral instruments may prohibit its signatories from denying MLA on grounds of bank secrecy (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Similar prohibitions are much more rare in bilateral treaties, and can be found in only a few treaties involving the Initiative's members (e.g., the Australia-Malaysia; Hong Kong, China-Belgium; and India-

Mongolia treaties). Also, none of the members' domestic MLA legislation contains such a prohibition, though many of their anti-money laundering legislation do so.

III. Procedures and Measures to Facilitate Extradition and MLA

A. Preparing, Transmitting and Executing Requests

1. Preparation of Outgoing Requests

The preparation of an outgoing request can involve many individuals. Prosecutors and law enforcement officials who have conducted an investigation are most familiar with the case and should of course be involved in drafting the request. In corruption cases, these are often officials of a special anti-corruption agency. At the same time, expertise in extradition and MLA is necessary to shed light on technical matters such as treaty requirements, unique legal concepts and points of contact in the requested state. Diplomatic officials could also play a role because of the political considerations of seeking assistance. It is therefore important to ensure that all the necessary individuals are involved, but it is equally important that the process is as streamlined as possible to minimize delay.

Some members of the Initiative have adopted a practice of requiring the investigator/prosecutor in a corruption case to draft outgoing requests jointly or in consultation with an expert from the central authority. Such is the situation in Australia (MLA); Hong Kong, China; Macao, China; Malaysia (MLA); P.R. China; and Thailand. This greatly ensures that requests contain sufficient evidence and information to comply with the demands of the requested state. Australia requires a local law enforcement or prosecutorial agency to draft outgoing extradition requests and submit it to the Attorney-General for approval. Pakistan has no central authority per se. However, investigators from the National Accountability Bureau (the anti-corruption agency) draft outgoing requests with the assistance of experts on international cooperation from the Bureau's Overseas Wing.

After a request is drafted, most countries require the request to be approved before it is sent. In some cases, approval is given by the central authority which is already involved in the drafting of the request: Hong Kong,

China; Malaysia (MLA); Thailand (MLA). Others jurisdictions require additional bodies to approve the request before transmission: Australia (Minister for Justice and Customs for extradition; the Minister or a delegate for MLA); Macao, China (the Chief Executive); Malaysia (extradition – Ministry of Internal Security); Mongolia (extradition – Minister of Justice and Home Affairs); Pakistan (extradition – Ministry of Interior); Thailand (extradition – Ministry of Foreign Affairs). Indonesia has an extensive consultation and approval process: the Directorate of International Law of the Ministry of Law and Human Rights (MLHR) drafts extradition and MLA requests that are then reviewed by the relevant bodies, which may include the KPK, police, Attorney General, MLHR and the Ministry of Foreign Affairs.

Several members of the Initiative also have procedures to follow-up outgoing requests: Thailand will follow up after approximately six months, either through the diplomatic channel or the central authorities. In Malaysia, the Attorney General's Chambers will monitor outgoing extradition and MLA requests in consultation with other bodies involved. The central authority of P.R. China performs a similar function. In Hong Kong, China, the central authority monitors outgoing extradition requests, while counsel in charge of a case does so for MLA requests. Pakistan's National Accountability Bureau generates monthly reports on all outstanding incoming and outgoing requests in corruption cases.

2. Language of the Request and Translation

A technical but potentially thorny problem is the language of the request. A request must obviously be in a language that is understood by the officials of the requested state who are involved in executing the request. Often, a requesting state must therefore translate the request into an official language of the requested state, which could be costly and time-consuming. It can also be difficult to find a qualified translator. Further delay could result if the quality of the translation is poor, or if the requested state seeks additional information which must also be translated.

The severity of this problem is lessened if a requested state accepts incoming requests in English. Most requesting states can translate documents from their official language into English with relative ease. Several members of the

Table 23: Selected Members of the Initiative that Accept Incoming MLA Requests in English (Subject to Treaty)

Australia	Kazakhstan*	Palau
Bangladesh	Kyrgyzstan*	Papua New Guinea
Cook Islands	Korea	Philippines
Fiji	Malaysia	Singapore
Hong Kong, China	Nepal	Thailand
Indonesia	Pakistan	

* Must be accompanied by the original request in the language of the requesting state.

Initiative that do not use English as an official language have adopted this approach.

Finally, P.R. China will accept incoming requests in English or French. P.R. China will then translate the request into Chinese for execution if the requesting state agrees to assume the costs.

To translate requests, Indonesia indicates that they may hire translators in the private sector to perform the work. Outsourcing of this nature is often necessary because of cost, but it is vital that governments ensure that the confidentiality of the draft request is maintained.

3. Formal Transmission of Requests for Cooperation and Evidence

The transmission of requests for cooperation and evidence can impact the efficiency of cooperation in practice. The most commonly used channels of communication are the diplomatic channels, through central authorities and through direct law enforcement bodies.

a. Transmission through the Diplomatic Channel

The diplomatic channel is the traditional conduit for extradition and MLA requests among Asia-Pacific countries. This approach requires the law enforcement authorities of the requesting state to prepare a request and send it to the diplomatic authorities of their country. The request is then forwarded to the diplomatic authorities of the requested state, which then forwards it to the appropriate law enforcement or prosecutorial authorities for execution. Evidence that is gathered under the request is transmitted to the requesting state by retracing this route. Letters rogatory requests are also generally transmitted through the diplomatic channel.

The main disadvantage of the diplomatic channel is delay, which could be particularly damaging for requests for MLA or provisional arrest. The path of communication is somewhat circuitous. Experience shows that this may be time-consuming. More delay could occur when diplomatic authorities have heavy workloads or are inadequately staffed.

Table 24: Selected Extradition and MLA Legislation and Treaties which Require Communication through Diplomatic Channels (Except Possibly in Urgent Cases)

Extradition Legislation					
Bangladesh	India	Japan	Malaysia	Pakistan	Thailand
P.R. China	Indonesia		Nepal	Philippines	
Extradition Treaties					
Australia-Indonesia	P.R. China-Korea		India-Philippines	Korea-India	
Australia-Korea	P.R. China-Philippines		Indonesia-Korea	Korea-Mongolia	
Australia-Malaysia	P.R. China-Thailand		Indonesia-Malaysia	Korea-Philippines	
Australia-Philippines	Fiji-Thailand		Indonesia-Philippines	Korea-Thailand	
Australia-Thailand	Hong Kong, China-Korea		Indonesia-Thailand	Malaysia-Thailand	
Bangladesh-Thailand	India-Mongolia		Japan-Korea	Philippines-Thailand	
Cambodia-Thailand					
MLA Legislation					
Indonesia	Japan	Korea	Malaysia	Macao, China	Palau Thailand

b. Transmission through Central Authorities

A growing number of arrangements in the Asia-Pacific now take a different approach by replacing the diplomatic authorities with a "central authority". As its name suggests, the central authority is responsible for the transmission, receipt and handling of all requests for assistance on behalf of a state. It is typically located in a ministry of justice or the office of an attorney general.

The use of central authorities in Asia-Pacific is more common in MLA than in extradition. Among the extradition arrangements in Asia-Pacific, only the Australia-Hong Kong, China and P.R. China-Mongolia treaties require signatories to designate central authorities to transmit and receive requests. A list of the central authorities of the Initiative's members for MLA is found in Annex C.

Table 25: Selected MLA Legislation and Treaties which Allow Direct Transmission of Requests between Central Authorities

Legislation					
Australia	Fiji	Indonesia	Kyrgyzstan	Mongolia	Singapore
Cook Islands	Hong Kong, China	Kazakhstan	Macao, China*	Pakistan	
Treaties					
Australia-Hong Kong, China		Hong Kong, China-Korea		Korea-Thailand	
Australia-Indonesia		Hong Kong, China-Singapore		Korea-Vietnam	
Australia-Korea		India-Mongolia		OECD Convention	
P.R. China-Indonesia		India-Thailand		Southeast Asian MLAT	
P.R. China-Korea		Indonesia-Korea		UNCAC	
P.R. China-Philippines		Japan-Korea		UNTOC	
P.R. China-Thailand					

* For incoming requests only.

Direct receipt and transmission of requests by central authorities can increase the effectiveness of international cooperation. It avoids delays caused by the diplomatic channels. As a body involved in enforcing criminal laws, the central authority may execute the request itself immediately, or it may be better positioned (than the diplomatic authorities) to identify the body most suited for doing so. This is particularly important if a requested state has numerous law enforcement agencies. Central authorities can also monitor a request and ensure its execution.

Another advantage of central authorities is that they may provide a visible point of contact for other countries that are seeking assistance. Such a role is enhanced if a central authority has a Web site in a language that is widely-spoken internationally and which contains the relevant legislation and treaties, sample requests for assistance, description of the requirements for cooperation and contact information.

Table 26: Information Available on the Internet (See Part 2 for Web Site Addresses)

	Web Site for Central Authority	Available in English	Relevant Legislation	Relevant Treaties	Contact Information	Requirements for Cooperation	Sample Documents
Australia	x	x	x	x	x		
P.R. China	x	x	x				
Hong Kong, China		x	x	x	x		
India	x	x				x	
Indonesia							
Japan	x	x	x		x	x	
Macao, China*					x		
Malaysia	x	x	x		x	x	x
Mongolia							
Pakistan		x					
Thailand	x	x	x	x	x		

* Information refers to the Office of the Prosecutor General of the Macao, China, which is the central authority under the legislation of Macao, China. The Office of the Secretary for Administration and Justice is the central authority under the UNCAC..

Central authorities can also serve an advisory function in light of their expertise in international cooperation. Their staff can assist law enforcement authorities in preparing outgoing requests for assistance and advising foreign authorities on incoming requests. The following members of the Initiative state that their central authorities are staffed with law graduates who have experience in international criminal cases and can speak, read and write English: Hong Kong, China; Mongolia; and Thailand. Japan's International Affairs Division of the Ministry of Justice is staffed with qualified attorneys and experts in financial policy

and investigation. The Division, like the central authority of Hong Kong, China, will also assist foreign states in preparing and drafting requests. Australia's central authority will also discuss drafts of incoming requests with the requesting state.

On the other hand, there could also be drawbacks to using central authorities. Central authorities with inadequate resources could delay the execution of requests. Some countries also designate different bodies as central authorities for different treaties and conventions. This may cause confusion to requesting states, raise concerns about coordination, reduce economies of scale and dilute the concentration of expertise.

c. Transmission between Law Enforcement Agencies

To further enhance efficiency, some arrangements outside Asia-Pacific allow prosecutors and/or investigators of the requesting state who are involved in a case to directly request MLA from their counterparts in the requested state. (Though in some jurisdictions, the law enforcement agencies involved are required to send a copy of the request to their respective central authorities.) Pakistan is the only member of the Initiative whose legislation allows its anti-corruption agency (the National Accountability Bureau) to directly request MLA from a foreign state in corruption cases.

Direct communication at the law enforcement level is likely the quickest means of communicating information, but it is not without drawbacks. It may be unworkable for countries with numerous law enforcement authorities, since a requesting state may not know whom to contact. The law enforcement and prosecutorial authorities in the requested state may not be informed about factors that affect the decision to cooperate, such as the political relations between the requesting and requested states, the level of civil and human rights in the requesting state etc. The economies of scale and concentration of knowledge that central authorities offer may be lost. There is an increased risk of duplicate requests being made in the same case. Some of these concerns could be lessened if a central authority exists in parallel to direct communication between law enforcement. However, this solution is effective only if the law enforcement agencies involved diligently keep the central authorities apprised of every request and development.

4. Urgent Procedures for Extradition and MLA

a. *Provisional Arrest as an Emergency Measure for Extradition*

Provisional arrest is an emergency measure to arrest of a person sought for extradition before a full extradition request is made. A request for provisional arrest generally requires less supporting documentation than extradition and hence takes less time to make. After the person sought has been provisionally arrested, the requesting state is required to make a full extradition request within a certain time period. Otherwise, the person is released.

To facilitate expeditious transmission of a request for provisional arrest, some extradition arrangements allow the parties to communicate outside the diplomatic channel, such as via Interpol or central authorities. Other extradition treaties and legislation in Asia-Pacific specifically allow a request for provisional arrest to be sent via certain media, e.g., post, telegraph or other means affording a record in writing. As a matter of practice, Thailand will accept urgent requests via alternate media for the purposes of preparation. However, the formal request must still be sent through regular channels before the arrest will be effected.

Table 27: Selected Extradition Legislation and Treaties which Provide for Provisional Arrests

	Alternate Media	Outside Diplomatic Channel
Legislation		
Australia		
P.R. China		x
Cook Islands		x
Fiji		x
Hong Kong, China		
India		
Indonesia	x	x
Japan		
Kazakhstan	x	
Korea		
Macao, China	x	x
Treaties		
Malaysia		x
Nepal*		
Palau	x	x
Papua New Guinea		x
Philippines	x	x
Samoa		
Singapore		
Sri Lanka		
Thailand		
Vanuatu		x

* For non-Nepali nationals only.

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Table 27: Selected Extradition Legislation and Treaties which Provide for Provisional Arrests (cont.)

	Alternate Media	Outside Diplomatic Channel		Alternate Media	Outside Diplomatic Channel
Treaties					
Australia-Hong Kong, China		x	Hong Kong, China-Philippines		x
Australia-Korea	x		Hong Kong, China-Singapore		x
Australia-Indonesia		x	Hong Kong, China-Sri Lanka		x
Australia-Malaysia	x	x	India-Mongolia		x
Australia-Philippines	x	x	India-Philippines	x	x
Australia-Thailand			Indonesia-Korea		x
Bangladesh-Thailand		x	Indonesia-Malaysia	x	x
Cambodia-Thailand		x	Indonesia-Philippines	x	x
P.R. China-Korea		x	Indonesia-Thailand	x	x
P.R. China-Mongolia		x	Japan-Korea		
P.R. China-Philippines		x	Korea-India		x
P.R. China-Thailand		x	Korea-Mongolia		x
Fiji-Thailand			Korea-Philippines	x	
Hong Kong, China-India		x	Korea-Thailand	x	
Hong Kong, China-Indonesia		x	Korea-Vietnam		
Hong Kong, China-Korea	x	x	Malaysia-Thailand		
Hong Kong, China-Malaysia		x	Philippines-Thailand	x	x

b. Urgent MLA Requests

Some MLA schemes in Asia-Pacific also provide for urgent procedures. Some treaties permit oral requests or requests via facsimile with subsequent written confirmation in urgent cases. Other arrangements allow law enforcement authorities in the requesting and requested states to bypass the diplomatic channel and communicate directly. Some treaties also allow urgent requests to be communicated through Interpol or ASEANPOL.

Table 28: Selected MLA Legislation and Treaties with Urgent Procedures

	Oral or Fax Request	Bypass Diplomatic Channel		Oral or Fax Request	Bypass Diplomatic Channel
Legislation					
Fiji	x		Japan		x
P.R. China	x ⁴		Korea		x
Indonesia		x	Macao, China	x ¹	x
Treaties					
Australia-Hong Kong, China	x		India-Thailand	x ¹	
Australia-Philippines		x	Korea-Philippines	x	
P.R. China-Philippines	x		Korea-Thailand	x	
P.R. China-Thailand	x ¹		Macao, China	x	x
Hong Kong, China-Korea	x		Southeast Asian MLAT		x ³
Hong Kong, China-Philippines	x		UNCAC	x	x ²
India-Mongolia	x ¹		UNTOC	x	x ²

1 Via facsimile.

2 Via Interpol.

3 Via Interpol or ASEANPOL.

4 Request must subsequently be confirmed in writing.

5. Approval and Execution of Incoming Requests

The approval of incoming requests for extradition and MLA could also involve a range of factors and actors. Again, it is important to engage all the relevant bodies but also to streamline the process so as to ensure efficiency.

In many jurisdictions, a single body (usually the central authority) reviews incoming requests (e.g., for compliance with requirements in a relevant treaty or legislation) before execution: Australia (extradition); Cook Islands (extradition); P.R. China (MLA); Hong Kong, China (MLA); Indonesia (MLA); and Malaysia (MLA). Other jurisdictions involve additional bodies in the approval process: Australia (MLA - Minister for Justice and Customs); Hong Kong, China (extradition - Chief Executive); Japan (Ministry of Foreign Affairs, subject to treaty); Macao, China (Chief Executive); and Malaysia (extradition - Ministry of Internal Security).

Depending on the nature of the assistance sought, different law enforcement and judicial bodies may be involved in the execution of a request. For corruption cases, Hong Kong, China, assigns incoming MLA requests to the Independent Commission Against Corruption (ICAC), the territory's anti-corruption law enforcement agency, thus taking advantage of the ICAC's expertise in corruption cases. The ICAC may also provide a dedicated unit to deal with a particular request in certain cases. Pakistan and Singapore also require their anti-corruption agencies to execute incoming MLA requests in

corruption cases. Pakistan's anti-corruption agency (the National Accountability Bureau) also deals with the investigative aspects of incoming extradition requests (although the Ministry of Interior is formally responsible for executing the request). Under its governing legislation, Indonesia's anti-corruption agency, the Corruption Eradication Commission (KPK), is allowed to execute incoming requests.

It is advisable for countries to monitor incoming requests after they are received so as to ensure timely execution. Hence, the central authority of Hong Kong, China does so for incoming requests and holds regular team meetings to discuss the progress of cases. It may also be useful to keep the requesting state informed of the status of the request. Thus, Thailand's Office of the Attorney General communicates with the embassy of the requesting state on the status of an incoming extradition request, and does the same with the competent authority of the requesting state for MLA requests. As noted earlier, Pakistan's National Accountability Bureau issues monthly reports on all incoming and outgoing requests that are outstanding.

Since requests for cooperation often contain sensitive information, several jurisdictions have policies to keep incoming requests confidential. Such is the case in Hong Kong, China; Macao, China; and Thailand. For Macao, China, if confidential information must be revealed to execute the request, then it will consult the requesting state before proceeding. The P.R. China-Indonesia MLA treaty contains a similar requirement. So does Australia's MLA legislation. Pakistan's National Accountability Bureau has a strict system of internal controls to protect the confidentiality of requests.

6. Participation of Foreign Authorities in Executing Requests

Another measure that may facilitate effective cooperation is to allow foreign authorities to be present when a request is executed. For example, when seeking testimony from a witness, the requesting state could (and must, under some treaties) submit a list of questions to the official who will question the witness. However, even with such a list, the questioner may not know the investigation well enough to be able to ask additional or follow-up questions which are triggered by the witness' responses. The requesting state could of course submit a list of supplemental questions after the examination of the witness, but this could further delay the investigation. The supplemental questions could also generate further follow-up questions.

Many MLA arrangements in Asia-Pacific recognize this difficulty and thus allow officials of the requesting state to participate in the taking of evidence. In many instances, the officials of the requesting state may pose questions to a witness, either directly or through an official of the requested state. The legislation of some countries even allows the requesting state to question the witness via video link.

Table 29: Selected MLA Legislation and Treaties which Allow Requesting State to Participate in Proceedings to Take Evidence

Legislation			
Australia*	Hong Kong, China*	Kyrgyzstan	Papua New Guinea*
Cook Islands*	Indonesia	Macao, China	Samoa
Fiji*	Kazakhstan	Malaysia	Vanuatu*
Treaties			
Australia-Hong Kong, China	P.R. China-Thailand	Indonesia-Korea	
Australia-Indonesia	Hong Kong, China-Korea	Korea-Mongolia	
Australia-Korea	Hong Kong, China-Philippines	Korea-Philippines	
Australia-Malaysia	Hong Kong, China-Singapore	Korea-Thailand	
Australia-Philippines	India-Korea	Korea-Vietnam	
P.R. China-Indonesia	India-Mongolia	Southeast Asian MLAT	
P.R. China-Korea	India-Thailand		

* Requesting state may question a witness via video link

A similar problem could arise in a request for search and seizure. For instance, a search of an office for relevant evidence could require officers who execute the search to sift through thousands of documents. If the officers do not have a thorough understanding of the facts of the investigation, it could be difficult for them to judge the relevance of each document. To address this problem, the legislation of Kyrgyzstan permits a representative of the requesting state to be present at a search. The MLA legislation of other Asia-Pacific jurisdictions allows an officer who executes a search warrant to “obtain such assistance ... as is necessary and reasonable in the circumstances.” Arguably, this provision could allow an executing officer to seek the assistance of representatives of the requesting state during the execution of the warrant. The following jurisdictions have legislation that includes such a provision: Australia; Hong Kong, China; Papua New Guinea; and Vanuatu.

7. Use of Liaison Personnel

The law enforcement agencies of some Asia-Pacific countries have designated liaison personnel to deal with international cooperation. The duties of these personnel usually do not include sending and receiving formal requests for assistance (i.e., they do not replace the diplomatic or central authorities). Their responsibility (among other tasks) is to serve as a contact point and to advise to

domestic and foreign law enforcement officials who are seeking international cooperation. In some cases, liaison personnel may be posted in a foreign country.

Law enforcement officials are well-advised to contact liaison personnel when preparing a request for assistance, even if the request must still be formally sent through diplomatic channels or central authorities. Liaison officers are often familiar with the requirements for cooperation between their home country and the foreign country to which he/she has been assigned. Hence, he/she could advise law enforcement authorities in either country on how to meet those requirements. A liaison officer will also likely have contacts in foreign law enforcement agencies, which could be useful for following up requests that have been submitted.

Some members of the Initiative have designated liaison personnel. For example, the Liaison Bureau of the Hong Kong Police Force coordinates and deals with all police-related inquiries from overseas police organizations and local consulate officials. Australia has gone further by posting liaison personnel overseas: the International Network of the Australian Federal Police provides liaison support for extradition and MLA requests to and from Australia. As of September 2007, the Network had 86 officers at 31 posts in 25 countries, including 16 posts in 13 members of the Initiative. P.R. China also has 26 police liaison officers in 16 countries and regions, including the United States, Canada, and Thailand. Liaison officers from 14 foreign countries are stationed in P.R. China.

The central authorities of Hong Kong, China and Malaysia also have a practice of liaising with other jurisdictions when seeking or providing extradition and MLA in corruption cases. The communication may pertain to both general and case-specific matters.

Inter-governmental bodies can also serve as forums for liaison. Law enforcement representatives from members of the Initiative meet regularly in the framework of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific. Law enforcement officials from signatories to the OECD Convention do likewise in the OECD Working Group on Bribery. Law enforcement agencies in ASEAN member countries also exchange information through the ASEAN Senior Officials on Transnational Crime and the ASEAN Chiefs of National Police (ASEANPOL). Finally, Hong Kong, China has posted liaison personnel with the International Criminal Police Organization (Interpol).

B. Procedural Measures for Enhancing Extradition and MLA

1. Simplified Extradition through Endorsement of Warrants and Consent Extradition

Extradition between many Asia-Pacific countries follows a two-stage procedure. The person sought is first brought before a judge who will conduct a hearing to determine whether some of the conditions for extradition are met (e.g., sufficiency of evidence). If the judge finds that these conditions are met, the judge will commit the person sought into custody to await surrender. At the second stage, the matter reverts to the executive branch of government to decide whether the person sought should be surrendered in light of all of the circumstances. The decisions of the extradition judge and the executive may be subject to appeals.

Extradition is streamlined between some Asia-Pacific countries through the endorsement of warrants. Under such schemes, a requesting state sends the warrant for the arrest of the person sought (or a copy in some cases). The judicial authorities of the requested state then endorse the warrant, after which the warrant can be executed like an arrest warrant issued by the requested state. When the warrant is executed, the arrested person is brought to court. The court may then conduct a brief hearing to determine whether certain conditions are met, such as whether the person arrested is the person sought. If the conditions are fulfilled, the court orders the surrender of the person to the requesting state.

Extradition based on the endorsement of warrants tends to be more expeditious than regular extradition requests. The requesting state usually has fewer documents to compile, transmit and authenticate. More importantly, the process in the requested state tends to be more abbreviated. There is generally no lengthy hearing in the requested state to determine a panoply of preconditions to extradition, such as dual criminality, the sufficiency of evidence etc. As well, the court often orders surrender directly. There is no second phase of proceedings after the judicial hearing in which the executive branch of government decides whether to surrender the person sought. It should be noted, however, that these schemes are often based on domestic law, not treaties. A requested state therefore has no international obligations to accede to an extradition request.

In Asia-Pacific, arrest of fugitives on endorsement of a foreign warrant is used for extradition between Malaysia and Singapore, as the penal laws of the two countries are very similar, due to a shared legal history in the pre-

independence era. For extraditions to Singapore, a Malaysian court only has to confirm the identity of the person who has been arrested before ordering surrender. For extraditions to Malaysia, a Singapore court has to confirm that the person arrested is the person specified in the Malaysian warrant, before ordering his surrender to the appropriate court in Malaysia.

Extradition among most Pacific Islands Forum countries also uses a system of endorsement of warrants because of similarities in these countries' legal systems. The process begins when a magistrate of the requested state endorses the original arrest warrant issued in the requesting state. Upon the arrest of the person sought, a magistrate will determine whether extradition should be denied because of some limited grounds, such as whether surrender would be unjust or oppressive. The magistrate does not consider some of the grounds for denying extradition that apply when a non-Forum country requests extradition, such as insufficient evidence of the crime, political offense, double jeopardy, cruel punishment and nationality. If there are no grounds to deny extradition, the magistrate orders surrender, subject to appeal. Extradition among the following members of the Initiative uses such a scheme: Cook Islands; Fiji; Papua New Guinea; and Vanuatu.

Another measure used by some Asia-Pacific countries to expedite extradition is to allow extradition by consent. A person sought for extradition is allowed to consent to extradition, often shortly after his/her arrest. Extradition by consent obviates the need for a lengthy examination of the preconditions for extradition. It may also relieve the requesting state of its duty to provide all of the necessary documentation.

Table 30: Selected Legislation and Treaties that Provide for Consent Extraditions

Legislation		
Australia	Hong Kong, China	Palau
Cook Islands	Macao, China	Papua New Guinea
Fiji	Malaysia	Vanuatu
Treaties		
Australia-Indonesia	Hong Kong, China-Korea	Korea-Philippines
Australia-Philippines	Hong Kong, China-Malaysia	Korea-Thailand
Australia-Korea	Hong Kong, China-Singapore	Korea-Vietnam
Bangladesh-Thailand	India-Korea	
Cambodia-Thailand	Korea-Mongolia	

2. Appeals

Appeals may be necessary in the interests of justice, but they can also prolong proceedings and lead to further delay. Most Asia-Pacific jurisdictions allow a person sought to appeal the decision of an extradition judge. Some jurisdictions also allow the requesting state to appeal a judge's denial of extradition. In some cases, the available grounds of appeal are more restricted for the requesting state than for the person sought.

Table 31: Selected Extradition Legislation which Gives Requesting States a Right of Appeal

Australia	Malaysia*	Thailand
Cook Islands	Palau	Vanuatu
Fiji	Papua New Guinea	
Hong Kong, China*	Philippines	

* Only on questions of law.

Proceedings can be further prolonged if the person sought can tender additional evidence on appeal. The extradition legislation of Hong Kong, China and Singapore allows the person sought to do so. The legislation in other jurisdictions expressly precludes appellants from tendering additional evidence: Australia; Cook Islands; Fiji; Papua New Guinea; and Vanuatu.

In addition to appeals of the decision of an extradition judge, Australia and Hong Kong, China also permit appeals of the government's decision to surrender. In some instances, these appeals are heard in proceedings that are separate from and after the appeal of the decision of the extradition judge. The result could be multiple and somewhat convoluted appeal proceedings that may cause delay.

Appeals of MLA requests in the requested state are less common. The MLA legislation of most members of the Initiative does not allow appeals for most types of assistance. One exception is Japan, which permits a court to review a seizure of evidence by the police. In the Philippines, MLA requests may be challenged by the target of an investigation or prosecution, or a person who has been ordered to provide evidence (e.g., a bank).

3. Time Requirements

To ensure proceedings are expeditious, extradition legislation in Asia-Pacific may contain very short time requirements for certain steps to be taken. For instance, an extradition hearing in Korea must commence within 2 months after the arrest of the person sought. The deadline is 60 days and 48 hours in Palau and Macao, China respectively.

Instead of fixing a deadline, some Asia-Pacific countries merely require the hearing to commence “as soon as practicable” after the parties have had “reasonable time” to prepare: Cook Islands; Fiji; Papua New Guinea; and Vanuatu. In addition, many countries only give the person sought 15 days to appeal the decision of the extradition judge: Australia; Bangladesh; P.R. China (10 days); Cook Islands; Fiji; Hong Kong, China; Macao, China (10 days); Papua New Guinea; Pakistan; Philippines (10 days); Thailand; and Vanuatu. Indonesia’s Extradition Law does not set a deadline but stipulates that extradition cases are high priority. Despite these short limitation periods, delays still frequently occur in extradition proceedings. One problem may be that these provisions only require certain steps to commence. They do not, for instance, prevent the proceedings from being commenced and then adjourned or drawn out for lengthy periods of time.

Hence, provisions which require certain steps to be completed by a certain time may be more effective. In P.R. China, after receiving notice of an extradition hearing, a person sought has 30 days to make submissions to the court. In Macao, China, a person sought has only 10 days to do so. In Japan and Korea, if a person sought has not been granted bail, an extradition judge must decide whether to order committal within two months of the person’s arrest. A judge in Palau must render a decision within 7 days of the hearing, while a court in Macao, China has 20 days to do so. Many Asia-Pacific jurisdictions also impose deadlines for the government to order surrender within a certain time after the court proceedings (including appeals) have ended. In addition, the person sought may be released if he/she is not surrendered within a certain time after the order has been made. Imposing relatively short deadlines could certainly expedite proceedings, but there may be one drawback: in exceptionally complex cases, the court and the litigants may not have sufficient time to properly prepare and consider the case.

Table 32: Selected Legislation that Imposes Time Limits for the Government on Surrender

	Time to Order Surrender (days)	Time to Effect Surrender (Months)		Time to Order Surrender (days)	Time to Effect Surrender (Months)
Australia		2	Macao, China		20 days
Bangladesh		2	Nepal		2
Cook Islands		2	Pakistan		2
Fiji		2	Palau		2
Hong Kong, China	75	1	Papua New Guinea		2
India		2	Samoa	60	1
Indonesia		15 days	Singapore	60	
Japan	10	1	Sri Lanka		2
Korea		1	Thailand		3
Kyrgyzstan		1	Vanuatu		2

C. Alternatives to Formal MLA and Extradition

In practice, it is imperative that practitioners also consider whether assistance outside regular MLA treaties and legislation can meet their needs. This is often available when gathering information through non-coercive means. Since such channels are likely much faster and simpler, practitioners should explore and exhaust them before resorting to formal MLA. They may also be the only option if formal measures are unavailable, e.g., because there is no MLA treaty or the treaty does not provide the type of assistance in question.

The most common form of informal assistance is direct contact at the law enforcement level. An investigator can often call another investigator in a foreign state and quickly obtain publicly available information such as land title records and company registration and filings. This method may also be used to obtain a statement from a cooperative witness. The liaison officers discussed earlier can often facilitate such assistance (see Section II.B.1). For example, Thailand's law enforcement authorities can directly assist their foreign counterparts at the police-to-police level or on the basis of MOUs.

There are also non-police channels of assistance. Financial intelligence units (FIUs) which are part of the Egmont Group (which includes FIUs from 8 members of the Initiative) have undertaken to cooperate and share information. Individual FIUs may have memoranda of understanding or letters to accomplish the same. Korea's legislation specifically allows its FIU to exchange information with foreign counterparts under certain circumstances. Another source of information is company and securities regulators. For instance, regulators in the Philippines and Hong Kong, China have signed a memorandum of understanding (MOU) to share information. Both the securities regulators in Malaysia and P.R. China have seven MOUs with their counterparts in other members of the Initiative. Likewise, some tax treaties and agreements allow tax authorities to share information about crimes, including corruption. For instance, the OECD Model Tax Convention was recently amended to expressly permit the sharing of information in corruption cases. However, one limitation to these channels of informal assistance is that some jurisdictions may refuse to provide information through regulatory channels for use in a criminal investigation, and some criminal courts may not accept the information as sufficient proof if it is not backed by evidence provided in a more formal way.

IV. Recovery of Proceeds of Corruption in Criminal Proceedings

It has become increasingly easy to conduct transnational financial transactions. Corrupt officials have taken advantage of this situation by siphoning and hiding the proceeds of their crimes abroad, including bribes and embezzled funds. Asia-Pacific countries have seen examples in which corrupt officials transferred millions of dollars of proceeds overseas. Bribers may also deposit the proceeds of bribery abroad, such as proceeds from a contract obtained through bribery. The confiscation of proceeds of corruption through MLA has therefore become a focal issue in recent years. An even more complicated question is whether confiscated proceeds should be retained by the requesting state, the requested state or a third party.

A few Asia-Pacific countries have sought to recover proceeds of corruption that have been exported, with varying degrees of success. For example, in 2003, the Philippines recovered USD 658 million from Switzerland which had been exported by a former president. The entire recovery process took 17 years from the Philippines' initial request for MLA. In 1997, Pakistan requested MLA from Switzerland to seek the return of assets exported by a former prime minister. Switzerland subsequently charged and convicted the former prime minister with money laundering. In July 2003, a magistrate ordered the assets forfeited to Pakistan, but the order as well as the conviction remains under appeal. In May 2007, the Swiss, U.S. and Kazakh governments agreed to transfer USD 84 million in a frozen Swiss bank account to Kazakhstan. The funds had been intended as bribes for Kazakh officials.

This section of the report focuses on the legal basis, preconditions and procedure for the repatriation of the proceeds of corruption through formal MLA in criminal proceedings. However, as with other types of cases, MLA in criminal matters is but one means of securing international assistance. The alternatives to formal MLA that are described earlier (see Section II.C) may also be useful for seizing proceeds of corruption, particularly since speed is often of the essence

when recovering assets. Another possibility is to request a foreign state to commence domestic criminal proceedings, such as for money laundering. Yet another option is to commence civil proceedings in the requested state and seek remedies such as an injunction to freeze assets or a confiscation order. Civil proceedings could be advantageous because they generally require a lower evidentiary burden of proof. Remedies may be available in the absence of a criminal conviction. However, the cost of civil proceedings could be quite high.

A. Legal Basis for Assistance

The legal basis for MLA in relation to proceeds of crime, including corruption, within Asia-Pacific is similar to that for other forms of MLA. Several bilateral treaties expressly provide for MLA relating to proceeds of crime. Some Asia-Pacific jurisdictions provide MLA in this area based on domestic legislation. The complexity of the legislation varies across jurisdictions. Some have extensive provisions that detail the procedure for rendering MLA to trace, freeze and confiscate proceeds of crime. Other jurisdictions have legislation that contemplates the granting of MLA relating to proceeds of crime without prescribing the detailed procedure for doing so. These relevant provisions are sometimes found in laws on money laundering, not MLA.

MLA concerning proceeds of corruption may involve some additional preconditions that may not apply to MLA for other types of crime. Some Asia-Pacific jurisdictions provide MLA only for proceeds that derive from serious crimes, such as offenses that attract punishment of at least one year imprisonment in the requesting and requested states. In some cases, the requesting state may have to provide an assurance of reciprocity.

Some multilateral treaties could also be relevant. The UNCAC requires States Parties to provide MLA for asset confiscation and repatriation. If a State Party requires a treaty as a precondition to providing MLA of this nature, it must consider the UNCAC as the requisite treaty basis. The UNTOC also requires States Parties to assist one another in the confiscation of assets to the extent possible under their domestic law. The Southeast Asian MLAT requires its signatories to “endeavor to locate, trace, restrain, freeze, seize, forfeit or confiscate” assets subject to their domestic laws.

Table 33: Selected Legislation and Treaties which Expressly Provide MLA in Relation to Proceeds of Crime

Legislation			
Australia ¹	Indonesia	Palau ¹	Singapore ⁵
Cook Islands ²	Korea ⁶	Papua New Guinea	Sri Lanka ¹
Fiji ³	Macao, China	Philippines ⁶	Thailand ⁶
Hong Kong, China ⁴	Malaysia ^{1,7}	Samoa	Vanuatu ¹

Table 33: Selected Legislation and Treaties which Expressly Provide MLA in Relation to Proceeds of Crime (cont.)

Treaties		
Southeast Asian MLAT	P.R. China-Philippines	India-Thailand
Australia-Hong Kong, China	P.R. China-Thailand	Korea-Mongolia
Australia-Indonesia	Hong Kong, China-Korea	Korea-Philippines
Australia-Korea	Hong Kong, China-Philippines	Korea-Thailand
Australia-Malaysia	Hong Kong, China-Singapore	Korea-Vietnam
Australia-Philippines	India-Korea	UNCAC
P.R. China-Korea	India-Mongolia	UNTOC

- 1 Only for proceeds of offenses punishable by at least 1 year's imprisonment.
- 2 Only for proceeds of offenses punishable by at least 1 year's imprisonment or NZD 5,000 (approximately USD 3,500).
- 3 Only for proceeds of offenses punishable by at least 6 months' imprisonment or FJD 500 (approximately USD 300).
- 4 Only for proceeds of offenses punishable by at least 2 years' imprisonment.
- 5 Only for proceeds of listed offenses (which includes corruption).
- 6 Requesting state must provide an assurance of reciprocity.
- 7 Requesting state may be asked to provide an assurance of reciprocity.

As noted earlier (see Section I.A.3), the extradition treaties and legislation of many Asia-Pacific countries include MLA features. The authorities of the requested state could use these provisions to search, seize and transmit property acquired by the person sought as a result of corruption.

Another issue that may arise is whether the definition of proceeds of corruption includes "indirect" proceeds. Indirect proceeds are essentially proceeds derived or converted from the proceeds of corruption. For example, if a public official accepts a bribe and uses the bribe to purchase property, the bribe is "direct" proceeds and the property is "indirect" proceeds. Members of the Initiative that may provide MLA in relation to indirect proceeds of corruption include Australia; P.R. China; Cook Islands; Fiji Islands; Hong Kong, China; India; Indonesia; Japan; Malaysia; Nepal; Pakistan; Palau; Papua New Guinea; the Philippines; Samoa; Singapore; Sri Lanka; Thailand; and Vanuatu.

B. Procedures

The recovery and return of proceeds of corruption generally involves several steps. Proceeds must first be traced and identified in the requested state. Once located, the assets may have to be quickly frozen or seized to prevent their removal. A more lengthy legal process may follow to confiscate the assets to the requested state and finally to repatriate the assets to the requesting state.

1. Tracing and Identification of Assets

The first step in asset recovery is to locate the assets in question. Several MLA treaties and legislation in Asia-Pacific expressly require a state to trace and identify proceeds of crime in their jurisdiction upon request.

Table 34: Selected Legislation and Treaties under which Signatories Endeavor to Trace and Identify Proceeds of Crime upon Request

Australia-Hong Kong, China	P.R. China-Thailand	Korea-Philippines
Australia-Indonesia	Hong Kong, China-Korea	Korea-Thailand
Australia-Korea	Hong Kong, China-Philippines	Korea-Vietnam
Australia-Malaysia	India-Korea	Macao, China (legislation)
Australia-Philippines	India-Mongolia	UNCAC
P.R. China-Korea	India-Thailand	UNTOC
P.R. China-Philippines	Korea-Mongolia	

Tracing and identification of assets often do not involve any special MLA procedures but only the gathering of documents, which is covered by almost all MLA arrangements. Some Asia-Pacific countries, however, have additional measures designed specifically for the tracing of proceeds of crime. For instance, Australia's MLA legislation allows courts to issue production orders for "property-tracking documents". These orders compel persons (e.g., financial institutions) to produce documents relevant to the identifying, locating or quantifying of proceeds of a serious foreign offense. The legislation also allows the issuance of search warrants for such documents. The legislation in the Cook Islands; Fiji; Papua New Guinea; Samoa; and Vanuatu contains similar provisions.

Another tool to trace proceeds of corruption is the monitoring of an account at a financial institution. At the request of a foreign country, Australia, Palau and Samoa may seek a monitoring order from a court. Such an order compels a financial institution to provide information about transactions conducted through a specific account during a particular period. However, these orders are only available if the investigation pertains to a crime punishable by at least three years imprisonment.

The quantification of proceeds has been an issue for some parties to the OECD Convention, and could also become a challenge for the Initiative's members. This matter may need to be further developed as practice emerges.

2. Freezing and Seizure

Once an asset is identified, it may be imperative for the authorities to quickly "freeze and seize" the asset to prevent its removal before confiscation. Treaties and legislation that contain proceeds of crime provisions often require the requested state to freeze proceeds upon discovery. It may also be wise to

include in treaties and legislation provisions on the cost of maintaining or managing a frozen asset, as such costs could be significant for assets such as real estate or an on-going business.

Table 35: Selected Legislation and Treaties under which Signatories Must Freeze Proceeds upon Discovery

Australia-Hong Kong, China	P.R. China-Thailand	Korea-Philippines
Australia-Indonesia	Hong Kong, China-Korea	Korea-Thailand
Australia-Korea	Hong Kong, China-Philippines	Korea-Vietnam
Australia-Malaysia	Hong Kong, China-Singapore	Macao, China (legislation)
Australia-Philippines	India-Korea	UNCAC
P.R. China-Korea	India-Thailand	UNTOC
P.R. China-Philippines	Korea-Mongolia	

To discharge this obligation, the MLA legislation of many Asia-Pacific jurisdictions allows the requested state to apply for a court order to freeze the subject asset. One obvious drawback to this approach is delay. Assets such as funds in bank accounts can be transferred very quickly. Time is therefore of the essence. Yet this can prove challenging because of delays in marshalling and transmitting evidence in support of an application for a freezing order in the requested state. The hearing of the application itself can cause further delay.

Several Asia-Pacific countries have attempted to overcome this problem by allowing direct enforcement of a foreign freezing order. Under this approach, the requesting state obtains a freezing order from its courts and transmits the order to the requested state. The requested state then registers the foreign freezing order in its courts, after which the foreign order becomes enforceable in the requested state like a domestic court order. Time is saved because there is no application before the courts of the requested state for a second freezing order. Studies have shown that this approach is timely, requires fewer resources, avoids duplication and is significantly more effective.

To further expedite the process, some members of the Initiative permit registration of faxed copies of foreign orders. However, in most cases, a properly sealed or authenticated copy of the order must subsequently be filed.

One potential obstacle to freezing is the requirement that criminal proceedings be instituted in the requesting state. Some jurisdictions will freeze proceeds if criminal proceedings have been commenced or are about to be commenced. Others require reasonable grounds to believe that proceedings will be instituted and that confiscation may be ordered in those proceedings. The most demanding legislation may require a final conviction of a person and a final confiscation order in the requesting state.

Table 36: Prerequisites for Enforcing a Foreign Freezing Order in Selected Members of the Initiative

	Court Application	Direct Registration	Faxed Orders*	Proceedings Instituted or about to Be Instituted	Reasonable Grounds to Believe Proceedings Will Be Instituted	Final Conviction and Confiscation Order
Australia	x	x	x	x		
Cook Islands	x	x	x		x	
Fiji	x	x	x		x	
Hong Kong, China	x				x	
Indonesia	x					
Japan	x				x	
Korea	x					
Macao, China	x			x	x	
Malaysia	x				x	
Palau	x	x	x		x	
Papua New Guinea	x	x	x		x	
Philippines						x
Samoa	x	x				
Singapore	x				x	
Sri Lanka		x				
Thailand	x					x
Vanuatu	x	x	x		x	
UNCAC		x				

* Properly sealed or authenticated copy of the order must subsequently be filed within 21 days.

It may be useful in some instances to ensure that an account holder is not aware that his/her account has been frozen and hence is not alerted to an on-going investigation. In almost all of the Initiative's members, an application to enforce a foreign freezing order may be made *ex parte*, but the account holder is usually given notice of the freezing order after its issuance. The exceptions are P.R. China; Cook Islands; and Kyrgyzstan, in which the financial institution where an account has been frozen may be forbidden from disclosing the freezing order to the account holder.

3. Confiscation to the Requested State

The third step in the repatriation process is the confiscation of the property to the requested state. Similar to freezing orders, a foreign forfeiture order is enforced either through an application in the courts of the requested state or through direct registration of the foreign order. Apart from forfeiture of actual proceeds of crime, some jurisdictions will render MLA to enforce fines that have been imposed by a foreign state in lieu of forfeiture.

One commonly-cited obstacle to confiscation in corruption cases in Asia-Pacific and elsewhere is the proof of a connection between an underlying crime and the subject asset. The standard of proof varies among jurisdictions. Some

legislation and treaties require the subject property to be “payments or other rewards received in connection with” an offense, or “property derived or realized, directly or indirectly” from such assets. Other jurisdictions may also cover property that is used or intended to be used in connection with an offense (i.e., instrumentalities of an offense). Still others require the subject property to be “in respect of an offense”.

Another potential obstacle to asset forfeiture is the requirement of a criminal conviction. Some members of the Initiative require requesting states to show that a person has been convicted of a crime and that the conviction is final. This could be problematic if the perpetrator has absconded or died, or if he/she has immunity from prosecution. Other countries only require the foreign confiscation order to be final.

Other complicating factors include public and essential interests and the interests of third parties. Some Asia-Pacific countries may refuse to enforce a foreign confiscation order if the request is likely to prejudice its national interest or is “contrary to the interests of justice”. The legislation in several Asia-Pacific jurisdictions also requires notice to be given to third parties who may have an interest in the subject property. These third parties could include individuals who acquired in good faith an interest in assets of criminal origin, or even a company or an individual who has suffered a loss because of the crime.

Table 37: Prerequisites for Enforcing a Foreign Confiscation Order in Selected Legislation and Treaties

	Court Application	Direct Registration	Foreign Fine Orders	In Connection with an Offense or Derived therefrom	Used or Intended to be Used in Connection with Offense	In Respect of the Offense	Final Conviction	Final Confiscation Order	Notice to Third Parties	Public or Essential Interests
Legislation										
Australia		x	x			x	x*		x	
P.R. China	x				x		x			
Cook Islands		x	x				x			
Fiji		x	x			x				
Hong Kong, China	x	x	x	x	x			x	x	x
Indonesia	x		x							
Japan	x					x		x		
Korea	x							x		
Macao, China	x		x	x	X		x	x	x	x
Malaysia		x	x	x				x	x	x
Palau		x		x				x		
Papua New Guinea		x	x			x	x	x		
Philippines							x			x
Samoa		x	x				x	x		
Singapore		x		x	x			x	x	x
Sri Lanka		x	x					x		
Thailand	x							x		
Vanuatu		x	x				x			

Table 37: Prerequisites for Enforcing a Foreign Confiscation Order in Selected Legislation and Treaties (cont.)

	Court Application	Direct Registration	Foreign Fine Orders	In Connection with an Offense or Derived therefrom	Used or Intended to be Used in Connection with Offense	In Respect of the Offense	Final Conviction	Final Confiscation Order	Notice To Third Parties	Public or Essential Interests
Treaties										
Australia-Philippines		x								
Australia-Malaysia			x		x			x		
Hong Kong, China-Korea		x								
Hong Kong, China-Philippines			x							
Hong Kong, China-Singapore		x								
Korea-Philippines				x	x					
Korea-Vietnam			x	x						
UNCAC	x	x								

* Except for certain designated countries.

4. Repatriation to the Requesting State

The final and sometimes the most vexing step in the asset recovery process is the repatriation of the asset to the requesting state. The issues that arise can be complicated. For instance, should the asset be repatriated in whole, in part or not at all to the requesting state? Can the requested state deduct costs of recovery? Should assets be returned to the government of the requesting state, or to a victim (e.g., a briber or a victim of embezzlement)? If the asset is to be turned over to the government of the requesting state, should one consider whether the officials of this government may misuse the assets again?

The MLA legislation of most countries in the Initiative is either silent or vague on this issue. Australia's legislation states that property that is subject to a registered foreign forfeiture order may be disposed of or otherwise dealt with in accordance with any direction of the Attorney-General. This may include giving all or part of the assets to the requesting state. Under the legislation of Hong Kong, China, the Secretary of Justice has discretion to give all or part of the confiscated assets to the requesting state that is a treaty partner. Macao, China may return all or part of a confiscated asset to the requesting state upon request. Regulations in Malaysia merely state that the government has absolute discretion to manage and dispose of the seized property. The legislation of the Cook Islands; Palau; Samoa; Sri Lanka; and Vanuatu permits (but does not require) their Attorneys General or another body to enter into arrangements with the requesting state for reciprocal sharing. Indonesia's legislation has a similar provision that applies to the proceeds of confiscated assets that have been

auctioned. Legislation scheduled to come into force at the end of 2006 was expected to allow Japan to repatriate assets to a foreign state on a case-by-case basis and upon an assurance of reciprocity by the requesting state. Unlike other jurisdictions, Thailand's legislation is clear: forfeited items become Thailand's property.

Several MLA treaties involving Asia-Pacific countries provide some additional guidance. Some mandate repatriation of confiscated proceeds (or their value), e.g., the Australia-Indonesia; Australia-Philippines; and P.R. China-Indonesia treaties. The Hong Kong, China-Philippines treaty is more explicit. It requires the requested state to give effect to a final decision by a court of the requesting state imposing a pecuniary penalty or confiscation. The requested state must return the property to the requesting state. Where the subject property is real property, the requested state must sell the property and deliver the proceeds to the requesting state.

The remaining MLA treaties in Asia-Pacific that deal with this issue largely give the requested state wide discretion in dealing with confiscated assets. Some stipulate that the requested state will retain confiscated proceeds of crime, unless otherwise decided by the parties in a particular case, e.g., the Australia-Hong Kong, China; Hong Kong, China-Singapore; India-Mongolia; India-Thailand; Korea-Philippines; and Korea-Vietnam treaties. Other treaties state that forfeited proceeds may be transferred to the requesting state, subject to the applicable domestic law and the agreement of the parties, e.g., the Australia-Malaysia; P.R. China-Korea; P.R. China-Philippines; P.R. China-Thailand; Hong Kong, China-Korea; India-Korea; Korea-Mongolia; and Korea-Thailand treaties. The Australia-Korea and Hong Kong, China-Korea treaties merely require that the confiscated assets be dealt with in accordance with the law of the requested state.

Some multilateral conventions may also be of assistance. The UNCAC requires States Parties to adopt legislative and other measures, "in accordance with the fundamental principles of its domestic law," to deal with the return of assets confiscated pursuant to a request made under the Convention. It also prescribes certain instances in which the proceeds of corruption are returned to a foreign state depending on the nature of the predicate offense. The Southeast Asian MLAT states that, "[s]ubject to the domestic laws of the Requested Party, property forfeited or confiscated ... may accrue to the Requesting Party unless otherwise agreed in each particular case."

When there are no applicable treaties or conventions, governments may have specific policies to deal with the repatriation of assets. For example, Pakistan may return confiscated proceeds of corruption to a requesting state, having regard to factors such as the expenses incurred by Pakistani authorities in

confiscating the assets. If repatriated, the assets would be returned to the government of the requesting state or to victims of the crime. Mongolia will return all confiscated proceeds of corruption to a requesting state on the basis of reciprocity.

Even if a requested state is willing to repatriate assets, it may impose certain conditions on how and when to use or distribute the assets. In the case noted above involving the Philippines, Switzerland forwarded the funds to an escrow account. The funds could be released only after an independent Philippine court found that the assets were illicit property and ordered confiscation to the Philippine government. These proceedings in the Philippine court must further comply with international standards on human rights and due process. A separate case involving proceeds of corruption from Nigeria illustrates another method: Switzerland transferred the assets to the Bank for International Settlements, most of which were later spent on housing projects, education and allocations to state governments in Nigeria. In another example, the Swiss, U.S. and Kazakh governments agreed in May 2007 to transfer USD 84 million in a frozen Swiss bank account to Kazakhstan. The funds, which had been intended as bribes for Kazakh officials, would be released to a foundation supervised by the World Bank to help poor children in Kazakhstan. The agreement also obliged Kazakhstan to set up a five-year program to improve public financial management and an action plan for transparency in the oil, gas and mining industries.

Conclusions and Recommendations

Many countries in Asia and the Pacific have taken significant strides in implementing systems for extradition, MLA and recovery of proceeds of corruption. At the international level, there is a sizeable body of bilateral extradition and MLA agreements among countries in the region, as well as between the region and OECD countries outside Asia and the Pacific. Many states have also ratified multilateral treaties – including some that deal exclusively with corruption - that can be used to seek international cooperation in corruption cases. More countries are expected become parties to these instruments in the coming years. In many instances, states may also provide assistance in the absence of an applicable international agreement. At the national level, many countries have detailed framework legislation for extradition and MLA, some of which were enacted recently and thus contain many modern features. Several states have undertaken efforts to improve their laws. Most jurisdictions also have central authorities with specialized expertise in international cooperation.

Despite these achievements, there is room for improvement. The frameworks for extradition and MLA among countries in Asia and the Pacific exhibit a wide range of sophistication. The most pressing challenges for one country may therefore differ greatly from those for another, but the most important and prevalent issues are as follows:

Treaties for cooperation: A handful of countries are parties to an overwhelming majority of the bilateral treaties, while most countries have very few or no treaties at all. The cost and time for treaty negotiation is only a partial explanation, since some countries with relatively few treaties also have economies of significant size. Many countries have passed legislation to provide cooperation in the absence of a treaty, but this does not bind foreign countries to provide assistance. Countries in Asia and the Pacific should therefore consider concluding more bilateral treaties and/or ratifying multilateral instruments that could provide extradition and/or MLA in corruption cases (e.g., the UNCAC, the OECD Convention, and the Southeast Asian MLAT). In this regard, P.R. China;

Hong Kong, China; and Indonesia have expressed their desire to conclude more bilateral treaties with other jurisdictions.

Framework legislation: Several members of the Initiative do not have specific legislation on international cooperation. Some jurisdictions cannot provide cooperation in the absence of a treaty because of this reason. Others adapt their criminal procedure laws on domestic investigations for use in foreign cases. The resulting scheme, however, often fails to address issues that arise in international cooperation but not in domestic investigations. Countries in Asia and the Pacific should therefore enact framework legislation that is dedicated to extradition and MLA. Model legislation (e.g., prepared by the UNODC) could be of guidance.

Dual criminality: Just two members of the Initiative do not require dual criminality for MLA; the requirement is mandatory in approximately half of the members, and discretionary in the remaining ones. For extradition, practically all members of the Initiative require dual criminality. Most members of the Initiative have adopted a conduct-based definition of dual criminality, which should enhance their ability to provide cooperation. More potentially problematic are cases involving illicit enrichment or bribery of foreign public officials, which are not crimes per se in most members of the Initiative. Creating these offenses would help ameliorate the concerns. They should also consider waiving dual criminality when a foreign state seeks assistance of a non-coercive nature.

Bank secrecy: It is now widely recognized that bank secrecy laws have the potential to impede MLA in corruption cases. Multilateral instruments such as the UNCAC, the OECD Convention and the Southeast Asian MLAT therefore expressly prohibit the refusal of MLA on this ground. However, comparable provisions are very rare in bilateral MLA treaties and MLA legislation in Asia and the Pacific. Countries in the region should therefore amend their laws to rectify this situation.

Central authorities: It is generally accepted that the designation of a central authority to process extradition and MLA requests may enhance international cooperation. Although most members of the Initiative have done so, the powers and functions of their central authorities vary. Many central authorities are not empowered to send and receive requests directly to and from their foreign counterparts. Some play a limited or no role in advising and supporting domestic and foreign law enforcement authorities that seek cooperation. Others may be hampered by limited resources and training. Many also lack visibility to foreign law authorities. To take full advantage of the concept, countries should give their central authorities more prominent and enhanced roles, and not reduce them to mere post-boxes for forwarding requests. It could also be helpful for central authorities to discuss common issues

and concerns through regular meetings, either bilaterally or on a multilateral, regional basis. The staff of the central authority also need to have legal training and adequate language skills.

MLA relating to proceeds of corruption: Comprehensive legislation and treaty provisions on MLA in relation to proceeds of crime (including corruption) are still comparatively rare in Asia and the Pacific. Many jurisdictions still do not have MLA legislation or treaties that deal with enforcement of foreign forfeiture, confiscation and pecuniary penalty orders. Where such laws exist, they often lack modern features such as enforcement of foreign orders by direct registration, special search warrants, and production orders. Some jurisdictions require a conviction before it will cooperate, which could be problematic if the perpetrator has died or absconded, or has immunity from prosecution. In short, there is a general need to strengthen MLA laws relating to proceeds of crime in many members of the Initiative. As for the repatriation of assets, even fewer legislation and treaties address the subject. To enhance certainty and accountability, states should enter into more arrangements for asset repatriation. They could also pass legislation or guidelines to elaborate the factors to be considered when repatriating proceeds of corruption.

Level of practice: The limited statistical information suggests that, apart from a few jurisdictions, the level of practice in extradition and MLA within Asia and the Pacific tends to be low. Cases involving corruption offenses, including repatriation of the proceeds of corruption, is rarer still. The reason for this is not completely clear. The lack of practice makes it difficult to evaluate how the legal frameworks described in this survey function in practice. Unforeseen obstacles could appear as more cases arise. Continued monitoring and evaluation may therefore be necessary.

Part 2

Frameworks and Practices for Mutual Legal Assistance, Extradition and Recovery of Proceeds in 27 Asian and Pacific Jurisdictions

Australia

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Australia are principally governed by the *Extradition Act 1988* (Act 4 of 1988, as amended) and the *Mutual Assistance in Criminal Matters Act 1987* (Act No. 85 of 1987, as amended) (MACMA) and regulations to those Acts. The *Proceeds of Crime Act 2002* (Act No. 85 of 2002) (POCA) may also be applicable. The MACMA applies to all incoming and outgoing MLA requests, including requests made in the absence of a treaty. The MACMA does not require reciprocity as a precondition for rendering MLA. Australia can make and receive MLA requests with any country, subject to the mandatory grounds for refusing a request for MLA in the MACMA. Pursuant to the Extradition Act, a country defined as an "extradition country" can make an extradition request to Australia. An extradition country means a country declared in regulations, which includes countries with which Australia does not have a bilateral extradition treaty. Australia is able to make an extradition request to any country.

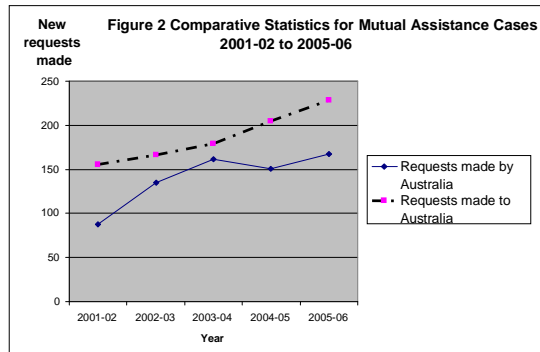
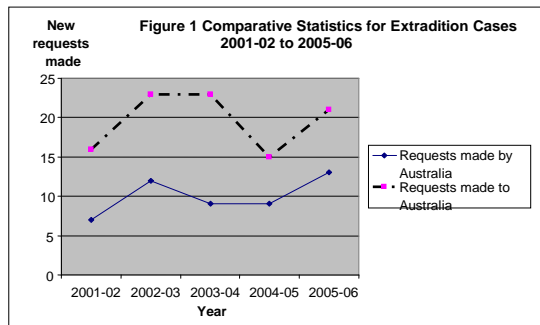
Australia is a party to several multilateral conventions that deal with extradition and MLA in corruption cases, including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UNCAC and the UNTOC. In addition, Australia has bilateral MLA treaties in force with 26 countries and non-treaty based arrangements under the Harare Scheme. Australia has extradition relations with approximately 130 foreign countries, based on bilateral treaties (including treaties inherited from the United Kingdom), the London Scheme, and through designation in the regulations under the Extradition Act.

Both the Extradition Act and the MACMA are comprehensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation also contains some modern features commonly found in the corresponding legislation of other jurisdictions, such as the taking of evidence by video conference and consent extradition. The MACMA also includes specific provisions for seeking and providing MLA in relation to proceeds of crime.

The Attorney-General's Department (AGD) is the Central Authority for MLA and Extradition in Australia. MLA in the form of letters rogatory sent to an Australian court are referred to the AGD for execution. Outgoing requests for

MLA may be made by the Attorney-General under the Act. Under administrative arrangements and a delegation under the Act, the Minister for Justice and Customs or a delegate may also make requests. Outgoing requests for extradition may be made by the Attorney-General or the Minister for Justice and Customs, while provisional arrest requests may be made by a delegate. Requests are sent through diplomatic channels, although MLA treaties may specify that requests may be sent directly to the Central Authority.

Statistics indicate that Australia is very active in giving and seeking extradition and MLA, with the number of requests being made for MLA and extradition by Australia doubling from 2001-02 to 2005-06. From 1 July 2001 to 30 June 2006, Australia made 50 extradition and 702 MLA requests. During the same period, Australia received 98 extradition and 934 MLA requests, of which 14 extradition and 3 MLA requests were refused (see Figures 1 and 2). Of the 19 incoming and outgoing extradition requests that were granted in the 12 months to 30 June 2005, none involved corruption offences.



Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for extradition from Australia. Under the Extradition Act, the offense for which extradition is sought must be punishable by at least 12 months imprisonment. This requirement may be varied by extradition treaties to which Australia is a party and which have been incorporated into regulations under the Extradition Act. The conduct underlying the extradition request must also constitute a criminal offense in Australia if it had occurred there. The definition of dual criminality is conduct-based. As a party to

the OECD Convention, Australia has established an offense of bribery of foreign public officials.

The MACMA does not stipulate an evidentiary threshold for less coercive forms of MLA, such as requests to take evidence or to produce documents. However, for more coercive assistance, such as search and seizure, there must be reasonable grounds to believe that evidence relating to the investigation or proceeding is located in Australia. Australia has adopted a "no evidence" standard as a preferred model for extradition requests. The "no evidence" standard requires the requesting country to provide relevant documentation such as a duly authenticated statement of the offense and the applicable penalty, the warrant for arrest, and a statement setting out the alleged conduct constituting the offense. A full brief of evidence is not necessary. However, under some extradition arrangements between Australia and other countries (including most Commonwealth countries) the extradition request must meet the *prima facie* evidence test. The Extradition Act also specifically prohibits a person sought from tendering evidence at an extradition hearing to contradict the allegations that he/she committed the offense.

Specialty and use limitation are addressed in the Extradition Act and the MACMA respectively. A requesting state must provide an assurance of specialty before Australia will grant extradition. The assurance may be provided in the law of the requesting state, a relevant treaty provision, or an undertaking given by the requesting state. The Extradition Act also specifically confers specialty protection to persons surrendered to Australia. For MLA, the MACMA restricts evidence obtained by Australia from a foreign country to the proceeding or investigation referred to in the MLA request. Applicable treaties (but not the MACMA) contains a similar provision for incoming MLA requests.

Infringement of essential interests may be a ground for denying MLA. Under the MACMA, Australia will refuse to grant a request that would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory. The UNCAC also allows requests made under the Convention to be refused if the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested state.

The death penalty is another ground for denying MLA. If the request relates to an offense in which the death penalty may be imposed, Australia may extradite only if the requesting state provides an assurance that the penalty will not be imposed or carried out. Where a foreign country makes an MLA request for assistance to investigate an offense which carries the death penalty, the Attorney-General or the Minister for Justice and Customs has discretion to refuse assistance. Where the foreign country requests assistance and the person has

been charged with, or convicted of, an offense which carries the death penalty, the Attorney-General or the Minister for Justice and Customs must refuse to provide the assistance unless there are special circumstances. Special circumstances include where the evidence would assist the defense, or where the foreign country undertakes not to impose or carry out the death penalty.

Extradition and MLA are refused if the request relates to the prosecution or punishment of a person for a political offense. This is a mandatory ground for denying MLA. The Extradition Act contains a negative definition of a political offense, specifying that certain offenses do not amount to political offenses, but the provision does not refer to corruption offenses. The Extradition Act and the MACMA also contemplate regulations to exclude from the definition of a political offense certain conduct that fall within a multilateral convention that deals with extradition or MLA. However, no regulations have been issued in relation to the OECD Convention, the UNCAC or the UNTOC in this regard. Similarly, a request will be refused if, in the opinion of the Attorney-General or the Minister for Justice and Customs, the request was made to prosecute, punish or otherwise prejudice a person on account of his or her race, sex, religion, nationality or political opinions.

Under the legislation, the Attorney-General or the Minister for Justice and Customs will also refuse extradition and MLA if a request relates to an offense for which the person has been acquitted, punished or pardoned in the requesting state or Australia (double jeopardy). MLA may also be refused if the provision of assistance could prejudice a criminal investigation or proceeding in Australia. There is no general prohibition against the extradition of Australian nationals, though it is a factor that may be considered. The Extradition Act provides jurisdiction to prosecute in Australia in certain circumstances when extradition has been refused on the basis of the person's nationality. The denial of MLA because of bank secrecy is not dealt with in the MACMA or in many of the bilateral MLA treaties involving Australia. For requests made under the UNCAC and the OECD Convention, Australia is prohibited from declining to render MLA on the ground of bank secrecy. Generally, while legislation exists to protect a clients' personal information, there is no Australian "banking secrecy" legislation that allows financial institutions to conduct activity or provide service that may not be reviewed by competent authorities. The financial sector regulators in Australia also have broad powers to obtain information and documents about the financial institutions they regulate and are able to disclose information they collect to other competent authorities (including foreign counterpart agencies) where it will assist them to perform their functions or exercise their powers.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Mutual Assistance and Extradition Branch of the Attorney-General's Department is specifically responsible for extradition and MLA case work. The Attorney-General's role can also be performed by the Minister for Justice and Customs, under section 19A of the *Acts Interpretation Act 1901*.

AGD works with the Commonwealth Director of Public Prosecution and law enforcement authorities in preparing a draft request for Commonwealth offenses. MLA requests relating to state and territory offenses are usually drafted by AGD in consultation with the state and territory law enforcement agencies. The Attorney-General or the Minister for Justice and Customs (or delegate at AGD) is responsible for determining whether a MLA request should be transmitted a foreign state. Extradition requests are transmitted through the diplomatic channel, while MLA requests may be sent directly to the foreign state. AGD liaise directly with the central authority of the requested state or via diplomatic channels regarding the progress of outstanding requests.

Incoming requests for MLA are sent to the Attorney-General's delegate within AGD, after which AGD will examine the request to ensure its conformity with the MACMA and a relevant treaty (if any). If the assistance sought is of a type that must be authorized under the Act, AGD will complete a submission to the Attorney-General or the Minister for Justice and Customs, either recommending the assistance be provided or refusing the request on one of the grounds outlined above. If the request is approved, it will be executed by the relevant law enforcement or prosecutorial body. It is an offense under the MACMA for a person to disclose the existence, contents or status of an incoming request without the Attorney-General's approval, unless disclosure is necessary for the performance of the persons' duties. Similarly, Australia's requests for MLA are generally not disclosed as they are made in the course of ongoing law enforcement operations and are treated as confidential.

Incoming extradition requests are sent to the Attorney-General, after which the Attorney-General or the Minister for Justice and Customs must decide whether the request meets certain requirements, such as dual criminality and the absence of an "extradition objection" (e.g. double jeopardy, political offense). If these requirements are met, the Attorney-General or the Minister for Justice and Customs may issue a notice to a magistrate that an extradition request has been received. The magistrate may order that the person sought be arrested and brought before the court for a hearing, during which the magistrate will assess matters such as the sufficiency of documents in support of extradition, dual criminality and the presence of extradition objections. If these requirements are

met, the magistrate will order the person sought to be committed into custody to await surrender. The case then reverts to the Attorney-General or the Minister for Justice and Customs to decide whether to surrender the person sought, having regard to factors such as, among other things, whether there are any extradition objections.

To expedite cooperation, the Extradition Act contemplates the provisional arrest of a person sought pending a formal request for extradition. By contrast, the MACMA makes no special provisions for urgent MLA requests: urgent requests, like regular ones, must be submitted in writing. However, in practice, requests may be emailed or faxed directly to AGD in urgent cases. Some of Australia's bilateral MLA treaties allow requests to be made orally with subsequent confirmation in writing. The Extradition Act also provides for consent extradition so as to expedite the extradition process. Upon arrest, a person sought may appear before a magistrate and consent to waive his/her right to a judicial hearing. The person sought is then committed into custody to await the decision of the Attorney-General or the Minister for Justice and Customs on whether he/she should be surrendered to the requesting state. The consent provisions do not apply to a person who has been provisionally arrested but where the Minister has not issued a notice of acceptance of an extradition request.

Various steps in the extradition and MLA process are subject to judicial review or appeal. For extradition, a person sought may seek judicial review of the decision by the Attorney-General or Minister for Justice and Customs to issue a notice to a magistrate that a request has been received. After a magistrate orders a person sought to be committed into custody to await surrender, the person sought may ask a higher court to review the magistrate's decision. Finally, a person sought may also seek judicial review of a decision by the Attorney-General or the Minister for Justice and Customs to surrender. In the area of MLA, decisions made by the Attorney-General or the Minister for Justice and Customs may also be subject to judicial review.

To further enhance international cooperation, Australia has an extensive liaison network. In addition to liaising with foreign central authorities to monitor outstanding requests, AGD can assist foreign countries in preparing extradition and MLA requests. AGD also maintains a Web site with extensive information on international cooperation, including a detailed description of the procedure for executing incoming and outgoing requests, statistics, links to relevant legislation and treaties, and a checklist for preparing a MLA request to Australia. AGD also provides technical and capacity-building assistance to Pacific and Southeast Asian countries in the area of international cooperation in criminal matters. At the law enforcement level, the Australian Federal Police International Network has 86

officers posted in 26 countries as at May 2007, including in 13 member countries of the Initiative and six Parties to the OECD Convention. The Network provides police-level cooperation and assistance as well as liaison support for extradition and MLA requests to and from Australia.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA regarding proceeds of corruption is provided primarily through the MACMA, although the *Proceeds of Crime Act 2002* (POCA) may also be applicable. A broad range of assistance is available, including tracing, restraining and forfeiting proceeds of crime.

The MACMA offers some specific tools for tracing and identifying proceeds of corruption. For instance, foreign countries may request production orders for “property-tracking documents” that compel persons (or financial institutions) to produce documents relevant to identifying, locating or quantifying proceeds of a serious foreign offense. For a crime punishable by at least three years’ imprisonment, an Australian court may issue a monitoring order that compels a financial institution to provide information about transactions conducted through a specific account during a particular period. A foreign state may also request a warrant to search for and seize proceeds, an instrument of an offense or a property-tracking document that is reasonably suspected to be in Australia.

There are two methods to execute a foreign request to restrain proceeds of crime that are reasonably suspected to be in Australia. A foreign restraining order may be registered directly with an Australian court, after which the order may be enforced in Australia like a domestic court order. This method is available if the foreign order relates to a foreign serious offense (i.e., an offense punishable by death or at least 12 months’ imprisonment). Furthermore, a person must have been convicted in the requesting state for that foreign serious offense, unless the requesting state has been exempted from this requirement by regulation.

A foreign request to restrain proceeds of crime may also be executed by applying to an Australian court for a restraining order. An order may be issued if a criminal proceeding has commenced, or there are reasonable grounds to suspect that a criminal proceeding is about to commence, in the requesting state in respect of a foreign serious offense. An order may also be issued if foreign confiscation proceedings have commenced, or there are reasonable grounds to suspect that they are about to commence, in the requesting state and the requesting state has been designated by regulation. However this order will be an interim measure only, until foreign restraining order can be obtained and registered. Foreign requests to forfeit proceeds of crime or to enforce a pecuniary penalty can only be executed by direct registration of a foreign order.

A person must have been convicted of a foreign serious offense, and the conviction and foreign order must be final. Certain requesting states may be exempted by regulation from the requirement of a foreign conviction.

Under section 19 of POCA, a court must restrain assets if it is satisfied upon an application by the Director of Public Prosecutions that the property is the proceeds of a foreign indictable offense committed within the six years preceding the application. In these cases, there is no requirement that overseas proceedings have been commenced or are imminent. Under section 49 of POCA, a court will order forfeiture of property restrained under section 19 upon an application by the Director of Public Prosecutions, where the restraining order has been in force for at least six months, and the property is proceeds of one or more foreign indictable offenses committed within the six years preceding the application for the restraining order. POCA does not require the registration of foreign forfeiture orders.

To deal with urgent cases, the MACMA allows the use of a faxed copy of a sealed or authenticated foreign order. However, the registration ceases to have effect after 21 days unless a sealed or authenticated copy is filed with the court.

Concerning the sharing and repatriation of proceeds, the MACMA states that property that is subject to a registered foreign forfeiture order "may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General [or the Minister for Justice and Customs]." This allows the Attorney-General or the Minister for Justice and Customs to return all or part of forfeited property to the requesting state, subject to an order by the court that another person has a claim or interest over the property and were not involved in the commission of a foreign serious offense in respect of which the foreign forfeiture order was made. The provision does not apply to a foreign pecuniary penalty order. Alternatively, the Attorney-General or the Minister for Justice and Customs could direct that forfeited property or collected fines be credited to the Confiscated Assets Account under the Proceeds of Crime Act (CAA). The Act allows property to be paid out of the CAA for equitable sharing, thus allowing Australia to share a proportion of forfeited property or collected fines with a foreign country. Property may be shared particularly where the foreign country has contributed significantly to the recovery of the property, or to the investigation or prosecution.

Conclusion

Australia has a comprehensive regime for seeking and obtaining extradition and MLA for the purpose of criminal investigations and prosecutions, and for proceedings concerning corruption offenses. Australia's large network of

bilateral extradition and MLA treaties is complemented by multilateral conventions (e.g. the OECD Convention, the UNCAC and the UNTOC) and non-treaty-based arrangements such as the London Scheme and Harare Scheme. The ability to provide extradition and MLA in the absence of a treaty further enhances its ability to cooperate. The legislation for implementing extradition and MLA is extensive and recent. All major forms of assistance are available, including MLA in relation to proceeds of crime and the enforcement of foreign restraining orders through direct registration. The legislation also contains particular features to enhance cooperation, such as reduced evidentiary requirements for extradition to non-Commonwealth countries, and a discretionary approach to dual criminality for MLA requests. To ensure that extradition hearings are expeditious, the Extradition Act specifically prohibits a person sought from tendering evidence to contradict the allegations that he/she committed the offense.

In addition to processing incoming and outgoing requests AGD (Australia's Central Authority) plays an important role in facilitating international cooperation, such as by providing assistance to domestic and foreign authorities to prepare requests. Additional support is available on AGD's detailed and informative Web pages on extradition and MLA. The Australian Federal Police also maintains an extensive overseas liaison network that provides police-level cooperation as well as support for formal extradition and MLA requests.

Recommendations for a Way Forward

AGD has recognized that globalization and technological advances have greatly increased the incidence of transnational crimes since the Extradition Act and the MACMA were enacted in the 1980s. Accordingly, AGD commenced in 2005 a review of Australia's extradition and MLA law and practices to ensure that these processes remain responsive and streamlined. As part of the review, AGD published Discussion Papers to seek the public's views on the major issues. These papers can be accessed via the AGD Web site. As of May 2007, public submissions on the papers have closed and the outcome of the review, including possible reforms and amendments to the legal framework, were being developed.

The Legal Framework for Extradition and MLA

Under the Extradition Act, Australia may grant extradition in the absence of a treaty after declaring the requesting state to be an "extradition country" by regulation. The issuance of a regulation could cause delay, which could be problematic for an urgent request for provisional arrest. Australia could therefore

consider dispensing with the requirement of declaring a requesting state to be an extradition country by regulation, particularly in cases of urgency. Other alternative procedures include certification of an extradition country by the Attorney-General) or applying other specific safeguards on a case-by-case basis.

Legal Preconditions for Extradition and MLA

The political offense exception is currently a mandatory ground for refusing extradition and MLA. Consideration might be given to following the approach in Article 44(4) of the UNCAC, which exhorts states to exclude the political offense exception from extradition in corruption cases.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Certain issues are considered multiple times under the current extradition process. For instance, dual criminality is considered by a magistrate and twice by the Attorney-General or the Minister for Justice and Customs (before and after the extradition hearing). The efficiency of the process could potentially be improved by eliminating the overlap. A person may also seek a review of each decision in the process. As the AGD's Discussion Papers suggest, a single review of all of the decisions that is conducted after the Minister has decided to surrender the person could be more efficient. Imposing deadlines for a person sought to make submissions to the Attorney-General or the Minister for Justice and Customs on the question of surrender could have a similar effect.

Consideration could also be given to extending consent extradition by allowing a person sought to consent immediately after his/her provisional arrest, and by allowing the person sought to consent to surrender to the requesting state. Both proposals were raised in the AGD's Discussion Papers. Australia currently accepts urgent MLA requests electronically and by fax. However, it may also be worthwhile to accept urgent MLA requests orally with subsequent confirmation in writing (as in Article 46(14) of the UNCAC). Australia also currently accepts urgent requests for provisional arrest outside the diplomatic channel.

Recovery of Proceeds of Corruption in Criminal Proceedings

A foreign confiscation order will be enforced in Australia only if a person has been convicted of a foreign offense. Consideration might be given to following the approach of Article 54(1)(c) of the UNCAC so that assistance can

be rendered without a conviction when the offender cannot be prosecuted because of death, flight, absence etc. Repatriating the proceeds of corruption is a matter of discretion: in making their decision, the Attorney-General or Minister for Justice and Customs will consider whether the requesting state contributed significantly to the recovery of the assets, or to the investigation or prosecution of criminal activity. Consideration might be given to elaborating further how this discretion would be exercised in corruption cases, including whether and how the Attorney-General and the Minister for Justice and Customs will consider the factors referred to in Article 57 of the UNCAC. Consideration might also be given to entering into additional agreements to share and repatriate assets.

Information for Seeking Assistance

Central Authority

For Extradition and MLA:

Assistant Secretary
Mutual Assistance and Extradition Branch
International Crime Cooperation Division
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton Act 2600, Australia
Tel: +61 2 6250 6227
Fax: +61 2 6250 5457
mailto:mutualassistance@ag.gov.au
www.ag.gov.au/www/agd/agd.nsf/page/Extradition_and_mutual_assistance

Additional Contact

Australian Federal Police:

AFP National Media
National Headquarters
Barton Act 2600, Australia
Tel: +61 2 6275 7100
www.afp.gov.au

Relevant Laws and Documentation

The *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Proceeds of Crime Act 2002*, and the relevant Regulations (which includes the relevant bilateral treaties) can be found at: www.comlaw.gov.au

Attorney-General's Department (including information on the extradition and MLA process and a checklist for preparing MLA requests):
www.ag.gov.au/extraditionandma

Extradition and Mutual Assistance Review Discussion Papers:
www.ag.gov.au/www/agd/agd.nsf/Page/Extradition_and_mutual_assistanceExtradition_and_mutual_assistance_review

Bangladesh

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Bangladesh's legal framework for international cooperation in corruption cases consists essentially of the Extradition Act (No. 58 of 1974) and, to a limited extent, the provisions in the Criminal Procedure Code 1898 (No. 5 of 1898).

The Extradition Act sets out the basic elements for extradition from Bangladesh and some grounds for denying extradition. It applies to extradition to and from countries with which Bangladesh has a treaty and which the Bangladeshi Government has declared as an extradition country in the official Gazette. In the absence of a treaty, the Government may also direct that the Act applies to a foreign state if it is considered expedient that a person in Bangladesh be surrendered. Bangladesh has an extradition treaty in force with Thailand, a member of the ADB/OECD Initiative. It also has extradition relations under the London Scheme with nine members of the Initiative (Australia; Fiji; India; Malaysia; Papua New Guinea; Samoa; Singapore; Sri Lanka; and Vanuatu). Foreign requests for extradition may also be handled through the UNCAC, ratified by Bangladesh in 2007.

The Criminal Procedure Code contains limited provisions for seeking assistance abroad through evidence commissions; it allows the issuance of commissions to examine witnesses abroad, but does not contain provisions for seeking other types of MLA or for responding to incoming MLA requests. After ratifying the UNCAC on 27 February 2007, Bangladesh may seek and provide MLA to and from States Parties to the Convention.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a requirement under the Extradition Act. The conduct underlying the offense must be punishable in Bangladesh if it occurred there and fall within a list of offenses in the Extradition Act. The list includes bribery, stealing, embezzlement, fraudulent conversion, fraudulent false accounting, receiving stolen property and any offense in respect of property involving fraud. Money laundering and illicit enrichment are offenses in Bangladesh but are not on the list. The Act does not contain a fall-back provision for unlisted offenses, such as discretion to extradite for conduct that is not on the list but which constitutes a

crime in the requesting and requested states. As there is no offense of bribery of foreign public officials under Bangladesh law, it is unclear how the Bangladeshi authorities would handle extradition and MLA requests involving this offense. It is also unclear whether dual criminality would pose an obstacle in cases where a legal person is the target of a criminal investigation or proceedings as Bangladesh has not established the criminal liability of legal persons.

Before granting extradition, Bangladesh will require *prima facie* evidence of the underlying offense. The Extradition Act specifically requires a magistrate at an extradition hearing to hear evidence not only in support of extradition but also on behalf of the person sought. Specialty is mandatory for extradition to and from Bangladesh. For incoming requests, the Extradition Act requires the law of the requesting state or an applicable treaty to specifically provide specialty protection. The Act also provides such protection to persons extradited to Bangladesh.

Concerning grounds for refusing extradition, Bangladesh does not prohibit the extradition of its nationals *per se*, nor is the death penalty a bar to extradition. Extradition is refused if the person sought has been convicted or acquitted of the same offense in Bangladesh. It is also refused if the person would be discharged under a law relating to previous acquittal or conviction had he/she been charged with that offense in Bangladesh. The Extradition Act also prohibits extradition if the request relates to an offense of a political character. The same rule applies if an extradition request was made with a view to trying or punishing the person sought for a political offense. Bangladesh will also refuse extradition if it would be unjust or inexpedient to surrender the person sought, having regard to the gravity of the offense, whether the request was made in good faith, any unreasonable delay in requesting extradition, and the interest of justice.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Bangladesh does not have a central authority for extradition or MLA. Requests to and from Bangladesh must be transmitted through the diplomatic channel. Upon receiving an extradition request, the Bangladeshi government will ask a magistrate to issue a summons or warrant for the person sought. When the person appears before the court, the magistrate conducts a hearing to determine whether there is a *prima facie* case. If the case meets this test, the magistrate orders the person sought into custody to await the Government's decision on surrender. The person has 15 days to appeal the magistrate's decision. If the Government orders the person to be surrendered, he/she may be discharged unless the order is effected within two months.

To enhance efficiency, the Extradition Act allows extradition by endorsement of warrants to Commonwealth or neighboring countries if an applicable treaty allows for such a procedure. Bangladesh does not have treaties that allow for this arrangement, however. As well, the Act does not provide for provisional arrest. A person may be arrested only after the Bangladeshi Government has received and approved a request for the person's extradition.

Recovery of Proceeds of Corruption in Criminal Proceedings

Bangladeshi legislation does not deal with foreign requests to trace, restrain, forfeit or repatriate proceeds of corruption. The Money Laundering Prevention Act 2002 does not deal with international cooperation apart from authorizing the Government to enter into agreements with foreign countries to fulfill the Act's objective.

Conclusion

Bangladesh's legal framework for international cooperation in corruption cases consists essentially of the Extradition Act and, to a limited extent, the provisions in the Criminal Procedure Code on evidence commissions. Extradition to and from countries is, however, subject to the existence of a treaty. Until recently, the lack of treaties no doubt presented the greatest obstacle for cooperation. Since the ratification of the UNCAC in 2007, Bangladesh may now seek and provide extradition and MLA to and from States Parties to the Convention.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Allowing MLA to be provided in the absence of a treaty could enhance Bangladesh's ability to seek and provide international cooperation in corruption cases. To that end, Bangladesh could enact a law specific to MLA, which would also greatly enhance transparency and certainty to the process. The Extradition Act could be updated so as to provide more modern features, such as provisional arrest and consent extraditions. Abandoning the list approach to defining extradition offenses could ensure that all corruption and related offenses (e.g., money laundering and illicit enrichment) are covered.

Legal Preconditions for Extradition and MLA

Bangladesh applies the *prima facie* case evidentiary test in extraditions. Civil law jurisdictions seeking extradition from other common law jurisdictions have had difficulties in complying with this test. Bangladesh could therefore consider following the example of some common law countries (e.g., Australia for extradition to certain non-Commonwealth countries) and require less or even no evidence for extraditions. In addition, the Extradition Act requires the extradition judge to receive evidence on behalf of the person sought. Bangladesh may wish to consider whether this would allow the person to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition hearing could potentially be turned into a trial, thereby delaying the process.

As for grounds for denying cooperation, the Extradition Act does not specify when and which body considers whether extradition should be refused on a particular ground (except when extradition is unjust or inexpedient). Clarifying this matter could be helpful. The Extradition Act also requires the law of the requesting state or an applicable treaty to specifically provide specialty protection. Consideration could be given to accepting assurances of specialty from the judicial, prosecutorial or diplomatic authorities of the requesting state.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Establishing a central authority for extradition and MLA in corruption cases could result in economies of scale, concentration of expertise, better coordination among law enforcement agencies, and lower risks of duplication. Allowing the central authority to directly send and receive requests would eliminate delays caused by transmission through the diplomatic channel. Creating a Web page in English that is dedicated to international cooperation could further assist foreign authorities.

Also, Bangladesh could consider establishing additional measures for urgent requests such as allowing foreign states to transmit requests for provisional arrest outside the diplomatic channel and accepting oral MLA requests that are subsequently confirmed in writing (Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, treaties and legislation on MLA relating to proceeds of crime would greatly improve Bangladesh's ability to provide assistance.

Information for Seeking Assistance

Central Authority

For Extradition and MLA: the diplomatic channel

Relevant Laws and Documentation

Extradition Act (Act 58 of 1974)

Code of Criminal Procedure 1898 (Act 5 of 1898)

Summaries of mutual evaluation reports adopted in 2002 – 2003, APGML:
www.apgml.org/documents/docs/8/Summary%20ME%20Reports%202002-03.pdf

Cambodia

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Cambodia has a limited legal framework for extradition and MLA in corruption cases. It has passed a framework law for extradition for offenses such as drug trafficking but not corruption. Extradition in corruption cases is therefore available only if it is covered by an applicable treaty. Cambodia has three extradition treaties that are in force, including two with members of the ADB/OECD Initiative (P.R. China and Thailand). As for MLA, Cambodia has signed but has not ratified the Southeast Asian MLAT. Cambodia is also a party to the UNTOC. In the absence of any applicable treaty, Articles 38 and 86 of the Law on Criminal Procedure (LCP) allows Cambodian courts to make and execute letters rogatory requests for witness testimony.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is required under the extradition treaties to which Cambodia is party. The offense underlying an extradition request must be punishable by one year's imprisonment in the requesting and requested states. The Law on Criminal Procedure does not require dual criminality for letters rogatory requests.

Concerning grounds for denying cooperation, Cambodia's Constitution prohibits the extradition of Khmer nationals. Bilateral treaties may require Cambodia to submit a case to its competent authorities for prosecution whenever extradition is denied solely because of nationality. The treaties provide additional grounds for denying extradition that are commonly found in other extradition treaties, such as political offenses, concurrent proceedings against the person sought, double jeopardy, and humanitarian grounds. The LCP does not refer to grounds for refusing letters rogatory requests. The Law on Banking and Financial Institutions (NS/RKM/1199/13) states that the "obligation of professional secrecy may not be used as a ground for non-disclosure *vis-à-vis* ... a court dealing with a criminal proceeding."

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Cambodia does not have legislation prescribing the procedure for seeking and providing extradition and MLA. Cambodia's extradition treaties may provide for provisional arrest of persons sought for extradition in urgent cases.

The Cambodian National Police (CNP) can provide cooperation at the law enforcement level. The CNP's Interpol unit is located in the Central Office of International Police under the office of the General Commissariat of National Police.

Recovery of Proceeds of Corruption in Criminal Proceedings

Cambodia does not have framework legislation that provides for MLA in relation to proceeds of corruption.

Conclusion

Cambodia has a limited legal framework for extradition and MLA in corruption cases. It has passed a framework law for extradition for offenses such as drug trafficking but not corruption. Extradition is therefore available under the three bilateral extradition treaties that Cambodia has concluded. Cambodia also does not have a framework law for MLA in criminal matters. MLA in corruption cases is therefore available only if it is covered by an applicable treaty. In the absence of any such treaty, limited MLA is available under the Law on Criminal Procedure for seeking witness testimony pursuant to letters rogatory requests. Aware of these limitations, amendments to the LCP that include new provisions on extradition were being drafted in 2007. Legislation on MLA was being considered.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Expanding its network of extradition and MLA treaties could strengthen Cambodia's ability to seek and provide international cooperation in corruption cases. Signing and ratifying the UNCAC and the UNTOC would ameliorate this situation, as would ratifying the Southeast Asian MLAT and concluding more bilateral extradition and MLA treaties. Permitting extradition and MLA in the

absence of a treaty could significantly enhance Cambodia's ability to cooperate.

In the area of legislation, Cambodia could consider following the example of other jurisdictions and enact framework laws on extradition and MLA. Such legislation would be essential if Cambodia allows cooperation without a treaty in the future. The legislation could describe the types of cooperation available, such as extradition by consent or via endorsement of warrants, MLA for service of documents, obtaining unsworn and sworn witness statements, taking evidence through video conference, production orders, search and seizure, and transfer of prisoners to assist in an investigation or proceeding.

Legal Preconditions for Extradition and MLA

Passing framework laws on extradition and MLA that detail the prerequisites for cooperation and grounds for denying cooperation would add certainty, transparency and accountability to the process. As well, Cambodia does not extradite its nationals. Nonetheless, it may wish to amend the LCP to require cases to be submitted its competent authorities for prosecution whenever extradition is denied solely because of nationality (e.g., see Article 44(11) of the UNCAC and Article 10(3) of the OECD Convention). Ensuring that there is jurisdiction to prosecute all such cases could also be beneficial.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Designating a single body as the central authority for all extradition and MLA requests could result in economies of scale, concentration of expertise, better coordination among law enforcement agencies, and less duplication. Allowing the central authority to directly send and receive extradition and MLA requests could avoid delays caused by transmission through the diplomatic channel. Foreign authorities could benefit from a Web page in English that is dedicated to international cooperation and which contains a description of the Cambodian extradition and MLA process, copies of relevant legislation and treaties, contact information for the central authority, and sample documents.

Procedures for urgent requests, such as allowing Cambodian nationals to be provisionally arrested, could be useful. Delay could be reduced by accepting urgent requests for MLA or provisional arrest that are transmitted outside the diplomatic channel, such as by facsimile or Interpol. Cambodia could also consider accepting urgent MLA requests made orally with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, treaties and legislation on MLA that specifically address proceeds of crime could greatly improve Cambodia's ability to seek and provide cooperation. The framework should cover requests to trace, freeze, confiscate and repatriate proceeds of corruption. It should also permit the enforcement of foreign pecuniary orders and confiscation of property the value of which corresponds to the proceeds of corruption offenses. Permitting foreign confiscation orders to be enforced without a conviction (e.g., when an offender cannot be prosecuted because of death, flight, absence etc.) would bring the regime in line with Article 54(1)(c) of the UNCAC.

Procedural changes could also enhance cooperation, such as allowing the enforcement of foreign restraining, confiscation and pecuniary penalty orders by direct registration in a Cambodian court. Registration of faxed orders in urgent cases could also be useful. Finally, express provisions on repatriating proceeds of corruption could provide greater certainty and accountability. Particular consideration could be given to the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

Information not available.

Relevant Laws and Documentation

Cambodia: Mutual Evaluation Report 2007, APGML:
<http://www.apgml.org/documents/docs/17/Cambodia%20World%20Bank%20DA%20July%2007.pdf>

P.R. China

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in P.R. China are principally governed by the Extradition Law 2000 (Order of the President No. 42) and Article 17 of the Criminal Procedure Code 1997 (CPC). The legislation applies to all requests made under a treaty. Extradition and MLA in the absence of a treaty are available if there is reciprocity.

P.R. China is party to two multilateral conventions that could be used to provide extradition and MLA in corruption cases, namely the UNCAC and the UNTOC. China has 20 bilateral extradition treaties in force, including 7 with members of the ADB/OECD Initiative (Cambodia; Kazakhstan; Korea; Kyrgyzstan; Mongolia; Philippines; and Thailand) and 3 with Parties to the OECD Convention (Bulgaria; Korea; and South Africa). P.R. China also has MLA treaties in force with 28 countries, including 6 members of the Initiative (Kazakhstan; Korea; Kyrgyzstan; Mongolia; Thailand; and Vietnam) and 8 Parties to the OECD Convention (Bulgaria; Canada; Greece; Korea; Poland; South Africa; Turkey; and United States).

The Extradition Law is fairly comprehensive and contains many of the features found in more recent extradition legislation in other jurisdictions. As for MLA, Article 17 of the CPC merely states that the judicial organs of P.R. China and foreign countries may request judicial assistance from each other in criminal matters. By reason of this article, the provisions in the CPC dealing with domestic investigations (e.g., search and seizure, taking witness testimony, freezing and confiscation of assets) apply to foreign MLA requests.

P.R. China maintains detailed statistics on international cooperation. In 2003-2006, it averaged 5 outgoing and 50 incoming MLA requests annually, with at least 3 incoming and 7 outgoing requests involving corruption offenses. P.R. China also made and received 6 and 13 extradition requests respectively during the same period. MLA requests under a treaty may be sent directly to the Ministry of Justice, except for those under the UNCAC, which should be sent to the Supreme People's Procuratorate. MLA requests without a treaty and all extradition requests should be sent to the Ministry of Foreign Affairs (or another body if an extradition treaty so provides) via the diplomatic channel.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is mandatory for extradition from P.R. China. An offense is extraditable only if the conduct amounts to a criminal offense that is punishable by at least one year's imprisonment in both P.R. China and the requesting state. Dual criminality is discretionary for MLA (subject to an applicable treaty), and P.R. China has rendered MLA in the absence of dual criminality. P.R. China has created an offense of illicit enrichment; incoming MLA requests in such cases will therefore likely have dual criminality. Since P.R. China has not created an offense of bribery of foreign public officials, it is not clear whether dual criminality would prevent MLA in cases involving this offense. P.R. China imposes criminal liability against certain legal persons for some criminal offenses but not corruption. It is therefore also unclear whether an incoming MLA request would have dual criminality if a legal person is the sole target of a corruption investigation. P.R. China is obliged to provide non-coercive MLA that is requested under the UNCAC even in the absence of dual criminality.

Requests to P.R. China may have to meet certain evidentiary tests. The Extradition Law and the CPC do not specifically indicate the amount of evidence that is necessary, but an applicable treaty may do so. The Extradition Law also requires a court to hear the pleadings of the person sought and the opinions of his/her counsel at an extradition hearing.

Specialty is mandatory for extradition from P.R. China. The Extradition Law requires a requesting state to provide a specialty assurance but does not stipulate how the assurance should be made. For outgoing requests, the Extradition Law authorizes the Ministry of Foreign Affairs to provide specialty assurances to a foreign state. The CPC does not require evidence provided to a foreign state through MLA to be used only in the case referred to in the request. However, use limitation also applies to all MLA requests made under the UNCAC. An applicable bilateral treaty may contain a similar requirement.

P.R. China does not extradite its nationals. However, if the extradition request involves a corruption offense that is established in accordance with the UNCAC, then the Convention obliges P.R. China to submit the case to its competent authorities for prosecution at the request of another State Party. P.R. China's bilateral treaties may contain a similar requirement. The Extradition Law also states that, if the offense underlying an extradition request is "subject to prosecution by a Chinese judicial organ", then the Supreme People's Procuratorate must consider commencing domestic prosecution.

The Extradition Law lists several grounds for denying extradition. Mandatory grounds of refusal include requests that jeopardize the sovereignty, security or public interests of P.R. China, and if a judicial organ in P.R. China has rendered judgment or terminated proceedings for the same offense. Extradition is also refused if the person will probably be subject to torture or other cruel, inhuman or humiliating treatment or punishment in the requesting state. P.R. China refuses extradition for political offenses, but for requests made under the UNCAC, the Convention requires that corruption offenses not be considered political offenses. Extradition may be refused for humanitarian reasons (e.g., age, health and other circumstances of the person sought), or if P.R. China has jurisdiction over the subject offense and institutes a domestic prosecution.

By contrast, the CPC does not list any grounds for denying MLA, but bilateral treaties may include grounds such as infringement of essential interests, political offense, double jeopardy, and interference with an on-going investigation in the requested state. The UNCAC allows requests made under the Convention to be refused if the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested state. P.R. China's secrecy provisions for the financial sector are overruled for incoming MLA requests. The UNCAC also prohibits P.R. China from relying on bank secrecy to reject MLA requests made under the Convention.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Different bodies are involved in sending and receiving MLA requests in P.R. China. The central authority for MLA under the UNCAC is the Supreme People's Procuratorate. Under other MLA treaties, the Ministry of Justice is the central authority. However, if a treaty designates another body (e.g., a prosecutorial body) as a central authority in a foreign state, then P.R. China will designate that body's Chinese counterpart as an additional central authority. MLA requests that are not under a treaty are sent and received by the Ministry of Foreign Affairs through the diplomatic channel. P.R. China will accept incoming requests in the language of the requesting state accompanied by a translation in the Chinese language. If an incoming request is in English or French, P.R. China will translate the request into Chinese if the requesting state agrees to assume the costs.

Upon receiving an incoming MLA request, the Ministry of Justice or Foreign Affairs (as the case may be) reviews the request and forwards it to an appropriate law enforcement agency for execution. For requests based on treaties, the Ministry of Justice confirms that the request meets the terms of the relevant treaty and monitors the request's execution. After the request has been

executed, the evidence gathered is sent to the Ministry of Justice or Foreign Affairs and forwarded to the requesting state.

As for extradition, incoming requests are received from the diplomatic channel and provided to the Ministry of Foreign Affairs. The Ministry confirms that the requesting state has provided assurances of specialty and reciprocity (if required) and that the request meets the formal requirements set out in the Extradition Law. The Supreme People's Court (SPC) then designates the Higher People's Court (HPC) to conduct a hearing to examine the legal aspects of the case. If the HPC decides that the requirements for extradition are met, the case is transferred to the SPC within seven days for a review of the decision. The person sought has 10 days to make submissions to the SPC. If the SPC confirms the HPC's decision, it must notify the Ministry of Foreign Affairs within seven days. The Ministry then submits the case to the State Council for a final decision on whether the person should be surrendered.

To further facilitate cooperation, the Ministry of Justice maintains a Web site with a detailed description of the extradition and MLA process in P.R. China. In urgent cases, a foreign state may request the provisional arrest of a person sought through the diplomatic channel or directly to the Ministry of Public Security. The CPC does not expressly deal with urgent MLA requests, though the Chinese authorities will accept requests by facsimile.

P.R. China may also provide cooperation outside the formal MLA channels. The International Cooperation Department of the Ministry of Public Security cooperates with foreign law enforcement agencies. P.R. China has signed over 120 agreements and MOUs with law enforcement bodies in over 50 countries. It also has 26 police liaison officers in 16 countries and regions, including the United States, Canada, and Thailand. Liaison officers from 14 foreign countries are stationed in P.R. China.

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, the provisions in the CPC on proceeds of crime in domestic investigations apply equally to incoming MLA requests. Confiscation is covered under the Penal Code. Requests must be based on an applicable treaty or on the basis of reciprocity.

The CPC provides a range of measures for tracing and seizing proceeds of corruption. Articles 114 and 158 allow seizure of evidence that may be required to prove the guilt or innocence of an individual, while article 117 allows law enforcement to examine and seize bank accounts. There are no express provisions for seizing property for the purpose of eventual confiscation.

Confiscation is provided for under articles 64 and 191 of the Penal Code. The provisions allow confiscation of illegal proceeds, property or interest derived from illegal proceeds, laundered assets, and the instrumentalities for committing an offense. A conviction is required. The law is unclear as to whether confiscation of property of equivalent value is available. There are no provisions for enforcing foreign pecuniary penalty orders.

Though it has occurred in the past, asset sharing and repatriation is not a regular practice because of the lack of specific provisions in the CPC. In the future, the UNCAC should provide some guidance on dealing with assets that are confiscated pursuant to a request under the Convention. In particular, embezzled public funds (including laundered embezzled funds) must be returned to a requesting State Party. For other offenses covered by the Convention, confiscated assets must also be returned if a requesting State Party reasonably establishes its prior ownership of the property, or if P.R. China recognizes damage to the requesting State Party as a basis for returning the confiscated property. In all other cases, P.R. China is required to give priority consideration to returning confiscated property to a requesting State Party, returning such property to its prior legitimate owners, or compensating the victims of crime.

Conclusion

With the ratification of the UNCAC and the UNTOC, P.R. China now has a fairly extensive treaty framework for extradition and MLA in corruption cases. Cooperation may be provided flexibly, e.g., in the absence of a treaty or dual criminality. The full range of investigative measures in the CPC is available for executing foreign MLA requests. The maintenance of detailed statistics allows the performance of the extradition and MLA system to be properly assessed.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

P.R. China could consider introducing simplified extradition procedures into the Extradition Law, e.g., consent extradition. For MLA, consideration could be given to enacting a framework law that provides for the range of assistance commonly found in similar legislation in other jurisdictions, such as search and seizure, taking evidence by video conference, and transfer of witnesses who are in custody. Such a law could also add certainty, transparency and efficacy to the MLA process by expressly addressing matters such as dual criminality, use limitation, grounds for denying assistance, designation of a central authority, and

procedures for urgent requests. Finally, P.R. China has indicated that it wishes to conclude more bilateral extradition and MLA treaties with other countries.

Legal Preconditions for Extradition and MLA

P.R. China has not created an offense of bribery of foreign public officials, nor does it impose criminal liability against legal persons for corruption. Steps could be taken to ensure that dual criminality does not prevent cooperation in these cases. As well, the Extradition Law requires a court to hear the pleadings of the person sought. P.R. China may wish to consider whether the Law allows the person sought to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition hearing could potentially be turned into a trial, thereby delaying the process.

As for grounds to deny cooperation, P.R. China could follow the example of Article 44(4) of the UNCAC and specifically exclude corruption offenses from the definition of political offenses. As well, it could clarify in the Extradition Law that corruption cases would be submitted for prosecution whenever extradition is refused solely because the person sought is a Chinese national. Such an approach would be consistent with the standards found in recent international instruments (e.g., Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC). Ensuring that there is jurisdiction to prosecute all such cases would also be beneficial.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The responsibility for sending and receiving extradition and MLA requests in P.R. China is divided among three bodies, namely the Supreme People's Procuratorate and the Ministries of Justice and Foreign Affairs. Combining all of the functions of a central authority into a single entity could increase economies of scale and concentrate expertise. It could also enhance the monitoring of outstanding requests and reduce problems with coordination and duplication. To further assist domestic and foreign authorities in seeking assistance, P.R. China could provide additional information (e.g., sample documents and the relevant legislation and treaties) on the Web site that deals with extradition and MLA.

The framework for dealing with urgent incoming MLA requests could also be strengthened. P.R. China could amend the CPC to expressly accept urgent MLA requests that are made outside the diplomatic channel via any media that produces a writing, such as facsimile. It could also consider accepting urgent

oral requests with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, P.R. China could enact a framework law that deals specifically with MLA relating to proceeds of crime. The law could address matters specific to MLA that do not arise in domestic cases, e.g., grounds for denying cooperation, enforcement of foreign court orders by registration, and measures for urgent requests such as registration of faxed orders.

Furthermore, the scope of available assistance could be enhanced by allowing confiscation of property of equivalent value and enforcement of foreign pecuniary penalty orders. Allowing confiscation without a conviction (e.g., when an offender cannot be prosecuted because of death, flight, absence etc.) would bring the regime in line with Article 54(1)(c) of the UNCAC. An express provision to share and repatriate proceeds of corruption would provide greater certainty and accountability, particularly for requests made outside the UNCAC. Particular consideration could be given to the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For MLA without a treaty and extradition – via the diplomatic channel to:

Ministry of Foreign Affairs
No. 2 Nandajie, Chaoyangmen
Chaoyang District
Beijing 100701, China
Tel: +86 10 6596 1114
www.fmprc.gov.cn/eng/default.htm

For MLA under a treaty except the UNCAC:

Ministry of Justice
No.10 Nandajie, Chaoyangmen
Chaoyang District
Beijing 100020, China
Tel: +86 10 8313 9065
Fax: +86 10 8313 9051
worldlawin@yahoo.com.cn
www.legalinfo.gov.cn/english/englishindex.htm

Under the UNCAC:

Supreme People's Procuratorate
147 Beiheyuan Dajie
Dongcheng District
Beijing 100726, China
Tel: +86 10 65252000 / +86 10 65592000
web@spp.gov.cn

Relevant Laws and Documentation

Extradition Law 2000 (Order of the President No. 42): english.gov.cn/laws/2005-09/22/content_68710.htm

Criminal Procedure Code 1997:
www.chinalaw.gov.cn/jsp/jalor_en/index.jsp?id=menuhtcwzy31

Information on the extradition and MLA process and requirements:
www.legalinfo.gov.cn/english/JudicialAssis/JudicialAssis1.htm

First Mutual Evaluation – People's Republic of China, Financial Action Task Force (2007): www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html

Hu, Q. and Chen, Q., "China's Extradition Law of 2000", *Chinese JIL* (2002), pp. 647-654

Cook Islands

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in the Cook Islands are governed by the Extradition Act (No. 8 of 2003), the Mutual Assistance in Criminal Matters Act (No. 9 of 2003 as amended by Act No. 17 of 2003) (MACMA) and the Proceeds of Crime Act (Act No. 12 of 2003 as amended by Act No. 19 of 2003). The MACMA applies to all incoming and outgoing MLA requests including those made without a treaty. In the absence of a treaty or some other arrangement (e.g., the London Scheme or Pacific Islands Forum countries), a foreign state may be designated as an extradition country by Order in Executive Council. The Attorney-General may also certify a foreign state as an extradition country for a particular extradition request. In deciding whether to make a designation or certification, the Cook Islands will consider its public interests and those of the requesting state, and (for a certification) the seriousness of the offense. Designation or certification is not required for MLA without a treaty. The Extradition Act and the MACMA do not expressly require reciprocity for cooperation without a treaty.

The Cook Islands has bilateral extradition treaties in force with 57 countries, including 5 members of the ADB/OECD Initiative (Australia; Fiji; India; Samoa; and Thailand) and 24 Parties to the OECD Convention (Argentina; Australia; Austria; Belgium; Brazil; Chile; Czech Republic; Finland; France; Germany; Hungary; Iceland; Italy; Luxembourg; Mexico; Netherlands; New Zealand; Poland; Portugal; Slovakia; Spain; Sweden; Switzerland; and United States). In addition, the Cook Islands has extradition relations based on the London Scheme with 59 Commonwealth countries, including 5 members of the Initiative (Bangladesh; Malaysia; Pakistan; Singapore; and Sri Lanka) and 2 Parties to the OECD Convention (Canada; United Kingdom). The Cook Islands also employs a system of endorsement of arrest warrants for extradition to the 15 other members of the Pacific Islands Forum, including 6 members of the Initiative (Australia; Fiji; Palau; Papua New Guinea; Samoa; and Vanuatu) and 2 Parties to the OECD Convention (Australia; New Zealand). The Cook Islands is not party to any bilateral MLA treaties.

The Extradition Act and the MACMA are extensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation contains

several modern features commonly found in similar legislation of other jurisdictions, such as production orders, taking evidence by video or Internet link, consent extradition, and no-evidence extradition (except to some Commonwealth countries). The MACMA also contains provisions on MLA relating to proceeds of crime. Requests for MLA should be sent to the Attorney-General. Letters rogatory requests sent to Cook Island courts are forwarded to the Attorney-General for execution under the MACMA. The Extradition Act does not specify to whom an extradition request should be sent, or whether transmission must be through the diplomatic channel.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for MLA and extradition in the Cook Islands. To qualify for cooperation, an offense must be punishable by at least death, 12 months' imprisonment or a NZD 5 000 fine in the requesting state, and if the subject conduct is punishable by at least 12 months' imprisonment or a NZD 5,000 fine in the Cook Islands if it had occurred there. The definition of dual criminality is conduct-based. Bribery of foreign public officials and illicit enrichment are not criminal offenses in the Cook Islands. How the Cook Islands would handle extradition and MLA requests involving these offenses is therefore unclear. The Cook Islands does not impose criminal liability against legal persons for corruption offenses. It is therefore also unclear how it would handle MLA requests in cases in which a legal person is the target of a corruption investigation or prosecution. The Cook Islands has not encountered such cases so far.

Evidentiary tests apply to some incoming extradition and MLA requests. For more coercive forms of MLA (e.g., search and seizure), there must be reasonable grounds to believe that relevant evidence will be found. There is no such requirement for less coercive measures (e.g., taking of evidence and production orders). Incoming extradition requests from certain designated Commonwealth countries are subject to the *prima facie* case test, i.e., there must be sufficient evidence to place the person sought on trial for the offense if it had been committed in the Cook Islands. Other Commonwealth requesting states are required to submit a "record of the case" with a recital of the supporting evidence and authenticated copies, reproductions or photographs of all exhibits and documentary evidence. Extradition to Pacific Islands Forum countries is based on endorsement of warrants; supporting evidence is not necessary. Extradition to all other countries is also based on a no-evidence standard. The

requesting state is only required to provide a statement of the conduct that constitutes the offense, and the time and place of the offense's commission.

Specialty and use limitation are addressed in the Extradition Act and the MACMA respectively. The Extradition Act specifically confers specialty protection to persons surrendered to the Cook Islands. Evidence obtained by the Cook Islands under the MACMA may only be used in the proceeding or investigation referred to in the request. It is an offense to breach this restriction without the permission of the Attorney-General. The legislation does not deal with specialty or use limitation for incoming requests.

The Extradition Act contains only a few grounds for denying extradition. Extradition may be denied if the offense is punishable by death in the requesting state. The Cook Islands may prosecute the person in lieu of extradition if there is sufficient evidence and dual criminality. Extradition of nationals is not expressly included in the list of grounds for denying extradition in the Extradition Act. Nevertheless, the Act provides for prosecution of nationals in lieu of extradition if there is sufficient evidence and dual criminality. The Cook Islands may also extradite a national solely for trial if the requesting state undertakes to return the national to serve any sentences. The Attorney-General also has residual discretion to refuse extradition that would be unjust or oppressive, having regard to whether the offense is of a trivial nature, the age of the offense, and the good faith of the accusation.

The MACMA lists only two grounds for denying MLA. The Cook Islands refuses MLA that prejudices its sovereignty, security or national interest. It may also postpone MLA that could prejudice an investigation or proceeding in the Cook Islands. The MACMA does not address whether MLA may be denied because of bank secrecy, though Cook Island legislation in other contexts (e.g., section 35 of the Financial Transactions Reporting Act) expressly overrides secrecy obligations.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Attorney-General is the Cook Islands' central authority for MLA. Outgoing and incoming MLA requests must be made by and to the Attorney-General respectively. Upon receiving an MLA request, the Attorney-General will determine whether the requirements in the MACMA are met (e.g., whether there are reasonable grounds to believe that evidence of an offense will be found). The request is then forwarded to the appropriate body for execution. Unless it is necessary for the performance of duties, it is an offense to disclose the existence,

contents or status of an incoming MLA request without the approval of the Attorney-General.

The Extradition Act does not specify to whom an extradition request should be sent, or whether transmission must be through the diplomatic channel. After the Cook Islands receives an extradition request, the Attorney-General must determine whether certain requirements in the Extradition Act are met. If so, he/she issues an authority to proceed and a judge orders the arrest of the person sought. After the person is arrested, a judge conducts a hearing to confirm that certain conditions in the Extradition Act are met. If so and the requesting state is a Pacific Islands Forum country, the judge may order the person to be surrendered to the requesting state. For other cases, the judge may commit the person into custody to await extradition. The case then reverts to the Attorney-General to determine whether the person should be surrendered. The Extradition Act does not deal with the procedure for making outgoing extradition requests.

To deal with urgent requests, the Extradition Act allows a foreign state to request provisional arrest if the person sought for extradition is, or is believed to be, in or on his/her way to the Cook Islands. The request may be made directly to the Cook Islands or through Interpol. The MACMA does not contain any provisions on urgent MLA requests.

The official Cook Island government Web site does not specifically address extradition or MLA. The relevant legislation is available from an on-line database maintained by an independent organization. In addition to MLA under the MACMA, the Cook Islands Police may provide police-level assistance. The Police also exchanges information with its overseas counterparts through Interpol and the South Pacific Islands Criminal Intelligence Network. The Police's Intelligence Office records each request and response.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided primarily through the MACMA, though the Proceeds of Crime Act (POCA) may also be applicable. A broad range of assistance is available, including tracing, restraining and forfeiting proceeds of crime. Proceeds of crime is defined as "property into which any property derived or realized directly from a serious offense was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the commission of the offense." This definition does not appear to include "direct" proceeds of crime (i.e., property derived or realized directly from crime) but only "indirect" proceeds (i.e., property into which "direct" proceeds was later successively converted, transformed or intermingled). MLA is available only

if the conduct constituting the offense that gave rise to the proceeds, had it occurred in the Cook Islands, would have been punishable by at least 12 months' imprisonment or a NZD 5,000 fine.

The MACMA provides several tools for tracing and identifying proceeds of crime. Foreign countries may request production orders that compel persons (e.g., financial institutions) to produce "property-tracking documents", i.e., documents relevant to identifying, locating or quantifying proceeds of crime or an offender's property. A request can also be made for a warrant to search for and seize property-tracking documents, proceeds of crime, or property used or intended for use in the commission of an offense.

There are two means of executing a foreign request to restrain proceeds of crime that are reasonably believed to be in the Cook Islands. A foreign restraining order may be registered directly with a Cook Island court. The registered order may then be enforced in the Cook Islands like a domestic court order. Alternatively, a Cook Island court may issue a restraining order under the POCA if there are reasonable grounds to believe that a proceeding has commenced or is about to commence, and that property that may be subject to a foreign restraining order is located in the Cook Islands.

Unlike restraining orders, foreign forfeiture and pecuniary penalty orders can only be enforced by direct registration. A person must have been convicted of an offense in the requesting state, and the conviction and foreign order must be final.

To deal with urgent cases, the MACMA allows registration of a faxed copy of a sealed or authenticated foreign order. However, the registration ceases to have effect after 21 days unless a sealed or authenticated copy of the order is filed with the court.

Concerning the repatriation of proceeds, the MACMA gives the Attorney-General discretion to enter into arrangements with foreign states for the reciprocal sharing of property located in the Cook Islands or a foreign state. Arrangements may be made regarding forfeited property and funds collected under a pecuniary penalty order. In addition, funds realized under the POCA are paid into a Confiscated Assets Fund. With the approval of the Minister of Finance, the Financial Secretary may authorize payments out of the Fund to satisfy an obligation to a foreign jurisdiction in respect of confiscated assets.

Conclusion

The Cook Islands' legal framework for international cooperation in criminal matters consists of an extensive extradition treaty network and detailed

legislation on both extradition and MLA. Cooperation is enhanced by permitting extradition and MLA in the absence of a treaty. A foreign country may be designated as an extradition country for a particular extradition request by certification rather than regulation, thereby reducing potential delay. The MACMA offers a range of assistance, including production orders and taking evidence by video or Internet link. The legislation also specifically deals with proceeds of crime, with features such as tools for tracing and identifying proceeds, and enforcement of foreign restraining and forfeiture orders by direct registration. To facilitate extradition, the Cook Islands uses a no-evidence standard for extradition to most countries and endorsement of warrants for extradition to Pacific Islands Forum countries. Evidentiary requirements are also attenuated for extradition to many Commonwealth countries by using a record of the case. The legislation contains relatively few grounds for denying extradition or MLA, thereby increasing the level of cooperation. In some cases, a person may be prosecuted in the Cook Islands in lieu of extradition, or extradited solely for trial and then returned to serve a sentence.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Although the Cook Islands may provide MLA in the absence of a treaty, treaty-based cooperation could add certainty and enhance the Cook Islands' ability to seek assistance in corruption cases. Signing and ratifying the UNCAC would help accomplish this objective.

Legal Preconditions for Extradition and MLA

Dual criminality is mandatory for extradition and MLA. Consideration might be given to eliminating the dual criminality requirement or reducing it to a discretionary requirement so as to enhance cooperation. Alternatively, the Cook Islands could require dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Such an approach would be consistent with Article 46(7) of the UNCAC. The Cook Islands may also wish to ensure that dual criminality does not prevent cooperation in cases involving bribery of foreign public officials and illicit enrichment, or cases in which a legal person is the target of a corruption investigation or prosecution.

There is no absolute prohibition against the extradition of the Cook Islands nationals. Under certain circumstances, the Cook Islands may prosecute a

national in lieu of extradition or extradite a national on the condition that he/she is returned to serve any sentences. The Cook Islands may wish to ensure that one of these two alternatives is used whenever extradition is denied because of nationality. Such an approach would bring the Cook Islands into conformity with the standards embodied in recent international instruments on corruption (e.g., Article 10(3) of the OECD Convention and Articles 44(11) and 44(12) of the UNCAC).

The Cook Islands may refuse extradition in cases in which the person sought could face the death penalty. The Cook Islands may wish to consider allowing extradition if the requesting state provides sufficient assurances that the death penalty would not be imposed or carried out. Regarding other grounds for denying cooperation, the MACMA does not deal with the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Other Cook Island legislation (e.g., the Financial Transactions Reporting Act) also explicitly states that secrecy obligations should not prevent the disclosure of information. Consideration could be given to codifying a similar provision in the MACMA.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Extradition Act allows a foreign state to request provisional arrest directly or through Interpol. The Cook Islands may wish to clarify that it will accept requests through other media that produces a writing, such as facsimile. It could also consider accepting urgent MLA requests through these channels of communication, as well as oral requests that are subsequently confirmed in writing (e.g., see Article 46(14) of the UNCAC).

To assist foreign requesting states, the Cook Islands could clarify to whom an extradition request should be sent and whether transmission must be through the diplomatic channel. Consideration could also be given to making more information available on the Internet, e.g., by creating a Web page for the central authority with a description of the extradition and MLA process, contact information, and links to the relevant legislation.

Recovery of Proceeds of Corruption in Criminal Proceedings

The Cook Islands will enforce a foreign forfeiture order only if a person has been convicted of a foreign offense. Consideration might be given to ensuring that assistance can be rendered when the offender cannot be prosecuted by

reason of death, flight, absence etc., consistent with Article 54(1)(c) of the UNCAC. Consideration could also be given to ensuring that MLA can be rendered in relation to both "direct" and "indirect" proceeds.

As for repatriating the proceeds of corruption, the Attorney-General could consider exercising its discretion under the MACMA to enter into arrangements for sharing assets with foreign states. The Cook Islands could also elaborate on the criteria for entering into such arrangements and for making payments from the Confiscated Assets Fund to a foreign state. In particular, the Cook Islands could clarify whether and how it would take into account the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For Extradition and MLA:

Attorney-General's Office
Rarotonga, Cook Islands
Tel: +682 29 337
Fax: +682 20 839 / 23 725

Additional Contact

Cook Islands Police
National Headquarters
PO Box 101
Rarotonga, Cook Islands
Tel: +682 22 499
Fax: +682 21 499

Relevant Laws and Documentation

The Extradition Act 2003, Mutual Assistance in Criminal Matters Act 2003, the Proceeds of Crime Act 2003, and Cook Island case law: www.paclii.org/ck

Official Web Site of the Cook Island Government: www.cook-islands.gov.ck

Cook Islands: Assessment of the Supervision and Regulation of the Financial Sector Volume I – Review of Financial Sector Regulation and Supervision, IMF (2004): www.imf.org/external/pubs/ft/scr/2004/cr04413.pdf

Cook Islands: Assessment of the Supervision and Regulation of the Financial Sector Volume II - Detailed Assessment of Observance of Standards and Codes, IMF (2004): imf.org/external/pubs/ft/scr/2004/cr04414.pdf

Fiji Islands

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Fiji are governed by the Extradition Act 2003, the Mutual Assistance in Criminal Matters Act 1997 (as amended by Act No. 2 of 2005) (MACMA) and the Proceeds of Crime Act 1997 (as amended by Act No. 7 of 2005). The Extradition Act and the MACMA applies to all incoming and outgoing extradition and MLA requests respectively, including requests made in the absence of a treaty. Neither Act expressly requires reciprocity for cooperation without a treaty.

Fiji is not party to any multilateral or bilateral treaties that could be used to seek or provide MLA in corruption cases. The Extradition Act defines "treaty countries" as those listed in Schedule 3 of the Act. The Schedule is presently empty, even though there are bilateral extradition treaties that apply to Fiji, e.g., the United States-United Kingdom Treaty 1931. (See *State v. Minister for Foreign Affairs, ex parte Tunidau*, [2002] F.J.H.C. 143 for an example of extradition proceedings in Fiji under this treaty.) Fiji has extradition relations under the London Scheme with 58 countries, including 6 members of the ADB/OECD Initiative (Bangladesh; India; Malaysia; Pakistan; Singapore; and Sri Lanka) and 2 Parties to the OECD Convention (Canada; United Kingdom). Fiji uses a system of endorsement of arrest warrants for extradition to the 15 other members of the Pacific Islands Forum, including 5 members of the Initiative (Australia; Cook Islands; Palau; Papua New Guinea; Samoa; and Vanuatu) and 2 Parties to the OECD Convention (Australia; New Zealand). For extradition from Pacific Islands Forum countries to Fiji, only the Cook Islands, Papua New Guinea and Vanuatu use a similar system of endorsing warrants. For all other countries, Fiji may designate the country by regulation as a "comity country" under the Extradition Act. It may also certify a foreign country as a comity country for the purpose of a particular extradition request. As of July 2006, Fiji has not designated or certified any comity countries.

The Extradition Act and the MACMA are extensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation contains several modern features commonly found in similar legislation of other jurisdictions, such as production orders, taking evidence by video or Internet link,

consent extradition, and extradition based on a no-evidence standard. The MACMA also contains provisions on MLA relating to proceeds of crime.

While the statistical tools currently available to the Attorney General Department do not provide a full picture, Fiji processes approximately 10-12 MLA requests annually. In 2004-2006, Fiji made one MLA request to New Zealand (which was subsequently declined) and received MLA requests from Hong Kong, China; New Zealand; Tonga; and the United States. As of July 2006, two of the four incoming requests had been granted, one had been refused, and one had been processed. MLA requests may be sent directly to the Attorney-General outside the diplomatic channel. Letters rogatory requests sent to a Fijian court are forwarded to the Attorney-General for execution under the MACMA. Extradition requests may be sent to the Minister of Justice outside the diplomatic channel.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is not required for MLA, although the offense in question must be punishable in the requesting state by death or at least six months' imprisonment or a FJD 500 fine. By contrast, dual criminality is mandatory for extradition. Extradition is available for an offense that is punishable in the requesting state by death or imprisonment of at least 12 months or life, and if the conduct underlying the request, if committed in Fiji, is punishable there by imprisonment of 12 months or life. The definition of dual criminality is conduct-based. As bribery of foreign public officials and illicit enrichment are not criminal offenses in Fiji, it is not clear how extradition and MLA requests involving these offenses would be handled. Fiji also does not impose liability against legal persons for corruption offenses. However, since dual criminality is not required for MLA, this should not pose any obstacles in cases where a legal person is the target of an investigation or prosecution.

Evidentiary tests may apply to incoming MLA and extradition requests. For more coercive forms of MLA (e.g., search and seizure), there must be reasonable grounds to believe that relevant evidence will be found. There is no such requirement for less coercive measures (e.g., taking of evidence and production orders). For extradition to non-Commonwealth countries, requesting states are only required to provide a statement of the conduct that constitutes the offense, and the time and place of the offense, unless an applicable treaty provides otherwise. Commonwealth countries that request extradition are required to submit a record of the case that contains a recital of the evidence in support of the request and authenticated copies or photographs of all exhibits and

documentary evidence. The Extradition Act also contemplates applying the *prima facie* case test to certain Commonwealth countries, though none are subject to this requirement at present. For extradition to all countries, the Act expressly prohibits a person sought from tendering evidence at the extradition hearing to show that he/she did not commit the offense in question. The Act also requires appeals of an extradition judge's decision to be decided on the record of the hearing; fresh evidence may not be tendered at the appeal.

Specialty and use limitation are addressed in the Extradition Act and the MACMA respectively. Fiji may refuse extradition if the requesting state does not provide an undertaking of specialty. The undertaking may be given in a relevant treaty or law of the requesting state. The Extradition Act also specifically confers specialty protection to persons surrendered to Fiji. For MLA, the MACMA restricts evidence obtained by Fiji from a foreign country to the proceeding or investigation referred to in the request. It is an offense to breach this obligation without the permission of the Attorney-General. There are no corresponding provisions for incoming MLA requests.

The death penalty and nationality may be grounds for denying extradition. A judge may deny extradition if the subject offense is punishable by death in the requesting state but not Fiji, unless the requesting state undertakes that the penalty will not be imposed or carried out. If extradition is refused for this reason, Fiji may prosecute the person if there is sufficient evidence and if the conduct in question meets the dual criminality test. Alternatively, Fiji may extradite the person solely for trial, after which the person, if convicted, is returned to serve any sentences. Extradition may also be denied if the person sought is a Fijian citizen, though Fiji may prosecute the national in lieu of extradition (the same criteria as in death penalty cases apply).

Fiji will also refuse extradition for offenses of a political character. The Extradition Act states that an offense may be of a political character because of the circumstances of its commission and regardless of whether there are competing political parties in the country. The Act also contains a negative definition of political offense but the definition does not refer to corruption offenses. *In re Rutten*, [1992] F.J.H.C. 6, the Fijian High Court adopted the statement of Lord Diplock in *R. v. Governor of Pentonville Prison, Ex p. Cheng*, [1973] A.C. 931 (H.L.) that "*prima facie* an act committed in a foreign state was not 'an offense of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy." The Court added that an offense is not political if the offense was only remotely or indirectly connected to a political purpose or motive. Accordingly, a bank

robbery to obtain funds for a political party would not constitute a political offense.

Concurrent proceedings and double jeopardy may also prevent extradition. Extradition is refused if final judgment for the offense has been given against the person sought in Fiji or a third country. It is also denied if the person sought has been acquitted, punished or pardoned in the requesting state or Fiji for the subject conduct. Refusal is discretionary if a prosecution for the same crime is pending in Fiji, or if the offense was committed wholly or partly in Fiji. MLA may be postponed if assistance could prejudice an investigation or proceeding in Fiji.

As for other grounds of refusal, Fiji refuses MLA that prejudices its sovereignty, security or national interest. A judge has residual discretion to refuse extradition, having regard to the national interest of Fiji and the severity of the offense. The MACMA does not expressly prohibit Fiji from declining MLA on grounds of bank secrecy. However, Fijian legislation in other contexts (e.g., section 37 of the Financial Transaction Reporting Act 2004) expressly requires disclosure of information notwithstanding secrecy obligations.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

There are three channels for transmitting MLA and extradition requests. MLA requests are transmitted to and from the Attorney-General, which is Fiji's central authority for MLA. The Minister of Justice sends and receives extradition requests to and from countries that are not members of the Pacific Islands Forum. The Extradition Act does not specify the mode for transmitting an arrest warrant between Pacific Islands Forum countries.

There are two stages for executing incoming MLA requests. Upon receiving a request, the Attorney-General will determine whether the requirements of the MACMA are met (e.g., whether there are reasonable grounds to believe evidence of an offense will be found). Unless it is necessary for the performance of duties, it is an offense to disclose the existence, contents or status of an incoming MLA request without the approval of the Attorney-General. Upon the Attorney-General's approval, the request is executed by the International Assistance and Asset Recovery Unit of the Office of the Director for Public Prosecutions. If the assistance of another agency is required, the Unit will monitor and assist the request's execution by that agency. Evidence gathered is sent to the requesting state by the Attorney-General or, in urgent cases, by the executing agency.

Extradition requests with countries that are not members of the Pacific Islands Forum also involve several stages of decision-making. Upon receiving a request, the Minister will first consider whether certain requirements in the Extradition Act are met. If so, he/she will issue an authority to proceed and a magistrate will order the arrest of the person sought. For extradition to Pacific Islands Forum countries, proceedings are commenced when a magistrate endorses an original arrest warrant issued by the requesting state. For extradition to all countries, after the person is arrested, a magistrate conducts a hearing to ascertain whether certain conditions in the Extradition Act are met. If so, the magistrate may commit the person into custody to await surrender. The proceedings then move to the High Court, where a judge will determine whether the person should be surrendered. The judge may also review the magistrate's decision. Fiji has experienced extensive delays in some extradition cases because of appeals.

The MACMA requires the Attorney-General to make all outgoing MLA requests (except those relating to proceeds of crime). The Extradition Act does not prescribe a procedure for making outgoing extradition requests. Fiji has encountered various obstacles in seeking cooperation, including delay in receiving assistance, high costs and cumbersome procedures.

To deal with urgent requests, the Extradition Act allows a foreign state to request provisional arrest if the person sought for extradition is in Fiji or suspected to be on his/her way there. The request may be made directly or through Interpol. The MACMA does not contain specific provisions on urgent MLA requests. However, a 2005 amendment to the Act removed the requirement that the request be in writing, thereby allowing requests to be made orally.

To expedite extradition, the Extradition Act allows a person sought to consent to surrender after he/she has been arrested and brought before a magistrate. The consent allows a High Court Judge to order surrender immediately. Regardless of whether the person sought consents, if a judge orders surrender, the order must be carried out within two months. Otherwise, the person sought may apply to be discharged.

In addition to formal assistance pursuant to legislation and treaties, the Fiji Police Force provides police-level assistance. The Force's Interpol unit receives over 600 foreign requests per year, mostly from countries in Asia and the Pacific. The force also has a Transnational Crime Unit to exchange information and intelligence with other members of the Pacific Transnational Crime Coordination Network.

The Fijian government maintains a Web site that contains contact information for the Minister of Justice and the Attorney-General but not

information on international cooperation. Copies of the relevant legislation and case law are available from an on-line database maintained by an independent organization.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided primarily through the MACMA, though the Proceeds of Crime Act (POCA) may also be applicable. A broad range of assistance is available, including tracing, restraining and confiscating proceeds of crime. Proceeds of crime is defined as any property wholly or partly derived, realized or acquired, whether directly or indirectly, from the commission of a foreign serious offense. The definition includes proceeds that have been converted, transformed or intermingled, as well as gains derived or realized from proceeds. A foreign serious offense is an offense punishable by at least 6 months' imprisonment or a FJD 500 fine in the foreign state.

The MACMA provides several measures for tracing and identifying proceeds relating to a foreign serious offense. Foreign states may request production orders that compel persons (e.g., financial institutions) to produce "property-tracking documents," i.e., documents relevant to identifying, locating or quantifying the property of an offender, or the instruments or proceeds of an offense. A request can also be made for a warrant to search for and seize property-tracking documents, or the instrumentalities or proceeds of crime.

There are two means of executing a foreign request to restrain proceeds of crime that are reasonably believed to be in Fiji. A foreign restraining order may be registered directly with a Fijian court. The registered order may then be enforced in Fiji like a domestic court order. Alternatively, a Fijian court may issue a restraining order under the POCA if there are reasonable grounds to believe that a proceeding relating to a foreign serious offense has commenced or is about to commence in the requesting state. There must also be reasonable grounds to believe that property that may be subject to a foreign restraining order is located in Fiji.

Unlike restraining orders, foreign requests to confiscate proceeds of crime or to enforce a pecuniary penalty can only be executed by direct registration of a foreign order. A 2005 amendment to the MACMA removed the requirement that a person be convicted of a foreign indictable offense.

To deal with urgent cases, the MACMA allows the registration of a faxed copy of a sealed or authenticated foreign order. However, the registration ceases to have effect after 21 days unless a sealed or authenticated copy of the order is filed with the court.

Concerning the repatriation of proceeds, the POCA directs that property or money confiscated pursuant to foreign requests be deposited into a Forfeited Assets Fund. The Minister of Justice, with the approval of the Minister of Finance, may make payments from the Fund to a foreign country in satisfaction of a registered foreign forfeiture or pecuniary penalty order. The POCA also gives the Attorney-General discretion to enter into arrangements with foreign states for the reciprocal sharing of confiscated property or funds collected under a pecuniary penalty order. Fiji has not entered into any such arrangements as of July 2006.

Conclusion

Over the past ten years, the Government of Fiji has worked diligently to develop a generally-comprehensive framework for extradition and MLA. Extradition and MLA are available without a treaty or reciprocity, which greatly enhances cooperation. MLA is available in the absence of dual criminality. The MACMA offers a range of assistance, including production orders and taking evidence by video or Internet link. It specifically deals with proceeds of crime, with features such as tools for tracing and identifying proceeds, and enforcement of foreign restraining and confiscation orders by registration. Delay is reduced by allowing requests to be made outside the diplomatic channel. Cooperation is further enhanced by using a no-evidence standard for less coercive forms of MLA and most extradition requests. Extradition to Pacific Islands Forum countries is simplified through a system of endorsing arrest warrants. Fiji takes a flexible approach to extradition of nationals and death penalty cases. A person may be prosecuted in Fiji in lieu of extradition, or extradited solely for trial and then returned to serve a sentence.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Although Fiji may provide extradition and MLA without a treaty, treaty-based cooperation could add certainty and enhance its ability to seek assistance in corruption cases. Signing and ratifying the UNCAC would help accomplish this objective. Fiji may also wish to ensure that the schedules to the Extradition Act cover all bilateral extradition treaties that apply to Fiji.

Legal Preconditions for Extradition and MLA

Dual criminality is a mandatory requirement for extradition. Consideration might be given to eliminating the dual criminality requirement or reducing it to a discretionary requirement for the purpose of enhancing cooperation. Fiji may also wish to ensure that dual criminality does not prevent extradition in cases involving bribery of foreign public officials and illicit enrichment.

There is no prohibition against the extradition of Fijian nationals. If extradition is denied for this reason, Fiji may prosecute the national if there is sufficient evidence and dual criminality. The national may also be extradited solely for trial and returned to serve any sentences. Fiji may wish to ensure that one of these two alternatives is used whenever extradition in corruption cases is denied because of nationality. Such an approach would bring Fiji into conformity with the standards embodied in recent international instruments on corruption (e.g., Article 10(3) of the OECD Convention and Articles 44(11) and 44(12) of the UNCAC).

Regarding other grounds for denying cooperation, political offense is a potential ground for refusing extradition and MLA. Consideration might be given to following Article 44(4) of the UNCAC which exhorts states to exclude this ground from extradition in corruption cases. The MACMA is silent on the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Other Fijian legislation (e.g., the Financial Transactions Reporting Act 2004) also explicitly states that secrecy obligations should not prevent the disclosure of information. Fiji could therefore consider codifying a similar provision in the MACMA.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Extradition Act allows a foreign state to request provisional arrest directly or through Interpol. Fiji may wish to clarify that it will accept requests through other media that produces a writing, such as facsimile. Fiji could also consider accepting urgent MLA requests through these channels of communication. While Fiji accepts oral requests, it may wish to consider whether to require such requests to be subsequently confirmed in writing (e.g., see Article 46(14) of the UNCAC). Fiji could also make more information available on the Internet, e.g., by creating a Web page for the central authority with a description of the extradition and MLA process and links to the relevant legislation.

Fiji has experienced significant delays in granting extradition because of the appeal process. To address this concern, Fiji could consider imposing deadlines for certain steps in the process to be completed, e.g., deadlines for an appeal hearing to commence and for a High Court Judge to decide whether to order surrender.

Recovery of Proceeds of Corruption in Criminal Proceedings

The POCA confers on the Attorney-General discretion to enter into arrangements for the reciprocal sharing of assets with foreign states. Fiji has not made any such arrangements so far but could consider doing so. The Minister of Justice has discretion to may make payments out of the Forfeited Assets Fund to a foreign country in satisfaction of a registered foreign forfeiture or pecuniary penalty order. Fiji could elaborate how this discretion would be exercised in corruption cases, including whether and how the Minister will take into account the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For Extradition and MLA:

Attorney-General and Minister for Justice
Box 2213, Government Buildings
Level 7, Suvavou House, Victoria Parade
Suva, Fiji
Tel: +679 3309 866
Fax: +679 3302 404
www.ag.gov.fj

Relevant Laws and Documentation

The Extradition Act 2003, Mutual Assistance in Criminal Matters Act 1997, the Proceeds of Crime Act 1997, and Fijian case law:
www.paclii.org/databases.html#FJ

Official Web Site of the Fiji Government: www.fiji.gov.fj

Fiji: Detailed Assessment Report on Anti-Money Laundering and the Financing of Terrorism, World Bank (2006):
www.reservebank.gov.fj/press/2007/World_Bank_Assessment_Report_Fiji_A_ML_CFT.pdf;
www.apgml.org/documents/docs/17/Fiji%20DAR%20Final.pdf

Hong Kong, China

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition (known in Hong Kong, China as the surrender of fugitive offenders (SFO)) is governed by the Fugitive Offenders Ordinance (Cap 503) (FOO), while MLA and the recovery of proceeds are principally governed by the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) (MLACMO). The FOO and the MLACMO apply to SFO and MLA between Hong Kong, China and a partner jurisdiction when the Chief Executive in Council so directs in an order. For MLA (including MLA in relation to proceeds of corruption), the MLACMO also applies when there are no relevant agreements if the requesting state provides an assurance of reciprocity. On the other hand, the FOO applies only when there is a relevant agreement; SFO without an agreement is not possible.

There are bilateral MLA agreements in force between Hong Kong, China and 17 countries, 4 of which are members of the ADB/OECD Initiative (Australia, Korea, Philippines and Singapore), and 13 are Parties to the OECD Convention (Australia; Belgium; Canada; Denmark; France; Korea; Netherlands; New Zealand; Poland; Portugal; Switzerland; United Kingdom; and United States). Agreements have been signed but are not in force with one member of the Initiative (Malaysia) and four Parties to the OECD Convention (Finland, Germany, Ireland and Italy). In addition, Hong Kong, China has bilateral SFO agreements in force with 14 countries, including 8 members of the Initiative (Australia; India; Indonesia; Korea; Malaysia; Philippines; Singapore; and Sri Lanka), and 8 Parties to the OECD Convention (Australia; Canada; Korea; Netherlands; New Zealand; Portugal; United Kingdom; and United States). Agreements have been signed but are not in force with three Parties to the OECD Convention (Finland, Germany and Ireland). P.R. China has declared in February 2006 that the UNCAC (including the provisions on SFO and MLA) applies to Hong Kong, China and the Convention is accordingly in force in Hong Kong, China. As of September 2007, subsidiary orders by the Chief Executive under the relevant legislation to give full effect to the SFO and MLA provisions have been made. The SFO Order is due to commence operation on 21 December 2007 and the MLA Order sometime shortly thereafter.

The FOO and MLACMO both broadly include the main features of modern legislation on international cooperation, such as detailed provisions on the

grounds for denying cooperation, the procedure for executing requests, and the types of assistance available, including production orders and taking evidence by video conference. The MLACMO also contains detailed provisions on MLA regarding proceeds of crime, including the requirements and procedure for executing foreign requests to restrain or confiscate proceeds of crime.

Available statistics indicate that Hong Kong, China processes approximately 80–120 MLA and 20–35 SFO requests annually. There is no information on how many cases involve corruption offenses. Generally speaking, uncontested surrenders are processed within two months. Contested cases may take 1–3 years (up to 5 in rare cases) before a fugitive is surrendered. There is no statistical information on how long it takes to execute MLA requests, although routine requests can usually be handled within three to four months. Urgent requests are expedited as necessary.

All incoming MLA requests may be made directly to the Secretary for Justice at the Department of Justice. The Secretary also prepares and sends outgoing MLA requests. Incoming letters rogatory (i.e. purely court-to-court) requests may be sent to the Chief Secretary for Administration. Requests for SFO must be transmitted to the Secretary for Justice through the consular or diplomatic channel or any other channel approved by the government of P.R. China. The parties to bilateral agreements may also indicate a specific channel.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for incoming SFO and MLA requests to Hong Kong, China. The requirement is conduct-based, i.e., it does not depend on how the laws of a requesting state categorize an offense or the terminology used to denominate the offense, or whether the offenses in the requesting and requested states have the same elements. Hong Kong, China has not established a specific offense of bribery of foreign public officials. Nevertheless, incoming requests concerning this offense could satisfy the dual criminality requirement if the conduct underlying the request constitutes a crime under the laws of Hong Kong, China (e.g., corrupt transactions with agents under section 9 of the Prevention of Bribery Ordinance). On the other hand, illicit enrichment is an offense in Hong Kong, China; incoming requests involving this offense should meet the requirement of dual criminality. Hong Kong, China may also provide MLA in proceedings against legal persons since it has established the criminal liability of legal persons. Hong Kong, China is obliged to provide non-coercive MLA that is requested under the UNCAC even in the absence of dual criminality.

Certain evidentiary tests may have to be met before Hong Kong, China cooperates. For incoming SFO requests, Hong Kong, China continues to apply the *prima facie* case evidentiary test. For incoming and outgoing MLA requests, measures such as the issuance of search warrants and production orders require reasonable grounds to believe that evidence will be found. There are no evidentiary tests for other measures, such as the taking of evidence from a witness.

Specialty and use limitation may be required by Hong Kong, China for cooperation. Specialty is generally required for incoming SFO requests (except possibly for lesser or equivalent offenses based on the same conduct). Hong Kong, China will accept assurances from the central authority or consular representative of the requesting state that specialty is provided in the law of the requesting state or in a relevant agreement. For outgoing SFO requests, the FOO expressly grants specialty protection to persons who are extradited to Hong Kong, China. For MLA requests, bilateral agreements may impose use limitation on information provided to requesting states. In the absence of an agreement, Hong Kong, China may impose use limitation for incoming MLA requests in certain circumstances, e.g., if the information provided is of a personal or confidential nature. In these cases, Hong Kong, China will require an assurance from the requesting state, e.g., from the central authority if one exists. Use limitation applies to all MLA requests made under the UNCAC.

Concerning other specific grounds for denying cooperation, Hong Kong, China may decline to provide SFO or MLA if it is conducting an on-going investigation or prosecution into the same case. Its decision depends on factors such as the strength of its case and the location of the evidence. Hong Kong, China will refuse to surrender a person who may face torture or cruel or unusual punishment. In deciding whether to surrender, the Chief Executive will consider the submissions of a person sought and the requesting state. Surrender will be refused where the person sought may face the death penalty unless the requesting state provides an assurance that the death penalty will not be imposed or carried out. Hong Kong, China may also deny MLA in death penalty cases, depending on factors such as the gravity of the offense, the nature of the assistance sought, and whether the requesting state provides an assurance that the death penalty would not be imposed or carried out. Assurances in death penalty cases must be provided by the central authority or consular representative of the requesting state. Hong Kong, China will also refuse SFO and MLA for cases involving an offense of a political character. For SFO requests made under the UNCAC, the Convention requires that corruption offenses not be considered political offenses if the law of a State Party so permits.

Essential interests may be a ground for denying MLA. Under the MLACMO, Hong Kong, China will refuse to grant an MLA request that would seriously impair the essential interests of Hong Kong, China. It will also refuse to grant an MLA request that would impair the sovereignty of P.R. China, or the security or public order of the P.R. China or any part thereof. The UNCAC also allows requests made under the Convention to be refused if the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested state.

Hong Kong, China may deny SFO because the person sought is a national of P.R. China, but it has not exercised this power to date. Hong Kong, China has discretion to commence domestic criminal proceedings in lieu of surrender if it has jurisdiction to prosecute. However, this discretion is qualified by the UNCAC for SFO relating to offenses that are established in accordance with the Convention. In these cases, if Hong Kong, China declines surrender for such an offense solely on the ground that the person sought is a national of P.R. China, then the UNCAC obliges Hong Kong, China to submit the case to its competent authorities for prosecution.

The denial of MLA because of bank secrecy is not dealt with in the MLACMO or the bilateral MLA agreements involving Hong Kong, China. The only exception is the agreement with Belgium, which states that bank secrecy shall not be invoked as an essential interest for denying cooperation. At common law, a bank's duty of confidentiality to its clients is subject to certain exceptions, such as disclosure compelled by a court order issued under the MLACMO. Accordingly, there is no law which prohibits access by the authorities to information or documents on grounds of bank secrecy. For requests made under the UNCAC, Hong Kong, China is prohibited from declining to render MLA on the ground of bank secrecy.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Hong Kong, China has designated a central authority for international cooperation in criminal matters. The central authority - the Department of Justice (DoJ) headed by the Secretary for Justice - has five main functions: preparing and sending outgoing requests, receiving and processing incoming requests, assisting foreign authorities to prepare incoming requests, maintaining communication with foreign authorities, and providing training on international cooperation to officials of Hong Kong, China.

Outgoing SFO and MLA requests are prepared by the specialized MLA Unit in the Department of Justice. In corruption cases, the Unit will do so in consultation with officers from the Independent Commission Against Corruption (ICAC), the territory's specialized anti-corruption law enforcement agency, and the prosecutors involved in the case. The MLACMO authorizes the Secretary for Justice to directly send MLA requests to foreign countries. SFO requests may also be sent directly to foreign countries in accordance with the provisions of the bilateral agreements.

Receiving and processing incoming requests is another function of the MLA Unit. The Unit receives incoming MLA requests directly from a requesting state. Requests involving corruption offenses are executed by counsel in the MLA Unit in conjunction with the ICAC. In some instances, the ICAC may provide a dedicated unit to deal with a particular request for assistance. Incoming extradition requests are received from the diplomatic or consular channel by the MLA Unit. Incoming SFO and MLA requests are kept confidential, though parts of the request may have to be tendered in court and thus be made public.

The MLA Unit also assists foreign requesting states. The Unit is available to advise foreign countries on drafting requests in specific cases. In addition, it has prepared two booklets in English on the SFO and MLA process in Hong Kong, China. The booklets include a description of the requirements for cooperation, a standard form for MLA requests to Hong Kong, China, and sample wording for reciprocity undertakings. As well, the DoJ maintains a Web site in English with contact information and a brief description of SFO and MLA. The FOO, MLACMO, and relevant agreements are available on a separate government Web site.

The MLA Unit maintains communication with foreign states in order to enhance cooperation. In specific corruption cases, the Unit and the ICAC monitor outgoing requests after they have been sent. For both incoming and outgoing requests, the MLA Unit maintains direct communication with the central authority or prosecutor's office of the foreign state. The Liaison Bureau of the Hong Kong Police Force may also liaise with foreign states on specific SFO and MLA requests. In addition, the Bureau coordinates and deals with all police-related inquiries from overseas police organizations and local consulate officials. Hong Kong, China has also posted liaison personnel with the Interpol. The MLA Unit regularly meets more active agreement partners to review cases and discuss mechanisms for cooperation.

To perform these functions, the MLA Unit is staffed with 11 members (not including support staff) who have substantial experience in international cooperation in criminal matters, including corruption cases. All are fluent in English. The MLA Unit provides training on international cooperation to its new

recruits, as well as to other law enforcement officials and prosecutors in Hong Kong, China.

Particular measures to deal with urgent requests are provided by Hong Kong, China. Urgent incoming requests for provisional arrest may be made directly to the MLA Unit in the DoJ or through Interpol. For MLA, certain bilateral agreements allow urgent requests to be sent to the MLA Unit electronically or by fax. Others allow oral requests with subsequent confirmation in writing within 10 days. Hong Kong, China may accept urgent oral MLA requests made under the UNCAC with subsequent confirmation in writing.

The FOO contains certain features which expedite SFO, such as limited consent surrender. At any time after his/her arrest, a person sought may appear before a magistrate and consent to waive his/her right to a judicial hearing. The person sought is then committed into custody to wait for the Chief Executive to decide whether to surrender him/her to the requesting state. The FOO also sets time limits for particular steps in the SFO process. A person sought has only 15 days to appeal a judicial order of committal. The Chief Executive must order surrender within two months from when he has the power to do so (e.g., when a committal order becomes final); otherwise, the person sought may apply to court for discharge. Once surrender is ordered, the person sought should be removed within one month.

Appeal procedures in SFO cases are provided by the FOO. The person sought may appeal a committal to the Court of First Instance, and the Court may receive additional evidence on appeal relating to the statutory restrictions on surrender. The requesting state may also appeal a court's decision to discharge a person sought.

Recovery of Proceeds of Corruption in Criminal Proceedings

A broad definition of "proceeds" that may be subject to restraint or forfeiture is provided under the MLACMO. The definition includes direct proceeds ("payments or other rewards received in connection with an offense") and indirect proceeds ("property derived or realized, directly or indirectly, from "direct proceeds"). Also covered are confiscation of property of equivalent value, and confiscation to deprive a person of a pecuniary advantage obtained in connection with an offense. The proceeds, however, must relate to a predicate offense that is punishable in the requesting state by death or imprisonment of at least 24 months.

The status of foreign proceedings may affect whether Hong Kong, China can execute a request for restraint or confiscation. Restraining orders are

available if proceedings have commenced and are on-going in the requesting state, and if a confiscation order has been made or there are reasonable grounds to believe such an order will be made. Restraining orders are also available if proceedings will be instituted in the requesting state and confiscation may be ordered in those proceedings. Requests for confiscation may be executed only if a court in the requesting state has ordered confiscation and the order is not subject to appeal. There is no requirement that a person be finally convicted of an offense.

Foreign confiscation orders may be enforced through direct registration in Hong Kong, China: foreign orders may be directly registered with a court in Hong Kong, China, after which the order becomes enforceable in Hong Kong, China like a domestic court order. There is thus no need to apply for a second court order in Hong Kong, China.

The MLACMO also deals with the sharing and repatriation of proceeds. The Ordinance allows the Secretary for Justice to liquidate property that has been confiscated. The Secretary may direct that all or part of the confiscated property (and the proceeds from its liquidation) be provided to the government of a requesting state that is a "prescribed place". (A "prescribed place" is a place outside Hong Kong to or from which MLA may be provided or obtained pursuant to prescribed arrangements.) Conditions may be attached. Reasonable expenses incurred during the asset's recovery may also be deducted.

The UNCAC may circumscribe the discretion of the Secretary for Justice in disposing assets that are confiscated pursuant to a request under the Convention. In particular, embezzled public funds (including embezzled funds that have been laundered) must be returned to a requesting State Party. For other offenses covered by the Convention, confiscated assets must also be returned to a requesting State Party that reasonably establishes its prior ownership of the property, or if Hong Kong, China recognizes damage to the requesting State Party as a basis for returning the confiscated property. In all other cases, Hong Kong, China is required to give priority consideration to returning confiscated property to a requesting State Party, returning such property to its prior legitimate owners or compensating the victims of crime.

Conclusion

The system in Hong Kong, China for international cooperation in corruption cases is advanced and well-developed. Hong Kong, China has a fairly extensive network of bilateral SFO and MLA agreements which should soon be supplemented by the UNCAC. MLA is available in the absence of an agreement,

thus further enhancing the ability of Hong Kong, China to assist. The legislation for implementing these agreements is extensive and recent. All major forms of assistance are available, including MLA in relation to proceeds of crime and enforcement of foreign confiscation orders through direct registration.

This legal framework also appears to function well in practice. Commensurate with its role as a major financial center, Hong Kong, China is fairly active in seeking and providing international assistance. As the central authority, the specialized MLA Unit in the DoJ plays a vigorous role in managing the entire cooperation process. The Unit is staffed with qualified specialists in international cooperation. Expertise in corruption investigations is available by involving the ICAC in executing requests in corruption cases. There is frequent communication with foreign authorities through the central authority, police and Interpol on general and case-specific matters, which greatly enhances the likelihood of successful cooperation.

Information for Seeking Assistance

Central Authority

For MLA:

Department of Justice
Mutual Legal Assistance Unit, International Law Division
47th Floor, High Block, Queensway Government Offices
66 Queensway, Hong Kong, China
Tel: +852 2867 4748
Fax: +852 2523 7959
ild@doj.gov.hk
www.doj.gov.hk/eng/about/ild.htm

For Letters Rogatory (Court-to-Court) Requests:

Chief Secretary for Administration
Central Government Offices, West Wing
Lower Albert Road, Hong Kong, China

For Surrender of Fugitive Offenders:

Pursuant to the FOO, requests for SFO must be transmitted through the diplomatic channel or any other channel approved by the government of P.R. China. The parties to bilateral agreements may also indicate a specific channel.

Additional Contact

Liaison Bureau, Hong Kong Police Force
16/F Arsenal House, West Wing, Police Headquarters

Arsenal Street, Wan Chai, Hong Kong, China
Tel: +852 2860 2109
Fax: +852 2529 3166; +852 2294 0016

Relevant Laws and Documentation

The Fugitive Offenders Ordinance, the Mutual Legal Assistance in Criminal Matters Ordinance, and the relevant Orders: www.legislation.gov.hk/index.htm

Applicable MLA agreements: www.legislation.gov.hk/table3ti.htm, and

Applicable SFO agreements: www.legislation.gov.hk/table4ti.htm

People's Republic of China – Hong Kong Special Administrative Region: Financial System Stability Assessment, Country Report No. 03/191, IMF (2003): www.imf.org/external/pubs/ft/scr/2003/cr03191.pdf

India

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition and MLA in India are principally governed by treaties, the Extradition Act (No. 34 of 1962), and sections 166A and 166B of the Code of Criminal Procedure 1973 (Act No. 2 of 1974) (CCP). Extradition and MLA are available without a treaty subject to reciprocity. Additional MLA is available in cases involving money laundering under the Prevention of Money-Laundering Act 2002 (No. 15 of 2003) (PMLA) if there is an applicable treaty. Extradition and MLA requests must be transmitted via the diplomatic channel unless an applicable treaty provides otherwise.

India has bilateral extradition treaties in force with 25 countries, including 5 members of the ADB/OECD Initiative (Cook Islands; Hong Kong, China; Korea; Mongolia; and Nepal) and 14 Parties to the OECD Convention (Belgium; Bulgaria; Canada; France; Germany; Korea; Netherlands; Poland; South Africa; Spain; Switzerland; Turkey; United Kingdom; and United States). An extradition treaty has been signed but is not in force between India and the Philippines, a member of the Initiative. India has extradition relations under the London Scheme with 8 countries, including 6 members of the Initiative (Australia; Fiji; Papua New Guinea; Singapore; Sri Lanka; and Thailand) and 1 Party to the OECD Convention (Australia). It also has extradition arrangements with Portugal and Sweden, two Parties to the OECD Convention.

India also has 13 bilateral MLA treaties that are in force, including with 4 members of the Initiative (Kazakhstan; Korea; Mongolia; and Thailand) and 7 Parties to the OECD Convention (Canada; France; Korea; Switzerland; Turkey; United Kingdom; and United States). MLA treaties have also been signed—but not yet in force—with Kyrgyzstan (a member of the Initiative) and South Africa, a Party to the OECD Convention. India has signed but has not ratified the UNCAC and the UNTOC.

The Extradition Act and the CCP only set out the basic procedure for MLA and extradition. The Extradition Act contains some of the features found in more recent extradition legislation in other jurisdictions. As for MLA, sections 166A and 166B of the CCP only provides for witness testimony and production of evidence.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a requirement under Act No. 34 of 1962, according to which India may provide extradition for criminal investigations instituted by the authorities in a requesting State in respect of offenses that are punishable by one year's imprisonment under the laws of India or the foreign state. The CCP does not expressly require dual criminality for MLA, though an applicable treaty may do so.

Evidentiary tests may apply for cooperation. India requires *prima facie* evidence of the underlying offense before it will grant extradition. The Extradition Act specifically requires an extradition magistrate to hear evidence not only in support of extradition but also on behalf of the person sought. An applicable extradition and MLA treaty may impose additional evidentiary requirements.

Specialty is mandatory for extradition to and from India. For incoming requests, the Extradition Act requires the law of the requesting state or an applicable treaty to specifically provide specialty protection. The Act also provides such protection to persons extradited to India. An applicable treaty (but not the CCP) may limit the use of evidence to the case referred to in an MLA request.

The Extradition Act lists only a few grounds of refusal. Extradition is denied if the offense underlying a request is of a political character, or if a request is made with a view to punishing a person for an offense of a political character. The Act lists a number of offenses that are deemed to not have a political character; corruption offenses are not included in the list. Extradition may also be refused if it is unjust or inexpedient, having regard to the trivial nature of the case, the good faith or political reasons underlying the request, and the interests of justice. The Extradition Act states that if extradition is refused on any ground, then India may prosecute the person if it sees fit to do so.

The Extradition Act also deals with outgoing requests involving the death penalty. If the offense underlying a request is punishable by death in India but not the requested state, then the person sought will only be liable to life imprisonment if he/she is surrendered.

By contrast, the CCP does not expressly list any grounds for denying MLA. However, bilateral treaties may include grounds of refusal such as infringement of essential interests, political offense, and interference with an on-going investigation in the requested state.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The GPA-II Desk of the Ministry of Home Affairs is the main central authority for extradition and MLA. The GPA-II Desk is responsible for processing incoming and outgoing extradition requests, and incoming MLA requests. Outgoing MLA requests are processed by the Interpol Wing of the Central Bureau of Investigation. The Interpol Wing maintains a Web site in English with a very detailed description of the extradition and MLA process in India.

Upon receiving an MLA request, the GPA-II Desk forwards the request to the Interpol Wing for consultation. If approved, the request is forwarded to a magistrate or the police for execution. Outgoing MLA requests by a requesting court or agency are sent to the Interpol Wing for transmission through the diplomatic channel. The GPA-II Desk is responsible for receiving the evidence gathered by the foreign state pursuant to the request.

For extradition, the Indian law enforcement agency prepares an outgoing request and forwards it to the Ministry of Home Affairs for transmission via the diplomatic channel. Incoming requests are sent to the Ministry, which may in turn order extradition proceedings to commence. When the person sought is arrested, a magistrate conducts a hearing to determine whether there is a *prima facie* case. If the test is met, the magistrate commits the person into custody to await the Government's decision on surrender. The person may be discharged if the Government fails to surrender him/her within two months after a magistrate orders committal.

In urgent cases, the Interpol Wing may be notified of an urgent MLA request; the original request must however be formally transmitted through the diplomatic channel. For extradition, a foreign state may request provisional arrest under the Extradition Act via the diplomatic channel. Alternatively, it may make a request outside the diplomatic channel (e.g., through Interpol). Indian law enforcement may then arrest the person without a warrant under Article 41 (g) of the CCP.

Recovery of Proceeds of Corruption in Criminal Proceedings

Apart from the CCP, MLA relating to proceeds of corruption may also be available under the Prevention of Money-Laundering Act 2002 (PMLA). Assistance is available only if there is an applicable treaty or arrangement, and if the investigation or prosecution concerns a money laundering offense. Money laundering is defined as any intentional activity "connected with the proceeds of crime and projecting it as untainted property." Proceeds are property derived or

obtained directly or indirectly as a result of a criminal activity relating to a predicate offense listed in the PMLA's schedule. The schedule includes several offenses in the Prevention of Corruption Act 1988 but not illicit enrichment. The schedule also does not cover giving bribes to national or foreign public officials, as these are not offenses under the Prevention of Corruption Act.

To trace and identify property, the PMLA provides for any inquiry, investigation or survey in respect of any person, place or property. Examination of witnesses, production orders, and search and seizure are available if there are reasonable grounds to believe that a money laundering offense has been committed and that evidence or proceeds relating to the offense will be found.

The PMLA also allows attachment (restraining) and confiscation of property pursuant to foreign requests. Property will be provisionally restrained if there are reasonable grounds to believe that a person is in possession of proceeds of crime, such a person has been charged with an eligible predicate offense, and that the proceeds are likely to be concealed, transferred or dealt with in order to frustrate eventual confiscation. An Adjudicating Authority then conducts a hearing in which a person(s) with an interest in the property must disprove that the property is proceeds of crime. If the person fails to do so, the Authority will confirm the restraining order. The property is then confiscated to the government if the person charged with the money laundering offense is convicted. The PMLA does not deal with sharing property with foreign governments.

Conclusion

MLA in India is available without a treaty under sections 166A and 166B of the CCP. MLA may also be available to trace, restrain and confiscate proceeds of corruption if the case involves money laundering. India has an extensive network of bilateral extradition and MLA treaties. The network is complemented by a number of extradition arrangements, including those under the London Scheme.

In terms of legislation, the Extradition Act could be modernized by expressly allowing extradition by consent. As for MLA, sections 166A and 166B of the CCP only provides for letters rogatory requests for witness testimony and production of evidence. Consideration could be given to enacting a framework law that deals specifically with MLA and which provides for the range of assistance commonly found in similar legislation in other jurisdictions, such as search and seizure, taking evidence by video conference, and transfer of witnesses who are in custody. Such a framework law could also add certainty, transparency and efficacy to the MLA process by expressly addressing matters

such as dual criminality, use limitation, grounds for denying assistance, designation of a central authority, and procedures for urgent requests.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

India has worked diligently to constantly expand its treaty network. Further expansion of India's network of treaties would likely strengthen India's ability to seek and provide international cooperation in corruption cases. Ratifying the instruments that have been signed, such as the UNCAC and the UNTOC, would expand this network, as would concluding more bilateral treaties, particularly in MLA.

Legal Preconditions for Extradition and MLA

India has not created an offense of bribery of foreign public officials, nor does it impose criminal liability against legal persons for corruption. Consideration could be given to ensuring that dual criminality does not impede cooperation in these cases. The Extradition Act also requires the law of the requesting state or an applicable treaty to provide specialty protection. Accepting assurances of specialty from judicial, prosecutorial or diplomatic authorities of a requesting state would add flexibility.

Extradition could also be enhanced by reviewing the evidentiary aspects of the process. India applies the *prima facie* case evidentiary test in extraditions. Civil law jurisdictions seeking extradition from other common law jurisdictions have had difficulties in complying with this test. India could therefore consider following the example of some common law countries and require less or even no evidence for extraditions. Furthermore, the Extradition Act allows a person sought to tender evidence at an extradition hearing. India may wish to consider whether this would allow the person to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition hearing could potentially be turned into a trial, thereby prolonging the process.

As for grounds to deny cooperation, India could follow the example of Article 44(4) of the UNCAC and specifically exclude corruption offenses from the definition of political offenses. Concerning bank secrecy, a legislated prohibition on denying MLA because of bank secrecy would be consistent with recent international instruments (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

With outgoing MLA requests, the Interpol Wing of the CBI is responsible for sending the request, while the GPA-II Desk is responsible for receiving the evidence provided by the requested state. Combining all of the functions of a central authority into a single entity could enhance economies of scale and concentrate expertise. It could also reduce problems with coordination, duplication, and the monitoring of outstanding requests. Adding information in English to the Central Authority's Web site, such as sample documents and copies of the relevant legislation and treaties, could further assist foreign authorities.

The framework for dealing with urgent incoming requests could also be enhanced, such as by accepting requests for provisional arrest under the Extradition Act that are made outside the diplomatic channel. As well, India could consider accepting urgent MLA requests outside the diplomatic channel via any media that produces a writing, such as facsimile. Permitting urgent oral requests with subsequent written confirmation could also be useful (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

To enhance MLA relating to proceeds of corruption, consideration could be given to allowing assistance under the PMLA without a treaty and assistance relating to instrumentalities of crime. It could also be useful to allow MLA in cases of not only money laundering but also corruption offenses, including illicit enrichment, and giving bribes to national and foreign public officials.

Regarding restraining and confiscation, efficiency could be enhanced if foreign orders could also be enforced by direct registration in an Indian court. Allowing registration of faxed orders in urgent cases could be useful. The scope of assistance could be enhanced by removing the requirement that a person be charged with an eligible predicate offense, and by allowing enforcement of foreign pecuniary orders and confiscation of property of equivalent value. Permitting foreign forfeiture orders to be enforced without a conviction (e.g., when an offender cannot be prosecuted because of death, flight, absence etc.) would bring the regime in line with Article 54(1)(c) of the UNCAC. Express provisions on repatriation of proceeds of corruption could provide greater certainty and accountability. Particular consideration could be given to the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

Under the MLA Treaties with Mongolia and Thailand:

Ministry of Home Affairs
North Block, Central Secretariat
New Delhi 110 001, India
Tel.: +91 11 2309 2011 or +91 11 2309 2161
Fax: +91 11 2309 3750 or +91 11 2309 2763

For extradition and all other MLA requests: via the diplomatic channel

Additional Contact

Central Bureau of Investigation (Interpol Wing)
Assistant Director (Interpol)
Block No. 4, CGO Complex
New Delhi 110 003, India
Tel.: +91 11 2436 4000
Fax: +91 11 2436 4070 or 2439 2170
interpol@nda.vsnl.net.in or adipol@cbi.gov.in
cbi.nic.in

Relevant Laws and Documentation

Extradition Act (No. 34 of 1962, as amended):
meaindia.nic.in/actsadm/30aa04.pdf

Code of Criminal Procedure 1973 (Act 2 of 1974 as amended):
www.helplinelaw.com/docs/title.html?cat=Procedural%20and%20Administration

Prevention of Money Laundering Act 2002 (Act 15 Of 2003):
www.imolin.org/doc/amlid2/India%20PMA02.pdf

Information on the extradition and MLA process from the Interpol Wing of the Central Investigation Bureau: cbi.nic.in/interpol/interpol.htm

India Mutual Evaluation Report 2005 - Executive Summary, APGML:
www.apgml.org/documents/docs/8/India%20Mutual%20Evaluation%20Executive%20Summary.pdf

Sanjiv Kumar Upadhyay, "Crime in India", UNAFEI Resource Material Series No. 58, pp. 197-207 (2001): www.unafei.or.jp/english/pdf/PDF_rms/no57/57-10.pdf

Indonesia

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Indonesia are governed by the Law on Extradition (Law No. 1 of 1979), the Law on Mutual Legal Assistance in Criminal Matters (Law No. 1 of 2006) (LMLACM), and the Law on Money Laundering (Law No. 15 of 2002, as amended by Law No. 25 of 2003). The Law on Extradition stipulates that extradition shall be granted on the basis of treaties, and - in the absence of a Treaty - on the basis of "good bilateral relationship and if the interest of [Indonesia] so requires.. Similarly, the LMLACM provides that MLA, including MLA in relation to proceeds of corruption, may be granted without a treaty if there is reciprocity and a "good bilateral relationship" with the requesting state. In practice, Indonesia has extended cooperation on a non-treaty basis to many countries.

Indonesia is a State Party to the United Nations Convention against Corruption (UNCAC) (ratified by Law No. 7 of 2006), a multilateral instrument that imposes obligations on State Parties to provide cooperation on extradition and/or MLA in corruption cases. Indonesia has signed (but not yet ratified) the Southeast Asian MLAT. Indonesia has two bilateral MLA treaties in effect with members of the ADB/OECD Initiative (Australia and P.R. China) and one with a Party to the OECD Convention (Australia). Indonesia also has signed but not yet ratified an MLA treaty with another member of the Initiative (Korea). In addition, Indonesia has bilateral extradition treaties in effect with five members of the Initiative (Australia; Hong Kong, China; Malaysia; Philippines; and Thailand) and one Party to the OECD Convention (Australia). Indonesia has also signed but not yet ratified bilateral extradition treaties with Singapore and P.R. China.

Enacted on March 3, 2006, the LMLACM contains fairly detailed provisions on the grounds for extending and refusing requests for MLA, the procedure for executing requests, and the types of assistance available, including search and seizure and production orders but not the taking of evidence by video conference. The LMLACM also contains provisions on MLA regarding proceeds of crime, including the requirements and procedure for executing foreign requests to restrain or confiscate proceeds. Similarly, the Law on Extradition contains fairly detailed provisions on the procedure and requirements for extradition.

Incoming and outgoing requests for extradition shall be made in writing and transmitted through the diplomatic channel unless a treaty provides

otherwise. All MLA requests to Indonesia may be submitted through the diplomatic channel or directly to the Minister for Law and Human Rights. The Minister also prepares and sends outgoing MLA requests. All MLA requests to Indonesia must be in the language of the requesting state and/or in English accompanied by a translation in the Indonesian language. In 2002-2007, Indonesia dealt with five incoming and five outgoing extradition requests, and 13 outgoing and 60 incoming MLA requests. None of the incoming extradition and MLA requests and eight outgoing requests involved corruption cases. A few MLA requests concern money laundering.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is mandatory for extradition and optional for MLA. The requirement is conduct-based. Indonesia has not established an offense of bribery of foreign public officials, nor has it received incoming extradition or MLA requests involving this offense. Illicit enrichment is also not an offense in Indonesia *per se*; it is a crime only if it amounts to money laundering and the enrichment derives from criminal activities. Indonesia does not impose liability against legal persons for corruption. It has received several MLA requests where the target of the investigation is a legal person; whether there is dual criminality in these cases is the subject of on-going discussions.

Certain evidentiary tests must be met before Indonesia extends its cooperation, as stipulated under Article 22 of Law on Extradition and Article 28 of LMLACM. Before granting extradition or MLA, a requesting state must show sufficient evidence that an offense has been committed or a *prima facie* case. In all cases, Indonesia will attempt to resolve the problem by discussing with the foreign state.

Specialty is mandatory for incoming extradition requests, as is use limitation for incoming MLA requests. Use limitation also applies to MLA requests made under the UNCAC. To meet these requirements, the competent authority of the requesting state should provide an assurance in a sworn statement. For requests to obtain evidence or testimony, an assurance of use limitation may also be provided by a functionary or public officer in the central authority of the requesting state.

Essential interests may be a ground for denying MLA. Under the LMLACM, Indonesia will refuse to grant an MLA request that is harmful to its sovereignty, security, interests, and national law. The UNCAC also allows requests made under the Convention to be refused if the request is likely to prejudice the sovereignty,

security, *ordre public* or other essential interests of the requested state. Indonesia has never denied an MLA request because of an infringement of its essential interests.

Indonesia generally does not extradite its nationals unless it determines that the person sought ought to be tried in the requesting state, having regard to "the interest of the state, law and justice." For an Indonesian national to be extradited on this basis, the requesting state must provide an assurance of reciprocity. Prior to refusing to extradite a national, the Indonesian authorities will consult their counterparts in the requesting state. If a national is not extradited, Article 5 of Penal Code provides Indonesia with jurisdiction to prosecute the national. One case (involving homicide) in which an Indonesian national was prosecuted in lieu of extradition has been recorded since 1990.

Indonesia will also refuse extradition if the crime involved is punishable by death in the requesting state but not in Indonesia, unless the requesting state provides an assurance that the penalty will not be carried out. The requesting state must provide the assurance in a letter attached to the extradition request along with translations of the letter in the English and Indonesian languages. For MLA, the death penalty is only an optional ground for denying assistance.

Indonesia will also refuse extradition in respect of a political crime. For extradition requests made under the UNCAC, the Convention requires that corruption offenses not be considered political offenses. Under the LMLACM, MLA will be refused for a crime of "a political nature", which is defined as "a criminal act against national security as stipulated in the Penal Code."

Other grounds for denying cooperation exist. For example, Indonesia may refuse MLA if it would harm the investigation, prosecution or examination of a case in Indonesia. Likewise, extradition may be refused if Indonesia is proceeding against the person sought for the same crime. In practice, Indonesia will generally postpone its decision on whether to cooperate until the domestic proceedings have concluded. Extradition will also be refused if the person sought has been punished for the subject offense in another state, or if an Indonesian court has rendered a final judgment for the crime in question. MLA will be refused if the person has been acquitted or punished for the crime. The UNCAC prohibits Indonesia from declining to render MLA on this ground for requests made under the Convention. The LMLACM is silent on the denial of MLA because of bank secrecy. However, incoming MLA requests in corruption cases are executed by the Anti-corruption Agency the Corruption Eradication Commission (KPK). Pursuant to other legislation, the KPK may access banking records without the authorization of the Governor of the Indonesian central bank.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Minister of Law and Human Rights (MLHR; formerly the Minister of Justice) is the central authority for international cooperation in criminal matters. As such, its main function is to process incoming and outgoing requests. Outgoing requests for extradition and MLA are made by the MLHR at the request of the Attorney General or Kapolri (the Head of Police). In corruption cases, MLA may also be requested by the Chairman of the Commission for the Eradication of Corruption (KPK), Indonesia's specialized anti-corruption agency. Outgoing extradition and MLA requests are drafted by the Directorate of International Law of the MLHR and reviewed through coordination meetings among the relevant bodies which may include the KPK, police, Attorney General, MLHR and the Ministry of Foreign Affairs. Extradition requests must be transmitted to the foreign state through the diplomatic channel, while MLA requests may be sent by the MLHR.

The MLHR also processes incoming requests for extradition and MLA. Extradition requests must be sent to the MLHR through the diplomatic channel, while MLA requests may be sent directly. Upon receiving a request, the MLHR verifies that the request meets the requirements of the relevant legislation and treaty (if any). If the requirements are met, the MLHR will forward the request to the Attorney General and Kapolri for execution. The Directorate of International Law monitors outstanding incoming requests by communicating with the police or the Attorney General. All incoming requests are kept confidential.

Beyond sending and receiving requests for cooperation, the MLHR has limited contact with foreign authorities. For example, it does not hold regular meetings with its foreign counterparts to discuss mechanisms for cooperation. Nor does it liaise with other countries when providing MLA or extradition in corruption cases. The MLHR's Web site is available in the Indonesian language only and does not contain information on international cooperation.

To discharge their functions, the MLHR staff who are responsible for international cooperation are required to have law degrees and be fluent in English (oral and written). Specialized training in international cooperation has only been provided to police officers and prosecutors. For MLHR staff, expertise in international cooperation is learned mostly on the job. The MLHR does not have a separate, independent budget for international cooperation but one has been proposed.

Indonesia provides specific measures to handle urgent requests only in connection with extradition. Pursuant to the Law on Extradition, requests for

provisional arrest may be sent directly to the Kapolri or the Attorney General through the diplomatic channel, Interpol, post, or telegram. In addition, the Law on Extradition imposes some deadlines in order to expedite the extradition process, e.g., a requesting state must formally request extradition within 60 days of the provisional arrest of the person sought. According to Indonesia, requesting states sometimes encounter difficulties in meeting these deadlines because of lengthy delays in the diplomatic channel and because incomplete or illegible documentation is provided.

Recovery of Proceeds of Corruption in Criminal Proceedings

The LMLACM broadly defines "proceeds of crime" as any property derived directly from a crime (direct proceeds), as well as property converted or transformed from direct proceeds (indirect proceeds) or from other indirect proceeds. The definition also covers income, capital and other economic gains derived from direct or indirect proceeds.

To freeze proceeds of crime pursuant to a foreign request, there must be reasonable grounds to believe that an offense has been committed and that the subject assets are proceeds of the offense. Unlike some other jurisdictions in the world, Indonesia does not require evidence that proceedings have been or will be commenced in the requesting state. Direct registration of a foreign freezing order is not available.

Indonesia can also provide MLA to enforce a foreign confiscation or fine order. As with freezing, the LMLACM does not require evidence that proceedings have been or will be commenced in the requesting state, nor does it require a final foreign conviction or a foreign confiscation order. Direct registration of a foreign confiscation order is also not available.

Indonesia undertakes to repatriate confiscated proceeds of corruption on a mandatory basis, which goes beyond the requirements of Article 57 of the UNCAC. The LMLACM, however, does not mandate repatriation. Article 57 of the LMLACM states that "The Minister may enter into an agreement with a foreign state to obtain shares on the seized properties ... in Indonesia, as the result of an auction taken in Indonesia based on a seizure decision requested by the foreign state." Also relevant may be Article 46(1) of the Penal code (Law No. 8 of 1981), which states that "goods on which seizure is imposed are returned to the person or to those from whom the goods are seized, or to the person or to those most entitled. ... If the case has been decided, then the goods on which seizure is imposed will be returned to the person or to those mentioned in the judgment."

Conclusion

Indonesia has a rather limited network of bilateral extradition and MLA treaties. However, by ratifying the UNCAC and permitting cooperation without a treaty, Indonesia has a sound and wide basis for international cooperation in corruption cases. Adopted recently, the Law on Mutual Legal Assistance covers most major forms of assistance, including MLA in relation to proceeds of crime. The law also contains many features for enhancing assistance, such as making dual criminality an optional requirement and allowing communication outside the diplomatic channel. Proceeds of corruption may be repatriated to a foreign state. To ensure the legal framework functions smoothly in practice, Indonesia has designated a central authority to deal with all incoming and outgoing extradition and MLA requests.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Ratification of the Southeast Asian MLAT could significantly expand Indonesia's treaty framework for cooperation. The LMLACM could also be strengthened by permitting foreign requests to take evidence via video conference. To expedite the extradition process, Indonesia could consider amending the Law on Extradition to allow a person sought to waive his/her right to a judicial hearing and consent to being surrendered.

Legal Preconditions for Extradition and MLA

Indonesia may wish to clarify its application of dual criminality to incoming requests in cases involving bribery of foreign public officials, illicit enrichment, or corruption perpetrated by a legal person. While these are not offenses in Indonesia *per se*, Indonesia may wish to take steps to ensure that it is able to cooperate in these cases.

Even though Article 5 of the Penal Code provides nationality jurisdiction to prosecute, Indonesia, under Article 7 of the Law on Extradition, will not extradite its nationals unless it determines that the person sought ought to be tried in the requesting state, having regard to "the interest of the state, law and justice." Against this backdrop and in line with recent international standards on corruption cases (e.g., Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC), Indonesia is obliged to submit the case without undue delay to its

competent authorities for the purpose of prosecution whenever request of extradition is refused solely because of nationality.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The available statistics indicate that the number of extradition and MLA cases appears quite low, while the proportion of outstanding requests seems relatively high. Indonesia may wish to inquire why this is the case. Indonesia could also take greater advantage of the MLHR's expertise as a central authority by expanding its role. For instance, the MLHR could offer its expertise to foreign states that are drafting requests to Indonesia. Also helpful to foreign states would be a Web site in English that is dedicated to extradition and MLA, with at least information on the requirements for cooperation, the relevant legislation and treaties, and contact information. In addition, the MLHR could develop a system of monitoring all outstanding requests to ensure cases are not lost in the system. It could also take a more active role in liaising with foreign authorities on case-specific and general matters. More training on international cooperation for MLHR staff could also be useful.

Indonesia could also consider adopting specific procedures to deal with urgent requests. For instance, it could consider allowing requests for provisional arrest and requests for urgent MLA to be transmitted electronically or via facsimile. As well, Indonesia could consider accepting urgent requests for MLA that are made orally, with subsequent confirmation in writing (see UNCAC Article 46(14)).

Indonesia may wish to revisit its practice concerning assurances provided by foreign states. As noted above, Indonesia refuses cooperation unless the competent authority of a requesting state provides an assurance of specialty protection (for extradition) or use limitation (for MLA) in a sworn statement. It also refuses extradition in certain death penalty cases unless the judiciary of the requesting state provides an assurance that the penalty will not be carried out. The assurance should be in a sworn statement preferably made by the judge hearing the case and the head of the supreme court of the requesting state. Indonesia could consider accepting assurances that are provided by the diplomatic or prosecutorial authorities of the requesting state, which is the approach in many other jurisdictions. This could be particularly important if the judicial authorities of a requesting state are prohibited by their laws and constitutions from providing such sworn assurances.

Recovery of Proceeds of Corruption in Criminal Proceedings

With regard to the recovery of proceeds of corruption in criminal proceedings, Article 57 of the LMLACM stipulates that the MLHR may conclude an agreement with foreign countries in order to recover the costs of confiscation and the sharing of confiscated assets. The provision applies to both property in foreign countries viz. confiscation orders requested by the MLHR and property in Indonesia as viz. confiscation orders requested by a foreign state.

Information for Seeking Assistance

Central Authority

For MLA under the Law on Mutual Legal Assistance in Criminal Matters:

Mrs. Prijatni SAWADI
Director for International Law
Directorate of International Law
Directorate General of General Administration of Law
Department of Law and Human Rights of the Republic of Indonesia
Tel: +62 21 5221619
Fax: +62 21 5221619
rismaindriyani@yahoo.com
www.depkmham.go.id

For extradition: the Minister of Law and Human Rights through the diplomatic channel.

Diplomatic channel:

Mr. Mirza Nurhidayat
Deputy Director for Political and Security Treaties
Directorate of Political, Security and Territorial Treaties
Directorate General of Law and International Treaties
Department of Foreign Affairs of the Republic of Indonesia
Tel: +62 21 3849618
Fax: +62 21 3524154
mirzanurhidayat@gmail.com
www.deplu.go.id

Relevant Laws and Documentation

Law on Extradition (Law No. 1 of 1979)

Law on Mutual Legal Assistance in Criminal Matters (Law No. 1 of 2006)

Law on the Commission for the Eradication of Criminal Acts of Corruption (Law No. 30 of 2002)

Japan

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition and MLA in Japan are primarily governed by the Law of Extradition (Law No. 68 of 1953, as amended) and the Law for International Assistance in Investigation and Other Related Matters (Law No. 69 of 1980, as amended) (LIAIORM). The Law of Extradition and the LIAIORM apply to all extradition and MLA proceedings subject to the provisions of a relevant treaty. Therefore, in the absence of a treaty, Japan may provide extradition and MLA if a requesting state provides an assurance of reciprocity.

Japan is a party to one multilateral instrument that is applicable to MLA in corruption cases, namely the OECD Convention. The OECD Convention is also the only multilateral instrument that is applicable to extradition in corruption cases and to which Japan is a party. Japan has also signed the UNCAC and the UNTOC but not yet ratified these instruments. Bilateral extradition and MLA treaties are in force with the United States (a Party to the OECD Convention) and Korea (a member of the Initiative and a Party to the OECD Convention)..

Both the Law of Extradition and the LIAIORM contain a detailed description of the procedure for executing incoming requests. The LIAIORM specifically provides for various types of assistance including search and seizure, and the taking of evidence. There are no provisions for consent extraditions or the taking of evidence via video-conference, however. The LIAIORM also does not contain provisions that deal specifically with proceeds of crime. Accordingly, MLA requests involving proceeds are dealt with under Japan's domestic money laundering legislation, the Law for Punishment of Organized Crimes, Control of Proceeds and Other Matters (Law No. 136 of 1999, as amended). In addition, letters rogatory requests to take evidence are governed by the Law on Judicial Aid to Be Given at the Request of Foreign Courts (Law No. 63 of 1905, as amended). Extradition and MLA treaties concluded by the executive government must receive the approval of the Diet (parliament) before they become operative in the domestic legal order.

In 2001-2005, Japan made and received 12 requests (6 outgoing, 6 incoming) for extradition. Over the same period, Japan averaged 33 incoming and 25 outgoing MLA requests annually. (These statistics refer to requests that were executed; statistics on rejected requests were not available.) Unless a treaty provides otherwise, all extradition and MLA requests to and from Japan

are transmitted through the diplomatic channel. All incoming requests are then forwarded by the Ministry of Foreign Affairs (MoFA) to the Ministry of Justice (MoJ) for execution (unless the request does not comply with a relevant treaty or if there is no reciprocity).

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Severity and dual criminality are mandatory preconditions for extradition from Japan, unless an applicable treaty specifies otherwise. The definition of dual criminality is based on conduct. MLA is available only when the underlying conduct is also an offense in Japan if it was committed there. Extradition is available only for offenses that are punishable by death, life or at least three years' imprisonment in the requesting state and Japan. Since Japan has criminalized bribery of foreign public officials, difficulties in providing cooperation in such cases are not expected to be encountered. On the other hand, Japan does not have an offense of illicit enrichment, nor has it received a request based on this offense. If Japan receives such a request, it will consider whether the conduct underlying the request constitutes another offense. Liability of legal persons for corruption offenses, except for bribery of foreign public officials, also does not exist in Japan. If it receives an MLA request in a case where a legal person is the target of an investigation, it will ask the requesting state to change the target of the investigation to a natural person, even if the identity of the natural person is not known.

Japan imposes certain evidentiary tests for cooperation. For incoming extradition requests, there must be probable cause to suspect that the person sought committed the offense underlying the extradition request. For incoming MLA requests, the LIAIORM does not specifically require evidence of the underlying offense for most types of assistance. However, search, seizure or compulsory inspection of evidence is available only if such a measure is "deemed to be necessary". For requests to examine a witness, the requesting state must demonstrate in writing that the evidence sought is "indispensable" to the investigation. Japanese authorities indicate that "deemed to be necessary" and "indispensable" are roughly equivalent.

Japan requires a requesting state to provide an assurance of specialty (for extradition) and use limitation (for MLA). Despite this requirement, Japan does not require a requesting state to provide an express assurance because it deems these matters to be generally-accepted principles in extradition and MLA. The Law of Extradition and the LIAIORM also do not expressly address these matters.

Japan may deny cooperation on several grounds. First, in cases of double jeopardy or when there is an on-going domestic investigation. Unless a treaty provides otherwise, the Extradition Law prohibits extradition in cases where there is a pending prosecution or a final conviction in Japan for the same act which underlies the extradition request. For MLA, the LIAIORM does not have a specific provision on this issue. Nevertheless, the Minister of Justice has discretion to deny MLA on these grounds, having regard to factors such as whether a domestic investigation or proceeding would be jeopardized.

Japan also considers essential interests as a discretionary ground for denying extradition and MLA. However, the Law of Extradition and the LIAIORM again do not expressly address the issue. In the absence of an applicable treaty provision, Japan will consider this issue on a case-by-case basis. Japan has not denied an extradition or MLA request on this basis. Extradition and MLA are also denied in cases involving political offenses. There is no precise definition of the concept, but Japan distinguishes between pure political offenses and relative political offenses; cooperation is denied only for the former. The issue has arisen in at least one extradition case in which a court extradited a fugitive after ruling that hijacking is not a political offense.

The Law of Extradition also prohibits the extradition of Japanese nationals (unless a treaty states otherwise) but it is silent on whether a national would be prosecuted in lieu of extradition. In practice, a national may be prosecuted in lieu of extradition if Japan has jurisdiction to prosecute. However, no such case has arisen. There are no legislative provisions to allow a national to be extradited for trial and returned to Japan to serve a sentence.

The LIAIORM does not address whether Japan may deny MLA on grounds of bank secrecy. The Law of Extradition and the LIAIORM also do not expressly deal with extradition and MLA for offenses committed wholly or partly in Japan, nor do they address cases in which death, torture or cruel and unusual punishment may be imposed. Nevertheless, the Minister of Justice has discretion to deny cooperation, having regard to factors such as human rights concerns and the proportionality between the crime and the penalty. Japan may cooperate in death penalty cases if the judicial or diplomatic authorities of the requesting state provide an assurance that the penalty will not be imposed or carried out.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

All incoming extradition and MLA requests must be transmitted to and from Japan through the diplomatic channel. If an incoming request is made pursuant

to a treaty, the MoFA will verify whether the form of the request complies with the treaty. For other requests, the MoFA will ascertain whether the requesting state has provided an assurance of reciprocity. If these formal requirements are met, the MoFA will forward the request to the International Affairs Division of the MoJ (IAD). The IAD's responsibilities are to process incoming requests, and to assist foreign states in identifying the requirements for cooperation.

The IAD's primary function is to deal with incoming extradition and MLA requests. Upon receiving an incoming extradition request, the IAD will determine whether the person sought clearly cannot be surrendered. For requests based on treaties, the IAD will also consider whether Japan would deny extradition based on the discretionary grounds in the relevant treaty. If the IAD determines that the case should proceed, then it will forward the request to the Superintending Prosecutor of the Tokyo High Public Prosecutors' Office. The prosecutors will seek the arrest of the person sought and bring him/her to the Tokyo High Court which will examine of the case. If the High Court determines that the request complies with the Law of Extradition, then it will order the person sought to be committed into custody. The matter then reverts to the IAD to decide whether the person sought should be surrendered, although the Law of Extradition does not indicate what factors are relevant to this decision. For incoming MLA requests, the IAD will determine whether any of the grounds for denying assistance in the LIAIORM apply. If none of the grounds apply, the IAD will forward the request to the appropriate prosecutorial or law enforcement body for execution, after which the IAD will monitor the status of the case. All incoming requests are kept confidential.

The IAD also assists foreign authorities in drafting requests for extradition or MLA. In addition to providing advice in specific cases, the IAD maintains a Web site in English that describes the extradition and MLA procedure and the requirements for cooperation. The Web site also contains contact information and the relevant legislation. To carry out these functions, the IAD is staffed with five qualified attorneys and additional experts in financial policy and investigation. Competence in international cooperation is acquired mainly through on-the-job training. The IAD provides lectures to prosecutors on international cooperation in criminal matters.

In urgent cases, requests for MLA may be sent to Japan outside the diplomatic channel. MLA requests may also be transmitted through Interpol to the National Public Safety Commission for execution. There are no special provisions for requests for provisional arrest; all such requests must be sent to Japan through the diplomatic channel.

Outgoing requests from Japan are principally prepared by the investigators and prosecutors who are involved in the case. The relevant central organizations of each law enforcement body (such as the MoJ and the National Police Agency) may support the preparation of a request. Translators from the MoFA can also assist if necessary. Once a request has been drafted, it is forwarded to the MoFA for transmission to the requested state via the diplomatic channel.

Liaison with foreign states on incoming and outgoing requests is performed through Japanese embassies and other overseas diplomatic missions. These overseas diplomatic representations generally include qualified attorneys that have been seconded to the MoFA.

Limited appeals are available to challenge decisions in the extradition and MLA process. For extradition, the person sought cannot appeal a judicial order of committal, but he/she may appeal the surrender decision of the Minister of Justice. For MLA, the person against whom a compulsory measure has been taken (e.g., search and seizure) may object to the court.

The Law of Extradition imposes some time limits in order to expedite the extradition process. If a person sought is in custody, a court must decide whether to order committal within two months of the person's arrest. After a court orders committal, the government has only ten days to decide whether to order surrender, and thereafter only one month to effect surrender.

Recovery of Proceeds of Corruption in Criminal Proceedings

To execute incoming requests in relation to proceeds of corruption, Japan must rely on its domestic legislation on money laundering and proceeds of crime, such as the Anti-Organized Crime Law. According to Japanese jurisprudence, the definition of proceeds covers indirect proceeds, i.e. proceeds derived or converted from direct proceeds.

To enforce a foreign freezing or confiscation order, an application to a Japanese court for a second order is necessary; direct registration of a foreign order is not available. In order to enforce a foreign freezing order, there must be reasonable grounds to believe that proceedings will be instituted. To enforce a confiscation order, there must be proof that the subject property was acquired in respect of an offense, that a court in the requesting state has ordered confiscation, and that the order is final.

On 1 December 2006, legislation came into force which allows Japan to repatriate assets to a foreign state on a case-by-case basis and upon an assurance of reciprocity by the requesting state.

Conclusion

Japan's system for international cooperation in criminal matters is based almost entirely on legislation rather than treaties. All foreign countries are eligible for assistance, subject to reciprocity. To assist foreign states, Japan has created an informative Web page that is dedicated to extradition and MLA and which includes links to relevant legislation, a fairly detailed description of the procedure, and contact information. The Law of Extradition imposes fairly short deadlines for an extradition judge to decide whether to order committal and for the government to decide whether to surrender the person sought.

Recommendations for a Way Forward

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Expansion of its network of extradition and MLA treaties could strengthen Japan's ability to seek and provide international cooperation in corruption cases. Ratifying the bilateral and multilateral instruments that have already been signed, such as the UNCAC, and the MLA treaties with Korea and the United States would expand this network, as would concluding more bilateral extradition and MLA treaties.

Japan could consider updating the Law of Extradition and the LIAIORM, which were originally enacted in 1953 and 1980 respectively and have not been significantly revised since. Such revised legislation might include more modern features found in similar legislation in other jurisdictions, such as extradition by consent, production orders, the taking of evidence via video conference, enforcement of foreign fines, and service of documents. Other means to reinforce the legal framework could include codifying in the legislation the conditions for cooperation, such as specialty, use limitation, bank secrecy, and when death, torture or cruel and unusual punishment may be imposed in the requesting state. Clearly stipulating these matters in the legislation could add transparency and accountability to the process. It could also assist foreign states in preparing requests to Japan.

Legal Preconditions for Extradition and MLA

Extradition from Japan is available only for offenses that are punishable by death, life or at least three years' imprisonment in the requesting state and Japan. The threshold of three years' imprisonment is relatively high; many

bilateral treaties and extradition legislation in other jurisdictions set the threshold at only one year. Japan may therefore wish to consider whether this threshold prevents extradition in some corruption cases. As well, Japan does not extradite its nationals but has discretion to prosecute them in lieu of extradition. In line with Article 44(11) of the UNCAC and Article 10(3) of the OECD Convention, consideration could be given to making this provision mandatory. Ensuring that criminal law provides for jurisdiction to prosecute all such cases could be another beneficial step.

As for MLA, Japan will accede to a request for search, seizure, or compulsory inspection of evidence only if such a measure is “deemed to be necessary”. Similarly, when requesting to examine a witness, a requesting state must demonstrate in writing that the evidence sought is “indispensable” to the investigation. Most bilateral and multilateral international instruments generally impose a lower threshold, such as reasonable grounds to believe that relevant evidence will be found (e.g., Article 18(1) of the Southeast Asian MLAT). Japan could consider following the example of these instruments and reducing the threshold in the LIAIORM.

To further enhance cooperation, Japan may wish to eliminate the dual criminality requirement for MLA or reduce it to a discretionary requirement. Alternatively, the requirement of dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents, could be contemplated. For incoming MLA requests in investigations of legal persons, Japan will ask the requesting state to change the target of the investigation to a natural person who perpetrated the crime. Japan may wish to consider whether this approach is adequate for dealing with cases in which the perpetrator cannot be prosecuted (e.g., because he/she has died).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

In terms of general practice, statistics on international cooperation indicate that Japan has a relatively low level of practice despite the size of its population and economy. Close examination into why this is the case may be a useful exercise. The impact of IAD’s expertise and experience in international cooperation could be maximized by giving the IAD more active roles in liaising with foreign authorities and in preparing and monitoring outgoing requests. Assigning additional liaison personnel at the police and prosecutorial level could also be helpful. Finally, Japan could consider establishing additional measures for urgent requests, such as allowing foreign states to transmit requests for provisional

arrest outside the diplomatic channel, and accepting oral MLA requests that are subsequently confirmed in writing (see UNCAC Article 46(14)).

Recovery of Proceeds of Corruption in Criminal Proceedings

Domestic legislation on proceeds of crime is now used to deal with foreign requests, presumably because the legislation covers proceeds of crimes that were committed outside Japan. However, such legislation is not designed to deal with foreign requests and hence does not deal with issues that uniquely arise in such cases, e.g., grounds of denying assistance, reciprocity, use limitation, channels of communication with the foreign state etc. For these reasons, enacting legislation that deals specifically with MLA requests to trace, freeze, and confiscate proceeds of crime may be a constructive means to address this matter. Furthermore, if foreign forfeiture and confiscation orders could be enforced by direct registration and if there are special measures to deal with urgent requests to freeze assets (e.g., the use of faxed copies of foreign orders), then Japan could enhance its ability to provide assistance.

Information for Seeking Assistance

Central Authority

For MLA - Via the diplomatic channel to:

Ministry of Justice
International Affairs Division
1-1-1 Kasumigaseki, Chiyoda-ku, Tokyo 100-8977, Japan
Tel: +81 3 3592 7049
Fax: +81 3 3592 7063
infojp@moj.go.jp
www.moj.go.jp

For extradition under the Japan-Korea treaty and extradition without treaties: the diplomatic channel.

Letters rogatory requests: the diplomatic channel.

Relevant Laws and Documentation

The Law of Extradition, the Law for International Assistance in Investigation and Other Related Matters, and additional information on the extradition and MLA process in Japan: www.moj.go.jp/ENGLISH/information/ic-01.html

Kazakhstan

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Kazakhstan are primarily governed by Chapter 55 of the Criminal Procedure Code (Law No. 206 of 1997) (CPC). The Chapter applies to all incoming and outgoing extradition and MLA requests subject to an applicable treaty. It also applies to requests that are made in the absence of a treaty but on the basis of reciprocity.

Kazakhstan is party to two multilateral conventions that may provide extradition and MLA in corruption cases, namely, the Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters of the Commonwealth of Independent States dated 22 January 1993 and 7 October 2002. Kazakhstan has bilateral MLA treaties in force with 13 countries, including 5 members of the Initiative (P.R. China; India; Kyrgyzstan; Mongolia; and Pakistan) and 1 Party to the OECD Convention (Turkey). Kazakhstan also has bilateral extradition treaties with 3 members of the Initiative (P.R. China; Kyrgyzstan; and Mongolia).

The provisions on extradition and MLA in Chapter 55 are fairly recent and detailed, describing the procedures for processing incoming and outgoing requests and several grounds for denying cooperation. However, the Chapter does not prescribe how specific types of MLA are provided, e.g., the preconditions and procedure for search and seizure or the taking of evidence from a witness. Instead, the Chapter refers to the provisions in the general part of the CPC on the corresponding measures in domestic investigations. Chapter 55 also does not contain provisions dealing specifically with proceeds of crime.

Limited statistics indicate that the level of extradition practice in Kazakhstan is quite high. In 2004, approximately 100 and 150 persons were extradited to and from Kazakhstan respectively. Approximately 95% of the extradition case work involves CIS countries, including 80% with the Russian Federation. Information was not available on the number MLA requests or the proportion of case work relating to corruption offenses. Requests to Kazakhstan must be in the Kazakh or Russian language. Extradition requests may be transmitted directly to the Procurator General, while MLA requests may be sent to any court, prosecutor, investigator or inquest authority.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for extradition from Kazakhstan only; it is not required for MLA. The definition of dual criminality is conduct-based. Bribery of a foreign public official (other than an official of an international organization) is an offense in Kazakhstan; incoming extradition requests involving this offense will therefore likely satisfy the dual criminality requirement. On the other hand, Kazakhstan has not created an offense of illicit enrichment, and it is not clear how it would handle incoming extradition requests involving this offense. Kazakhstan also does not impose criminal liability against legal persons. However, dual criminality is not required for MLA and therefore should not pose any obstacles in cases where a legal person is the target of an investigation or prosecution.

Evidentiary tests apply to search and seizure but not less-coercive forms of MLA. A search warrant may be issued only if there is sufficient information for believing that the evidence sought may be found at a specified location. Evidentiary tests also do not apply to incoming extradition requests; requesting states need only specify the circumstances of the offense.

The CPC specifically provides specialty protection to persons extradited to Kazakhstan but does not expressly require a reciprocal undertaking by foreign states that request extradition. It also does not require a foreign state to undertake to use evidence obtained through MLA only in the investigation or prosecution referred to in the request.

Regarding grounds for denying cooperation, Kazakhstan will deny extradition if the person sought has been sentenced in Kazakhstan for the same offense, or if proceedings in Kazakhstan against the person sought for the same offense have been terminated. It will also deny extradition if the underlying offense was committed in Kazakhstan and was aimed against Kazakhstan's interests. Kazakhstan will reject an MLA request that infringes its essential interests, a concept that is defined relatively narrowly as its sovereignty or security. The Constitution prohibits the extradition of Kazakh nationals. In lieu of extradition of a national, Kazakhstan will submit the case to its Procurator General for prosecution at the request of the foreign state. The CPC does not refer to the death penalty, bank secrecy or political offense as grounds for denying cooperation. However, extradition will be denied if Kazakhstan has granted political asylum to the person sought.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

There is no central authority for extradition and MLA in Kazakhstan. Outgoing MLA requests arising from an investigation and outgoing extradition requests are prepared by the investigator or prosecutor in charge of the case and submitted to the Procurator General. If the Procurator General approves the request, he will transmit it to the competent authority in the foreign state. Outgoing letters rogatory requests for MLA are prepared by the courts and submitted to the Minister of Justice, who in turn forwards the request to the Ministry of Foreign Affairs for transmission through the diplomatic channel. Incoming extradition requests may be transmitted directly to the Procurator General, while incoming MLA requests may be sent to any court, prosecutor, investigator, or inquest authority.

Unlike most jurisdictions in the world, extradition from Kazakhstan does not entail a court hearing. Upon receiving a request for extradition, the Procurator General examines whether the request meets the requirements in the CPC and an applicable treaty. If so, the Procurator General orders the person sought to be arrested. After the arrest is effected, the person sought is surrendered to the requesting state. Judicial review of the decisions of the Procurator General is not available.

There are provisions for dealing with requests for provisional arrest but not urgent MLA requests. A foreign state may send a request for provisional arrest to any Kazakh prosecutor by mail, telegraph, telex, or fax. If the prosecutor decides that there are sufficient grounds supporting the request, he/she will arrest the person sought and notify the Procurator General thereafter. A person may also be provisionally arrested without a request by a foreign state and detained for three days if there are grounds to believe that the person has committed an extraditable offense.

Recovery of Proceeds of Corruption in Criminal Proceedings

Kazakh legislation does not clearly provide for tracing, seizing, confiscating and repatriating proceeds of crime pursuant to a foreign request. As noted above, Chapter 55 of the CPC does not contain any provisions that deal with MLA relating to proceeds of crime; it merely states that the general rules of the CPC are applicable. The CPC permits the seizure of property that may be the subject of subsequent confiscation and mandatory confiscation of the tools of a crime. Confiscation of other types of property (e.g., proceeds of a crime) is found in other laws such as the Criminal Code, not the CPC. It is thus unclear whether

these other types of property may be confiscated pursuant to a foreign request. Finally, there are no provisions in the CPC dealing with the repatriation of proceeds to a foreign state.

Conclusion

Kazakhstan has passed legislation specifically dealing with international cooperation in criminal matters that is fairly detailed. It has bilateral and multilateral extradition and MLA relations with many countries in Asia. In the absence of a treaty, extradition and MLA are available on the basis of reciprocity. Dual criminality not required for MLA, thereby enhancing Kazakhstan's ability to cooperate. Although Kazakhstan is prohibited by its constitution to extradite its nationals, the CPC requires prosecution in lieu of extradition upon the demand of the requesting state. Extradition and MLA requests can often be sent outside the diplomatic channel, thereby avoiding the delays frequently associated with this mode of communication.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

As an emerging major player in the energy industry, Kazakhstan may wish to consider establishing more treaty-based extradition and MLA relations in corruption cases, particularly with major industrialized countries. Signing and ratifying the UNCAC could greatly ameliorate the situation. As well, Kazakhstan could consider expanding Chapter 55 of the CPC and create a complete, standalone code on international cooperation without reference to other parts of the CPC. A self-contained code would add certainty and transparency to the process. The expanded legislation could enumerate the assistance available and conditions for cooperation, as well as additional measures such as the taking of evidence by video conference.

Legal Preconditions for Extradition and MLA

Chapter 55 of the CPC is silent on the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Kazakhstan could consider codifying a similar prohibition in the CPC.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

As Kazakhstan does not have a central authority to handle all extradition and MLA requests, the Procurator General deals with most requests. Letters rogatory requests are prepared by the courts and transmitted through the Ministry of Foreign Affairs. Incoming MLA requests may also be sent to any court, prosecutor, investigator or inquest authority. The designation of a single authority to handle (or at least monitor) all requests could enhance coordination among different agencies, avoid duplication and reduce delays in executing requests. It could also assist foreign states by identifying a visible point of contact for seeking assistance and following up outstanding requests.

The CPC contains provisions dealing with urgent requests for provisional arrest. Kazakhstan could consider extending these provisions to urgent MLA requests, such as by accepting urgent requests via any device that produces a writing or oral requests with subsequent written confirmation (e.g., UNCAC Article 46(14)). To further enhance international cooperation, Kazakhstan could also consider creating an English Web page dedicated to international cooperation that contains the relevant legislation and treaties, a description of the procedure for cooperation, contact information, and sample documents. Such a Web page could be particularly useful for foreign states that seek cooperation in the absence of a treaty.

Recovery of Proceeds of Corruption in Criminal Proceedings

Kazakhstan could consider adding to Chapter 55 of the CPC express provisions on tracing, seizing and confiscating proceeds of crime pursuant to foreign requests. These provisions should expressly cover a wide range of property, including the proceeds of corruption, property the value of which corresponds to that of such proceeds, and property, equipment or other instrumentalities used in or destined for use in corruption offenses. Articles 31(1) and 55(1) of the UNCAC could be of guidance, even if Kazakhstan is not a State Party to the Convention.

To further enhance cooperation, Kazakhstan could also consider permitting the enforcement of foreign orders by direct registration along the lines of Article 55(1)(b) of the UNCAC. Also helpful could be measures to deal with urgent requests, such as allowing registration of faxed orders with subsequent filing of an authenticated version. Furthermore, Kazakhstan may wish to ensure that MLA relating to proceeds of corruption is available even where a person has not been convicted in the requesting state (e.g., see Article 54(1)(c) of the UNCAC)). Finally, Kazakhstan could consider codifying procedures for

repatriating forfeited property to a foreign state in a manner consistent with international standards, such as those embodied in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For Extradition:

Office of the Procurator General of the Republic of Kazakhstan
31, pr. Pobedy
Astana 473000, Kazakhstan

For MLA: None

Relevant Laws and Documentation

Criminal Procedure Code (Law No. 206 of 1997), Chapter 55

Kazakhstan: Country and Monitoring Reports, OECD Anti-Corruption Network for Eastern Europe and Central Asia (2004-2006):
www.oecd.org/document/17/0,2340,en_36595778_36595861_37187921_1_1_1_1,00.html

Republic of Kazakhstan: Financial System Stability Assessment – Update including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision and Anti-Money Laundering and Combating the Financing of Terrorism, IMF (2004): www.imf.org/external/pubs/cat/longres.cfm?sk=17663.0

Korea

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Korea are principally governed by treaties, the Extradition Act, Act on International Judicial Mutual Assistance in Criminal Matters (AIJMACM), and Proceeds of Crime Act (POCA). Extradition and MLA are available in the absence of a treaty on the basis of reciprocity.

Korea is party to one multilateral instrument that is applicable to extradition and MLA in corruption cases, namely, the OECD Convention. Korea has signed but has not yet ratified the UNCAC and the UNTOC. Korea has bilateral extradition treaties in force with 21 countries, including 9 members of the ADB/OECD Initiative (Australia; P.R. China; Hong Kong, China; India; Japan; Mongolia; Philippines; Thailand; and Vietnam) and 10 Parties to the OECD Convention (Argentina; Australia; Brazil; Canada; Chile; Japan; Mexico; New Zealand; Spain; and United States). Treaties have been signed but are not in force with Indonesia and Kazakhstan, two members of the ADB/OECD Initiative. Korea is considering joining the European Convention on Extradition of the Council of Europe.

Korea has also signed 22 bilateral MLA treaties, 17 of which in force, including 8 with members of the Initiative (Australia; P.R. China; Hong Kong, China; India; Japan; Mongolia; Thailand; and Vietnam) and 8 with Parties to the OECD Convention (Australia; Brazil; Canada; France; Japan; Mexico; New Zealand; and United States). MLA treaties with Indonesia, Kazakhstan, the Philippines (three members of the Initiative) and Belgium (a Party to the OECD Convention) have been signed but are not yet in force.

The Extradition Act, the AIJMACM, and the POCA describe the procedure for executing requests, grounds for denying assistance and the types of assistance available, such as search and seizure, production orders, and MLA relating to proceeds of crime. All extradition and MLA requests should be sent to the Ministry of Justice via the diplomatic channel unless a treaty provides otherwise. In case of urgency, the AIJMACM allows the Minister of Justice to directly send or receive MLA requests with the approval of the Minister of Foreign Affairs and Trade.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is mandatory for extradition and discretionary for MLA, unless an applicable treaty provides otherwise. An offense is extraditable if it is punishable by death or at least one year's imprisonment under the laws of Korea and the requesting state. Korea has established an offense of bribery of foreign public officials; requests involving this offense will therefore more likely have dual criminality. The OECD Convention also deems extradition requests made under the Convention to have dual criminality. On the other hand, illicit enrichment is not an offense in Korea; it is not clear whether dual criminality would prevent MLA in cases involving this offense. Korea does not impose liability against legal persons for corruption (except bribery of foreign public officials). It is therefore also unclear whether dual criminality would impede MLA when a legal person is the target of a corruption investigation not involving bribery of foreign public officials.

Evidentiary tests may have to be met before Korea cooperates. The AIJMACM does not prescribe evidentiary thresholds for rendering assistance, but an applicable treaty may do so. For extradition, there must be "proper reason to suspect" that the person sought has committed an extraditable crime. The Extradition Act allows a court to examine a witness and to order an appraisal, interpretation or translation. Additional regulations allow the Chief Judge of the Supreme Court to order the parties to the proceedings to submit additional materials.

Specialty is mandatory for extradition from Korea. The Extradition Act, however, does not stipulate the form in which a specialty assurance must be made, nor does it identify the body(s) that may make the assurance. Regarding MLA, an applicable treaty (but not the AIJMACM) may require a foreign state to restrict the use of evidence to the case referred to in the request.

Korea will refuse extradition and MLA if the case involves an offense of a political nature, or if the request was made for the purpose of prosecuting a person for such an offense. Under the Extradition Act (but not the AIJMACM), a political offense does not include a crime for which Korea has jurisdiction to prosecute or an obligation to extradite under a multilateral treaty.

Extradition and MLA may also be affected by concurrent proceedings. Korea will refuse extradition if the person sought is being tried in Korea for the same crime. Refusal is discretionary if the person sought has been punished in a third state for the offense. Korea may also postpone MLA if it is conducting its own investigation or proceedings regarding the same offense.

Korea may deny cooperation on other grounds. Korea may refuse to extradite its nationals. An applicable treaty (but not the Extradition Act) may require Korea to prosecute its nationals in lieu of extradition. Extradition may also be denied if the offense was committed in Korea (which is to be determined via negotiations with the requesting state) or if surrender of the person is "inhuman". Finally, Korea may refuse MLA that is detrimental to its sovereignty, national security, public peace and order, or public morals.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Ministry of Justice is the central authority for international cooperation in legal affairs in Korea. The AIJMACM requires all incoming MLA requests to be transmitted through the diplomatic channel, except in urgent cases or if an applicable treaty provides otherwise. Requests must be in writing. Upon receiving an incoming request, the Ministry determines whether it is "reasonable to comply with the request". If so, the Ministry forwards the request to an appropriate agency for execution. Evidence gathered pursuant to the request is sent by the executing agency to the Ministry and then forwarded to the requesting state via the diplomatic channel or a channel stipulated in an applicable treaty.

Incoming extradition requests are received from the diplomatic channel and provided to the Ministry of Justice. The Ministry determines whether the request complies with an applicable treaty and whether it is reasonable to extradite the person sought. The Ministry then forwards the case to the Seoul High Public Prosecutor's Office which will issue a warrant for the person's arrest. Once the person is arrested, the prosecutor must seek an extradition review before the Seoul Appellate Court within three days. The Court must in turn commence the review without delay and determine whether extradition is "lawful" and "possible". If the person is in custody during the review, then the Court must render its decision within two months from the date of detention. The person may consent to extradition, in which case the Court must render its decision without delay. If the Court finds in favor of extradition, the Minister of Justice will further consider whether surrender should be refused in order to protect Korea's interests. If the Minister orders surrender, the person must be removed from Korea within 30 days.

As for outgoing requests, the Minister of Justice has sole authority to seek extradition and MLA from foreign states. Requests are prepared by the prosecutor in charge of the case and sent to the Minister for approval. Requests must be sent via the diplomatic channel except in urgent cases or if an applicable treaty provides otherwise.

In urgent cases, a foreign state may seek the provisional arrest of a person sought under the Extradition Act. The Act requires requests to be in writing and sent via the diplomatic channel (though bilateral treaties usually allow transmission outside the diplomatic channel). As noted above, urgent incoming and outgoing MLA requests may be sent directly to and from the Ministry of Justice outside the diplomatic channel with the approval of the Minister of Foreign Affairs and Trade.

Cooperation may be available at the law enforcement level outside formal MLA channels. The AIJMACM authorizes the Ministry of Government Administration and Home Affairs to seek and provide cooperation via Interpol. Available assistance includes exchange of information, identification of suspects, and investigative steps that fall outside the formal MLA process.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA to identify and trace proceeds of crime (including corruption) is provided under the general provisions of the AIJMACM. The procedures, prerequisites, types of assistance (e.g., search and seizure) and grounds of denial that are described above apply equally to this context.

Foreign requests to freeze or confiscate proceeds of crime are governed by the Proceeds of Crime Act (POCA). In the absence of a treaty, MLA is available on the basis of reciprocity. Dual criminality may be required, i.e. the offense underlying the request must, in both Korea and the requesting state, constitute money laundering or an offense listed in the POCA. Corruption offenses that are listed in the POCA include receiving or soliciting a bribe (i.e. passive bribery) by a Korean official, and giving or offering a bribe (i.e. active bribery) to a foreign official. The property in question must be subject to a final freezing or confiscation order issued by a foreign court. It should be noted that the POCA does not incorporate the provisions of the AIJMACM. In other words, the grounds of denial, prerequisites and procedures under the AIJMACM are inapplicable. In order to freeze or confiscate funds in a bank account, the requesting state must provide full details of the account, e.g., account number, location of the bank etc.

The POCA does not provide for asset sharing with a foreign state.

Conclusion

Korea has a rather extensive extradition and MLA treaty network that covers several of the world's major economies. Cooperation may also be

provided without a treaty on the basis of reciprocity. Korea has also enacted specific laws to implement these treaties and to provide extradition and MLA without a treaty on the basis of reciprocity. A wide range of assistance is available, including search and seizure, production orders, and freezing and confiscation of property. Efficiency is enhanced by designating the Ministry of Justice as the central authority for extradition and MLA, and by imposing deadlines for completing various steps in the extradition process.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Further expanding its network of extradition and MLA treaties could strengthen Korea's ability to seek and provide international cooperation in corruption cases. This could be accomplished by ratifying the bilateral and multilateral instruments that have already been signed, such as the UNCAC and the UNTOC. To the same end, Korea could conclude more bilateral extradition and MLA treaties, particularly with countries that are important international financial centers and/or major trade or investment partners. Korea could also consider revising the AIJMACM by adding more modern features, such as taking evidence by video conference.

Legal Preconditions for Extradition and MLA

Dual criminality is mandatory for extradition and discretionary for MLA. To enhance cooperation, Korea could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. As well, the Extradition Act and the AIJMACM both define dual criminality in terms of the offense, not the conduct, which underlies a request. Korea could clarify that the definition of dual criminality is conduct-based, i.e., the test is whether the conduct underlying a request is criminal in both states. Finally, Korea could take steps to ensure that dual criminality does not prevent cooperation in cases involving illicit enrichment or where a legal person is the target of a corruption investigation.

The Extradition Act and additional regulations allow a person sought to tender evidence at an extradition review. Korea may wish to consider whether this would allow the person to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition review could potentially be turned into a trial, thereby delaying the process.

The Extradition Law prohibits the extradition of Korean nationals. An applicable treaty may require Korea to submit a case to its competent authorities for prosecution whenever extradition is refused solely because the person sought is a Korean national. Korea could consider adding a similar requirement to the Extradition Law so as to ensure that nationals are prosecuted in lieu of extradition. Such an approach would be in line with recent international standards, e.g., Article 44(11) of the UNCAC and Article 10(3) of the OECD Convention. Ensuring that Korean law provides for jurisdiction to prosecute all such cases could also be beneficial.

Regarding the definition of a political offense, the Extradition Act deems certain offenses to not have a political character. Adding corruption offenses to this negative definition and enacting a similar provision in the AIJMACM could enhance cooperation (e.g., see Article 44(4) of the UNCAC). Finally, Korea could consider amending the AIJMACM to expressly prohibit bank secrecy as a ground for denying MLA, thereby adopting the practice embodied in recent international conventions (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Regarding urgent requests, consideration could be given to allowing foreign states to transmit requests for provisional arrest outside the diplomatic channel, as is the case with urgent MLA requests. Stipulating in the AIJMACM that urgent MLA requests may be made via any device that produces a writing (e.g., facsimile) could help foreign requesting states. Korea could also consider accepting oral MLA requests with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

It could also be helpful to create a Web site in English that is dedicated to extradition and MLA, with information on the requirements for cooperation, the relevant legislation and treaties, contact information for the central authority, and sample documents.

The Extradition Act allows a person to consent to extradition at the hearing before the Seoul Appellate Court, after which the Court must render its decision without delay. To further expedite the process, Korea could consider allowing the person to consent at an earlier stage of the process, e.g., immediately after his/her arrest. Korea could also allow the person to consent to surrender to the requesting state without reverting the case to the Minister of Justice after the hearing in the Seoul Appellate Court.

Recovery of Proceeds of Corruption in Criminal Proceedings

Requests to identify and trace proceeds of crime and to freeze and confiscate property are subject to two different statutes (the AJMACM and POCA) with different procedures, conditions, and grounds of denial. Consideration could be given to harmonizing the two regimes, e.g., by placing both under one law.

To further enhance cooperation, Korea may also wish to consider providing MLA in relation to all corruption offenses, such as those referred to in the UNCAC, including illicit enrichment and active bribery of Korean officials.

Allowing the enforcement of foreign freezing, confiscation, and pecuniary penalty orders by direct registration of the order in a Korean court, as well as registration of faxed orders in urgent cases, could further facilitate cooperation. Permitting confiscation without a conviction (e.g., when an offender cannot be prosecuted because of death, flight, absence etc.) could also extend Korea's ability to ensure that the proceeds of corruption are subject to seizure and confiscation.

Finally, express provisions in Korean legislation to share and repatriate proceeds of corruption would provide greater certainty and accountability. Particular consideration could be given to the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For Extradition and MLA: via the diplomatic channel to:
Ministry of Justice
Building #1, Gwacheon Government Complex
Jungang-dong 1
Gwacheon-si, Gyeonggi-do, Republic of Korea
Tel: +82 2 503 7058
www.moj.go.kr/HP/ENG/index.do

Relevant Laws and Documentation

Act on International Judicial Mutual Assistance in Criminal Matters:
www.moleg.go.kr

Proceeds of Crime Act: www.kofiu.go.kr/HpEngMainFset.jsp

AGP Summary of Mutual Evaluation Report of Korea:
www.apgml.org/documents/docs/8/Summary%20ME%20Reports%202002-03.pdf

Republic of Korea: Financial System Stability Assessment, IMF (2003):
www.imf.org/external/pubs/ft/scr/2003/cr0381.pdf

Yong Kwan Park, "Transnational Organized Crime and the Countermeasures in Korea", UNAFEI Resource Material Series No. 58, pp. 61-78 (2001):
www.unafei.or.jp/english/pdf/PDF_rms/no58/58-06.pdf

Kyrgyz Republic

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Kyrgyzstan are primarily governed by Chapters 47-48 of the Criminal Procedure Code (CPC) and the relevant treaties. The Chapters apply to all incoming and outgoing extradition and MLA requests subject to an applicable treaty. Once ratified, treaties become operative in the domestic legal order and take precedence over domestic legislation. In the absence of a treaty, extradition and MLA are available on the basis of reciprocity.

Kyrgyzstan is party to three multilateral conventions that may provide extradition and MLA in corruption cases, namely, the UNCAC and the two Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters of the Commonwealth of Independent States dated 22 January 1993 and 7 October 2002. Kyrgyzstan has bilateral MLA treaties in force with 9 countries, including 3 members of the Initiative (P.R. China; Kazakhstan; and Mongolia) and 1 Party to the OECD Convention (the Czech Republic, adopting the 1992 agreement signed by the former Soviet Union). Kyrgyzstan also has bilateral extradition treaties in force with 4 countries including 2 members of the Initiative (P.R. China; and Kazakhstan).

The provisions on extradition and MLA in Chapters 47-48 of the CPC are fairly brief. The Chapters describe the procedures for cooperation in general terms and lists only a few grounds for denying cooperation, leaving most of the details to the provisions of the relevant treaty. Chapter 47, which deals with MLA, does not prescribe how specific types of MLA are executed, e.g., the conditions and procedure for search and seizure or the taking of evidence from a witness. Instead, the Chapter refers to provisions in the general part of the CPC that deal with corresponding measures in domestic investigations. There are also no provisions in Chapter 47 that specifically deal with MLA relating to proceeds of crime.

Limited statistics indicate that the level of extradition practice in Kyrgyzstan is quite high but approximately 90% of the case work involves Kazakhstan and the Russian Federation. It is unclear what proportion of the case work relates to corruption offenses. Corresponding statistics for MLA were not available. Subject to an applicable treaty, requests to Kyrgyzstan should be in the language of the requesting state accompanied by a translation in English or Russian. Extradition

requests may be transmitted directly to the Prosecutor General, while MLA requests may be sent to a court or prosecutor.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Chapters 47-48 of the CPC do not address whether dual criminality is required for extradition or MLA; the issue is presumably governed by an applicable treaty. Bribery of a foreign public official and illicit enrichment are not offenses in Kyrgyzstan. It is therefore unclear how Kyrgyzstan would handle incoming requests involving these offenses if dual criminality is required. Kyrgyzstan also does not impose criminal liability against legal persons, and it is not clear whether dual criminality poses any obstacles in cases where a legal person is the target of an investigation or prosecution. It should be noted that Kyrgyzstan is obliged to provide non-coercive MLA that is requested under the UNCAC even in the absence of dual criminality.

The CPC specifically provides specialty protection for persons extradited to Kyrgyzstan. The CPC also does not require a requesting state to undertake to use evidence provided through MLA only in the investigation or prosecution referred to in the request.

Regarding grounds for denying cooperation, the CPC states that extradition will be denied if a court has issued a verdict against the person sought for the same offense, or if proceedings against the person sought for the same offense have been suspended. Extradition is also denied if Kyrgyzstan has jurisdiction to prosecute the conduct underlying the request. Kyrgyzstan will reject an MLA request that infringes its essential interests, namely, harm to Kyrgyzstan's sovereignty or security. The Constitution prohibits the extradition of Kyrgyz nationals. In lieu of extradition of a national, Kyrgyzstan will submit the case to its Prosecutor General for prosecution at the request of the foreign state. Chapter 48 of the CPC specifically provides for jurisdiction to prosecute such cases and the admissibility of evidence gathered by foreign authorities. The CPC does not refer to the death penalty or political offense as grounds for denying cooperation. However, extradition will be denied if Kyrgyzstan has granted the person sought political asylum. The CPC is also silent on whether bank secrecy may be a ground for denying cooperation. However, the Laws on Commercial Secrecy, Bank Secrecy, and Banks and Banking Activity limit investigative bodies from accessing bank records before a criminal proceeding officially commences.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Office of the Prosecutor General is the central authority for international cooperation in Kyrgyzstan, though other bodies may also send and receive extradition and MLA requests. Outgoing MLA requests arising from an investigation and outgoing extradition requests are prepared by the investigator or prosecutor in charge of the case and submitted to the Prosecutor General. If the Prosecutor General approves the request, he will transmit it to the competent authority in the foreign state. Outgoing letters rogatory requests for MLA are prepared by the courts and submitted to the Minister of Justice for transmission to the foreign state. Incoming extradition requests may be transmitted directly to the Prosecutor General, while incoming MLA requests may be sent to a court or prosecutor.

Unlike most jurisdictions in the world, extradition from Kyrgyzstan does not entail a court hearing. Upon receiving a request for extradition, the Prosecutor General examines whether the request meets the requirements in the CPC and an applicable treaty. If so, the Prosecutor General orders the person sought to be arrested. After the arrest is effected, the person sought is surrendered to the requesting state. Judicial review of the decisions of the Prosecutor General is not available. There are also no provisions for dealing with requests for provisional arrest or urgent MLA requests, though such provisions may be found in an applicable treaty or convention (e.g., the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

Kyrgyz legislation does not clearly provide for tracing, seizing, confiscating and repatriating proceeds of crime pursuant to a foreign request. As noted above, Chapter 47 of the CPC does not contain any provisions that deal with MLA relating to proceeds of crime; it merely states that the general rules of the CPC are applicable. The CPC deals with seizure or confiscation only to the extent of requiring an investigator to take necessary measures to secure property that may be subject to confiscation under "the criminal law". There are also no provisions on the repatriation of proceeds to a foreign state. However, relevant bilateral treaties and conventions (e.g., the UNCAC) may contain provisions applicable to MLA relating to proceeds of corruption.

Conclusion

Kyrgyzstan has passed basic legislation that specifically deals with international cooperation in criminal matters. It has an extensive treaty

framework for extradition and MLA in corruption cases consisting of multilateral instruments (such as the UNCAC) and several bilateral treaties. Kyrgyzstan is prohibited by its constitution from extraditing its nationals. However, the CPC requires prosecution in lieu of extradition upon the demand of the requesting state, and specifically provides for jurisdiction and admissibility of foreign evidence in such cases.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

A law with more detailed provisions on the procedures and requirements for cooperation would provide greater certainty and accountability. Kyrgyzstan could also consider adding to the CPL features found in recent extradition and MLA legislation in other jurisdictions, such as consent extradition and taking evidence by video conference.

Legal Preconditions for Extradition and MLA

Chapter 47 of the CPC is silent on the issue of bank secrecy. On the other hand, the Laws on Commercial Secrecy, Bank Secrecy, and Banks and Banking Activity limit investigative bodies from accessing bank records before a criminal proceeding officially commences. To ensure that bank secrecy does not impede the provision of MLA, Kyrgyzstan could consider codifying in the CPC an express prohibition similar to those found in recent international instruments (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Prosecutor General deals with most extradition and MLA requests, but letters rogatory requests are prepared by the courts and transmitted through the Ministry of Justice. Incoming MLA requests may also be sent to any court or prosecutor. The designation of a single authority to handle (or at least monitor) all requests could enhance coordination among different agencies, avoid duplication and reduce delays in executing requests. It could also assist foreign states by identifying a visible point of contact for seeking assistance and following up outstanding requests.

To handle urgent requests, Kyrgyzstan could consider adding to the CPC provisions that deal with requests for provisional arrest. Kyrgyzstan could also consider adding provisions on urgent MLA requests, including accepting such requests via any device that produces a writing or oral requests with subsequent written confirmation, e.g., UNCAC Article 46(14). Kyrgyzstan may also wish to create an English Web page that is dedicated to international cooperation and contains the relevant legislation and treaties, a description of the procedure for cooperation, contact information, and sample documents. Such a Web page could be particularly useful if Kyrgyzstan decides to provide cooperation in the absence of a treaty in the future.

Recovery of Proceeds of Corruption in Criminal Proceedings

Kyrgyzstan may satisfy foreign requests to seize, confiscate and repatriate proceeds of crime (including corruption) if an applicable treaty (such as the UNCAC) so provides. However, an applicable treaty may not resolve all matters, e.g., whether foreign orders may be enforced by direct registration, which is an optional provision under Article 55 of the UNCAC. To avoid any ambiguities, Kyrgyzstan could elaborate in the CPC detail conditions and procedures for seizure and confiscation pursuant to a foreign request. The provisions could include enforcement of foreign orders by direct registration and repatriation of proceeds. Kyrgyzstan may also wish to ensure that MLA is available in relation to both direct and indirect proceeds of corruption, as well as seizure and confiscation of property that is equivalent in value to the proceeds (see Article 55(1) and 31(1) of the UNCAC). Finally, to extend cooperation to countries with which it has no treaty, Kyrgyzstan could permit MLA relating to proceeds of corruption in the absence of a treaty.

Information for Seeking Assistance

Central Authority

For Extradition and MLA:

Office of the Prosecutor General of the Republic of Kyrgyzstan

Relevant Laws and Documentation

Criminal Procedure Code, Chapters 47-48

Kyrgyz Republic: Country and Monitoring Reports, OECD Anti-Corruption Network for Eastern Europe and Central Asia (2004-2006):

<http://www.oecd.org/dataoecd/10/55/38009340.pdf>

Kyrgyz Republic: Financial System Stability Assessment, IMF (2003):
www.imf.org/external/pubs/ft/scr/2003/cr0352.pdf

Macao, China

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition (known in Macao, China as surrender of fugitive offenders (SFO)), MLA and the recovery of proceeds in Macao, China are governed by the Law of Judicial Cooperation in Criminal Matters (Law No. 6 of 2006) (LJCCM), which came into force on 1 November 2006. The LJCCM is applicable to international judicial cooperation in criminal matters between Macao, China and any other country but not to regional judicial cooperation in criminal matters between Macao, China and P.R. China, or Hong Kong, China. For SFO or MLA requests made under a treaty, the terms of the treaty apply with the LJCCM supplementing on matters that are not covered by the treaty. In the absence of a treaty, SFO and MLA are available pursuant to the LJCCM if the requesting state provides an assurance of reciprocity (except in certain cases). Macao, China has a Treaty on the Transfer of Sentenced Persons with Portugal, but no treaties on SFO. Pursuant to a decision of P.R. China, the UNCAC and UNTOC, including the provisions on SFO and MLA therein, also apply to Macao, China.

The LJCCM is very extensive and includes the main features of modern legislation on SFO and MLA, such as detailed provisions on the grounds for denying cooperation, the procedure for executing requests, and the types of assistance available. The LJCCM also contains provisions on MLA regarding proceeds of crime, including the requirements and procedure for executing foreign requests to confiscate proceeds of crime.

MLA requests to Macao, China may be sent directly to the Public Prosecutions Office, unless otherwise provided for by a treaty or convention. MLA requests under the UNCAC should be made to the Office of the Secretary for Administration and Justice. Requests for SFO should also be sent to the PPO. Requests to Macao, China should be in the official language of the requesting state accompanied by a translation in the Chinese or Portuguese language.

Legal Preconditions for SFO and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for incoming SFO and MLA requests to Macao, China. For SFO, the conduct underlying the request must also be punishable by imprisonment of at least one year in both the requesting state

and Macao, China (if it had been committed there). The dual criminality requirement is conduct-based. Macao, China does not have an offence of bribery of foreign public officials, and it is unclear how it will handle incoming requests involving this offence. In order to be in line with the requirements of the UNCAC, Macao, China is considering how to create such offenses. On the other hand, illicit enrichment is an offence in Macao, China; incoming requests involving this offence will likely meet the requirement of dual criminality. Macao, China does not recognize the criminal liability of legal persons for corruption. For incoming MLA requests in cases in which a legal person is the target of a corruption investigation, the requesting state must specify at least one natural person who is responsible for the crime. It should be noted that Macao, China is obliged to provide non-coercive MLA that is requested under the UNCAC even in the absence of dual criminality.

There are limited evidentiary requirements for incoming requests. For SFO requests, Macao, China does not require evidence of the crime underlying the request. As well, the LJCCM only permits the person sought to tender evidence in relation to identity and whether the conditions for SFO are met. For incoming MLA requests, the LJCCM does not expressly require evidence concerning the underlying offence. Requests for search and seizure must however include a declaration that the measure is permissible under the law of the requesting state.

Specialty and use limitation may be required by Macao, China for cooperation. A requesting state may only use evidence and information provided under the LJCCM in the proceedings referred to in the request. However, the Chief Executive of Macao, China may waive this requirement upon request. For SFOs, a requesting state must provide an assurance of specialty in its request. The LJCCM does not specifically address specialty or use limitation for outgoing requests.

Concerning specific grounds for denying cooperation, Macao, China may decline to provide SFO or MLA if it has an on-going investigation or prosecution in the same case. Cooperation may also be declined if Macao, China has jurisdiction commence an investigation or prosecution in the same case. The LJCCM also prohibits SFO for offences that take place in Macao, China. According to the Criminal Code of Macao, China, an offense is considered to have taken place in Macao, China if it is committed wholly or partly there wholly or partly. If Macao, China refuses SFO on this ground, it may commence its own prosecution if the subject conduct constitutes an offence in Macao, China.

Other grounds for denying cooperation exist. For example, SFO and MLA will be refused in death penalty cases unless the requesting state provides an assurance that the penalty will not be imposed or carried out. Alternatively, the

requesting state could agree that the accused be punished by a court of and under the laws of Macao, China for the same offence. The LJCCM also allows SFO and MLA to be refused in cases involving an offence of a political character. The definition of political offences, however, excludes those offences that have been designated as non-political offenses under international conventions that apply to Macao, China. The UNCAC also requires that corruption offences not be considered political offences for SFO requests that are made under the Convention. Essential interests is a mandatory ground for denying SFO and MLA. Under the LJCCM, Macao, China may refuse to accede to SFO or MLA requests that impair the national defense, external relations, sovereignty, security or public order of P.R. China. The UNCAC also allows refusals of requests made under the Convention that are likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested state.

The LJCCM prohibits the SFO of nationals of P.R. China who do not reside in Macao, China. It also prohibits the SFO of residents of Macao, China unless SFO is requested by the country of the resident's nationality, or if SFO is required by an applicable international convention. If SFO is denied on any of these grounds, Macao, China may commence a domestic prosecution if the conduct underlying the SFO request constitutes an offence in Macao, China. Of note, this discretion to prosecute is now qualified by the UNCAC for SFO relating to offences that are established in accordance with the Convention. In these cases, if Macao, China declines SFO for such an offence solely on the ground of nationality, then the UNCAC obliges Macao, China to submit the case to its competent authorities for prosecution.

The LJCCM does not expressly deal with the refusal of MLA because of bank secrecy. It does stipulate, however, that incoming requests are subject to the provisions in the Criminal Procedure Code concerning confidentiality and professional secrecy. According to the Criminal Procedure Code of Macao, China, a judge may order a financial institution to be searched or to provide relevant information. The judge may also detain the staff of a financial institution, or order him/her to provide testimony. Therefore, Macao, China will not refuse to provide assistance solely on the ground of violation of bank secrecy. For requests made under the UNCAC, the Convention prohibits Macao, China from declining to render MLA on the ground of bank secrecy.

Procedures and Measures to Improve the Efficiency of SFO and MLA

In Macao, China, the central authority for dealing with SFO and MLA is the PPO. An exception is MLA requests under the UNCAC, which are handled by the

Office of the Secretary for Administration and Justice and forwarded to the PPO. The main functions of the PPO in the context of international cooperation are to handle incoming and outgoing SFO and MLA requests. The PPO maintains a Web site in Chinese and Portuguese with contact information and an email address. The LJCCM provides that: (1) Outgoing SFO requests from Macao, China are drafted by the PPO, including in corruption cases; (2) Outgoing MLA requests SFO are generally drafted by the Court or the PPO, including in corruption cases. However, if the case is under investigation, the PPO will draft the request. If a trial is under way, the Court will draft the request. The request is then sent to the Chief Executive through the Office of the Prosecutor General. If the Chief Executive approves the request, it is then sent to the foreign state via the diplomatic channel.

Incoming requests are received by the PPO. The Office opines on the request before submitting it to the Chief Executive. If the Chief Executive approves the request and the case involves corruption, the Commission against Corruption may be involved in the execution of the request. Incoming requests are kept confidential at the request of the requesting state. If confidentiality has to be breached in order to execute the request, then Macao, China will ask the requesting state whether to proceed.

The LJCCM provides for measures to deal with urgent requests. Urgent incoming requests for provisional arrest or MLA may be made directly to the judicial authorities in Macao, China via INTERPOL, fax or any other means that produces a written record. The request for assistance must stipulate the reason for the urgency. If the judicial authorities Macao, China believe that an urgent request meets the requirements of the LJCCM, then they will execute the request and advise the Chief Executive thereafter.

The LJCCM contains certain features which expedite SFO. At any time after his/her arrest, a person sought may appear before a judge and waive his/her right to a judicial hearing. Upon verifying that the waiver was given voluntarily, the judge may order the person sought to be surrendered to the requesting state. The LJCCM also sets time limits for particular steps in the SFO process. Once the person sought has been arrested, the judicial hearing must be concluded within 65 days if the person sought is in custody and 90 days if the person sought is out of custody. After the SFO hearing commences, a person sought has only 10 days to make submissions to the court on why he/she should not be extradited. Thereafter, the person sought has 10 days to file an appeal. Once the decision becomes final, the person sought must be surrendered within 20 days.

Recovery of Proceeds of Corruption in Criminal Proceedings

The LJCCM provides MLA in relation to the proceeds, objects and instruments of any crime, including corruption. According to the LJCCM, Macao, China will provide assistance only if the requesting party has passed a criminal sentence for confiscation of proceeds of crime. Although the LJCCM does not mention indirect proceeds, proceeds include both direct and indirect proceeds under the Criminal Code of Macao, China. Indirect proceeds includes all income obtained through or derived from criminal proceeds.

The authorities of Macao, China may verify whether proceeds of crime are in its jurisdiction at the request of a foreign state. The requesting state is required to provide evidence to support its belief that the proceeds are in Macao, China. Once the proceeds are found, Macao, China may take measures to restrain the proceeds, such as applying for a restraint order. For restraint to be ordered, there is no requirement in the LJCCM that proceedings have been commenced or are expected to be commenced in the requesting state. A foreign restraint order cannot be enforced in Macao, China by direct registration.

In addition to the requirements for other types of MLA, Macao, China will enforce a foreign confiscation order only if a court in the requesting state has convicted an individual and ordered confiscation. Furthermore, the conviction must relate to a person who is resident or habitually resident in Macao, China. However, this requirement may be waived if a foreign court has imposed a sentence involving the deprivation of freedom; the sentenced person is in Macao, China; and Macao, China has refused to transfer the sentenced person to the foreign state. Macao, China is considering amending this system. The Macao, China authorities must apply to their courts to enforce the foreign order; direct registration of a foreign confiscation order is also not available. Foreign fine orders may also be imposed in the same manner.

The LJCCM expressly deals with the repatriation of proceeds of crime that have been confiscated pursuant to an MLA request. Confiscated assets belong to Macao, China, but they may be repatriated if a requesting state has a particular interest in the asset, and if the requesting state provides an assurance of reciprocity. Macao, China and a requesting state may also enter into an agreement to share confiscated assets on a case-by-case basis. Repatriated assets are returned to the government of the requesting state.

The UNCAC may circumscribe the discretion of Macao, China in disposing assets that are confiscated pursuant to a request under the Convention. In particular, embezzled public funds (including embezzled funds that have been laundered) must be returned to a requesting State Party. For other offences covered by the Convention, confiscated assets must also be returned to a

requesting State Party that reasonably establishes its prior ownership of the property, or if Macao, China recognizes damage to the requesting State Party as a basis for returning the confiscated property. In all other cases, Macao, China is required to give priority consideration to returning confiscated property to a requesting State Party, returning such property to its prior legitimate owners or compensating the victims of crime.

Conclusion

The application of the UNCAC and the UNTOC ameliorates the limited number of bilateral SFO or MLA treaties that apply to Macao, China. The availability of SFO and MLA in the absence of a treaty under the LJCCM should have a similar effect. The LJCCM is a recent and comprehensive piece of legislation. It contains many features to enhance and expedite international cooperation, such as consent SFOs and fairly tight deadlines for certain steps in SFO proceedings to begin and finish. Special provisions are made for urgent requests for MLA and requests for provisional arrests. The LJCCM also provides for tracing, restraint and confiscation of proceeds of crime at the request of a foreign state. The amount of evidence required for SFO and MLA is relatively low, commensurate with the continental civil law tradition of Macao, China. The designation of the PPO as a central authority for incoming and outgoing SFO and MLA requests under the LJCCM should help to ensure prompt execution of requests.

Recommendations for A Way Forward

The Legal Framework for SFO and MLA

Macao, China could expect a significant demand for international cooperation in corruption cases given its very significant gambling industry and sizeable financial institutions. The UNCAC and UNTOC are useful instruments in this context. Nevertheless, Macao, China may wish to conclude more bilateral treaties with certain countries so as to tailor the SFO and MLA relationships to the specific needs of the signatories.

Legal Preconditions for SFO and MLA

Concerning SFO, the LJCCM prohibits SFO of nationals of P.R. China and residents of Macao, China under certain circumstances. If Macao, China refuses SFO on these grounds, it has discretion to prosecute the person sought in lieu of

SFO. Macao, China could consider requiring corruption cases to be submitted to its competent authorities for prosecution whenever SFO is denied solely because of nationality, in line with recent international standards (e.g. Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC). Furthermore, prosecution in lieu of SFO in these cases is possible only if the underlying conduct constitutes an offence under the laws of Macao, China. Macao, China may wish to take steps to ensure that it can prosecute in lieu of SFO cases involving bribery of foreign public officials, which is presently not an offence under its laws and the conduct underlying the request might not be entirely covered by other offenses. It should be noted that Macao, China is making efforts to create this offense.

Macao, China also refuses SFO if the underlying offence was committed on its territory, and it may wish to ensure that it will prosecute persons whose SFO has been refused on this ground. Macao, China could also consider making this a discretionary ground for denying SFO. This would allow the person sought to be prosecuted in Macao, China or the requesting state on a case-by-case basis, having regard to factors such as the location of the evidence, the strength of the case in each jurisdiction etc.

To further enhance international cooperation, Macao, China could also consider eliminating the dual criminality requirement for MLA or reducing it to a discretionary requirement. Alternatively, Macao, China could consider requiring dual criminality only for more coercive measures (SFO, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Macao, China should also ensure that it can execute non-coercive requests made under the UNCAC even in the absence of dual criminality (as required by Article 46(7) of the UNCAC). Macao, China may also wish to take steps to ensure that it can provide SFO and MLA in cases involving bribery of foreign public officials, even though there is no such offence in Macao, China. (As noted earlier, Macao, China is considering establishing this offense.) As well, for incoming MLA requests in cases where a legal person is the target of a corruption investigation, Macao, China requires the requesting state to specify at least one natural person who is responsible for the crime. Macao, China may wish to ensure that this requirement does not prevent it from providing MLA if the perpetrator of the crime cannot be prosecuted.

Procedures and Measures to Improve the Efficiency of SFO and MLA

As for practice and procedure, there has been limited practice under the LJCCM because of the legislation's recency. Macao, China may wish to evaluate the performance of its legal framework for cooperation in due course.

To that end, Macao, China could consider keeping statistical information on international cooperation, including the number of incoming and outgoing requests, the requesting and requested states involved, the number of requests executed, the time it takes to execute a request, and whether corruption offences are involved.

Regarding the central authority, SFO visibility could be enhanced by creating a Web site in English that is dedicated to international cooperation and which includes a description of the SFO procedure, contact information, the LJCCM etc. Such a Web site could be particularly useful to foreign states since most requests for cooperation to Macao, China will likely be made in the absence of a treaty. According to Macao, China, the PPO is considering including English information such as a brief introduction of the LJCCM and other relevant laws, and detailed contact information for the PPO on its Web site. SFO Macao, China could also consider allowing outgoing requests to be sent outside the diplomatic channel.

Recovery of Proceeds of Corruption in Criminal Proceedings

For the purpose of enhancing its ability to provide MLA in relation to proceeds of corruption, Macao, China could allow enforcement of foreign restraint and confiscation orders by direct registration. Furthermore, Macao, China will accede to a foreign request to confiscate proceeds only if a court in the requesting state has convicted an individual and ordered confiscation. Macao, China may wish to adopt the standards embodied in recent international instruments (e.g. Article 54(1)(c) of the UNCAC) and dispense with the requirement of a conviction where the offender cannot be prosecuted. Finally, a foreign confiscation order will be enforced only if a foreign court has convicted a resident or habitual resident of Macao, China. Macao, China may wish to consider whether this requirement unduly restricts its ability to provide assistance to foreign countries. Macao, China is considering ways to improve the system.

Information for Seeking Assistance

Central Authority

For MLA under the UNCAC:

Office of the Secretary for Administration and Justice
Sede do Governo da RAEM
Avenida da praia Grande
Macao Special Administrative Region, People's Republic of China

For SFO and MLA:

Office of the Prosecutor General of the MSAR
Alameda Dr. Carlos D' Assumpção
Edf. "Dynasty Plaza", 7o andar, NAPE
Macao Special Administrative Region, People's Republic of China
Tel: +853 797 8208
Fax: +853 28752 238
iapMacao@mp.gov.mo
www.mp.gov.mo

Relevant Laws and Documentation

The Law of Judicial Cooperation in Criminal Matters (in Portuguese and Chinese only):

www.imprensa.macao.gov.mo/bo/i/2006/30/lei06_cn.asp

www.imprensa.macao.gov.mo/bo/i/2006/30/lei06.asp

Malaysia

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Malaysia are governed by the Extradition Act 1992 (Act 479) and the Mutual Assistance in Criminal Matters Act 2002 (Act 621) (MACMA). An extradition or MLA treaty which Malaysia has signed is incorporated into the domestic legal framework when the Minister of Internal Security (MIS) issues an order directing that the Extradition Act or the MACMA applies to the treaty in question. In the absence of a treaty, the MIS may direct that the MACMA or the Extradition Act applies to a foreign state with which Malaysia has no treaty, though MLA may be refused in the absence of an assurance of reciprocity by the requesting state. Malaysia has internal guidelines on when a request should be refused on other grounds. Letters rogatory requests are governed by Order 66 of the Rules of the High Court 1980.

Concerning multilateral instruments that may provide MLA in corruption cases, Malaysia (along with Singapore and Vietnam) has signed and ratified the Southeast Asian MLAT. Malaysia has signed the UNTOC and UNCAC but, as of April 2007, it had only ratified the former. Malaysia has only one bilateral MLA treaty in force (with Australia, which is a member of the ADB/OECD Initiative and a Party to the OECD Convention).

As for multilateral instruments that may provide extradition in corruption cases, Malaysia has signed but has not ratified the UNCAC. It has also signed and ratified the UNTOC, but it has declared that it does not take the Convention as a legal basis for extradition with other States Parties. Malaysia also has extradition relations based on its legislation under the London Scheme with six member countries of the Initiative (Bangladesh; Cook Islands; Fiji Islands; Samoa; Sri Lanka; and Vanuatu) and one Party to the OECD Convention (United Kingdom). Malaysia has five bilateral extradition treaties in force, four of which are with members of the Initiative (Australia; Hong Kong, China; Indonesia; Thailand) and two with Parties to the OECD Convention (Australia and United States). Extradition to and from Singapore is based on a scheme in the Extradition Act for the endorsement of arrest warrants.

The Extradition Act and the MACMA are both fairly recent legislation. Both broadly include detailed provisions on the grounds for denying cooperation, the procedure for making outgoing requests and executing incoming requests. The MACMA provides for a broad range of assistance, including search warrants,

production orders, and enforcement of foreign restraining and confiscation orders. Taking evidence by video conference is not available.

Available statistics indicate that, from 2002 to 2006, Malaysia had 1 outgoing and 9 incoming extradition cases, and 7 outgoing and 48 incoming MLA cases. None of these cases involved corruption offenses. During the same period, Malaysia has received 11 MLA requests concerning proceeds of crime, 4 of which concern freezing or confiscation. It has also made 3 outgoing requests concerning proceeds of crime involving freezing or confiscation. Upon receiving a request from a country with which Malaysia has no treaty, it takes an average of 1 to 3 months for the MIS to issue the requisite special direction that allows the matter to proceed. It then takes a further 6 months to 2 years for the complete execution of the request. The delay in extradition cases is mainly due to court challenges to the request by the person sought, and because requests must be go through the MIS before they are sent to the Attorney General's Chambers for review and approval (see below).

All incoming MLA requests may be made to the Attorney General of Malaysia through the diplomatic channel. Incoming requests for extradition must be transmitted through the diplomatic channel to the MIS. The parties to bilateral agreements may also indicate a specific channel. A requesting state must provide its request (or a translation) in English.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for incoming extradition and MLA requests to Malaysia. The definition of dual criminality is conduct-based. For extradition, the offense in the requesting state, if committed within the jurisdiction of Malaysia, must be punishable under the laws of Malaysia by imprisonment of not less than one year, or death. Extradition between Malaysia and Singapore does not require dual criminality. For incoming requests to take evidence, the request must relate to an act or omission that, if it had occurred in Malaysia, would have constituted an offense against the laws of Malaysia. For incoming requests for more intrusive measures (e.g., production orders, search and seizure), the foreign offense must be punishable by at least one year's imprisonment or death. Malaysia does not have an offense of bribery of foreign public officials, but as of early 2007, it was in the process of creating such an offense in order to comply with the UNCAC. Illicit enrichment is an offense in Malaysia; incoming requests involving this offense will likely meet the requirement of dual criminality. Since Malaysia imposes liability against legal persons for corruption offenses, the

requirement of dual criminality should not pose difficulties to incoming requests in which the target of an investigation is a legal person.

Certain evidentiary tests may have to be met before Malaysia provides extradition or MLA. For incoming extradition requests, the Extradition Act requires sworn evidence of a *prima facie* case against the person sought unless an applicable treaty provides otherwise. For outgoing MLA requests, the Attorney General must be satisfied that there are reasonable grounds for believing that relevant evidence would be found in the requested state. For incoming requests for production orders or search and seizure, there must be reasonable grounds to suspect that a person specified in the request has committed an offense, and that evidence of substantial value will likely be found. The MACMA does not prescribe an evidentiary threshold for incoming requests to take evidence from a witness. Malaysia has encountered some difficulties in meeting evidentiary tests in outgoing requests but some have been resolved successfully: In one extradition case, Malaysia had difficulty confirming the location of a fugitive and the requested state was unable to assist. In an outgoing MLA case involving money laundering, initial problems – insufficient evidence to show probable cause – were resolved by consultation, providing additional evidence and amending the request.

Necessity and the importance of the evidence sought are also relevant factors for incoming MLA requests. Malaysia will refuse MLA if the evidence requested is not of sufficient importance to the foreign investigation, or if the evidence could reasonably be obtained by other means.

Specialty and use limitation apply to extradition and MLA respectively. For incoming extradition requests, specialty must be provided for in a relevant treaty, a provision in the law of the requesting state, or through an undertaking by the government of the requesting state. For outgoing extradition requests, the Extradition Act provides specialty protection to persons surrendered to Malaysia. With incoming MLA requests, the appropriate authority of the requesting state must undertake that the evidence requested will only be used for the criminal matter in respect of which the request was made. However, the Attorney General of Malaysia may agree to waive this requirement.

Essential interests may be a ground for denying MLA. Under the MACMA, Malaysia will refuse to grant an MLA request that would affect the sovereignty, security, public order or other essential interests of Malaysia. A court may also refuse to issue a production order or search warrant if it finds that it is not in the public interest to do so. Malaysia has never denied an extradition or MLA request for these reasons.

Malaysia may refuse to extradite its nationals, having regard to factors such as whether the legal prerequisites for surrender are satisfied, whether it is detrimental to the security of Malaysia, and public interest concerns. If extradition is refused for this reason, the Public Prosecutor will consider prosecuting the person sought if Malaysian courts have jurisdiction over the offense. Malaysia may also agree to extradite if the national will be returned by the requesting state to Malaysia to serve any sentences upon conviction. Malaysia has never refused extradition solely on the ground that the person sought is its national.

The presence of an on-going proceeding or investigation in Malaysia could affect whether Malaysia will provide MLA. Under the MACMA, Malaysia will refuse MLA if the provision of assistance could prejudice a criminal matter in Malaysia. In practice, Malaysia will postpone executing the request and reconsider the case after the domestic investigation has been completed.

Regarding other grounds for denying cooperation, Malaysia may refuse extradition and MLA if it has jurisdiction to prosecute the offense underlying a request. Malaysia will not provide extradition or MLA in respect of an offense of a political character. MLA will also be denied if the target of an investigation or proceedings has been convicted, acquitted, pardoned or punished in the requesting state for the same offense. As of early 2007, Malaysia had not denied extradition or MLA on any of these grounds.

The denial of MLA because of bank secrecy is not dealt with in the MACMA. However, both the Southeast Asian MLAT and the Australia-Malaysia treaty state that assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions.

Malaysia is not obliged to consult with a requesting state before denying a request for extradition or MLA. In practice, Malaysian authorities will consult and confer with the requesting state in order to facilitate the granting and execution of the request.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The International Affairs Division (IAD) of the Attorney General's Chambers (AGC) is the main body involved in extradition and MLA, being involved in receiving, transmitting and monitoring requests. The MIS also plays a key role in extradition cases.

Incoming extradition and MLA requests are processed slightly differently in Malaysia. Incoming extradition requests received through the diplomatic channel are forwarded to the MIS. The MIS then reviews the request with the advice of the AGC to determine whether the request complies with the relevant legislation and treaty. If the requirements are met, the MIS forwards the request to the AGC for execution. In corruption cases, the Anti-Corruption Agency Malaysia (ACA) will cooperate with the AGC to execute the request. On the other hand, incoming MLA requests are provided directly to the AGC, which will review the request in consultation with other relevant agencies, e.g., the ACA in corruption cases. The MIS is involved only for requests that are not based on a treaty, in which case the MIS must issue a special direction that the MACMA applies to the case. Once the AGC decides to proceed with the case, the IAD will process the request with the cooperation of the Prosecution Division of the AGC and the relevant law enforcement agency (again the ACA in corruption cases). All incoming extradition and MLA requests are kept confidential.

Outgoing extradition and MLA requests are handled in a similar fashion to incoming requests. Outgoing extradition requests are drafted by a law enforcement agency (e.g., the ACA in corruption cases) and forwarded to the MIS, which will review the request with the assistance of the AGC. If the MIS decides that the request meets the requirements of a relevant treaty and that there is sufficient evidence to support the request, it will send the request to the foreign state through the diplomatic channel. On the other hand, outgoing MLA requests are drafted by the AGC with the cooperation of the prosecutors and investigators involved in the case before they are sent through the diplomatic channel. The MIS is not involved.

The IAD also plays a central role in monitoring all incoming and outgoing extradition and MLA requests. In doing so, the IAD communicates with the competent authorities of the requested state as well as the relevant Malaysian officials in the MIS, the Ministry of Foreign Affairs, and law enforcement agencies (e.g., the ACA). Malaysia also liaises with foreign authorities through diplomatic and informal channels on case-specific and general matters. To help foreign authorities prepare requests to Malaysia, the AGC has a Web site in English with a description of the extradition and MLA process, the relevant legislation and treaties, contact information, and a Model Request Form and Checklist.

To discharge these responsibilities, the IAD is staffed with legally qualified officers who are fluent in Malay and English. Qualified translators are available if necessary. Training on extradition and MLA is provided to officials in the IAD as well as law enforcement officers, prosecutors and judges through training programs organized by the Judicial and Legal Services Training Institute. Officials are bound by the *Official Secrets Acts* to maintain the confidentiality of requests.

Malaysia provides particular measures to deal with urgent requests. Requests for provisional arrest may be transmitted outside the diplomatic channel, such as via Interpol or other police channels. Urgent MLA requests must still be transmitted through the diplomatic channel. However, the AGC will begin to prepare executing a request based on an advance copy of the request while waiting for the formal request to arrive through the diplomatic channel.

Regarding the procedural aspects of the extradition process in Malaysia, a person sought must be brought before a magistrate upon his/her arrest. Upon being advised by the MIS that the person arrested is sought for extradition, the magistrate shall transfer the case to the Sessions Court. At this stage, the person sought may consent to being committed into custody to await the decision of the MIS on whether he/she should be surrendered. Alternatively, the Sessions Court will conduct a hearing before deciding whether to commit the person sought. During the hearing, the Court must receive evidence tendered by the person sought to show that he/she "did not do or omit to do the act alleged to have been done or omitted by him" (Extradition Act Section 19(1)(a)). If the Court orders committal, the matter reverts to the MIS to decide whether the person sought should be surrendered. The Extradition Act, however, does not impose any time limits on the MIS.

The Royal Malaysian Police (RMP) may provide additional assistance at the police level. The RMP and its counterparts in Indonesia, Singapore and Thailand meet annually to share information on transnational crime. The agency also cooperates closely with law enforcement agencies in Australia, Germany, New Zealand, the Netherlands, and the United States.

Recovery of Proceeds of Corruption in Criminal Proceedings

The MACMA contains a broad definition of "proceeds of crime" that may be the subject of an incoming request to restrain or forfeit. The definition includes direct proceeds ("payments or other rewards received in connection with a foreign serious offense") and indirect proceeds ("property derived or realized, directly or indirectly, from [direct proceeds].") Also covered is confiscation of property of a value equivalent to direct or indirect proceeds. A "foreign serious offense" is in turn defined as an offense consisting of conduct which, if it had occurred in Malaysia, amounts to a defined offense under the Anti-Money Laundering Act 2001 (AMLA), or an offense punishable by death or imprisonment of at least one year. Defined offenses under the AMLA include all of the major corruption offenses in the Anti-Corruption Act 1997.

The status of foreign proceedings may affect whether Malaysia can execute a request for restraint or forfeiture. Restraining orders are available if

proceedings are on-going in the requesting state and a forfeiture order has been made or there are reasonable grounds to believe such an order will be made. Restraining orders are also available if proceedings will be instituted in the requesting state and forfeiture may be ordered in those proceedings. Requests for forfeiture may be executed only if a court in the requesting state has ordered forfeiture. There is no requirement that a person be finally convicted of an offense.

Foreign forfeiture orders that are not subject to appeal may be enforced in Malaysia through direct registration. In other words, foreign orders may be directly registered with a court in Malaysia, after which the order becomes enforceable in Malaysia like a domestic court order. There is thus no need to apply for a second court order in Malaysia. Foreign restraining orders cannot be enforced by direct registration.

The MACMA also deals with the sharing and repatriation of proceeds. The Malaysian government has absolute discretion to manage and dispose of forfeited property, including liquidation. After paying for expenses incurred in recovering and managing the property out of the forfeited property (or the proceeds of liquidation), the Minister has discretion to return the balance to the appropriate authority of the requesting state.

Conclusion

Malaysia has established a legal framework for extradition and MLA based primarily on its domestic legislation rather than on treaties. Malaysia has recently expanded its treaty relationships, however, by concluding and ratifying the Southeast Asian MLAT, and bilateral extradition and MLA treaties with Australia. The implementing legislation (the Extradition Act and the MACMA) contains helpful features for expediting cooperation, such as extradition by consent, extradition by endorsement of warrants to and from Singapore, and enforcement of a foreign forfeiture order by direct registration.

To implement this framework in practice, Malaysia has designated the IAD as the central authority for MLA. The AGC has sufficient qualified staff and budgetary resources. It maintains an informative Web site in English with contact information and relevant legislation. Training on international cooperation has been provided to IAD staff as well as law enforcement officers, prosecutors and judges. The ACA is involved in executing incoming extradition and MLA requests in corruption cases, thereby taking advantage of the ACA's expertise in these cases.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Further expansion of its network of treaties, especially in MLA, could strengthen Malaysia's ability to seek and provide international cooperation in corruption cases. Malaysia could therefore consider ratifying the UNCAC and concluding more bilateral extradition and MLA treaties.

Legal Preconditions for Extradition and MLA

To enhance extradition, Malaysia may wish to revisit the evidentiary aspects of the process. At present, Malaysia continues to apply the *prima facie* case evidentiary test in extraditions. Civil law jurisdictions seeking extradition from other common law jurisdictions have had difficulties in complying with this test. Malaysia could therefore consider following the example of some common law countries (e.g., Australia and the United Kingdom for extradition to certain non-Commonwealth countries) and require less or even no evidence for extraditions. Malaysia could also consider removing the right of a person sought under Section 19(1)(a) of the Extradition Act to tender evidence in relation to the substance of the charges at the extradition hearing, bearing in mind that the hearing should not be converted into a trial of the crime.

Malaysia could further streamline the extradition process by examining the distribution of functions among institutions. Unlike MLA requests, outgoing extradition requests are checked by both the MIS and the AGC for treaty compliance and sufficiency of evidence. The MIS also checks incoming requests for compliance with the relevant treaty and legislation before sending the request to the AGC for execution. Malaysia may wish to consider assigning these functions to a single central authority (as in many other jurisdictions), which will likely speed up the extradition process.

To further enhance extradition, Malaysia could relax the requirement that the requesting state provide a specialty assurance in its law or an applicable treaty. Instead, Malaysia could consider accepting assurances by diplomatic, judicial or prosecutorial officials. Malaysia could also consider imposing additional time limits for certain steps in the extradition process, such as deadlines for the person sought to make submissions to the MIS, and for the MIS to order and to effect surrender. Malaysia may also wish to expand the scheme for consent extraditions by allowing the person sought to consent immediately after arrest and to consent to surrender (as opposed to just committal).

To improve its system of providing MLA further, Malaysia could consider reducing the applicable evidentiary thresholds. Presently, search warrants and production orders may be issued only if there are reasonable grounds to believe that evidence of *substantial value* will be found. There is no such requirement for outgoing requests for search and seizure by Malaysia or in international instruments, e.g., Article 18(1) of the Southeast Asian MLAT.

Malaysia could consider further enhancing MLA by addressing bank secrecy in the MACMO. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Considering its emerging role as a financial center, Malaysia could consider codifying a similar prohibition in the MACMA. Malaysia could also consider allowing the taking evidence by video conference and providing for the necessary technical equipment.

To provide greater cooperation in both extradition and MLA, Malaysia could consider revising its approach to prosecution in lieu of cooperation. If Malaysia refuses to extradite its nationals, it will prosecute the person sought only if it has jurisdiction over the offense. Malaysia may wish to ensure that its criminal law provides for jurisdiction to prosecute all such cases. As well, in light of international standards (such as Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC) Malaysia could consider requiring a case to be submitted to its competent authorities for prosecution whenever extradition is denied solely because of nationality. In addition, Malaysia may refuse extradition and MLA if it has jurisdiction to prosecute the offense underlying the request. It could consider ensuring that the jurisdiction to prosecute is exercised whenever it denies extradition or MLA on this basis. Finally, before denying cooperation on these grounds, Malaysia may wish to ensure that it consults the requesting state.

Relaxing the dual criminality requirement, which is presently mandatory for both extradition and MLA, could also improve cooperation. Malaysia could consider eliminating the dual criminality requirement for MLA or reducing it to a discretionary requirement. Alternatively, Malaysia could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents.

Malaysia denies extradition and MLA for political offenses, and the Extradition Act and the MACMA contain negative definitions of offenses that are not considered political. Malaysia could consider following the example of Article 44(4) of the UNCAC and add corruption offenses to this negative definition.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

As for procedure and practice, Malaysia requires all incoming requests (except requests for provisional arrest) to be sent via the diplomatic channel. It has observed delays in using this medium of transmission. Malaysia could therefore consider allowing transmission of requests outside the diplomatic channel, particularly urgent MLA requests. Possible options include accepting requests electronically, via facsimile, or even orally with subsequent confirmation in writing.

Recovery of Proceeds of Corruption in Criminal Proceedings

As for MLA in relation to proceeds of corruption, Malaysia could consider allowing direct registration of foreign restraining orders (as opposed to only confiscation orders). Malaysia may also wish to clarify its policy on when and how it will repatriate proceeds of corruption.

Information for Seeking Assistance

Central Authority

For MLA under the Southeast Asian MLAT:

Attorney General of Malaysia
c/o International Affairs Division
Attorney General's Chambers
Level 6, Block C3, Federal Government Administrative Centre
62512 Putrajaya, Malaysia
Tel: +60 3 8885 5000
Fax: +60 3 8888 3518 or +60 3 8888 6368
www.agc.gov.my/agc/agc/int/int.htm

For MLA under the Australia-Malaysia treaty and requests in the absence of a treaty: The Attorney General of Malaysia through the diplomatic channel

For Extradition: The Minister of Internal Security through the diplomatic channel

Relevant Laws and Documentation

Extradition Act and information on the extradition process:
www.agc.gov.my/agc/agc/int/EU/index.htm

The MACMA and information on the MLA process:
www.agc.gov.my/agc/agc/int/EMAM/index.htm

Model MLA Request Form and Checklist: www.agc.gov.my/agc/sec/form.htm

Mutual Evaluation Report on Malaysia, APGML (2007):
www.apgml.org/documents/docs/17/Malaysian%20MER%20-%20FINAL%20August%202007.pdf

Abdul Jalal Bin Mohd Yunus, "International Cooperation in Criminal Matters on Extradition and Mutual Legal Assistance in Malaysia", UNAFEI Resource Material Series No. 57, pp. 149-157 (2001): www.unafei.or.jp/english/pdf/PDF_rms/no57/57-00.pdf

Mongolia

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition and MLA in Mongolia are governed by Articles 398-409 of the Criminal Procedure Law (CPL). These provisions apply to all incoming and outgoing extradition and MLA requests that are made pursuant to applicable treaties. Extradition and MLA in the absence of a treaty is not available. Bilateral MLA treaties are in force between Mongolia and seven members of the ADB/OECD Initiative (P.R. China; India; Kazakhstan; Korea; Kyrgyzstan; Vietnam). Mongolia has four bilateral extradition treaties that are in force, all involving members of the Initiative (P.R. China; Kazakhstan; Korea; and India). In addition, requests for extradition and MLA in corruption cases may be handled through the UNCAC, which Mongolia ratified in early 2006. Available statistics indicate that Mongolia is fairly active in extradition and MLA. In 2004-2005, there were 82 incoming and 51 outgoing extradition and MLA requests, 61 of which have been resolved. None of the requests relate to corruption cases. The average time to execute a request was 1-3 months.

The CPL contains a basic framework for seeking and providing extradition and MLA. The law lists few grounds for denying cooperation and does not prescribe detail procedures for executing requests. Instead, the CPL stipulates that requests are to be executed in accordance with the applicable international agreement, thereby leaving most of the details to the provisions of the relevant treaty. Also of relevance are the provisions in the CPL governing similar measures in domestic investigations, e.g., taking testimony, search and seizure, confiscation. All incoming MLA and extradition requests may be sent to the Foreign Relations and Cooperation Department (FRACD) of the Ministry of Justice and Home Affairs (MOJHA), Mongolia's central authority for extradition and MLA. The FRACD also prepares outgoing requests. Requests are transmitted to and from the FRACD outside the diplomatic channel.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

The CPL expressly requires dual criminality for incoming extradition requests to Mongolia, but there is no corresponding provision for incoming MLA requests. It is not clear whether the requirement is conduct-based since the Mongolian

courts have not examined the issue. There are no offenses of bribery of foreign public officials or illicit enrichment in Mongolian law. Mongolia has not received incoming extradition or MLA requests involving these offenses, and it is unclear how such requests would be handled. Mongolia also does not impose liability against legal persons for corruption. It is therefore unclear how Mongolia would deal with incoming MLA cases in which a legal person is the target of a corruption investigation. It should be noted that Mongolia is obliged to provide non-coercive MLA that is requested under the UNCAC even in the absence of dual criminality.

The CPL only prescribes two grounds for denying cooperation. It prohibits the execution of MLA requests that would infringe Mongolia's essential interests, namely "sovereignty and security of Mongolia". As well, the CPL and the Constitution prohibit the extradition of Mongolian nationals. Nationals will be prosecuted in lieu of extradition if the Mongolian authorities receive a complaint about the crime and there is sufficient evidence (Article 166 CPL). An applicable treaty (e.g., Article 44(11) of the UNCAC) may also require prosecution of a national in lieu of extradition. In addition to these grounds stipulated in the CPL, Mongolia denies extradition if the penalty imposed by the requesting state is more cruel than that imposed by Mongolia. Apart from these grounds for denying cooperation and dual criminality, all other conditions for cooperation are found in an applicable treaty.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The FRACD is Mongolia's central authority for extradition and MLA with some exceptions, e.g., the MLA treaty with India, which designates the General Prosecutor's Office as the central authority, and the extradition treaty with Kazakhstan, under which both the FRACD and the General Prosecutor's Office are central authorities. In cases where the FRACD is the central authority, its main tasks are to process and monitor incoming and outgoing extradition and MLA requests.

Outgoing extradition and MLA requests are drafted by the FRACD. The request must be formally approved by the Minister of Justice and Home Affairs before it is sent to a foreign state. There are no specific rules on monitoring requests that have been sent, but the FRACD will inquire about the status of a request if necessary. The FRACD is also responsible for receiving and approving incoming extradition and MLA requests. Incoming requests involving corruption offenses are forwarded by the FRACD to the State Authority against Corruption

for execution. The FRACD is obliged to monitor outstanding requests but there are no specific rules to implement this obligation.

To discharge these responsibilities, the FRACD's staff are required to have a bachelor's degree in law, a good knowledge of foreign languages (particularly English), and experience in drafting documents. Current staff members are also fluent in Russian and German, and have experience in dealing with extradition and MLA cases. Official translators may provide assistance if necessary. The National Legal Centre of the MOJHA has not provided training to officials on international cooperation. The MOJHA maintains a Web site in the Mongolian language that contains contact information but not information pertaining to international cooperation.

The CPL does not contain provisions dealing with urgent MLA or extradition requests. Upon receiving an urgent request, the FRACD will endeavor to execute the request as quickly as possible. It usually takes one month to execute an urgent request.

Recovery of Proceeds of Corruption in Criminal Proceedings

Mongolia does not have specific laws or regulations dealing with the recovery of proceeds of crime (including corruption) in criminal proceedings. However, foreign requests for tracing, seizure, confiscation and repatriation of proceeds of corruption may be handled through the UNCAC and some bilateral MLA treaties (e.g., with India and Korea). As a matter of policy, Mongolia will repatriate all confiscated assets to a requesting state on the basis of reciprocity, although its laws are silent on this issue.

Conclusion

Mongolia appears to readily cooperate. The Mongolian central authority processes a rather large number of MLA and extradition requests annually. By allowing the authority to directly send and receive extradition and MLA requests, Mongolia is able to render MLA and extradition in a timely way. Since the ratification of UNCAC in 2006, the number of Mongolia's treaty relationships with countries within and outside Asia-Pacific has been significantly enlarged.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Mongolia has expanded its network of extradition and MLA treaties in corruption cases by ratifying the UNCAC. Nevertheless, permitting extradition and MLA in the absence of a treaty could further facilitate extradition and MLA with countries that are not State Parties to the UNCAC. A law with detailed provisions on the procedures and requirements for cooperation would be essential for providing cooperation in the absence of a treaty. Mongolia could also consider adding to the Criminal Procedure Law features found in recent extradition and MLA legislation in other jurisdictions, such as consent extradition, taking evidence by video conference and production orders.

Legal Preconditions for Extradition and MLA

Mongolian courts have not adjudged whether the dual criminality requirement is conduct-based. Mongolia could consider removing any doubts by expressly defining dual criminality in the CPL in terms of conduct. Since Mongolia does not have offenses of bribery of foreign public officials and illicit enrichment, it may wish to ensure that it can provide extradition and MLA in cases involving these offenses. Mongolia may also wish to ensure that it can provide MLA in cases in which a legal person is the target of a corruption investigation. Mongolia could consider clarifying in the CPL that dual criminality is not required for non-coercive MLA as mandated under the UNCAC. Finally, Mongolia could consider expressly prohibiting in the CPL the denial of MLA on grounds of bank secrecy (see Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The FRACD is the central authority for extradition and MLA, with some exceptions. Designating a single body as the central authority for all extradition and MLA requests without any exception could help avoid duplication and problems with coordination. Once a request is sent, there are no specific rules on monitoring the status of the request. Establishing a system to periodically review the status of outgoing requests could also help ensure that cases are not lost in the system. The central authority could also be encouraged to work closely with investigators and prosecutors who have knowledge of the case (such as the State Authority against Corruption) when drafting outgoing requests.

Providing training on international cooperation to prosecutors and law enforcement officers, particularly to members of the new State Authority against Corruption, could further enhance cooperation. Mongolia could also better evaluate and improve (if necessary) international cooperation by maintaining more detailed statistics, including the type of assistance, and the requesting and requested states involved. As well, Mongolia could consider providing special measures for executing urgent requests, which presently take approximately one month to execute, such as by accepting oral requests with subsequent written confirmation (see UNCAC Article 46(14)). An English Web page dedicated to international cooperation and which contains the relevant legislation and treaties, a description of the procedure for cooperation, contact information, and sample documents could also enhance cooperation.

Recovery of Proceeds of Corruption in Criminal Proceedings

Mongolia may satisfy foreign requests to seize, confiscate and repatriate proceeds of crime (including corruption) if an applicable treaty (such as the UNCAC) so provides. To further enhance cooperation, Mongolia may wish to consider permitting MLA relating to proceeds of corruption in the absence of a treaty. Mongolia could also add to the CPL provisions dealing with foreign requests for freezing and confiscation, including enforcement of foreign orders by direct registration and repatriation of proceeds. Mongolia may also wish to ensure that MLA is available in relation to both direct and indirect proceeds of corruption, as well as confiscation and freezing of property that is equivalent in value to the proceeds.

Information for Seeking Assistance

Central Authority

For Extradition and MLA except under the India-Mongolia treaty:

Foreign Relations and Cooperation Department
Ministry of Justice and Home Affairs
Ulaanbaatar-46, Khudaldaani gudamj 61A, Mongolia
Tel: +976 1 325225
Fax: +976 1 325225
www.mojha.gov.mn

For MLA under the India-Mongolia treaty:

General Prosecutor's Office

For Extradition under the Kazakhstan-Mongolia treaty:

Ministry of Justice and Home Affairs or the General Prosecutor's Office

Relevant Laws and Documentation

Articles 398-409 of the Criminal Procedure Law

Mutual Evaluation Report on Mongolia, APGML (2007):

www.apgml.org/documents/docs/17/Mongolia%20Mutual%20Evaluation%2007%20-%20Final%20.pdf

Nepal

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Nepal does not have a law on and hence cannot provide MLA. Nepal however has a law which governs extradition, the Extradition Act 2045 (No. 3 of 1988). The Act prescribes the circumstances under which a request for persons in Nepal may be extradited. The Act applies to countries that have treaties with Nepal. Nepal has one bilateral extradition treaty in force (with India, a member of the ADB/OECD Initiative). Nepal has signed the UNCAC and the UNTOC but not yet ratified these instruments. As of July 2007, it has taken steps to pass extradition and MLA legislation that is in line with the UNCAC and the UNTOC. It also intends to conclude additional bilateral treaties that are in line with both Conventions.

Legal Preconditions for Extradition

The Extradition Act 2045 establishes procedures for responding to extradition request. The Act defers to an applicable treaty for the definition of extraditable offenses. The treaty with India lists extraditable offenses including embezzlement, serious theft, and receiving illegal gratification by a public servant. Giving a bribe to a national or foreign public official, money laundering, and false accounting are not listed.

The Extradition Act lists few grounds for denying extradition, leaving the matter to an applicable treaty. A person will not be extradited from Nepal if the offense underlying the extradition request is of a political nature. The Act excludes terrorism but not corruption offenses from the definition of political offense. In addition, Nepal may refuse extradition if the person sought is not proper to be surrendered, if the offense in question is trivial, if it is in the interest of justice, or for any reason which it deems proper. Extradition is postponed if the person is facing proceedings in Nepal. The Act also allows the government to punish the person sought in lieu of extradition if it is reasonable to do so.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Nepal does not have a central authority for extradition. The Extradition Act requires requests to be transmitted through the diplomatic channel. Upon receiving a request, a court will issue an arrest warrant for the person sought. When the person is arrested, the court conducts a hearing to determine whether the offense is extraditable or is of a political character. If the court decides that the person should be extradited, the person is committed into custody to await surrender. The court's ruling may be appealed. The person may be discharged if he/she is not surrendered within 60 days of committal.

The Extradition Act provides for provisional arrest, but only of a "fugitive accused or offender of any foreign country", not Nepali nationals. A court may issue an arrest warrant upon receiving information that the person sought is coming to or has been residing in Nepal, and that it is necessary to arrest the person.

Recovery of Proceeds of Corruption in Criminal Proceedings

In the absence of any treaty or legislative framework governing the granting of mutual legal assistance, Nepal cannot render MLA relating to proceeds of corruption. Legislation on asset seizure was drafted in 1997 with assistance from the United Nations Office on Drugs and Crime and has been under the review of the Ministry of Law and Justice since then.

Conclusion

Nepal's legal framework for international cooperation consists of the Extradition Act and its bilateral treaty with India. It has no framework law setting out rules for MLA. Nepal has signed, but has not yet ratified, the UN Convention against Transnational Organized Crime and the UN Convention against Corruption.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Expansion of its network of extradition and MLA treaties could strengthen Nepal's ability to seek and provide international cooperation in corruption cases. Ratifying the multilateral treaties that have already been signed, such as the

UNCAC and the UNTOC, would expand this network, as would concluding more bilateral extradition and MLA treaties. Allowing extradition and MLA without a treaty would be useful.

In the area of legislation, the Extradition Act could be updated to provide features such as extradition by consent or via endorsement of warrants. As for MLA, a law with detailed provisions on the procedures and requirements for MLA would be essential to providing cooperation, particularly when providing assistance that requires judicial intervention or MLA in the absence of a treaty. Such a law could include features found in recent MLA legislation in other jurisdictions, such as service of documents, obtaining unsworn and sworn witness statements, taking evidence through video conference, production orders, search and seizure, and transfer of prisoners to assist in an investigation or proceeding.

Legal Preconditions for Extradition and MLA

Dual criminality is not compulsory under the Extradition Act but may be required under a treaty. It could be important to ensure that dual criminality does not hinder cooperation in cases involving bribery of national and foreign public officials, illicit enrichment, money laundering, and false accounting. This could be accomplished by abandoning the list approach to defining extradition offenses.

The Extradition Act contains several concepts that could benefit from clarification. The Act allows extradition to be denied if the person sought is not proper or for any reason which the government deems proper. A person may also be punished in lieu of extradition if it is reasonable to do so. Elaborating on the meaning of “proper” and “reasonable” could add certainty and accountability. Consideration could also be given to deeming corruption offenses to not be offenses of a political character (see Article 44(4) of the UNCAC).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Establishing a central authority for extradition and MLA in corruption cases could result in economies of scale, concentration of expertise, better coordination among law enforcement agencies, and less duplication. Allowing the central authority to directly send and receive requests would eliminate delays caused by transmission through the diplomatic channel. It could be beneficial to foreign authorities to create a Web page in English that is dedicated to international cooperation. The page could contain a description of

the Nepali extradition and MLA process, copies of relevant legislation and treaties, contact information for the central authority, and sample documents.

Procedures for urgent requests, such as allowing Nepali nationals to be provisionally arrested, could be useful. Delay could be reduced by accepting requests for provisional arrest made outside the diplomatic channel, such as by facsimile or Interpol. These media could also be used for urgent MLA requests. Nepal could also consider accepting oral requests with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, treaties and legislation on MLA relating to proceeds of crime could greatly improve Nepal's ability to provide assistance. The law and treaty framework should cover tracing, freezing, forfeiture and repatriation of property pursuant to foreign requests. The definition of proceeds should encompass property derived from or obtained, directly or indirectly, through the commission of a corruption offense. Assistance could also cover property or instrumentalities used in or destined for use in corruption offenses, as well as confiscation of property the value of which corresponds to proceeds of corruption offenses. Allowing foreign restraining, confiscation and pecuniary penalty orders to be enforced, especially by direct registration of the foreign order, could enhance efficiency (e.g., Articles 2(e), 31, 54 and 55 of the UNCAC).

Information for Seeking Assistance

Central Authority

For Extradition: the diplomatic channel

Relevant Laws and Documentation

Extradition Act 2045 (No. 3 of 1988)

Nepal Mutual Evaluation Report 2005 - Executive Summary (APGML):
[www.apgml.org/documents/docs/8/Nepal%20MER%20Executive%20Summary.p
df](http://www.apgml.org/documents/docs/8/Nepal%20MER%20Executive%20Summary.pdf)

Pakistan

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition in Pakistan is governed by the Extradition Act (Act 21 of 1972) while MLA and the recovery of proceeds in corruption cases are governed by the National Accountability Bureau Ordinance (Act 18 of 1999) (NAO), which applies the Code of Criminal Procedure 1898 (Act 5 of 1898 as amended by Act 2 of 1997) (CrPC). Treaties are not self-executing in Pakistan but are incorporated into the domestic legal framework by legislation. The Extradition Act applies to a concluded treaty only when the Federal Government so declares in the official Gazette. In the absence of a treaty, the Federal Government can direct that the Extradition Act applies to a foreign state if the Government considers it expedient (on the basis of "comity") that a person in Pakistan should be surrendered. MLA may be rendered in the absence of a treaty.

Pakistan is a party to one multilateral convention that could be used to provide extradition and MLA in corruption cases, namely, the UNCAC. It has signed but it has not ratified the UNTOC. Pakistan has only one bilateral MLA treaty in force (with Kazakhstan, a member of the ADB/OECD Initiative). Pakistan has 13 bilateral extradition treaties in force with Parties to the OECD Convention (Argentina; Austria; Belgium; Denmark; France; Greece; Italy; Luxembourg; Netherlands; Portugal; Switzerland; Turkey; and United States). Most of these treaties date back to Pakistan's pre-independence period. In addition, under the London Scheme, Pakistan has extradition relations with four members of the Initiative (Australia; Cook Islands; Fiji; and Vanuatu).

The Extradition Act has not been significantly amended since its enactment in 1972. The Act is not overly extensive and contains only some of the features found in more recent extradition legislation in other jurisdictions. For MLA, the CrPC allows the issuance of commissions to examine witnesses abroad, but otherwise contains no provisions dealing with outgoing MLA requests. In corruption cases that fall within the jurisdiction of the National Accountability Bureau (NAB), the NAO permits the NAB Chairman to request MLA from a foreign state. Incoming requests are executed by applying the NAO and the CrPC as necessary, even though strictly speaking the CrPC applies only to domestic investigations. The NAO also empowers the NAB Chairman to provide MLA to foreign jurisdictions in corruption matters.

In 2001-2005, Pakistan received 62 incoming requests for legal assistance in corruption matters from 12 different countries, including two members of the Initiative (Australia and Malaysia) and nine Parties to the OECD Convention (Australia; Belgium; Canada; France; Germany; Norway; Spain; United Kingdom; and United States). Pakistan has acted on 75% of the incoming requests as of November 2006. Over the same period, Pakistan sent 50 outgoing extradition and MLA requests to four countries, all of which are Parties to the OECD Convention (Australia; Canada; United Kingdom; and United States) and one is a member of the Initiative (Australia).

MLA requests to Pakistan in corruption cases may be made directly to the NAB. Requests for extradition must be transmitted through the diplomatic channel unless Pakistan and a foreign state have agreed upon an alternate arrangement. Requests may be submitted in English.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

To preclude extradition for trivial offenses, the Extradition Act allows for extradition from Pakistan only if the underlying offense is punishable by imprisonment for at least one year or by death. In addition, the Extradition Act lists extraditable offenses, including the following which pertain to corruption: bribery, stealing, embezzlement, fraudulent conversion, fraudulent false accounting, receiving stolen property, and any offense in respect of property involving fraud. The Act does not mention money laundering and illicit enrichment as extraditable offenses *per se*. However, both are offenses under the NAO, thus allowing the Federal Government to seek and provide extradition in such cases. Pakistan may also grant extradition if an extraditable offense (e.g., bribery or embezzlement) underlies an offense of illicit enrichment. Pakistan has in fact sought extradition in a number of illicit enrichment cases. For incoming MLA requests, there are no restrictions on what offenses are eligible for assistance. The NAB Chairman can make MLA requests for any offense that falls within the NAO.

Dual criminality is a mandatory requirement for incoming extradition and MLA requests to Pakistan. The definition of dual criminality in the Extradition Act is conduct-based, and the same definition presumably applies to MLA requests. Bribery of foreign public officials and illicit enrichment are offenses in Pakistan; incoming requests involving these offenses will probably meet the requirement of dual criminality. Pakistan imposes criminal liability against legal persons for corruption offenses. Dual criminality is therefore unlikely to be an obstacle to MLA in cases where a legal person is the target of an investigation or proceeding.

Pakistan requires *prima facie* evidence of the underlying offense before it will grant extradition. The Extradition Act specifically requires an extradition magistrate to hear evidence not only in support of extradition but also on behalf of the person sought.

Specialty may be required by Pakistan for extradition. For incoming requests, the Extradition Act requires the law of the requesting state or an applicable treaty to specifically provide specialty protection. In practice, Pakistan will accept an assurance or undertaking from the judicial or diplomatic authorities of the requesting state. The Act also provides specialty protection to persons extradited to Pakistan.

Pakistan will refuse extradition and MLA if the target of a case is being investigated or prosecuted in Pakistan for the same offense, or if Pakistan has tried and acquitted that person for the same offense. Whether extradition and MLA will be granted for offenses that are committed wholly or partly in Pakistan is decided on a case-by-case basis, having regard to factors such as the relative importance of the case to Pakistan and the requesting state, the magnitude of the crime, and whether the requesting state would reciprocate under the similar circumstances.

The Extradition Act expressly prohibits surrender if the request relates to an offense of a political character. The same principle applies to incoming MLA requests. However, the Pakistani Federal Government considers that this exception does not cover a person who holds political office and who misuses his/her authority or engages in corruption, if such allegations are proven in court. The Government distinguishes between prosecution because of "political beliefs and views", and prosecution of crimes and corruption committed by persons holding political office.

Concerning other grounds for refusing cooperation, Pakistan does not prohibit the extradition of its nationals *per se*. The death penalty is also not a bar to extradition or MLA. Pakistan will refuse an extradition or MLA request that prejudices its "essential interest", though the concept is not defined in its legislation. Pakistan will also refuse extradition if it would be unjust or inexpedient to surrender the person sought. As a matter of comity, Pakistan will consult the requesting state before denying an extradition or MLA request on any grounds.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The NAB is the *de facto* central authority for MLA in corruption cases, while the Ministry of Interior (MoI) has conduct of all extradition cases. In practice, if an

extradition request involves corruption offenses, the NAB may also be asked to verify certain facts and to comment on the merits of the request.

The NAB plays a central role when Pakistan seeks extradition and MLA in corruption cases. All requests for cooperation are forwarded by a regional NAB office to the NAB's Overseas Wing in Islamabad. The Overseas Wing is divided into teams based on different geographical regions in the world. A request for assistance is drafted by the team responsible for the region in which the requested state is located. A legal expert in the Wing then reviews the request to ensure compliance with domestic and international law before sending it to the competent authority for approval. MLA requests are sent directly by the NAB to the foreign state, while extradition requests are sent via the Ministry of Foreign Affairs and the diplomatic channel.

In corruption cases, incoming extradition requests are treated differently from MLA requests. Pursuant to the Extradition Act, incoming extradition requests are received by the Ministry of Foreign Affairs via the diplomatic channel and forwarded to the Mol for execution. The NAB is involved only to the extent of verifying certain facts and commenting on the merits of the case. On occasion, however, the NAB receives incoming extradition requests directly from a foreign state, which it will forward to the Mol with the knowledge of the Ministry of Foreign Affairs. Incoming MLA requests in corruption cases are received directly by the Director of the Overseas Wing of the NAB and forwarded to the relevant department in the Wing. A legal expert verifies that the request conforms to the relevant legislation and treaties. The request is then executed by the appropriate wing of the NAB, e.g., requests for financial information are handled by the Financial Wing of the NAB. Evidence collected is sent by the NAB directly to the foreign authorities. The only exception to this procedure is requests involving the repatriation of assets, which the NAB must forward to the Mol for execution. All requests are kept confidential.

The NAB monitors all outstanding extradition and MLA requests. Each team in the Overseas Wing is responsible for following up all incoming and outgoing requests with which it has dealt. Monthly activity reports are generated by each team for the competent authority. The NAB also liaises directly with its foreign counterparts on MLA matters. Most communication pertains to specific cases, although Pakistan also has working groups with some jurisdictions to improve international cooperation generally. The NAB does not communicate with foreign authorities in extradition cases; all communication must be through the Ministries of Interior and Foreign Affairs.

In order to discharge these responsibilities, the Overseas Wing of the NAB is staffed with lawyers, bankers and experts in finance and international law. The

NAB's training program for its staff includes a component that deals specifically with MLA. The NAB maintains a Web site in English with general contact information but not information specific to MLA and extradition. The relevant extradition and MLA legislation and treaties are not available online.

Although the NAB does not have a separate arrangement for urgent MLA requests, it will process such requests on a fast-track basis and the requesting state will be kept abreast of developments. For extradition, the Extradition Act does not provide for provisional arrest of a person sought. A person sought may be arrested only after the foreign state has requested the person's extradition through the diplomatic channel and the Pakistani Federal Government has approved the request.

Recovery of Proceeds of Corruption in Criminal Proceedings

Pakistan may provide MLA in relation to proceeds (including indirect proceeds) of corruption. Information is not available on the preconditions for tracing, freezing and confiscating such proceeds.

Pakistan may repatriate confiscated proceeds to a foreign state, having regard to the cost, time and resources expended by Pakistan in confiscating the assets. If the assets are returned, Pakistan will send them either to the foreign government, or directly to the victims of the crime in consultation with the foreign government with the approval of the Pakistani court.

Conclusion

Extradition and MLA are available with or without a treaty. In corruption cases, the Overseas Wing of the NAB is a *de facto* central authority for incoming and outgoing MLA requests. The Overseas Wing is staffed with specialists in criminal and international law. It is divided into departments by geographical location, which allows for specialization of knowledge and greater ease in maintaining personal contacts with foreign counterparts. In addition, NAB has trained its staff specifically on MLA. The Overseas Wing also has a fairly elaborate method of tracking outstanding requests.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Ratifying the UNTOC, as well as concluding new bilateral extradition and MLA treaties, would likely enhance Pakistan's ability to seek and provide international cooperation in corruption cases. Pakistan has only one MLA treaty, while some of its extradition treaties were adopted from the United Kingdom and are thus quite old. Legislative reform could also improve Pakistan's ability to provide international cooperation. Pakistan could amend or replace the Extradition Act so as to provide more modern features, such as provisional arrest and consent extraditions. Abandoning the list approach to defining extradition offenses could also help ensure that all corruption and related offenses (e.g., money laundering and illicit enrichment) are covered. Pakistan could also consider allowing MLA to be provided in the absence of a treaty.

Furthermore, Pakistan could consider improving its legal framework for MLA by enacting a law that deals specifically with MLA. Because the CrPC is designed for domestic and not foreign investigations, it does not expressly address matters such as dual criminality, offenses eligible for assistance, grounds for denying assistance, channel of communication with foreign states, designation of a central authority to handle requests, taking evidence by video conference, production orders etc. A special law that expressly addresses these matters could add certainty and transparency to the MLA process.

Legal Preconditions for Extradition and MLA

Pakistan could consider enhancing extradition by reviewing the evidentiary aspects of the process. In particular, Pakistan applies the *prima facie* case evidentiary test in extraditions. Civil law jurisdictions seeking extradition from other common law jurisdictions have had difficulties in complying with this test. Pakistan could therefore consider following the example of some common law countries (e.g., Australia and the United Kingdom for extradition to certain non-Commonwealth countries) and require less or even no evidence for extraditions, while bearing in mind the need to protect the rights of the person sought. In addition, the Extradition Act requires the extradition judge to receive evidence on behalf of the person sought. Pakistan may wish to consider whether this would allow the person sought to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition hearing could potentially be turned into a trial, thereby delaying the process.

To further enhance international cooperation, Pakistan could consider eliminating the dual criminality requirement for MLA or reducing it to a discretionary requirement for requests made outside the UNCAC. Alternatively, Pakistan could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Such an approach would be consistent with the standards embodied in international instruments, e.g., Article 46(7) of the UNCAC.

As for grounds to deny cooperation, Pakistan refuses extradition and MLA if the target of a case is being investigated or prosecuted in Pakistan for the same offense. Pakistan could consider reducing this to a discretionary ground for denying cooperation, which could give more flexibility to the decision of whether the prosecution should proceed in Pakistan or the requesting state. Such an approach would also be consistent with Pakistan's policy of rendering extradition and MLA where the underlying offense is committed wholly or partly in Pakistan. Enacting a legislative provision to prohibit MLA from being denied because of bank secrecy would bring Pakistan in line with recent international standards (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Pakistan has a *de facto* central authority for MLA in corruption cases, namely the NAB. The NAB will execute incoming requests unless they involve extradition or repatriation of assets, which must be executed by the MoI. This division of responsibilities between the NAB and the MoI has led to some confusion, e.g., foreign states sending extradition requests to the NAB. Pakistan could therefore consider simplifying this process by creating a single central authority for all extradition and MLA cases, and by allowing the central authority to communicate directly with a foreign state outside the diplomatic channel. Pakistan could also consider creating a Web page in English that is dedicated to international cooperation and includes information such as the relevant legislation, contact information for the central authority etc.

Finally, Pakistan could also consider establishing procedures for dealing with urgent requests. It could consider providing for provisional arrest under the Extradition Act, and allowing such requests to be made outside the diplomatic channel. It could also consider accepting urgent requests for MLA that are made via Interpol, email, facsimile, or orally with subsequent written confirmation.

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, Pakistan could consider creating legislation that specifically deals with enforcement of foreign freezing and confiscation orders, including enforcement by direct registration. A special law that expressly addresses these matters could add certainty and transparency to the process. The legislation could also codify Pakistan's policy for repatriating proceeds of corruption.

Information for Seeking Assistance

Central Authority

For MLA in corruption cases:

National Accountability Bureau
Attaturk Avenue G-5/2
Islamabad, Pakistan
Tel: +92 051 920 2182
Fax: +92 051 921 4502 03
chairman@nab.gov.pk; infonab@nab.gov.pk
www.nab.gov.pk

For extradition: the diplomatic channel

Relevant Laws and Documentation

Extradition Act (Act 21 of 1972)

Code of Criminal Procedure (Act 5 of 1898 as amended by Act 2 of 1997)

The National Accountability Bureau Ordinance (Act 18 of 1999)

Hussain, F., "Seizure, Confiscation and Asset Recovery", 3rd Master Training Seminar, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific:
www.oecd.org/dataoecd/21/4/35167365.pdf

Farooq, A., "International Cooperation to Combat Transnational Organized Crime - With Special Emphasis on Mutual Legal Assistance and Extradition", UNAFEI Resource Material Series No. 57, pp. 166-176 (2001):
www.unafei.or.jp/english/pdf/PDF_rms/no57/57-14.pdf

Palau

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Palau are governed by the Extradition and Transfer Act 2001 (ETA), Mutual Assistance in Criminal Matters Act 2001 (MACMA), and the Money Laundering and Proceeds of Crime Act 2001. The ETA and the MACMA apply to all incoming and outgoing extradition and MLA requests respectively, including requests made in the absence of a treaty. The President of Palau (or his/her designate) may reject an extradition or MLA request for lack of reciprocity.

Palau is not party to any multilateral or bilateral treaties that could be used to provide MLA in corruption cases. It is party to one bilateral extradition treaty (with the United States, a party to the OECD Convention) and one multilateral extradition treaty (with the Federated States of Micronesia and the Republic of the Marshall Islands). Extradition to Palau has been implemented through endorsement of arrest warrants by four members of the ADB/OECD Initiative that are also members of the Pacific Islands Forum (Cook Islands; Fiji; Papua New Guinea; and Vanuatu). However, extradition from Palau to these countries does not employ a similar system. Extradition to and from the United States is governed by the Compact of Free Association, which is considered a treaty under the ETA. For all other foreign countries, Palau may designate the country by regulation as a “comity country” under the ETA. It may also certify a foreign country as a comity country for the purpose of a particular extradition request.

The ETA and the MACMA are extensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation contains several modern features commonly found in similar legislation of other jurisdictions, such as production orders and consent extradition, but not service of process pursuant to a foreign request. The MACMA also contains provisions on MLA relating to proceeds of crime. Extradition requests may be sent to the Minister of Justice outside the diplomatic channel, e.g., via Interpol. The request and supporting documents must be in English or accompanied by an authentic translation into English. MLA requests should be sent to the Attorney General through the diplomatic channel.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is mandatory for extradition and MLA. An offense must be punishable in the requesting state by at least one year's imprisonment. The conduct underlying the request must also be punishable in Palau by a minimum of one year's imprisonment if it was committed there. The definition of dual criminality is conduct-based. Bribery of foreign public officials and illicit enrichment are not criminal offenses in Palau, and it is not clear how extradition and MLA requests involving these offenses would be handled. Palau does not impose liability against legal persons for corruption offenses. Palau does not impose criminal liability against legal persons for corruption offenses. It is therefore also unclear how it would handle MLA requests in cases in which a legal person is the target of a corruption investigation.

Evidentiary tests apply to incoming MLA and extradition requests. For MLA requests, there must be probable cause to believe that an offense has been committed and that evidence relating to the offense will be found in Palau. For incoming extradition requests, there must be probable cause to believe that the person sought committed the extraditable offense. Palau may also impose the *prima facie* case test for requests from countries that use this test in granting extradition. To meet the applicable evidentiary test, an extradition request must include a detailed statement of the conduct constituting the offense and a description of the supporting evidence.

Specialty and use limitation are addressed in the ETA and the MACMA respectively. Palau may refuse extradition if the requesting state does not provide an undertaking of specialty in the form of an affidavit. The ETA also specifically confers specialty protection to persons surrendered to Palau. Under the MACMA, evidence obtained by Palau through MLA may only be used in the proceeding or investigation referred to in the request (unless the Supreme Court permits otherwise). There are no corresponding provisions for incoming MLA requests.

Extradition may be denied in cases involving the death penalty. No Palau citizen or person of Palauan ancestry may be extradited for an offense that is punishable by death in the requesting state. Persons of other nationality or ancestry may be extradited for such an offense only if the requesting state provides sufficient assurances that the death penalty will not be imposed or carried out.

Concurrent proceedings and double jeopardy are mandatory grounds for denying extradition. These include cases in which the person sought has been

convicted of the offense in Palau, or has been acquitted, punished or pardoned in the requesting state or Palau for the subject conduct. Refusal is also mandatory if a prosecution for the same offense is pending in Palau, or if the offense was committed wholly or partly in Palau and the Attorney General confirms that prosecution will be instituted. MLA may be postponed if assistance will likely prejudice an investigation or proceeding in Palau.

Essential interests is also a ground for denying cooperation. Palau refuses MLA that prejudices its sovereignty, security or national interest. The President may also reject an MLA request if it is in Palau's public interests to do so. A judge has residual discretion to refuse extradition, having regard to the national interest of Palau, the interest in effective international cooperation, the severity of the offense, and the age of the offense.

As for other grounds of refusal, nationality is not an absolute bar to extradition from Palau. If extradition of a Palau national is denied for this reason, the ETA requires the case to be submitted to Palau's competent authorities for prosecution. Palau refuses extradition for political offenses, which is defined as any charge or conviction based on a person's political beliefs or affiliation where the conduct involved does not otherwise constitute a violation of that country's criminal laws. The MACMA does not address whether MLA may be denied because of bank secrecy. Palauan legislation in other contexts (e.g., section 25 of the Money Laundering and Proceeds of Crime Act 2001) expressly requires disclosure of information notwithstanding secrecy obligations.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Attorney General is Palau's central authority for MLA, although all incoming and outgoing requests must be transmitted through the diplomatic channel and the Minister of State. Upon receiving a request, the Attorney General will determine whether the requirements in the MACMA are met (e.g., whether a ground of refusal applies and whether there is probable cause to believe evidence of an offense will be found). Unless it is necessary for the execution of the request, it is an offense to disclose the receipt or contents of an incoming MLA request, including documents associated with the request. Evidence gathered is sent only after the Attorney General is satisfied that the requesting state will comply with any terms or conditions imposed.

The Minister of Justice is Palau's central authority for extradition. Upon receiving a request, the Minister must consider whether certain requirements in the ETA are met. If so, he/she commences proceedings in the Supreme Court and seeks a warrant for the person sought's arrest. After the arrest is made, a

preliminary hearing is conducted to determine whether there is probable cause to believe that the correct person has been arrested, and that the person has committed an extraditable offense in the requesting state. If these conditions are satisfied, a judge will hold a further surrender determination hearing to examine the requirements for surrender in the ETA. If these requirements are met, the judge will order the person to be surrendered to the requesting state. The ETA does not prescribe a procedure for making outgoing extradition requests.

To deal with urgent requests, a person sought for extradition may be provisionally arrested if the person is in or is about to enter Palau, and there is a substantial likelihood that he/she will flee if not arrested. A facsimile or electronically transmitted copy of the arrest warrant may be used in support of an application for a provisional arrest warrant. However, the requesting state must produce an original or authenticated copy within 10 business days. The MACMA makes no provision for urgent requests (except for MLA relating to proceeds of crime).

The ETA contains several features to expedite extradition. A person sought may consent to surrender at any time after his/her arrest. A judge may order the person's surrender immediately after confirming the validity of the consent; no further court proceedings will take place. The ETA also imposes strict deadlines for various steps in the extradition process to be completed. For instance, the surrender determination hearing must commence no later than 60 days after the filing of the application for extradition. A judge must decide whether to order surrender within 7 days of the hearing. If the person sought is not surrendered within 60 days of the order, he/she will be discharged absent justifiable cause for the delay. In all cases the person must be surrendered within 180 days.

The Palauan government maintains a Web site that contains contact information for the Minister of Justice and the Attorney General but not information on international cooperation. Copies of the relevant legislation are available from United Nations Web sites.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided primarily through the MACMA, though the Money Laundering and Proceeds of Crime Act (MLPCA) may also be applicable. A range of assistance is available, including tracing, restraining and confiscating proceeds of crime. Proceeds of crime is defined as the fruits of a crime, or any property derived or realized, whether directly or indirectly, from a serious offense. The definition includes proceeds that have been converted, transformed or intermingled, as well as gains derived or realized from proceeds. A serious offense is an offense punishable in Palau by more than

one year's imprisonment, or an offense in a foreign state in which the underlying conduct would be punishable in Palau by at least one year's imprisonment if it was committed there.

A range of tools is available for tracing and identifying proceeds of crime. When a foreign state requests Palau to locate proceeds of a serious offense, the Attorney General may authorize any application of the MLPCA to seek the necessary information. The available measures include the monitoring of bank accounts, surveillance, wiretapping and undercover operations.

There are two means of executing a foreign request to restrain proceeds of crime. A foreign restraining order may be registered directly with a Palauan court, after which it may then be enforced like a domestic court order. Alternatively, a Palauan court may issue a restraining order if there is probable cause to believe that property relating to a serious offense or belonging to a defendant is located in Palau.

Unlike restraining orders, foreign requests to confiscate proceeds of crime can only be executed by direct registration of a foreign order. The foreign order must be in force and not be subject to appeal at the time of registration. There is no requirement that a person be convicted of an offense in the requesting state.

To deal with urgent cases, the MACMA allows registration of a faxed copy of a duly authenticated foreign restraining or confiscation order. However, the registration ceases to have effect after 21 days unless a duly authenticated original is registered with the court.

Concerning the repatriation of proceeds, the MACMA gives the Attorney General discretion to enter into arrangements with foreign states for the reciprocal sharing of property realized in the foreign state. However, there is no corresponding provision to share property realized in Palau. The MLPCA states that confiscated property and proceeds accrue to Palau's general fund. There are no provisions for making payments out of the general fund to foreign states.

Conclusion

Palau has an extensive legislative framework for extradition and MLA. Both forms of cooperation are available without a treaty. The legislation specifically provides MLA relating to proceeds of crime, including measures to trace and identify proceeds, and enforcement of foreign restraining and confiscation orders by registration. The MACMA contains relatively few grounds for denying MLA, thus increasing Palau's ability to provide assistance. The efficiency of extradition is enhanced by allowing requests to be transmitted outside the diplomatic channel and by setting deadlines for various steps in the process to

be completed. If Palau refuses extradition because the person sought is its national, it will submit the case to its competent authorities for prosecution, consistent with the standard set out in Article 44(11) of the UNCAC and Article 10(3) of the OECD Convention. Most corruption offenses should not amount to political offenses since the latter does not include conduct that constitutes a violation of the criminal laws.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Although Palau may provide extradition and MLA without a treaty, treaty-based cooperation could add certainty and enhance Palau's ability to seek assistance in corruption cases. Palau could therefore consider ratifying the UNCAC. It may also be useful to permit extradition to all Pacific Islands Forum countries by endorsement of arrest warrants. To enlarge the range of assistance available, Palau could amend the MACMA to allow the service of process pursuant to a foreign request and the taking of evidence via video or Internet link.

Legal Preconditions for Extradition and MLA

Palau could consider eliminating the dual criminality requirement for MLA or reducing it to a discretionary requirement. Alternatively, Palau could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders. Such an approach would be in line with recent international standards (e.g., see Article 46(7) of the UNCAC). Palau may also wish to ensure that dual criminality does not prevent cooperation in cases involving bribery of foreign public officials and illicit enrichment, and where a legal person is the target of a corruption investigation or prosecution.

The MACMA is silent on the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Other Palauan legislation (e.g., the Money Laundering and Proceeds of Crime Act 2001) also explicitly states that secrecy obligations should not prevent the disclosure of information. Consideration could be given to codifying a similar provision in the MACMA.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

To avoid delays associated with the diplomatic channel, consideration might be given to allowing MLA requests to be sent directly to the Ministry of Justice. As well, consideration might be given to accepting urgent requests through any media that produces a writing (e.g., electronically or by facsimile) or even oral requests with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

More information could also be made available on the Internet so as to assist foreign states in preparing requests. For example, a Web page dedicated to international cooperation could be created, with a description of the extradition and MLA process, contact information for the central authorities, and links to the relevant legislation.

Recovery of Proceeds of Corruption in Criminal Proceedings

The MACMA allows enforcement of foreign restraining and confiscation orders through direct registration, but Palau could consider extending this regime to foreign pecuniary penalty orders. The Attorney General could consider exercising its discretion under the MACMA to enter into arrangements for the reciprocal sharing of confiscated assets in foreign states. Consideration could also be given to granting the Attorney General similar discretion over property confiscated in Palau. Proceeds of corruption could also be repatriated by allowing funds realized from confiscated property to be paid out of the general fund to a foreign state. In this respect, elaborating the criteria for sharing and repatriating assets to foreign countries, including the role of the factors referred to in Article 57 of the UNCAC, could enhance cooperation.

Information for Seeking Assistance

Central Authority

For MLA - via the diplomatic channel to:

Office of the Attorney General
PO Box 1365
Koror, Palau 96940
Tel: +680 488 2481
Fax: +680 488 3329
agoffice@palaunet.com
www.vpchin.com/moj/ag.php;
www.palagov.net/minjustice/attrgeneral.html

For Extradition:

Ministry of Justice
PO Box 100
Koror, Palau 96940
Tel: +680 488 3198
Fax: +680 488 4567
moj@palaunet.com; justice@palaunet.com
www.vpchin.com/moj

Relevant Laws and Documentation

The Extradition and Transfer Act 2001, Mutual Assistance in Criminal Matters Act 2001, and the Money Laundering and Proceeds of Crime Act 2001:
www.imolin.org/amlid/browse.jsp?country=TTR;
www.unodc.org/enl/browse_country.jsp?country=TTR

Official Web Site of the Palau Government: www.palaugov.net

Republic of Palau: Assessment of the Supervision and Regulation of the Financial Sector - Volume II - Detailed Assessment of Observance of Standards and Codes, IMF (2004): <http://www.imf.org/external/pubs/ft/scr/2004/cr04170.pdf>

1st Mutual Evaluation of Palau, Annual Report 2002-2003, APGML

Papua New Guinea

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Papua New Guinea are principally governed by the Extradition Act (No. 21 of 2005), the Mutual Assistance in Criminal Matters Act (No. 22 of 2005) (MACMA) and the Proceeds of Crime Act (No. 23 of 2005). The Extradition Act and the MACMA apply to all incoming and outgoing extradition and MLA requests respectively, including requests made in the absence of a treaty. Neither Act expressly requires reciprocity for cooperation without a treaty.

Papua New Guinea has ratified the UNCAC. It has extradition relations based on the London Scheme with 3 members of the ADB/OECD Initiative (Bangladesh; Singapore; and Sri Lanka) and 2 Parties to the OECD Convention (Canada; United Kingdom). Papua New Guinea also employs a system of endorsement of arrest warrants for extradition to the 15 other members of the Pacific Islands Forum, including 6 members of the Initiative (Australia; Cook Islands; Fiji; Palau; Samoa; and Vanuatu) and 2 Parties to the OECD Convention (Australia; New Zealand). For extradition from Pacific Islands Forum countries to Papua New Guinea, only the Cook Islands, Fiji and Vanuatu use a similar system of endorsing warrants.

The Extradition Act and the MACMA are extensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation contains several modern features commonly found in similar legislation of other jurisdictions, such as production orders, taking evidence by video link, consent extradition, and extradition based on a no-evidence standard. The MACMA also contains provisions on MLA relating to proceeds of crime. MLA requests should be sent to the Minister of Justice or his/her delegate. Letters rogatory requests sent to a Papua New Guinean court are forwarded to the Minister for execution under the MACMA. The Extradition Act does not specify the recipient of an extradition request; it merely states that the request should be sent to Papua New Guinea. Extradition requests to Papua New Guinea must be in English.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for extradition from Papua New Guinea. Extradition is available for an offense that is punishable by at least 12 months' imprisonment or death in the requesting state and in Papua New Guinea (if it had occurred there). Dual criminality is deemed to be met if extradition is required under a treaty to which Papua New Guinea is party. Dual criminality is also mandatory for coercive MLA measures such as search and seizure (dual criminality is discretionary for other measures such as production orders). The definition of dual criminality for both extradition and MLA is conduct-based. As bribery of foreign public officials and illicit enrichment are not criminal offenses in Papua New Guinea, it is not clear how extradition and MLA requests involving these offenses would be handled. As Papua New Guinea does not impose criminal liability against legal persons for corruption offenses, it is also unclear how MLA requests in which the target of a corruption investigation is a legal person would be handled.

Evidentiary tests apply to incoming MLA requests but not extradition. For more coercive forms of MLA (e.g., search and seizure), there must be reasonable grounds to believe that relevant evidence will be found. There is no such requirement for less coercive measures (e.g., taking of evidence and production orders). For incoming extradition requests, the requesting state is only required to provide a statement of the conduct that constitute the offense, and the time and place of the offense. The Extradition Act expressly prohibits the person sought from tendering evidence at the extradition hearing to show that he/she did not commit the offense in question. The Act also stipulates that appeals of an extradition judge's decision are decided on the record, i.e., fresh evidence may not be tendered at the appeal.

Specialty and use limitation are addressed in the Extradition Act and the MACMA respectively. Papua New Guinea may refuse extradition if the requesting state does not provide an undertaking of specialty. The undertaking may be given in a relevant treaty or a law of the requesting state. The Extradition Act also specifically confers specialty protection to persons surrendered to Papua New Guinea. For MLA, the MACMA restricts evidence obtained by Papua New Guinea from a foreign country to the proceeding or investigation referred to in the request. It is an offense to breach of this obligation without the permission of the Minister of Justice. There are no corresponding provisions for incoming MLA requests.

Extradition may be denied if the person sought is a Papua New Guinean citizen or if the offense is punishable by death in the requesting state. In lieu of

extradition, Papua New Guinea may prosecute a national if there is sufficient evidence and the subject conduct meets the dual criminality requirement. Alternatively, a requesting state may seek the extradition of a Papua New Guinean national for the purposes of trial only. Papua New Guinea may then allow extradition on the understanding that, if the person is convicted in the requesting state, he/she would be returned to Papua New Guinea to serve the sentence. As for the death penalty, the grounds for denying extradition listed in the Extradition Act do not explicitly refer to this issue. Nevertheless, the Act provides for prosecution in lieu of extradition and extradition solely for trial in death penalty cases under the same criteria as those for extradition of nationals.

Cooperation may also be denied for political offenses. Papua New Guinea will refuse extradition for offenses of a political character. The Act contains a negative definition of political offense but the definition does not refer to corruption offenses. The MACMA prohibits assistance relating to a political offense, as well as a request that has been made with a view to prosecuting or punishing a person for a political offense.

Concurrent proceedings and the doctrine of double jeopardy may also prevent cooperation. Extradition is refused if final judgment for the offense has been given against the person sought in Papua New Guinea or another country. It is also denied if the person has been acquitted, punished or pardoned in the requesting state or Papua New Guinea for the subject conduct. Refusal is discretionary if a prosecution for the same crime is pending in Papua New Guinea, or if the offense was committed wholly or partly in Papua New Guinea. MLA is refused if the person being prosecuted has been acquitted, punished or pardoned in the requesting state. It may also be denied if assistance could prejudice an investigation or proceeding in Papua New Guinea.

As for other grounds of denial, Papua New Guinea refuses MLA that prejudices its sovereignty, security or national interest. The Minister of Justice has residual discretion to refuse extradition, having regard to the national interest of Papua New Guinea and the severity of the offense. The MACMA does not address whether MLA may be denied because of bank secrecy.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Minister of Justice is Papua New Guinea's central authority for MLA. Upon receiving an MLA request, the Minister will determine whether the requirements in the MACMA are met (e.g., whether there are reasonable grounds to believe evidence of an offense will be found). The request is then forwarded to the appropriate body for execution. Unless it is necessary for the

performance of duties, it is an offense to disclose the existence, contents or status of an incoming MLA request without the approval of the Minister.

For extradition to countries that are not members of the Pacific Islands Forum, the functions of a central authority are shared between the Public Prosecutor and the Minister of Justice. Upon receipt, the request for extradition is sent to the Public Prosecutor with a copy to the Minister of Justice. The Public Prosecutor then applies to a magistrate for a warrant to arrest the person sought. After the arrest is effected, the magistrate conducts a hearing to confirm that certain conditions in the Extradition Act are met. At any time before the hearing is concluded, the Minister may decide that the person should not be extradited. The Public Prosecutor is then notified and the proceedings before the magistrate are terminated. If the hearing proceeds to conclusion and the requirements of the Act are met, the magistrate will commit the person sought into custody to await extradition. The case then reverts to the Minister to determine whether the person should be surrendered. The Extradition Act does not deal with the procedure for making outgoing extradition requests.

Extradition to Pacific Island Forum countries is more streamlined. An application may be made to a magistrate to endorse the original arrest warrant that had been issued in the requesting state. If the application is granted, the person sought may be arrested under the endorsed warrant and be brought before a magistrate. Once the magistrate concludes that the requirements of the Extradition Act are met, he/she may directly order the person's surrender to the requesting state (subject to any appeals of the magistrate's decision). The Minister of Justice is not involved.

To deal with urgent requests, the Extradition Act allows a foreign state to request provisional arrest if the person sought for extradition is in Papua New Guinea or is suspected to be on his/her way there. The request may be made directly or through Interpol. The MACMA does not contain provisions on urgent MLA requests.

To expedite extradition, the Extradition Act allows a person sought to consent to surrender after he/she has been arrested and brought before a magistrate. The consent allows the Minister to order surrender immediately. Regardless of whether the person sought consents, if the Minister orders surrender, the order must be carried out within two months. Otherwise, the person sought may apply to be discharged.

The government maintains a Web site which does not contain information that specifically addresses procedures for extradition and MLA. Copies of the relevant legislation are available from an on-line database maintained by an independent organization.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided primarily through the MACMA, though the Proceeds of Crime Act (POCA) may also be applicable. A broad range of assistance is available, including tracing, restraining, and confiscating proceeds of crime. Proceeds of crime is defined as any property wholly or partly derived or realized, whether directly or indirectly, from the commission of an offense. The definition includes proceeds that have been converted or transformed, as well as gains derived or realized from proceeds.

The MACMA provides several measures for tracing and identifying proceeds relating to a "foreign indictable offense". This term is defined as conduct that, if it occurred in Papua New Guinea, would be an indictable offense that is punishable by death or at least one year's imprisonment. For such offenses, foreign countries may request production orders that compel persons (e.g., financial institutions) to produce "property-tracking documents", i.e., documents relevant to identifying, locating or quantifying proceeds of crime. A request can also be made for a warrant to search for and seize property-tracking documents, proceeds of crime, or property used or intended for use in the commission of an offense.

There are two means of executing a foreign request to restrain proceeds of crime that are reasonably believed to be in Papua New Guinea. A foreign restraining order may be registered directly with a Papua New Guinean court. The registered order may then be enforced in Papua New Guinea like a domestic court order. Alternatively, a Papua New Guinean court may issue a restraining order under the POCA if there are reasonable grounds to believe that a proceeding relating to a foreign indictable offense has commenced or is about to commence in the requesting state. There must also be reasonable grounds to believe that property that may be subject to a foreign restraining order is located in Papua New Guinea.

Unlike restraining orders, foreign requests to confiscate proceeds of crime or to enforce a pecuniary penalty can only be executed by direct registration of a foreign order. A person must have been convicted of an offense in the requesting state, and the conviction and foreign order must be final. There is, however, no requirement that the conviction relates to a foreign indictable offense.

To deal with urgent cases, the MACMA allows registration of a faxed copy of a sealed or authenticated foreign order. However, the registration ceases to have effect after 21 days unless a sealed or authenticated copy of the order is filed with the court.

Concerning the repatriation of proceeds, the MACMA gives the Minister of Justice discretion to enter into arrangements with foreign states for the reciprocal sharing of property. The provisions cover both confiscated property and funds collected under a pecuniary penalty order, as well as property found in Papua New Guinea and a foreign state.

Conclusion

Papua New Guinea's framework for extradition and MLA is based entirely on its legislation. Extradition and MLA are available without a treaty. The MACMA offers a range of assistance, including production orders, taking evidence by video link. The legislation also specifically deals with proceeds of crime, with features such as tools for tracing and identifying proceeds, and enforcement of foreign restraining and confiscation orders by direct registration. To facilitate extradition, Papua New Guinea employs a no-evidence standard for all extradition requests. Extradition to all Pacific Island Forum countries is simplified through a system of endorsing arrest warrants. Papua New Guinea takes a flexible approach to certain grounds of denying extradition such as the death penalty and Papua New Guinean nationals. A person may be prosecuted in Papua New Guinea in lieu of extradition, or extradited solely for trial and then returned to Papua New Guinea to serve a sentence.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Papua New Guinea may provide extradition and MLA in the absence of a treaty. Nevertheless, treaty-based assistance could add certainty and enhance its ability to seek assistance in corruption cases. Papua New Guinea could therefore consider concluding additional bilateral and multilateral instruments for this purpose.

Legal Preconditions for Extradition and MLA

Dual criminality is mandatory for extradition. Papua New Guinea could consider eliminating this requirement for extradition or reducing it to a discretionary requirement. It may also wish to ensure that dual criminality does not prevent cooperation in cases involving bribery of foreign public officials and illicit enrichment, and where the target of a corruption investigation is a legal person.

There is no prohibition against the extradition of Papua New Guinean nationals. If extradition is denied for this reason, Papua New Guinea may submit the case to its competent authorities for prosecution under certain circumstances. It may also extradite a national solely for trial on the condition that he/she is returned to serve any sentences. Papua New Guinea may wish to ensure that one of these two alternatives is used whenever extradition is denied because of nationality. Such an approach is consistent with the standards embodied in recent international instruments on corruption (e.g., Article 10(3) of the OECD Convention and Articles 44(11) and 44(12) of the UNCAC). Papua New Guinea may also wish to clarify that extradition may be refused in cases in which the death penalty may be imposed. The Extradition Act does not list the death penalty as a ground for denying extradition but allows prosecution in lieu of extradition or surrender solely for trial in these cases. Papua New Guinea could also consider allowing extradition in death penalty cases if the requesting state provides sufficient assurances that the penalty would not be imposed or carried out.

Regarding other grounds for denying cooperation, political offense is a potential ground for refusing extradition and MLA. Consideration might be given to following the approach of Article 44(4) of the UNCAC to exclude this ground from extradition in corruption cases. As well, the MACMA is silent on the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Papua New Guinea could consider codifying a similar prohibition in the MACMA.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Extradition Act does not specify the recipient of an extradition request; it merely states that the request should be sent to Papua New Guinea. Clarifying to whom and how a request should be sent (e.g., directly or through the diplomatic channel) could greatly assist foreign states. The Extradition Act allows a foreign state to request provisional arrest directly or through Interpol. Papua New Guinea may wish to clarify whether it will accept requests through other media that produces a writing, such as facsimile. Papua New Guinea could also consider accepting urgent MLA requests through these channels of communication, as well as oral requests that are subsequently confirmed in writing (e.g., see Article 46(14) of the UNCAC).

Consideration might also be given to creating a Web page for the central authority with a description of the extradition and MLA process, contact information, and links to the relevant legislation.

Recovery of Proceeds of Corruption in Criminal Proceedings

Papua New Guinea will enforce a foreign confiscation order only if a person has been convicted of a foreign offense. It may wish ensure that assistance can also be rendered when the offender cannot be prosecuted by reason of death, flight, absence etc., consistent with Article 54(1)(c) of the UNCAC.

As for repatriating the proceeds of corruption, the MACMA confers on the Minister of Justice discretion to enter into arrangements for sharing assets with foreign states. Papua New Guinea could consider elaborating how this discretion would be exercised in corruption cases, including whether and how the Minister of Justice will take into account the factors referred to in Article 57 of the UNCAC. Papua New Guinea could also enter into arrangements for sharing and repatriating assets.

Information for Seeking Assistance

Central Authority

For Extradition and MLA: Ministry of Justice

Additional Contact

Department of Police of Papua New Guinea
Police Headquarters
PO Box 85
Konedobu
Port Moresby, NCD, Papua New Guinea
Tel: +675 322 6100
Fax: +675 322 6113

Relevant Laws and Documentation

The Extradition Act, Mutual Assistance in Criminal Matters Act, and the Proceeds of Crime Act: www.paclii.org/pg/legis/consol_act

Government of Papua New Guinea:
www.pngonline.gov.pg and
www.lawandjustice.gov.pg/www/html/7-home-page.asp

Philippines

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition in the Philippines is governed by treaties and the Extradition Law 1977 (Presidential Decree 1069). If the Law conflicts with a treaty, the more recent instrument prevails. Extradition without a treaty is not available. The Philippines has bilateral extradition treaties in force with ten countries, including six members of the ADB/OECD Initiative (Australia; P.R. China; Hong Kong, China; Indonesia; Korea; and Thailand) and five Parties to the OECD Convention (Australia; Canada; Korea; Switzerland; and United States). The Philippines is also party to one multilateral convention under which extradition requests in corruption cases may be handled, namely the UNTOC. Although the Philippines is party to the UNCAC, it has declared that it does not accept the Convention as a treaty basis for extradition. The Philippines has also signed but not yet ratified the Southeast Asian MLAT.

MLA involving the offense of money laundering is governed by the Anti-Money Laundering Act 2001 (as amended). There is no applicable legislation for MLA involving other offenses. If a bilateral or multilateral MLA treaty is available, then the treaty provisions are applied directly since there is no implementing legislation. In addition to the UNCAC and the UNTOC, the Philippines has bilateral MLA treaties in force with two members of the Initiative (Australia and Hong Kong, China) and three Parties to the OECD Convention (Australia; Switzerland; United States). Additional MLA treaties have been signed but are not in force with Korea (a member of the Initiative and Party to the OECD Convention) and Spain (a Party to the OECD Convention). In the absence of a treaty, the Philippines may only provide MLA that does not require judicial intervention, e.g., taking a voluntary witness statement. Measures such as search and seizure, compelling a witness to give evidence under oath and document production are not available.

Extradition requests must be sent through the diplomatic channel to the Secretary of Foreign Affairs. MLA requests under a bilateral treaty should be sent to the Department of Justice. In the absence of a treaty, MLA requests involving corruption and money laundering should be sent to the Office of the Ombudsman and the Anti-Money Laundering Council respectively. All requests should be in English.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is mandatory under the Extradition Law and may be required in certain bilateral MLA treaties. The offense for which extradition is sought must be punishable in the requesting state and the Philippines by imprisonment. The definition of dual criminality is based on conduct. Because the offenses of bribery of foreign public officials and illicit enrichment have not been established under Philippine law, it is unclear whether dual criminality would impede requests involving these offenses. The Philippines does not impose criminal liability against legal persons for corruption. It is therefore also unclear how dual criminality would impact MLA in cases in which a legal person is the target of a corruption case. As a State Party to the UNCAC, the Philippines is obliged to provide non-coercive MLA that is requested under the Convention even in the absence of dual criminality.

The *prima facie* case test applies to extradition. Certified copies of affidavits of witnesses are usually required; an affidavit by a prosecutor summarizing the evidence will not suffice. The Philippines generally requires specialty before it grants extradition, although the Extradition Law is silent on the issue. The Extradition Law does not list any other grounds for denying extradition, presumably leaving the applicable treaty to address the matter. These treaties may provide for a number of bases for refusal, including the availability of the death penalty, political offenses, double jeopardy, and offenses over which the Philippines has jurisdiction to prosecute.

Grounds for denying MLA are found in an applicable treaty, which may exclude MLA if the request harms the Philippines' essential interests. The UNCAC also allows requests made under the Convention to be refused if the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested state. Also, these bilateral MLA treaties generally do not prohibit the denial of assistance because of bank secrecy. Consequently, it has been observed that the Philippines' strict bank secrecy rules have "derailed, if not impeded", foreign requests to examine bank records or to freeze accounts. For requests made under the UNCAC, the Philippines is prohibited from declining to render MLA on the ground of bank secrecy.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Office of the Chief State Counsel (OCSC) in the Department of Justice is the Philippines' central authority for extradition and most MLA requests.

Requests under the UNCAC and the Anti-Money Laundering Act are handled by the Office of the Ombudsman and the Anti-Money Laundering Council. To perform its functions, the OCSC is staffed with approximately 27 attorneys, all of whom are fluent in English and have experience in extradition and MLA matters.

Under the Extradition Law, incoming requests must be sent through the diplomatic channel to the Secretary of Foreign Affairs. The Secretary of Foreign Affairs assesses whether the request meets the formal requirements of the relevant treaty before forwarding it to the OCSC. If the request is in order, the Department of Justice files a petition for extradition and an application for a summons or an arrest warrant. The person then appears before the Regional Trial Court for a hearing to determine whether there is a *prima facie* case. If the test is met, the person may be surrendered to the foreign state, subject to any appeals of the Court's decision.

As for MLA, treaties may allow requests to be sent directly to the Department of Justice outside the diplomatic channel. If the Department approves the request, the case is forwarded to the appropriate body (e.g., an investigative agency) for execution. Incoming extradition and MLA requests are kept confidential.

The OCSC plays a central role in outgoing extradition and MLA requests. The law enforcement agency in charge advises the Department of Justice of the need to seek cooperation. OCSC attorneys then draft a request for extradition or MLA in consultation with the agency. MLA requests are then sent by the Department of Justice to the foreign state through the appropriate channel.

The OCSC is also responsible for monitoring outstanding requests. With outgoing requests, the Office communicates with its foreign counterpart or the embassy of the requested state regarding the status of the request. The Philippine investigating agency and/or the embassy in the requested state may also be involved. With incoming requests, the Office monitors the case by liaising with the executing agency. When requests, the Office may also advise foreign states on how to prepare requests. As well, the Philippines maintains regular communication on non-case specific matters with treaty partners.

The Extradition Law allows the issuance of provisional arrest warrants in case of urgency. A request should be sent to the Director of the National Bureau of Investigation in Manila via the diplomatic channel, post or telegraph.

Steps in the extradition and MLA process are subject to judicial review or appeal. MLA requests may be challenged by the target of an investigation or prosecution, or a person who has been ordered to provide evidence (e.g., a bank). For extradition, the person sought may appeal a court's decision on

interim issues (e.g., bail, authentication of documents, and the right to tender evidence) to the Court of Appeal and ultimately to the Supreme Court. Such appeals may be taken before a court delivers its final decision to extradite the person. The person may also appeal the court's ultimate decision to extradite. These multiple appeals have sometimes resulted in protracted extradition cases.

Recovery of Proceeds of Corruption in Criminal Proceedings

Apart from applicable bilateral and multilateral treaties, MLA is also available under the Anti-Money Laundering Act 2001 (AMLA) in an investigation or prosecution of a money laundering offense (including laundering proceeds of corruption). Assistance without a treaty is available on the basis of reciprocity. Among other conditions, the requesting state must provide the particulars of the alleged offender's identity and the basis of the investigation or prosecution. The Anti-Money Laundering Council, the Philippines's FIU (AMLC), may refuse a request that contravenes the Constitution or prejudices the Philippines' national interest, unless an applicable treaty requires assistance to be provided. Requests made on the basis of reciprocity in the absence of a treaty should be sent to the AMLC.

The provisions of the AMLA are available for tracing proceeds of crime pursuant to a foreign request. Available measures include the use of information gathered through anti-money laundering measures, such as customer due diligence and suspicious transaction reporting. A court may also permit the AMLC to inquire into or examine a transaction or account that is involved in a money laundering offense.

The AMLA may be used to restrain property pursuant to a foreign request. The AMLC may restrain an account for 15 days if there is probable cause to believe that the account is related to an unlawful activity (e.g., a corruption offense). The account holder has 72 hours to explain why the restraining order should be lifted. A court may extend the restraining order beyond 15 days.

Foreign states may also request forfeiture under the AMLA. The request must be supported by an authenticated forfeiture order issued by a court in the requesting state. The property in question must belong to a person who has been convicted of money laundering (not corruption) in the requesting state. The conviction and the forfeiture order must be final.

The AMLA does not deal with sharing or repatriating forfeited assets to a foreign country, but the UNCAC contains such provisions for assets confiscated pursuant to a request under the Convention. In particular, embezzled public funds (including embezzled funds that have been laundered) must be returned

to a requesting State Party. For other offenses covered by the Convention, confiscated assets must also be returned to a requesting State Party that reasonably establishes its prior ownership of the property, or if the Philippines recognizes damage to the requesting State Party as a basis for returning the confiscated property. In all other cases, the Philippines is required to give priority consideration to returning confiscated property to a requesting State Party, returning such property to its prior legitimate owners or compensating the victims of crime.

Conclusion

By ratifying the UNCAC, the Philippines has significantly increased the number of countries to which it can provide MLA in corruption cases. In the absence of a MLA bilateral treaty, Article 46(9)-(29) of the UNCAC can be used to provide a wide range of assistance. MLA relating to proceeds of corruption is also available under Article 54.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Expansion of its network of extradition and MLA treaties could strengthen the Philippines's ability to seek and provide international cooperation in corruption cases. Ratifying the Southeast Asian MLAT and accepting the UNCAC as the treaty-basis for extradition would be one way of expanding this network, as would concluding more bilateral extradition and MLA treaties. Permitting extradition and MLA (that requires judicial intervention) without a treaty would be another beneficial step. A law with detailed provisions on the procedures and requirements for MLA would be essential to providing cooperation in the absence of a treaty. Such a law could include features found in recent MLA legislation in other jurisdictions, such as taking evidence by video conference. The Extradition Law could be modernized by adding features such as consent extradition.

Legal Preconditions for Extradition and MLA

The Philippines has not created offenses of bribery of foreign public officials or illicit enrichment, nor does it impose criminal liability against legal persons for corruption. Consideration could be given to ensuring that dual criminality does not prevent the Philippines from cooperating in these cases. As

for bank secrecy, a legislated prohibition on denying MLA because of secrecy would be consistent with recent international instruments (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Extradition Law allows a person sought to immediately appeal each decision in the process, e.g., bail, authentication of documents, and the right to tender evidence. Combining all appeals into a single review after extradition has been ordered could enhance efficiency. The process could also be expedited by imposing deadlines for certain steps (e.g., the commencement and conclusion of a hearing or appeal).

Another beneficial step would be to create an English Web page that is dedicated to international cooperation and contains the relevant legislation and treaties, a description of the procedure for cooperation, contact information, and sample documents. Such a Web page could be particularly useful if the Philippines allows cooperation without a treaty in the future. To assess and develop policy in international cooperation, it could be constructive to keep detailed statistics on the number of requests received, sent, executed and rejected, the foreign states involved, the nature of the assistance sought, the type of offense involved, and the time it takes to execute requests.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA relating to proceeds of crime is available without a treaty under the Anti-Money Laundering Act. The scope of assistance could be enhanced in several respects, however, such as by providing MLA to foreign investigations or prosecutions of corruption (instead of only money laundering), and removing the requirement that a requesting state provide particulars of an offender's identity (especially when a requesting state seeks MLA to ascertain a suspect's identity). Allowing foreign forfeiture orders to be enforced without a conviction (e.g., when an offender cannot be prosecuted because of death, flight, absence etc.) would bring the regime more in line with Article 54(1)(c) of the UNCAC.

Increasing the types of assistance available could also be helpful, e.g., providing for search and seizure to recover proceeds, and allowing enforcement of not only forfeiture but also pecuniary penalty orders. Foreign restraining and forfeiture orders may be enforced more efficiently through direct registration with a Philippine court (as in Article 55 of the UNCAC). Provisions could be made to

process urgent requests, such as allowing registration of faxed orders. Also, an express provision on sharing and repatriation of proceeds of corruption would provide greater certainty and accountability. In this regard, particular consideration could be given to the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For Extradition - via the diplomatic channel to the Secretary of Foreign Affairs

For MLA under a bilateral treaty:

Office of the Chief State Counsel
Department of Justice
Padre Faura Street
Manila, Philippines
Tel: +63 2 525 0764 / +63 2 521 6264
Fax: +63 2 525 2218
www.doj.gov.ph

For MLA in corruption cases in the absence of a treaty:

Office of the Ombudsman
Agham Road, North Triangle
Diliman, Quezon City 1101, Philippines
Tel: +63 2 926 9032-50
Fax: +63 2 926 8776
omb1@ombudsman.gov.ph
www.ombudsman.gov.ph

For MLA relating to money laundering in the absence of a treaty:

Anti-Money Laundering Council
5th Floor, EDPC Building
Bangko Sentral ng Pilipinas (BSP) Complex
Mabini corner Vito Cruz Street, Malate
Manila, Philippines
Tel: +63 2 524 7011 local 3083 or 3084
Fax: +63 2 524 6085
secretariat@amlc.gov.ph / amlc@bsp.gov.ph
www.amlc.gov.ph

Additional Contact

National Bureau of Investigation
NBI Building, Taft Avenue, Ermita
Manila, Philippines 1000

Tel: +63 523-8231 to 38
Fax: +63 526-1216, 523-7414
director@nbi.gov.ph
www.nbi.gov.ph

Relevant Laws and Documentation

Extradition Law 1977: www.chanrobles.com/presidentialdecreeno1069.htm

Anti-Money Laundering Act 2001 (as amended): www.amlc.gov.ph/archive.html

Supreme Court of the Philippines: www.supremecourt.gov.ph

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Gaña Jr., S., "International Cooperation in Combating Trafficking in Human Beings and Smuggling of Migrants", UNAFEI Resource Material Series No. 62, pp. 94-103 (2004): www.unafei.or.jp/english/pdf/PDF_rms_all/no62.pdf

Marcelo, S., "Denying Safe Havens through Regional and Worldwide Judicial Cooperation: The Philippine Perspective", ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 5th Regional Anti-Corruption Conference (2005):
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Samoa

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Samoa are governed by the Extradition Act (No. 12 of 1974 as amended by Act No. 4 of 1994), the Mutual Assistance in Criminal Matters Act (No. 3 of 2007) (MACMA), the Proceeds of Crime Act (Act No. 4 of 2007) (POCA), and the Money Laundering Prevention Act (Act No. 2 of 2007). The MACMA applies to all incoming and outgoing MLA requests involving any foreign country, including requests made in the absence of a treaty (so far, Samoa is not party to any bilateral or multilateral MLA treaty). There is no express requirement of reciprocity as a precondition for rendering MLA.

Pursuant to the Extradition Act, extradition is only available to and from foreign countries pursuant to a treaty and, in the absence of a treaty, to designated Commonwealth countries. Samoa has not concluded any bilateral or multilateral treaties that could provide extradition in corruption cases. It has designated certain Commonwealth countries as extradition partners, but the Extradition Act does not indicate which countries have been so designated. In practice, Samoa has effected extradition requests by canceling a person sought's permit to be in Samoa under its immigration laws. Certain Pacific Island Forum countries (e.g., Palau and Fiji) have enacted legislation allowing extradition to Samoa by endorsement of warrants, but Samoa has yet to reciprocate.

The Extradition Act and the MACMA are extensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation contains some modern features commonly found in similar legislation of other jurisdictions, such as attenuated evidentiary requirements for extradition to certain Commonwealth countries, production orders, and taking evidence by video or Internet link. The MACMA also contains provisions on MLA relating to proceeds of crime, including enforcement of foreign restraining and confiscation orders by direct registration. Requests for MLA and extradition should be sent to the Attorney-General (or his/her delegate) and the Minister of Justice respectively.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for extradition and MLA from Samoa. The definition of dual criminality is conduct-based. MLA is available for "foreign serious offenses", which is defined in the Proceeds of Crime Act as an act or omission that is against the laws of the requesting state and Samoa (if it occurred there). Extradition is available for an offense that is punishable in the requesting state by at least 12 months' imprisonment or death, and if the relevant act or omission is an offense in Samoa if it occurred there. Bribery of foreign public officials and illicit enrichment are not criminal offenses in Samoa, and it is not clear how Samoa will handle extradition and MLA requests involving these offenses. As Samoa does not impose liability against legal persons for corruption offenses, it is unclear how it would handle MLA requests in which the target of an investigation is a legal person.

Evidentiary tests apply to incoming extradition and MLA requests. Incoming and outgoing requests for evidence gathering, production orders, and search and seizure, must be founded upon reasonable grounds to believe that relevant evidence will be found. Incoming extradition requests are subject to the *prima facie* case test, i.e., there must be sufficient evidence to warrant the trial of the person sought for the offense if it had been committed in Samoa. However, Samoa may exempt certain Commonwealth countries from the *prima facie* case test. In these cases, the requesting Commonwealth state only needs to provide a "record of the case" that contains the particulars of the extradition offense and a recital of the evidence.

Specialty and use limitation are addressed in the Extradition Act and the MACMA respectively. Samoa will grant extradition only if the requesting state provides an assurance of specialty in its legislation or via a specific arrangement. The Extradition Act also specifically confers specialty protection to persons surrendered to Samoa. For MLA, the MACMA restricts evidence obtained by Samoa from a foreign country to the proceeding or investigation referred to in the request. There is no corresponding provision for incoming MLA requests.

Concerning grounds for denying MLA, the Attorney-General will refuse to grant an MLA request that, in his/her opinion, would prejudice the sovereignty, security or other essential public interest of Samoa or would be against the interest of justice. MLA will also be denied or postponed if the request would prejudice the conduct of an investigation or proceeding in Samoa. The MACMA does not address whether MLA may be denied because of bank secrecy, though other Samoan legislation in other contexts (e.g., section 3 of the Money Laundering Prevention Act) expressly overrides secrecy obligations.

The Extradition Act also prescribes grounds for denying cooperation. Extradition will be refused for offenses of a political character, or where the person sought, if charged with the underlying offense in Samoa, would be discharged because of a previous acquittal or conviction. Extradition is also refused if it is unjust or oppressive, having regard to factors such as the gravity of the offense, the passage of time after the commission of the crime, and whether the request was made in good faith. Other grounds for denying extradition are discretionary, such as where the person sought is a Samoan national, and where the subject offense is punishable by death in the requesting state but not in Samoa.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Attorney-General is Samoa's central authority for MLA. Outgoing MLA requests must be made by or through the Attorney-General, while incoming requests must be made to the Attorney-General or a person authorized by him/her. Upon receiving a request, the Attorney-General will determine whether the requirements in the MACMA are met (e.g., whether there are reasonable grounds to believe evidence of an offense will be found). If so, the Attorney-General will issue an authorization for the request to be executed. Officials of the requesting state may attend Samoa to assist the execution of a request, if necessary.

For extradition, the central authority is the Minister of Justice. Upon receiving an extradition request, the Minister may issue an authority to proceed unless it appears that the person sought could not be extradited under the Extradition Act. A magistrate may then order that the person sought be arrested and brought to court. The court then conducts a committal hearing to determine whether the documentation in support of extradition is sufficient and whether there are grounds for denying extradition. If the *prima facie* case test applies, the court must hear any evidence tendered in support of extradition or on behalf of the person sought. If the requirements of the Act are met, the court may commit the person sought into custody to await extradition. The case then reverts to the Minister to determine whether the person sought should be surrendered. The person sought may be discharged from custody if the Minister does not order surrender within two months of the committal order, or if the Minister's surrender order is not executed within one month (subject to any appeals). The Extradition Act does not deal with the procedure for making outgoing extradition requests.

To deal with urgent requests, the Extradition Act allows a magistrate to issue a provisional arrest warrant before the Minister issues an authority to proceed. However, the Act does not state whether a foreign state can request provisional arrest and, if so, to whom or how a request may be made, or what the request must contain. The MACMA does not contain any provisions on urgent MLA requests.

The Samoan government maintains a Web site which does not contain information relevant to extradition and MLA. Copies of the relevant legislation are available from the Web site of the Samoa International Finance Authority and from an on-line database of Samoan laws maintained by an independent organization. The Government Web site includes some contact information for the Attorney-General but not the Minister of Justice.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided primarily through the Mutual Assistance in Criminal Matters Act, though the Proceeds of Crime Act may also be applicable. A broad range of assistance is available, including tracing, restraining and confiscating proceeds of crime. Proceeds of crime is defined as any property wholly or partly derived or realized, whether directly or indirectly, from a serious offense. The definition includes proceeds that have been converted, transformed or intermingled, as well as gains derived or realized from proceeds. Property may be proceeds of crime even if no person has been convicted of the predicate offense.

The MACMA offers some specific tools for tracing and identifying proceeds of corruption. For instance, foreign countries may request production orders that compel persons (e.g., financial institutions) to produce "property-tracking documents", i.e., documents or data relevant to identifying, locating or quantifying proceeds of crime. A Samoan court may issue a monitoring order to compel a financial institution to provide information about transactions conducted through a specific account during a particular period. A foreign state may also request a warrant to search and seize proceeds or instruments of crime.

There are two means of executing a foreign request to restrain proceeds of crime that are reasonably believed to be in Samoa. A foreign restraining order that relates to a criminal investigation or proceeding in respect of a foreign offense may be registered directly with a Samoan court. The registered order may then be enforced in Samoa like a domestic court order. Alternatively, a Samoan court may issue a restraining order under the POCA if the following conditions are met. First, a person has been convicted of an offense. In the alternative, there are reasonable grounds to believe that a person has

committed an offense, and the person has been charged or will be charged within five days. Second, there are reasonable grounds to believe that the subject property is proceeds or instruments of a crime or, if the subject property belongs to the defendant, that the defendant derived a benefit from the commission of the offense. Third, there are reasonable grounds to believe that a confiscation order or pecuniary penalty order may be or is likely to be made in the requesting state.

Unlike restraining orders, foreign requests to confiscate proceeds of crime or to enforce a pecuniary penalty can only be executed by direct registration of a foreign order. A person must have been convicted of an offense in the requesting state, and the conviction and foreign order must be final.

To deal with urgent cases, the MACMA allows the registration of a faxed copy of a sealed or authenticated foreign order. However, the registration ceases to have effect after 21 days unless a sealed or authenticated copy of the order is filed with the court.

Concerning the repatriation of proceeds, the MACMA gives the Attorney-General discretion to enter into arrangements with the competent authorities of foreign states for the reciprocal sharing of property. The provision covers arrangements regarding property confiscated and realized in Samoa or in a foreign state. As well, the Money Laundering Prevention Act 2007 allows the Minister of Finance to send property forfeited under the POCA (or its equivalent value) to a foreign state if the interest of the community or an international agreement so requires.

Conclusion

Samoa has enacted extensive legislation for international cooperation in criminal matters, particularly in the area of MLA. The legislative scheme is extensive and contains many useful features such as attenuated evidentiary requirements for extradition through a record of the case, taking evidence by video or Internet link, and enforcement of foreign restraining and confiscation orders by direct registration. The ability to render MLA in the absence of a treaty also enhances cooperation.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

The Extradition Act applies only to extradition to and from designated Commonwealth countries and countries with which Samoa has an extradition treaty. This requirement is not problematic in and of itself. However, they render the Extradition Act inoperative in practice because Samoa has not designated any Commonwealth countries as extradition partners, nor has it entered into any extradition treaties. Samoa has sought to overcome this hurdle by deporting persons sought for extradition via immigration procedures. Yet, this approach is an unsatisfactory substitute for extradition because a deported person is not necessarily sent to the country seeking extradition. Deportation also may not apply to Samoan nationals.

Abandoning the requirement of a treaty for extradition to and from all countries or entering into bilateral and multilateral treaties with other countries could alleviate these hurdles. Samoa could also designate certain Commonwealth countries as extradition partners under the Extradition Act, particularly those countries that have already so designated Samoa under the London Scheme (e.g., Australia). Finally, Samoa could consider implementing the scheme of extradition among Pacific Islands Forum countries that is based on the endorsement of warrants. Two members of the Initiative (Palau and Fiji) have already implemented such a scheme for extradition to Samoa.

Samoa may provide MLA under the MACMA in the absence of a treaty. Nevertheless, treaty-based assistance could add certainty and enhance Samoa's ability to seek assistance.

Legal Preconditions for Extradition and MLA

Dual criminality is mandatory for extradition and MLA. Samoa could consider eliminating the dual criminality requirement or reducing it to a discretionary requirement. Alternatively, Samoa could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Such an approach would be consistent with Article 46(7) of the UNCAC. Samoa may also wish to ensure that the dual criminality requirement does not prevent cooperation in cases involving bribery of foreign public officials, illicit enrichment and liability of legal persons for corruption offenses.

In the area of extradition, the Extradition Act allows certain Commonwealth countries to be exempted from the *prima facie* case evidentiary test. Countries with civil law systems have reported difficulties in meeting the *prima facie* case test when seeking extradition from common law countries. Samoa could therefore consider extending the exemption from the *prima facie* case test to civil law jurisdictions. Furthermore, the Extradition Act allows a person sought to tender evidence at the committal hearing when the *prima facie* case test applies. Samoa may wish to consider whether this allows the person sought to adduce evidence challenging the allegations against him/her, thereby turning the hearing into a trial and prolonging the proceedings.

Although there is no prohibition against the extradition of its nationals, Samoa may wish to require corruption cases to be submitted to its competent authorities for prosecution whenever extradition is denied solely because of nationality. Such an approach would bring Samoa into conformity with standards embodied in recent international instruments on corruption (e.g., Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC).

Samoa's MLA legislation is silent on the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). As other Samoan legislation (e.g., the Money Laundering Prevention Act) explicitly states that secrecy obligations should not prevent the disclosure of information, a similar prohibition could be introduced in the MACMA.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Samoa could consider improving its central authority for international cooperation. Currently, the Attorney-General and the Minister of Justice are the central authorities for MLA and extradition respectively. Combining the two functions into a single body could achieve greater economies of scale and avoid problems with coordination. To assist foreign states, Samoa could make more information available on the Internet, e.g., creating a Web page for the central authority with a description of the extradition and MLA process, contact information, and links to the relevant legislation.

Samoa could also consider improving the procedure for urgent requests. For instance, Samoa could clarify in the Extradition Act whether a requesting state can request provisional arrest and, if so, the procedure for making such requests, e.g., to whom a request should be sent, and the information that a request should contain. Furthermore, Samoa could consider accepting requests

for provisional arrest that are sent outside the diplomatic channel (e.g., via Interpol or directly to law enforcement or prosecutorial bodies) and via media such as facsimile or electronic mail. Samoa could also consider accepting urgent MLA requests through these channels of communication, as well as oral requests that are subsequently confirmed in writing (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

In Samoa, a foreign confiscation order will be enforced only if a person has been convicted of a foreign offense. Samoa may wish ensure that assistance can be rendered when the offender cannot be prosecuted by reason of death, flight, absence etc., consistent with Article 54(1)(c) of the UNCAC.

As for repatriating the proceeds of corruption, the MACMA confers discretion on the Attorney-General to enter into arrangements for sharing assets with foreign states. Samoa could consider elaborating how this discretion would be exercised in corruption cases, including whether and how the Attorney-General will consider the factors referred to in Article 57 of the UNCAC. Samoa could also consider entering into arrangements to share and repatriate assets.

Information for Seeking Assistance

Central Authority

For Extradition: Ministry of Justice

For MLA:

Office of the Attorney-General

Tel: +685 20 295

Fax: +685 22 118

attorney.general@samoa.ws

Relevant Laws and Documentation

The Extradition Act, Mutual Assistance in Criminal Matters Act, and the Proceeds of Crime Act: www.paclii.org/ws/legis/consol_act or www.sifa.ws/Legislation/tabid/1080/Default.aspx

2nd Mutual Evaluation Report of Samoa, APGML and Offshore Group of Banking Supervisors (2006): www.apgml.org/documents/default.aspx?DocumentCategoryID=17

Samoa: Assessment of the Supervision and Regulation of the Financial Sector –
Review of Financial Sector Regulation and Supervision, IMF (2004):
www.rbv.gov.vu/IMF.htm or www.imf.org/external/pubs/ft/scr/2003/cr03254.pdf

Government of Samoa: www.govt.ws

Singapore

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Singapore are principally governed by the Extradition Act (Cap. 103) and the Mutual Assistance in Criminal Matters Act (Cap. 190A) (MACMA). In addition, Section 55 of the Criminal Procedure Code (Cap. 68) specifically applies in the context of extradition from Singapore to Malaysia and Brunei. The MACMA also applies to incoming requests for MLA from a state that does not have a treaty with Singapore, though the requesting state must provide an undertaking of reciprocity for some types of assistance (including enforcement of foreign confiscation orders). Extradition in the absence of a treaty is possible only to and from declared Commonwealth countries, which total 39 as of September 2007.

Concerning multilateral instruments that may provide MLA in corruption cases, Singapore has signed but has not ratified the UNCAC. Singapore has signed and ratified the UNTOC and the Treaty on Mutual Legal Assistance in Criminal Matters among Like-minded ASEAN Member Countries (referred to elsewhere in this report as the Southeast Asian MLAT), which has also been ratified by two other members of the ADB/OECD Initiative (Malaysia and Vietnam) as well as Brunei and Lao People's Democratic Republic. Two bilateral MLA treaties, with Hong Kong, China (14 July 2004) and with India (4 November 2005), are in force. Singapore also signed a Drug Designation Agreement with the United States that came into effect on 12 February 2001.

As for multilateral instruments that concern extradition in corruption cases, Singapore has signed the UNCAC and UNTOC but has only ratified the latter. It has three bilateral extradition treaties in effect with other countries, one with a member of the Initiative (Hong Kong, China) and two with Parties to the OECD Convention (Germany; United States). Under the Extradition Act and the Extradition (Commonwealth Countries) (Consolidation) Declaration, Singapore has extradition relations with 39 Commonwealth countries, including nine members of the Initiative (Australia; Bangladesh; Cook Islands; Fiji; India; Papua New Guinea; Samoa; Sri Lanka; and Vanuatu) and four Parties to the OECD Convention (Australia; Canada; New Zealand; and United Kingdom). Extradition between Singapore and Malaysia is based on endorsement of warrants under the Extradition Act and section 55 of the Criminal Procedure Code.

The Extradition Act and MACMA were enacted on 1 August 1968 and 1 April 2000 respectively and have since been updated. Both include detailed provisions on the grounds for denying cooperation, the procedure for executing requests, and the types of assistance available, including production orders. Although the MACMA does not expressly provide for the taking of evidence by video conference, it has allowed witnesses to testify by video in criminal proceedings in a foreign state. The MACMA also contains detailed provisions on MLA regarding proceeds of crime, including the requirements and procedure for executing foreign requests to restrain or confiscate proceeds of crime. The Extradition Act is divided into three parts with slightly different procedures for extradition to and from certain Commonwealth countries, Malaysia, and other foreign states.

According to statistics published by the Attorney General, from 2002-2004, Singapore has dealt with an average of 128 "extraditions and inquiries" annually. Over the same period, Singapore has processed an average of 102 MLA requests annually, and responded to 88% of the cases within 7 days, and 90% of the cases within 14 days. There is no information on how many cases involve corruption offenses, how they have been dealt with, or whether these statistics include outgoing requests.

All requests to Singapore for extradition and MLA are processed by the Attorney General as the central authority for Singapore. Outgoing extradition requests are made by the Minister, while outgoing MLA requests are made by the Attorney General acting on the instructions of the Minister. The parties to bilateral agreements may also indicate a specific channel of communication. A requesting state must provide its request (or a translation) in English.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for incoming extradition and MLA requests to Singapore. For MLA, the act or omission underlying the request, if it had occurred in Singapore, must constitute an offense under Singaporean law (as per the First and Second Schedules of the Corruption, Drug trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65) (CDSA)). For extradition, the act or omission underlying the request must constitute an offense against the law of Singapore that is described in a list in the Extradition Act. The list includes corruption-related offenses, such as bribery, stealing, embezzlement, fraudulent conversion, fraudulent false accounting, receiving stolen property, and an offense against the law relating to benefits derived from corruption. Bribery of foreign public officials is an offense for Singaporean citizens. Hence,

Singapore can provide extradition and MLA in cases involving this offense, at least when the offense is committed by a national of the requesting state. Illicit enrichment is not an offense in Singapore. If Singapore receives a request involving this offense, it will assess whether the conduct underlying the offense constitutes a different offense under Singaporean law. Singapore may provide MLA in proceedings against legal persons since it has established the criminal liability of legal persons.

Certain evidentiary tests may have to be met before Singapore grants assistance. For incoming extradition requests, Singapore applies the *prima facie* case evidentiary test, i.e., there must be evidence as would justify the trial of the person sought if the act or omission underlying the request had taken place in Singapore. The person sought has a right to tender evidence at an extradition hearing (sections 11(7)(c) and 25(7)(c) of the Extradition Act). However, this right does not allow the person to tender evidence that would convert the hearing into a trial of the crime and thereby delay the extradition process (*Chua Han Mow v. Superintendent of Pudu Prison*, [1979] 2 M.L.J. 70; *Kangu v. Director of Prisons*, [1996] 2 S.L.R. 747). For incoming requests for production orders and search and seizure, there must be reasonable grounds to suspect that a person has carried on or benefited from an offense, and that the evidence sought is likely to be of substantial value to the case. There are no evidentiary tests for less intrusive measures, such as the taking of evidence from a witness. For outgoing MLA requests, the Attorney General must be satisfied that there are reasonable grounds to believe that the evidence sought would be relevant to the case.

Necessity and the importance of the evidence sought are also relevant factors in incoming MLA requests. The MACMA states that Singapore will refuse to provide MLA if the evidence requested is not of sufficient importance to the foreign investigation, or if the evidence could reasonably be obtained by other means. However, Singapore has never refused MLA on this basis.

Singapore requires specialty and use limitation as conditions for cooperating. Specialty is required for all incoming extradition requests. Singapore will accept specialty assurances that are provided in the law of the requesting state or in a relevant treaty, or if they are provided by the appropriate authority of the requesting state. For outgoing extradition requests, the Extradition Act expressly grants specialty protection to persons who are extradited to Singapore. For incoming MLA requests, the MACMA requires requesting states to undertake that the evidence sought will only be used for the matter on which the request is based.

Singapore will refuse extradition and MLA if a request relates to an "offense of a political character". Singaporean courts have held that an offense

has a political character if “the only purpose sought to be achieved by the offender in committing it was to change the government of the state in which it was committed, or to induce it to change its policy, or to enable him to escape from the jurisdiction of a government of whose political policies the offender disapproved but despaired of altering so long as he was there” (*Kangu v. Director of Prisons*, [1996] 2 S.L.R. 747, citing *R. v. Governor of Pentonville Prison, Ex p. Cheng*, [1973] A.C. 931 (H.L.) per Lord Diplock). Singapore has never refused extradition or MLA on this basis.

Essential interests may be a ground for Singapore to refuse MLA. If the Minister believes that an incoming or outgoing request is against the interests of the sovereignty, security or public order of Singapore, he may instruct the Attorney General to not act on the request. In addition, an incoming request may also be refused if it is contrary to the public interest to provide the assistance.

Concerning other grounds for denying cooperation, Singapore may decline to provide MLA if the provision of assistance could prejudice an on-going criminal matter in Singapore. Singapore will also refuse to provide extradition and MLA by reason of double jeopardy, i.e., if the subject of the proceeding or investigation has been convicted, acquitted, or punished in any country. There is no prohibition against extradition or MLA in cases where the death penalty may be imposed, nor is there a bar against extradition of Singaporean nationals.

Bank secrecy is not a ground for refusing MLA under the MACMA. Section 24(2) provides that any person who complies with a production order shall not be treated in breach of any restriction upon the disclosure of information or thing imposed by law, contract, or rules of professional conduct. The provisions of the MACMA have been frequently invoked to obtain production orders relating to bank documents. In addition, the Treaty on Mutual Legal Assistance in Criminal Matters among Like-minded ASEAN Member Countries expressly states that assistance shall not be refused solely on the ground of secrecy of banks or similar financial institutions.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Attorney General's Chambers (AGC) is Singapore's central authority for extradition and MLA requests. The AGC prepares outgoing requests, executes incoming requests with the assistance of law enforcement agencies, and monitors the progress of outstanding requests. These functions are performed

mainly by the Criminal Justice Division (CJD) of the AGC. The Minister also plays a role in both extradition and MLA cases.

The AGC drafts outgoing extradition and MLA requests. In a corruption case, the AGC will review the evidence gathered by the Corrupt Practices Investigation Bureau (CPIB), Singapore's anti-corruption body. Once the request is drafted, it is forwarded for the Minister's signature (extradition requests) or instructions (MLA requests). If the Minister decides to sign the extradition request or instructs the Attorney General to make a request for MLA, the AGC will then make arrangements for the transmission of the request to the foreign state. The AGC then monitors the status of the request.

Incoming requests are handled in a similar fashion. The decision to proceed with an incoming extradition or MLA request is made by the Minister. After a decision to proceed is made, the AGC reviews and executes the request with the assistance of the relevant law enforcement authority. In corruption cases, the CPIB will assist the execution of the request if necessary. All incoming requests are kept confidential. The AGC also monitors all outstanding incoming requests. To discharge all of its responsibilities, the legal officers in the AGC have legal training. Seminars and training programs on international cooperation are provided to the AGC's officers, judges and law enforcement agencies. The AGC also maintains a Web site in English. All Singaporean statutes are available in English on a separate Web site.

Singapore also assists foreign states in preparing requests. The CJD provides general and specific advice and assistance to foreign states that wish to request cooperation from Singapore, such as by vetting draft requests and providing standard forms for MLA requests.

Singapore's legislation contains measures for dealing with urgent foreign requests for cooperation. Under the Extradition Act, a Magistrate may issue a warrant to provisionally arrest a fugitive who is or is suspected of being in Singapore. If the fugitive is wanted by a declared Commonwealth country or a country with which Singapore has a bilateral extradition treaty, a warrant may also be issued to provisionally arrest a fugitive who is on his/her way to Singapore. There are no specific provisions that deal with urgent MLA requests. In executing MLA requests, Singapore will give regard to any time requirements indicated by the requesting state. For time-sensitive requests, it is possible to obtain urgent hearing dates or make applications to court on short notice, as the case may be. This has been done in MLA cases involving applications for production orders and restraint of funds. Singapore has also processed MLA requests that are transmitted by facsimile or email pending receipt of the original request via the regular channels.

Recovery of Proceeds of Corruption in Criminal Proceedings

A broad range of "proceeds of crime" may be restrained or confiscated pursuant to a foreign request under the MACMA, including direct proceeds ("payments or other rewards received in connection with a [foreign] offense") and indirect proceeds ("property derived or realized, directly or indirectly, from [direct proceeds]"). Also covered is confiscation of the value of direct or indirect proceeds. The foreign offense that gave rise to the proceeds must consist of conduct which, if it had occurred in Singapore, would amount to a Singaporean offense listed in the Second Schedule of the CDSA. This Schedule covers corruption and related offenses.

The status of foreign proceedings may affect whether Singapore can execute a request for restraint or confiscation. Restraint orders are available if judicial proceedings are on-going in the requesting state, and a confiscation order has been made or there are reasonable grounds to believe that such an order will be made. Restraint orders are also available if judicial proceedings will be instituted in the requesting state and there are reasonable grounds to believe that confiscation may be ordered in those proceedings. A foreign country may request Singapore to enforce a foreign confiscation order that was made in any judicial proceedings instituted in that country. There is no requirement that a person be finally convicted of an offense.

Foreign confiscation orders are enforced in Singapore through direct registration. Upon the application of the Attorney General, a Singaporean court may register a foreign confiscation order if it is satisfied that the order is in force and not subject to further appeal, that a person affected by the order appeared in the foreign proceedings or was given notice of the proceedings, and that enforcement of the order would not be contrary to the interests of justice. Once the foreign order is registered, it can be enforced in Singapore pursuant to the Attorney General's application for the court to exercise its powers in the Schedule to the MACMA, which are similar to those under the CDSA for enforcing domestic confiscation orders. Foreign restraint orders, however, cannot be enforced by direct registration; it is therefore necessary to apply for a second court order in Singapore.

The MACMA also deals with the sharing and repatriation of proceeds. The Singaporean government may realize confiscated property and return the proceeds to a requesting state unconditionally (less expenses incurred during the recovery of the property).

Conclusion

Singapore's system for international cooperation in corruption cases is advanced and well-developed. The framework for cooperation is largely based on legislation rather than treaties, although Singapore has recently ratified the Treaty on Mutual Legal Assistance in Criminal Matters among Like-minded ASEAN Member Countries. The Extradition Act and the MACMA are both comprehensive pieces of legislation. All major forms of assistance are available, including MLA in relation to proceeds of crime and enforcement of foreign confiscation orders through direct registration.

This legal framework also appears to function well in practice. Commensurate with its role as a major financial center, Singapore is fairly active responding to foreign requests for assistance. As the designated central authority for extradition and MLA, the Criminal Justice Division of the AGC plays an important role in the cooperation process. It has qualified staffed in international cooperation. Expertise in corruption investigations is available by involving the CPIB in executing requests in corruption cases.

Information for Seeking Assistance

Central Authority

For MLA and Extradition:

Attorney General of Singapore
Criminal Justice Division
The Adelphi, 1 Coleman St, #10-00 Singapore 179803
Republic of Singapore
Tel: +65 6336 1411
Fax: +65 6332 5984
www.agc.gov.sg

Relevant Laws and Documentation

The Extradition Act (Cap 103) and Mutual Assistance in Criminal Matters Act (Cap 190A): statutes.agc.gov.sg

Singapore: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, Payment and Settlement Systems, Monetary and Financial Policy Transparency, and Anti-Money Laundering, IMF (2004): www.imf.org/external/pubs/ft/scr/2004/cr04104.pdf

Annual Report 2004-2005, Attorney-General's Chambers, Singapore:
www.agc.gov.sg/aboutus/docs/AGC_Annual_Report_2004-2005.pdf

Sri Lanka

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition in Sri Lanka is governed by the Extradition Law (No. 8 of 1977, as amended by Act 48 of 1999) and the Mutual Assistance in Criminal Matters Act (No. 25 of 2002) (MACMA). Extradition and MLA may be provided without a treaty to Commonwealth countries that have been designated by order in the Gazette. A treaty is required for all other countries (unless the request relates to an offense of money laundering).

In addition to the UNCAC, Sri Lanka is party to four bilateral extradition treaties, one with a member of the ADB/OECD Initiative (Hong Kong, China) and two with Parties to the OECD Convention (Italy and United States). Sri Lanka also has extradition relations under the London Scheme with eight members of the Initiative (Bangladesh; Fiji; India; Malaysia; Papua New Guinea; Samoa; Singapore; and Vanuatu). Sri Lanka has a bilateral MLA treaty in force with Hong Kong, China and Pakistan (members of the Initiative). An additional treaty with Thailand has been signed but is not in force.

The Extradition Law describes the procedure for extradition from Sri Lanka and several grounds of refusal. The MACMA offers a range of assistance, including production orders and MLA relating to proceeds of crime. Both laws lack some features commonly found in corresponding legislation in other jurisdictions, such as consent extradition and taking evidence by video conference. Extradition requests should be sent through the diplomatic channel to the Minister of Defence, Public Security, Law and Order (who at present is the President of Sri Lanka). MLA requests may be made through the diplomatic channel to the Secretary to the Minister of Justice. MLA requests must be made in English using the forms prescribed in the Schedule to the MACMA.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is required for extradition and MLA from Sri Lanka. The conduct underlying an extradition or MLA request must be an offense in Sri Lanka if it took place there. For more intrusive forms of MLA (e.g., search and seizure), the offense must also be punishable in the requesting state by death or one year's imprisonment. Sri Lanka may waive the dual criminality requirement for

MLA if the conduct underlying the request is “of a serious nature and is a criminal matter.” For extradition to Commonwealth countries without a treaty, the offense must also be described in a list in the Extradition Law. The list includes bribery, theft, criminal breach of trust, dishonest misappropriation of property, any offense in respect of property involving fraud, and money laundering. The Law does not contain a fall-back provision for unlisted offenses, such as discretion to extradite for conduct that is not on the list but which constitutes a crime in the requesting and requested states.

Sri Lanka has not created offenses of illicit enrichment and bribery of foreign public officials, and it is unclear whether dual criminality would impact extradition and MLA requests involving these offenses. Sri Lanka does not impose criminal liability against legal persons for corruption offenses. It is therefore also unclear whether dual criminality prevents MLA in cases in which a legal person is the target of a corruption investigation or prosecution. For MLA requests made under the UNCAC, Sri Lanka is obliged to provide non-coercive MLA even in the absence of dual criminality.

Evidentiary tests may have to be met before Sri Lanka cooperates. For search and seizure, there must be reasonable grounds to believe relevant evidence will be found in Sri Lanka. The *prima facie* case evidence test applies to extradition, i.e., there must be evidence that would be sufficient to warrant the trial of the person sought for the subject offense if it had been committed in Sri Lanka. The Extradition Law specifically requires an extradition court to hear evidence not only in support of extradition but also on behalf of the person sought.

Specialty applies to extradition. For incoming requests, the Extradition Law requires specialty protection to be provided in a law (if the requesting state is a Commonwealth country) or an applicable treaty. The Act also provides specialty protection to persons extradited to Sri Lanka. The MACMA does not limit the use of information obtained through MLA to the investigation or prosecution referred to in the request. However, the UNCAC imposes use limitation on all MLA requests made under the Convention.

Sri Lanka will not provide extradition or MLA if a request relates to the prosecution or punishment of an offense of a political character. The MACMA (but not the Extradition Law) excludes from this exception offenses that fall within the scope of an international convention to which Sri Lanka and the requesting state are parties, and which obliges Sri Lanka to extradite or prosecute the person sought. Money laundering is also deemed not to be a political offense under the Extradition Law. For extradition requests made under the UNCAC, the Convention requires that corruption offenses not be considered political offenses.

Double jeopardy is also a basis for refusing cooperation. Extradition is refused if the person sought would be discharged under a law relating to previous acquittal or conviction had he/she been charged with that offense in Sri Lanka. MLA is refused if the accused in a foreign prosecution has been acquitted or convicted in Sri Lanka for the same conduct.

There are additional grounds for refusing MLA. Sri Lanka will refuse a request that prejudices national security, international relations or public policy. The UNCAC also allows requests made under the Convention to be refused if assistance is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the requested state. The MACMA does not address whether MLA may be refused on grounds of bank secrecy. Other Sri Lankan legislation (e.g., section 16 of the Prevention of Money Laundering Act) expressly overrides secrecy obligations to compel disclosure of information. For requests made under the UNCAC, Sri Lanka is prohibited from refusing MLA on this ground.

As for other grounds for denying extradition, Sri Lanka does not prohibit the extradition of its nationals *per se*. Extradition is denied if the offense is punishable by death in the requesting state but not in Sri Lanka. It is also refused if extradition is unjust or oppressive, or if a person sought is facing charges in Sri Lanka (for the same or a different offense).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Sri Lanka's central authority for extradition is the Minister of Defence, Public Security, Law and Order, while the central authority for MLA is the Secretary to the Minister of Justice. Both bodies are required to use the diplomatic channel for sending and receiving requests.

The Secretary to the Minister of Justice examines all incoming requests to ensure compliance with the MACMA and any relevant treaties. If the request meets these requirements, the Secretary forwards the request to an appropriate body (e.g., the police) for execution. The Secretary also has sole authority to make outgoing MLA requests under the MACMA.

As the central authority for extradition, the Minister of Defence, Public Security, Law and Order may issue an authority to proceed upon receiving a request. The High Court may then issue a warrant to arrest the person sought. If the person is arrested, the Court conducts a hearing to determine whether there is a *prima facie* case, and whether there are certain grounds for refusing extradition (e.g., political offense). If the requisite conditions are met, the Court commits the person into custody to await extradition. The person then has 15

days to appeal the Court's decision. The appellate court may hear additional evidence relating to the grounds for denying extradition. If the appeal is dismissed, the case reverts to the Minister to determine whether the person should be surrendered. In making his/her decision, the Minister will also consider the grounds for denying extradition listed in the Extradition Law (e.g., political offense). The person may be discharged if he/she is not removed from Sri Lanka within 2.5 months after the Court orders committal and 1 month after the Minister orders surrender.

There are measures for handling urgent requests for extradition but not MLA. The Extradition Law allows foreign states to request provisional arrest. However, the request must be made through the diplomatic channel. The MACMA does not contain any provisions for urgent MLA requests. Both the Secretary to the Minister of Justice and the Minister of Defence, Public Security, Law and Order have Web sites. However, the sites do not contain information on extradition or MLA.

The Sri Lanka Police Service may provide assistance at the law-enforcement level outside of the MACMA. In 2005, the Service's Interpol Unit received and responded to 209 and 207 requests for information respectively. It sent 138 requests abroad in the same year.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided through the Mutual Assistance in Criminal Matters Act. A broad range of assistance is available, including, tracing, restraining and forfeiting property.

Sri Lanka may assist a foreign state in identifying, locating or valuing proceeds of crime. Proceeds is defined in this context as property reasonably believed to have been derived or obtained, directly or indirectly, from the commission of an offense that is punishable by death or one year's imprisonment. The MACMA does not specify the measures available for executing a request (e.g., search warrants, production or monitoring orders). It merely states that the Secretary to the Minister of Justice may, in his/her discretion, give the assistance wherever it is practicable to do so.

MLA to restrain or forfeit property under the MACMA consists essentially of the enforcement of foreign court orders. Foreign restraining, forfeiture and pecuniary penalty orders may be enforced if there are reasonable grounds to believe that there is property in Sri Lanka which is subject to the order or could satisfy the order. The foreign order must also be final. If these conditions are met, the foreign order may be registered with a Sri Lankan court, after which the order

may be enforced like a domestic order. The MACMA does not allow Sri Lankan courts to issue restraining orders pursuant to a foreign request. There are also no provisions for urgent requests.

Concerning the repatriation of proceeds, the MACMA authorizes the Secretary to deal with property recovered under the Act for the purpose of giving effect to a foreign request. The Prevention of Money Laundering Act also allows property forfeited under that Act to be returned to a requesting state. Neither Act provides guidance on what factors will be considered in the exercise of discretion.

Conclusion

Ratification of the UNCAC has significantly enhanced Sri Lanka's ability to seek and provide extradition and MLA in corruption cases. Sri Lanka has enacted legislation on extradition and MLA. A range of assistance is available, including MLA relating to proceeds of crime. Dual criminality may be waived if the conduct underlying an MLA request is "of a serious nature". Foreign restraining, forfeiture and pecuniary penalty orders may be enforced by direct registration, thereby avoiding delays associated with applying for a second order.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

To facilitate cooperation with countries that are not States Parties to the UNCAC, Sri Lanka could consider allowing extradition and MLA in the absence of a treaty. Cooperation could also be enhanced by adding features commonly found in other jurisdictions, such as extradition by consent and taking evidence via video conference.

Legal Preconditions for Extradition and MLA

MLA could be enhanced by eliminating the dual criminality requirement or reducing it to a discretionary requirement. Alternatively, Sri Lanka could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Sri Lanka should also ensure that it can execute non-coercive requests made under the UNCAC even in the absence of dual criminality (as required by Article 46(7) of the UNCAC). Abandoning the list approach to defining extradition offenses in the Extradition Law could help

ensure that all corruption and related offenses are covered. Sri Lanka could also take steps to ensure that dual criminality does not prevent cooperation in cases involving illicit enrichment, bribery of foreign public officials, or where the target of an investigation or proceeding is a legal person.

Reviewing the evidentiary aspects of the extradition process could further enhance cooperation. In particular, Sri Lanka applies the *prima facie* case test in extraditions. Civil law jurisdictions seeking extradition from common law jurisdictions have had difficulties in complying with this test. Consideration could therefore be given to following the example of some common law countries (e.g., Australia and the United Kingdom for extradition to certain non-Commonwealth countries) and requiring less or even no evidence for extraditions. In addition, the Extradition Law requires the extradition judge to receive evidence on behalf of the person sought. Sri Lanka may wish to consider whether this would allow the person to tender evidence regarding whether he/she committed the offense underlying the extradition. If so, the extradition hearing could potentially be turned into a trial, thereby delaying the process.

The Extradition Law requires an assurance of specialty either in an applicable treaty or a law in the requesting state. Consideration could be given to accepting specialty assurances from the judicial or diplomatic authorities of a requesting state, which is the practice in many countries.

Extradition and MLA is refused for offenses of a political character. Consideration could be given to expressly excluding corruption offenses from the definition of a political offense under both the Extradition Law and the MACMA. Extradition is also denied if the offense is punishable by death in the requesting state but not in Sri Lanka. To ensure that justice is served, Sri Lanka could consider allowing extradition if the requesting state provides an assurance that the death penalty would not be sought or carried out. Alternatively, Sri Lanka could take steps to allow the prosecution of the person sought whenever extradition is denied on this basis.

Regarding other grounds for denying cooperation, the MACMA does not deal with the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Other Sri Lankan legislation (e.g., the Prevention of Money Laundering Act) also explicitly states that secrecy obligations should not prevent the disclosure of information. Consideration could be given to codifying a similar provision in the MACMA for MLA requests that are made outside the UNCAC.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

There are separate central authorities for extradition and MLA in Sri Lanka. Designating a single body as the central authority for all extradition and MLA requests could concentrate expertise and help avoid problems with duplication and coordination. Allowing the central authority to send and receive requests directly could help avoid delays associated with the diplomatic channel. Creating a Web site for the central authority could greatly assist foreign requesting states. The site could contain information on the extradition and MLA process, contact information, copies of relevant legislation and treaties, and sample documents (particularly the required forms for requesting MLA). To properly evaluate the performance of the central authority, Sri Lanka could keep detailed statistics including the number of requests received, sent, executed and refused, the nature of the assistance sought, the offenses involved, and the time it took to execute the requests.

The extradition process could be made more efficient by streamlining the process. For example, certain grounds for denying extradition (e.g., political offense) are considered by both the Court at the extradition hearing and the Minister of Defence. Avoiding duplication could improve efficiency. As well, an order of committal may be appealed before the Minister decides to surrender the person. Allowing the appeal to be heard after the Minister's decision could be more efficient, since the Minister may decide against surrender and thus render the appeal moot. It may also be more efficient for an appellate court to review the committal and surrender orders simultaneously.

The procedures for urgent requests could also be improved. The Extradition Law requires foreign states to send requests for provisional arrest through the diplomatic channels, which could introduce significant delay. Allowing requests to be sent via facsimile or Interpol could alleviate these concerns. Urgent MLA requests could also be accepted through these channels as well as orally with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

Allowing MLA in relation to instrumentalities of crime could be helpful. As well, the MACMA does not provide specific measures to trace proceeds of crime. It merely states that the Secretary to the Minister of Justice may assist whenever it is practicable to do so. Consideration could be given to adding to the MACMA specific tools for tracing, e.g., search warrants, and production and monitoring orders.

Under the MACMA, foreign restraining and forfeiture orders may be enforced only by direct registration of the foreign order. It could be useful to also allow Sri Lankan courts to issue restraining or forfeiture orders pursuant to a foreign request. To deal with urgent cases, Sri Lanka could consider allowing registration (for a limited duration) of a faxed copy of a sealed or authenticated foreign order.

As for repatriating the proceeds of corruption, the Secretary to the Minister of Justice could consider entering into arrangements for sharing assets with foreign states. Sri Lanka could also clarify the criteria for repatriating assets, including whether and how it would take into account the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For MLA - Through the diplomatic channel to:

The Secretary to the Minister of Justice
Superior Courts Complex
Colombo 12, Sri Lanka
Tel: +94 1 2449 959 / 2323 979
Fax: +94 1 2445 447
Justices@sri.lanka.net
www.justiceministry.gov.lk

For Extradition - Through the diplomatic channel to

The President of Sri Lanka and Minister of Defence, Public Security, Law
and Order
Tel: +94 1 2324 801 / 2430 860
Fax: +94 1 2430 590
modmedia@sltnet.lk

Additional Contact

Sri Lanka Police Service
Interpol Unit
Criminal Investigation Department
Tel: +94 1 2320 570

Relevant Laws and Documentation

Extradition Law (No. 8 of 1977, as amended by Act 48 of 1999)

Mutual Assistance in Criminal Matters Act (No. 25 of 2002)

Prevention of Money Laundering Act (No. 5 of 2006)

Mutual Evaluation Report of Sri Lanka, APGML (2006):
www.apgml.org/documents/docs/17/Sri%20Lanka%20MER%20-%20Final%2010August06.pdf

Thailand

The Legal Framework for Extradition and MLA

Extradition, MLA and the recovery of proceeds in Thailand are governed by the Extradition Act B.E. 2472 (1929) and the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) (AMACM). The Extradition Act and the AMACM applies to all extradition and MLA proceedings respectively, subject to the provisions of a relevant treaty. Thailand may provide MLA in the absence of a treaty if the requesting state provides an assurance of reciprocity. Extradition without a treaty is also available.

Thailand has concluded bilateral MLA and extradition treaties with a number of countries. MLA treaties are in force with 10 countries, including two members of the ADB/OECD Initiative (India and Korea) and six Parties to the OECD Convention (Canada; France; Korea; Norway; United Kingdom; and United States). Extradition treaties are in force with ten members of the Initiative (Australia; Bangladesh; Cambodia; P.R. China; Cook Islands; Fiji Islands; Indonesia; Korea; Malaysia; and Philippines) and seven Parties to the OECD Convention (Australia; Belgium; Canada; Korea; New Zealand; United Kingdom; and United States). (In several cases, the bilateral treaty in question is the Extradition Treaty between Great Britain and Siam of 1911). In addition, Thailand has signed but has not yet ratified three multilateral instruments that may provide MLA in corruption cases, namely the UNCAC, the UNTOC and the Southeast Asian MLAT. Thailand has also signed but has not yet ratified two multilateral instruments that may provide for extradition in corruption cases, namely the UNCAC and the UNTOC. Bilateral extradition

The AMACM includes fairly detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. By contrast, the Extradition Act only prescribes some basic features, including some grounds for denying extradition and the procedure for surrender. The need to revise the Extradition Act has been addressed by the Thai government.

From 2001 to July 2007, Thailand had an annual average of 53 incoming MLA requests, 28 outgoing MLA requests, 21 incoming extradition requests, and 6 outgoing extradition requests. A significant portion of the requests involved Parties to the OECD Convention and some members of the Initiative. More detailed information is not available on the nature of assistance requested, the

type of offense involved, the outcome of the request, or the time needed to execute a request.

All MLA requests in the absence of a treaty and all extradition requests to Thailand should be made via the diplomatic channel. MLA requests based on a treaty should be made to the Attorney General of the Kingdom of Thailand. Unless an applicable treaty states otherwise, requests must be in Thai or English, or be accompanied by an authenticated translation into one of these languages.

Legal Limitations and Preconditions to Cooperation

Dual criminality is mandatory for extradition and MLA in Thailand. Although not stipulated in the legislation, the requirement is conduct-based. Subject to an applicable treaty, Thailand may provide extradition if the conduct underlying the extradition request is punishable in Thailand by imprisonment of at least one year. For MLA (including MLA in relation to proceeds of corruption), unless a treaty provides otherwise, the conduct underlying the request must constitute a crime in Thailand if it occurred there. Thailand does not have an offense of bribery of foreign public officials and has not received incoming requests involving this offense. Illicit enrichment is also not an offense in Thailand; Thailand therefore cannot provide assistance in relation to this offense. Thailand recognizes the criminal liability of legal persons, and hence it will handle incoming MLA requests in cases involving legal persons in the same manner as those involving natural persons.

Thailand imposes evidentiary tests for both extradition and MLA. The Extradition Act requires sufficient evidence against the person sought to commit him/her for trial if the offense had been committed in Thailand. Although this is the same wording as the *prima facie* case test in some common law jurisdictions, the test is applied more flexibly in Thailand. MLA requests for search and seizure must be based on reasonable grounds. There are no evidentiary tests for less coercive measures such as the taking of evidence from a witness.

Thailand's legislation does not require specialty for extradition or use limitation for incoming MLA requests, subject to an applicable treaty. Nevertheless, it is also open to Thailand to impose such requirements for requests that are not based on a treaty. If necessary, Thailand will accept an assurance of specialty or use limitation from the requesting state. For outgoing MLA requests, the AMACM requires the requesting agency to limit the use of the information or evidence to the purposes specified in the request.

Thailand may grant extradition or MLA in corruption cases in which the death penalty may be imposed. Even if a foreign state wishes to cooperate with Thailand in corruption cases on the condition that the death penalty cannot be carried out, the Thai government cannot provide such an assurance, since only the Thai judiciary may decide whether to impose the penalty. MLA may also be refused or postponed if it would interfere with an on-going investigation or prosecution in Thailand into the same matter. Extradition may be denied if the person sought has been tried and discharged or punished in any country for the crime underlying the extradition request. MLA will also be refused for this reason, even though the AMACM does not address this matter. Neither the Extradition Act nor the AMACM addresses offenses that are committed wholly or partly in Thailand. When such a situation arises in a case of transnational bribery, Thailand may agree to extradite if it does not have sufficient evidence to commence its own prosecution.

Thailand may also refuse MLA requests that affect its essential interests. To determine this issue, the AMACM creates a special Board comprising representatives from the Attorney General's Office (AGO), the Ministries of Defence, Foreign Affairs, Interior and Justice, and up to four other "distinguished people". The purpose of the Board is to advise the central authority in determining whether the rendering of MLA would affect Thailand's "national sovereignty or security, crucial public interests, international relation, or relate to a political or military offense." Disagreements between the Board and the central authority are resolved by the Prime Minister.

Thailand will also deny extradition for political offenses. Thai courts have refused to order extradition for this reason in the past, although it is not clear whether these cases involved corruption offenses. Political offense is a discretionary ground of denying MLA under the AMACM. Thailand has undertaken to interpret the ground narrowly.

The Extradition Act does not specifically prohibit the extradition of Thai nationals. In practice, Thailand will extradite its nationals only if required to do so under a treaty, if the requesting state provides an assurance of reciprocity, and if Thailand does not have jurisdiction to prosecute the case (Government and Cabinet resolutions dated 4 March 1997 and 26 October 1999 respectively). Prosecution of a national in lieu of extradition is discretionary (unless a treaty states otherwise), depending on factors such as the sufficiency of evidence and whether there is jurisdiction to prosecute.

The AMACM does not address the issue of bank secrecy. Criminal investigation is an exception to bank secrecy. This principle applies equally to

incoming MLA requests. Hence, although the AMACM does not address the issue, MLA has never been refused because of bank secrecy.

Procedures and Measures to Facilitate Extradition and MLA

The Attorney General is Thailand's central authority for international cooperation in criminal matters. Within the AGO, the International Affairs Department (IAD) is responsible for processing requests for cooperation. The IAD's main functions include executing and monitoring outgoing and incoming requests.

Outgoing extradition and MLA requests are drafted by prosecutors in the IAD. If necessary, the prosecutor may seek assistance from the investigating agency or the Ministry of Foreign Affairs (MoFA). For extradition requests, the MoFA reviews the request before sending it to the requested state. For MLA requests based on a treaty, the AGO sends the request directly to the foreign state. MLA requests in the absence of a treaty are sent to the AGO for transmission through the diplomatic channel. Incoming MLA requests follow the same route in reverse as outgoing requests. Requests based on a treaty are sent directly to the AGO for consideration, while those in the absence of a treaty are sent to the MoFA through the diplomatic channel and forwarded to the AGO for execution.

The procedure for incoming extradition requests is quite different. Under the Extradition Act, the MoFA receives a request from the diplomatic channel and provides it to the Ministry of Interior (Mol). The Mol in turn forwards the request to the Public Prosecutor (in the AGO) who arranges for the arrest of the person sought. In practice, the MoFA sends the original request to the Mol with the Public Prosecutor on copy, which allows the Public Prosecutor to begin preparing for the application for an arrest warrant. Nevertheless, the Public Prosecutor cannot apply for the warrant until it receives the original request from the Mol. The reason for this arrangement is historical: the Public Prosecutor was previously attached to the Mol which had the power to order the arrest of a person sought. This is no longer true, and the Mol's only role today is to serve as a conduit for transmitting the extradition request to the Public Prosecutor.

The AGO and other bodies are also responsible for communicating with foreign states regarding general and case-specific matters. For outgoing requests, the MoFA and the AGO will follow up the request with the requested state after approximately six months, usually via the diplomatic channel or the central authority of the foreign state. For incoming MLA requests, the AGO will follow up the execution of the request with the competent Thai authority also after six months. For incoming extradition requests, the AGO maintains constant

communication with the embassy of the requesting state. Thailand also liaises with the embassies of foreign states on a regular basis to discuss international cooperation. Finally, Thailand's law enforcement authorities can directly assist their foreign counterparts at the police-to-police level or on the basis of MOUs. An English compilation of Thailand's extradition and MLA legislation and treaties, as well as contact information for the AGO, are available in print and on the Internet.

To discharge these responsibilities, Thailand's central authority relies on officers who are law graduates with fluent English. Most officers also have experience in international criminal cases. Competence in international cooperation is acquired mainly through on-the-job training.

Thailand will maintain the confidentiality of incoming requests. Only the prosecutor in charge and the competent authority has knowledge of the details of a request. There are no requirements for Thailand to consult with the requesting state if confidentiality needs to be broken, e.g., when information contained in a request must be tendered in open court. For example, both at the initial judicial hearing and on appeal, the person sought may tender evidence relating only to identity, his/her nationality, whether extradition is sought for a political offense, and whether there is *prima facie* evidence that support his/her committal to trial, had the offence been committed in Thailand. The Act also gives the person sought only fifteen days to appeal an order of detention pending surrender. The person sought must then be surrendered to the requesting state within three months from the date on which the detention order becomes final. As a matter of practice, Thailand will accept requests for provisional arrest via alternate media (e.g., facsimile or email) for the purposes of preparation. However, before an arrest will be effected, the formal request must be sent through the same channels as an extradition request, i.e., from the diplomatic channel to the MoFA, the Mol, and finally the Public Prosecutor (AGO).

Recovery of Proceeds of Corruption in Criminal Proceedings

Part 9 of the AMACM deals with foreign requests for seizure or forfeiture of property. The Act also adopts the provisions in Thailand's Penal and Criminal Procedure Codes on the procedure for issuing seizure and forfeiture orders. As of November 2006, Thailand has had approximately ten outgoing and twelve incoming MLA requests involving proceeds of crime. It is not clear how many of these cases involve corruption.

Assistance under the AMACM concerning the proceeds of corruption consists essentially of the enforcement of foreign court orders. A foreign request

for freezing property may be executed only if a court in the requesting state has ordered freezing, and has ordered forfeiture but the order has not yet become final. The property in question must be capable of being seized or frozen under Thai laws. Once a Thai court orders the freezing of an asset, the holder of the asset is given notice of the order. Thailand may accede to a foreign request for forfeiture only if a court in the requesting state has ordered forfeiture, and the order has become final. MLA to forfeit property of equivalent value is not available.

The AMACM does not contemplate the enforcement of foreign orders through direct registration. In other words, a foreign order can be enforced only by applying to a Thai court for a domestic order. There are no procedures for urgent requests.

Thailand has no provisions to share or repatriate proceeds of corruption. The AMACM stipulates that assets that are forfeited upon the request of a foreign state become the property of Thailand. However, some of Thailand's MLA treaties (e.g., with China and Korea) state that forfeited proceeds may be transferred to the requesting state.

Conclusion

Thailand has a reasonably well-established system for international co-operation in corruption cases, with a sizeable network of extradition and MLA treaties. Thailand may also render MLA in the absence of a treaty, subject to reciprocity and dual criminality. The Extradition Act and the AMACM are special laws for implementing the treaty framework that have flexible evidentiary requirements for co-operation. Limits on the evidence that may be tendered at an extradition hearing and deadlines for appeal and surrender serve to expedite extradition proceedings. Treaty-based MLA requests may be transmitted directly by the AGO, thereby avoiding delays in the diplomatic channel. Available statistics indicate that Thailand is fairly active in seeking and providing extradition and MLA, including MLA in relation to proceeds of crime. As the central authority, the IAD plays a central role in managing the international cooperation process. An adequate budget and a qualified, experienced staff allow the IAD to discharge its duties.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Thailand could improve its framework for cooperation by expanding its network of treaties, particularly with countries that are important international financial centers, or are major trade or investment partners. Ratification of the UNCAC, the Southeast Asian MLAT and the UNTOC could also significantly ameliorate this situation. Thailand could also consider revising the Extradition Act 1929 and the AMACM by adding more modern features to both laws, such as consent extradition, taking evidence by video conference, and production orders. Furthermore, certain factors impact whether Thailand will cooperate but are not expressly mentioned in the legislation, e.g., offenses occurring wholly or partly in Thailand, specialty, extradition of nationals, use limitation, and double jeopardy (for MLA). Addressing these matters through legislation could increase certainty and transparency in the cooperation process, and assist foreign states in seeking assistance.

Legal Preconditions for Extradition and MLA

Thailand could consider eliminating the dual criminality requirement or reducing it to a discretionary requirement. Alternatively, Thailand could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents. Such an approach would be consistent with Article 46(7) of the UNCAC. Since Thailand does not have offenses of illicit enrichment and bribery of foreign public officials, it may wish to ensure that the requirement of dual criminality does not prevent cooperation in these cases.

Thailand extradites its nationals only if required to do so under a treaty or if the requesting state provides an assurance of reciprocity. Prosecution of a national in lieu of extradition is discretionary (unless a treaty states otherwise). Thailand could consider requiring corruption cases to be submitted to its competent authorities for prosecution whenever extradition is denied solely because of nationality, in light of recently-established international standards (e.g., Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC). It may also wish to ensure that its criminal law provides for jurisdiction to prosecute all such cases.

Concerning other grounds for denying cooperation, Thailand could consider expressly prohibiting in the AMACM the use of bank secrecy as a ground for denying MLA, similar to Article 9(3) of the OECD Convention, Article

46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT. The AMACM creates a special board to assess whether an MLA request may affect its essential interest. Thailand may wish to examine whether this introduces delay and/or undue political influence into the MLA process. Finally, Thailand may wish to examine whether its inability to provide assurances that the death penalty would not be carried out impedes its ability to seek extradition and MLA in corruption cases.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Requests for extradition and provisional arrest are sent by the MoFA to the Public Prosecutor through the Mol. Thailand could improve efficiency by eliminating the Mol from this process. The AMACM authorizes the Attorney General to send and receive treaty-based MLA requests directly to and from foreign countries. Thailand could consider extending this arrangement for requests made in the absence of a treaty.

Thailand allows copies of requests for provisional arrest to be sent via alternate media for the purposes of preparation but requires the formal request to be transmitted through the diplomatic channel. Since such requests are often urgent, Thailand may wish to consider accepting the formal request via Interpol or any device that produces a writing. Thailand may also wish to accept urgent MLA requests via the same media or orally with subsequent written confirmation (e.g., UNCAC Article 46(14)).

To increase the effectiveness of the AGO, its central authority, Thailand could consider whether the AGO should follow up an outstanding request sooner than six months, especially for relatively simple requests, e.g., production of a few documents from a financial institution. Thailand may also wish to provide training in international cooperation to AGO staff and law enforcement agencies. To better evaluate and improve performance, the AGO could maintain more detailed statistics, e.g., the type of assistance sought, the offense involved, and the time needed to execute the request. This may be especially important for determining why Thailand has experienced difficulties in meeting time requirements for incoming and outgoing requests. Finally, Thailand could also consider consulting with the requesting state if the confidentiality of an incoming request needs to be broken, e.g., when information contained in a request must be tendered in open court.

Recovery of Proceeds of Corruption in Criminal Proceedings

Thailand will freeze property pursuant to a foreign request only if a court in the requesting state has either ordered freezing, or has ordered forfeiture but the order is not yet final. Thailand could consider extending this regime to allow freezing where there is no foreign confiscation or freezing order but there are sufficient grounds to believe that the subject property would eventually be subject to confiscation (e.g., Article 54(2)(b) of the UNCAC). In addition, Thailand could consider allowing forfeiture of property of equivalent value, and enforcement of foreign freezing and confiscation orders through direct registration (e.g., UNCAC Article 55(1)(b)). It could also incorporate procedures for urgent requests, such as accepting foreign orders that have been sent by a device which produces a writing. Finally, Thailand may wish to permit repatriation of forfeited property upon the request of a foreign state in a manner consistent with international standards (e.g., UNCAC Article 57). It may also wish to allow repatriation to countries with which it has no MLA treaty.

Information for Seeking Assistance

Central Authority

For treaty-based MLA requests:

Attorney General of the Kingdom of Thailand
Office of the Attorney General
Na Hupphoei Road
Bangkok 10200, Thailand
Tel: +66 2 515 4656
Fax: +66 2 515 4657
inter@ago.go.th
www.inter.ago.go.th

For non-treaty based MLA requests: the diplomatic channel

For extradition: the diplomatic channel

Relevant Laws and Documentation

The Extradition Act, Act on Mutual Assistance in Criminal Matters, and the relevant Regulations and bilateral treaties:

[www.inter.ago.go.th/UN/UN%20\(E\)/contenteng.html](http://www.inter.ago.go.th/UN/UN%20(E)/contenteng.html)

Thailand: Mutual Evaluation Report 2007, APGML:

<http://www.apgml.org/documents/docs/17/Thailand%20DAR.pdf>

Foreign Affairs Division of the Royal Thai Police:
www.foreign.police.go.th/thailaws.html

Tiyapan, S., "Extradition and Mutual Legal Assistance in Thailand," UNAFEI
Resource Material Series No. 57, pp. 50-63 (2001):
www.unafei.or.jp/english/pdf/PDF_rms/no58/58-15.pdf

Vanuatu

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Vanuatu are governed by the Extradition Act (No. 16 of 2002), the Mutual Assistance in Criminal Matters Act (No. 14 of 2002 as amended by Act No. 31 of 2005) (MACMA) and the Proceeds of Crime Act (Act No. 13 of 2002). The MACMA applies to all incoming and outgoing MLA requests involving any foreign country, including requests made without a treaty. Under the Extradition Act, extradition is available to and from foreign countries pursuant to a treaty. In the absence of a treaty, the Minister of Justice may designate a requesting state as an extradition country by regulation. The Minister may also designate by certification a requesting state as an extradition country for a particular extradition request. In deciding whether to make a designation or certification, the Minister will consider the public interests of Vanuatu and the requesting state, and (for certification) the seriousness of the offense. The Extradition Act and the MACMA do not expressly require reciprocity for cooperation without a treaty.

Vanuatu has extradition relations with 57 Commonwealth countries based on the London Scheme, including 6 members of the ADB/OECD Initiative (Bangladesh; India; Malaysia; Pakistan; Singapore; and Sri Lanka) and 2 Parties to the OECD Convention (Canada; United Kingdom). Vanuatu also employs a system of endorsement of arrest warrants for extradition to the 15 other members of the Pacific Islands Forum, including 6 members of the Initiative (Australia; Cook Islands; Fiji; Palau; Papua New Guinea; and Samoa) and 2 Parties to the OECD Convention (Australia; New Zealand). Vanuatu is also party to the UNTOC.

The Extradition Act and the MACMA are extensive and include detailed provisions on the types of assistance available, the grounds for denying cooperation, and the procedure for executing requests. The legislation contains several modern features commonly found in similar legislation of other jurisdictions, such as production orders, taking evidence by video or Internet link, consent extradition, and no-evidence extradition to non-Commonwealth countries. The MACMA also contains provisions on MLA relating to proceeds of crime. Requests for MLA and extradition should be sent to the Attorney-General (or his/her delegate). Letters rogatory requests sent to Vanuatu courts are forwarded to the Attorney-General for execution under the MACMA.

From 2003 to March 2006 (latest data available), Vanuatu received 22 MLA requests, including 12 from Australia and 1 from Fiji; as of March 2006, 80% of the requests had been completed (i.e., all but 4). During the same period, Vanuatu made 3 MLA requests. Between 2002 and March 2006, no extradition requests were received or made by Vanuatu.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for both MLA and extradition in Vanuatu. Extradition is available for an offense that is punishable by at least 12 months' imprisonment or death in the requesting state and in Vanuatu (if it had occurred there). The MACMA states that dual criminality is a discretionary requirement for MLA, but the Vanuatu authorities consider the requirement to be mandatory in practice. The definition of dual criminality is conduct-based. As bribery of foreign public officials and illicit enrichment are not criminal offenses in Vanuatu, how extradition and MLA requests involving these offenses would be handled is unclear. By contrast, Vanuatu may provide MLA in cases in which a company is the target of a corruption investigation because it has established criminal liability against corporations.

Evidentiary tests apply to some incoming extradition and MLA requests. For more coercive forms of MLA (e.g., search and seizure), there must be reasonable grounds to believe that relevant evidence will be found. There is no such requirement for less coercive measures (e.g., taking of evidence and production orders). Incoming extradition requests from certain designated Commonwealth countries are subject to the *prima facie* case test, i.e., there must be sufficient evidence to place the person sought on trial for the offense if it had been committed in Vanuatu. Commonwealth requesting states are required to submit a "record of the case" with a recital of the supporting evidence. Extradition to Pacific Island Forum countries is based on endorsement of warrants; supporting evidence is not necessary. Extradition to all other countries is based on a no-evidence standard. The requesting state is only required to provide a statement of the acts and omissions that constitute the offense, and the time and place of the offense's commission.

Specialty and use limitation are addressed in the Extradition Act and the MACMA respectively. Vanuatu may refuse extradition if the requesting state does not provide an undertaking of specialty. The Extradition Act also specifically confers specialty protection to persons surrendered to Vanuatu. For MLA, the MACMA restricts evidence obtained by Vanuatu from a foreign country to the proceeding or investigation referred to in the request. It is an offense to breach

this obligation without the permission of the Attorney-General. There are no corresponding provisions for incoming MLA requests.

Extradition may be denied if the person sought is a Vanuatu citizen. In lieu of extradition, Vanuatu may prosecute a national if there is sufficient evidence and the subject conduct meets the requirement of dual criminality. Alternatively, a requesting state may seek the extradition of a Vanuatu national for the purposes of trial only. Vanuatu may then allow extradition on the understanding that, if the person sought is convicted in the requesting state, he/she would be returned to Vanuatu to serve the sentence imposed.

Vanuatu may also refuse extradition and MLA in death penalty cases. MLA may be denied if the subject offense is punishable by death in the requesting state absent special circumstances. It may also be denied if the Attorney-General, having regard to the interest of international cooperation, believes that the provision of assistance may result in the death penalty being imposed on a person. As for extradition, Vanuatu may refuse extradition for an offense for which the death penalty may be imposed, unless the requesting state undertakes that the penalty would not be carried out or imposed. Vanuatu may also prosecute in lieu of extradition. The same criteria as for prosecution of a national in lieu of extradition apply (see above).

Cooperation under the Extradition Act and the MACMA may also be denied for political offenses. The Extradition Act contains a negative definition of political offense but the definition does not refer to corruption offenses. The MACMA prohibits assistance relating to a political offense, as well as a request that has been made with a view to prosecuting or punishing a person for a political offense.

Concurrent proceedings and double jeopardy may also prevent cooperation. Extradition is refused if final judgment for the offense has been given against the person sought in Vanuatu or a third country. It is also denied if the person sought has been acquitted, punished or pardoned in the requesting state or Vanuatu for the offense, or if a prosecution for the same crime is pending in Vanuatu. MLA is refused if the person being prosecuted has been acquitted, punished or pardoned in the requesting state. It may also be denied if assistance could prejudice an investigation or proceeding in Vanuatu.

As for other grounds of denial, Vanuatu refuses MLA that prejudices its sovereignty, security or national interest. The Attorney-General has residual discretion to refuse extradition, having regard to the national interest of Vanuatu and the severity of the offense. The MACMA does not address whether MLA may be denied because of bank secrecy, though Vanuatu legislation in other contexts (e.g., section 17 of the Financial Transactions Reporting Act) expressly

overrides secrecy obligations. Case law from the Supreme Court of Vanuatu suggests that assistance requested via letters rogatory may be refused because of bank secrecy (*Application for Summonses to Be Issued Pursuant to Letters Rogatory*, [1984] V.U.S.C. 4, [1980-1994] Van. L.R. 90).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Attorney-General is Vanuatu's central authority for extradition and MLA. In practice, the Attorney-General has delegated his responsibilities to the Solicitor-General's Division in the State Law Office. Outgoing MLA requests must be made by or through the Attorney-General, while incoming requests must be made to the Attorney-General or a person authorized by him. Unless it is necessary for the performance of duties, it is an offense to disclose the existence, contents or status of an incoming MLA request without the approval of the Attorney-General.

Upon receiving an MLA request, the Attorney-General will determine whether the requirements in the MACMA are met (e.g., whether there are reasonable grounds to believe evidence of an offense will be found). The request is then forwarded to the appropriate body for execution. Upon receiving an extradition request, the Attorney-General also ascertains whether certain requirements in the Extradition Act are met. If so, he issues an authority to proceed and a magistrate will order the arrest of the person sought. After the arrest is effected, the magistrate conducts a hearing to confirm that certain conditions in the Extradition Act are met. For extradition to a Pacific Island Forum country based on the endorsement of warrants, the magistrate may order the person sought to be surrendered to the requesting state. For other cases, the magistrate may commit the person sought into custody to await extradition. The case then reverts to the Attorney-General to determine whether the person sought should be surrendered. The Extradition Act does not deal with the procedure for making outgoing extradition requests.

To deal with urgent requests, the Extradition Act allows a foreign state to request provisional arrest if the person sought for extradition is, or is believed to be, in or on his/her way to Vanuatu. The request may be made directly or through Interpol. The MACMA does not contain any provisions on urgent MLA requests.

The Vanuatu government maintains a Web site which does not contain information that specifically address procedures extradition and MLA. Copies of

the relevant legislation are available from an on-line database of Vanuatu laws maintained by an independent organization.

Recovery of Proceeds of Corruption in Criminal Proceedings

MLA concerning proceeds of corruption is provided primarily through the MACMA, though the Proceeds of Crime Act (POCA) may also be applicable. A broad range of assistance is available, including tracing, restraining and confiscating proceeds of crime. Proceeds of crime is defined as any property derived or realized directly or indirectly from a serious offense. The definition includes proceeds that have been converted or transformed, as well as gains derived or realized from proceeds. MLA is available only if the predicate offense is punishable by at least 12 months' imprisonment in the requesting state and Vanuatu (had it occurred there).

The MACMA provides several tools for tracing and identifying proceeds of crime. Foreign countries may request production orders that compel persons (e.g., financial institutions) to produce "property-tracking documents", i.e., documents relevant to identifying, locating or quantifying proceeds of crime. A request can also be made for a warrant to search for and seize property-tracking documents, proceeds of crime, or property used or intended for use in the commission of an offense. Similar provisions are found in the POCA.

There are two means of executing a foreign request to restrain proceeds of crime that are reasonably believed to be in Vanuatu. A foreign restraining order may be registered directly with a Vanuatu court. The registered order may then be enforced in Vanuatu like a domestic court order. Alternatively, a Vanuatu court may issue a restraining order under the POCA if there are reasonable grounds to believe that a proceeding has commenced or is about to commence, and that property that may be subject to a foreign restraining order is located in Vanuatu.

Unlike restraining orders, foreign requests to confiscate proceeds of crime or to enforce a pecuniary penalty can only be executed by direct registration of a foreign order. A person must have been convicted of an offense in the requesting state, and the conviction and foreign order must be final.

To deal with urgent cases, the MACMA allows registration of a faxed copy of a sealed or authenticated foreign order. However, the registration ceases to have effect after 21 days unless a sealed or authenticated order is filed with the court.

Concerning the repatriation of proceeds, the MACMA gives the Attorney-General discretion to enter into arrangements with foreign states for the

reciprocal sharing of property. The provision covers arrangements regarding confiscated property and funds collected under a pecuniary penalty order.

Conclusion

Vanuatu's framework for extradition and MLA is based almost entirely on its legislation. Cooperation is enhanced by permitting extradition and MLA in the absence of a treaty. A foreign country may be designated as an extradition country for a particular extradition request by certification rather than regulation, thereby reducing potential delay. The MACMA offers a range of assistance, including production orders and taking evidence by video or Internet link. The legislation also specifically deals with proceeds of crime, with features such as tools for tracing and identifying proceeds, and enforcement of foreign restraining and confiscation orders by direct registration. To facilitate extradition, Vanuatu has adopted a no-evidence standard for extradition requests from most countries and extradition via endorsement of warrants for Pacific Island Forum countries. Evidentiary requirements are also attenuated for extradition to most Commonwealth countries by using a record of the case. To overcome certain grounds of denying extradition, a person sought may be prosecuted in Vanuatu in lieu of extradition under certain circumstances. In some cases, the person could also be extradited solely for trial and then returned to Vanuatu to serve the sentence.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Vanuatu may provide extradition and MLA in the absence of a treaty. Nevertheless, treaty-based assistance could add certainty and enhance Vanuatu's ability to seek assistance in corruption cases. In this regard, consideration might be given to signing and ratifying the UNCAC.

Legal Preconditions for Extradition and MLA

Dual criminality is mandatory for extradition. It is optional under the MACMA, but Vanuatu considers it a mandatory requirement in practice. To enhance cooperation, Vanuatu could consider eliminating the dual criminality requirement or reducing it to a discretionary requirement. Alternatively, Vanuatu could require dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for

production orders and service of documents. Such an approach would be consistent with Article 46(7) of the UNCAC. Vanuatu may also wish to ensure that dual criminality does not prevent cooperation in cases involving bribery of foreign public officials and illicit enrichment.

There is no prohibition against the extradition of Vanuatu nationals. If extradition is denied for this reason, Vanuatu may prosecute the national under certain circumstances. Vanuatu may also extradite the national on the condition that he/she is returned to serve any sentences. Vanuatu may wish to ensure that one of these two alternatives is used whenever extradition is denied because of nationality. Such an approach would bring Vanuatu into conformity with the standards embodied in recent international instruments on corruption (e.g., Article 10(3) of the OECD Convention and Articles 44(11) and 44(12) of the UNCAC).

Regarding other grounds for denying cooperation, political offense is a potential ground for refusing extradition and MLA. Consideration might be given to following the approach of Article 44(4) of the UNCAC which exhorts states to exclude this ground from extradition in corruption cases. The MACMA is silent on the issue of bank secrecy. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Other Vanuatu legislation (e.g., the Financial Transactions Reporting Act) also explicitly states that secrecy obligations should not prevent the disclosure of information. Vanuatu could therefore consider codifying a similar prohibition in the MACMA.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The Extradition Act allows a foreign state to request provisional arrest directly or through Interpol. Vanuatu may wish to clarify that it will accept requests through other media that produces a writing, such as facsimile. Vanuatu could also consider accepting urgent MLA requests through these channels of communication, as well as oral requests that are subsequently confirmed in writing (e.g., see Article 46(14) of the UNCAC).

For the purpose of assisting foreign states further, Vanuatu could make more information available on the Internet, e.g., by creating a Web page for the central authority with a description of the extradition and MLA process, contact information, and links to the relevant legislation.

Recovery of Proceeds of Corruption in Criminal Proceedings

Vanuatu will enforce a foreign confiscation order only if a person has been convicted of a foreign offense. Vanuatu may wish ensure that assistance can be rendered when the offender cannot be prosecuted by reason of death, flight, absence etc., consistent with Article 54(1)(c) of the UNCAC.

As for repatriating the proceeds of corruption, the MACMA confers discretion on the Attorney-General to enter into arrangements for sharing assets with foreign states. Vanuatu could consider elaborating how this discretion would be exercised in corruption cases, including whether and how the Attorney-General will take into account the factors referred to in Article 57 of the UNCAC. Vanuatu could also enter into arrangements for sharing and repatriating assets.

Information for Seeking Assistance

Central Authority

For Extradition and MLA:

The Attorney-General
c/o The State Law Office
PMB 9048
Port Vila, Vanuatu
Tel: +678 22362
Fax: +678 25473

Relevant Laws and Documentation

The Extradition Act, Mutual Assistance in Criminal Matters Act, and the Proceeds of Crime Act: www.paclii.org/ws/legis/consol_act

Vanuatu: 2nd Joint Mutual Evaluation Report, APGML and Offshore Group of Banking Supervisors (2006):
www.apgml.org/documents/default.aspx?DocumentCategoryID=17

Vanuatu: Assessment of the Supervision and Regulation of the Financial Sector Volume II – Detailed Assessment of Observance of Standard and Codes, IMF (2003): www.rbv.gov.vu/IMF.htm or
www.imf.org/external/pubs/ft/scr/2004/cr04171.pdf

Government of Vanuatu: www.vanuatugovernment.gov.vu/index.html

Vietnam

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition and MLA (including in relation to proceeds of crime) in Vietnam are principally governed by Chapters 37 and 38 of the Criminal Procedure Code (No. 19/2003/QH11) (CPC), except for confiscation, which is covered by Articles 40 and 41 of the Penal Code. If the legislation conflicts with a treaty, the latter prevails. Vietnam is party to the Southeast Asian MLAT (which has also been ratified by two other members of the ADB/OECD Initiative, Malaysia and Singapore). Vietnam has signed but has not ratified the UNCAC and the UNTOC. It has bilateral extradition and MLA treaties in force with Korea, a member of the Initiative and a party to the OECD Convention. A bilateral MLA treaty is also in force with Mongolia, a member of the Initiative. Extradition and MLA are also available without a treaty on the basis of reciprocity. MLA and extradition requests in corruption cases should be sent to the Ministry of Justice, though an applicable treaty may require requests to be sent to other bodies.

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is required for extradition but not MLA. The requirement is conduct-based. As bribery of foreign public officials and illicit enrichment are not criminal offenses in Vietnam, it is not clear whether dual criminality would prevent cooperation in cases involving these offenses. Vietnam also does not impose liability against legal persons for corruption offenses. Vietnam also does not impose liability against legal persons for corruption offenses. However, this should not prevent cooperation in cases in which a legal person is the target of an investigation or prosecution, since dual criminality is not required for MLA.

The CPC does not prescribe evidentiary tests for extradition or MLA, nor does it expressly require specialty or use limitation. An applicable treaty may contain such provisions (e.g., Article 7 of the Southeast Asian MLAT).

The CPC does not allow the extradition of Vietnamese nationals unless the applicable treaty or agreement provides. Where extradition is declined on this ground, the CPC does not require the case to be submitted to the competent Vietnamese authorities for prosecution. Extradition is also refused if the person sought has been convicted or is being prosecuted in Vietnam for the same

crime. Under the CPC, Vietnam may also refuse to refuse a request for assistance from a foreign country if the application threatens its sovereignty, security or other important interests.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

There are several central authorities in Vietnam for extradition and MLA. The central authorities under the MLA Treaty with Korea and the Southeast Asian MLAT are the Prosecutor-General of the People's Supreme Procuracy and the Ministry of Public Security respectively. For all other MLA requests involving corruption offenses, the central authority is the Ministry of Justice (although this is not specified in the CPC). Extradition requests are transmitted via the diplomatic channel. The CPC does not describe the procedure for executing incoming extradition and MLA requests. There are also no provisions for processing urgent requests. The provisions in the CPC concerning domestic investigations may apply.

Recovery of Proceeds of Corruption in Criminal Proceedings

Vietnamese law does not contain provisions that deal specifically with foreign requests relating to proceeds of crime. The provisions of the CPC relating to proceeds of crime in domestic cases presumably apply with such modifications as necessary. These provisions do not include special measures for tracing property or proceeds of crime; the general investigative tools (e.g., search and seizure) are used for this purpose. Property may be restrained under Article 146 of the CPC if a person has been charged with an offense that may result in confiscation of the property under the Penal Code.

Confiscation is covered under Articles 40 and 41 of the Penal Code. Instrumentalities of a crime and objects or money acquired through the commission of a crime may be confiscated upon the conviction of a person. The conviction, however, must relate to a crime that causes great harm to society and which is punishable by at least seven years' imprisonment. The CPC requires confiscated property to be deposited into the State fund. There are no provisions for sharing confiscated property with a foreign state.

Conclusion

In the course of the past few years, Vietnam has enacted reform legislation in order to create an environment more conducive to international

cooperation in criminal matters. Thus, the Criminal Procedure Code enacted in 2003 contains Chapters 37 and 38 which regulate some matters of extradition and MLA. Confiscation is dealt with in the Penal Code which was enacted in 1999. In fall 2007, Vietnam was about to introduce improvements to this legal framework as part of an ongoing reform process.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Introducing, as part of the on-going reform process, more elaborate rules on cooperation in criminal cases into Vietnamese law would very likely enhance Vietnam's ability to seek and provide international cooperation in corruption cases. For instance, Vietnam could add features such as extradition by consent or via endorsement of warrants, and MLA for service of documents, taking evidence through video conference, and transfer of prisoners to assist in an investigation or proceeding. Expanding Vietnam's network of extradition and MLA treaties could further strengthen Vietnam's ability. Ratifying the multilateral treaties that have already been signed, such as the UNCAC and the UNTOC, would help accomplish this goal, as would concluding more bilateral extradition and MLA treaties.

Legal Preconditions for Extradition and MLA

Since dual criminality is required for extradition, it could be important to ensure that this requirement does not impede extradition in cases involving bribery of foreign public officials and illicit enrichment. Vietnam does not extradite its nationals. Vietnam could amend the CPC to ensure that cases are submitted to its competent authorities for prosecution whenever extradition is denied solely because of nationality (e.g., see Article 44(11) of the UNCAC and Article 10(3) of the OECD Convention). Ensuring that there is jurisdiction to prosecute all such cases could also be beneficial. Finally, expressly prohibiting the use of bank secrecy as a ground for denying MLA would bring the law in line with recent international instruments (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).

Procedures and Measures to Improve the Efficiency of Extradition and MLA

Designating a single body as the central authority for all extradition and MLA requests could result in economies of scale, concentration of expertise, better coordination among law enforcement agencies, and less duplication. Allowing the central authority to directly send and receive extradition and MLA requests could eliminate delays caused by transmission through the diplomatic channel. The authorities in requesting states could benefit from a Web page in English that is dedicated to international cooperation and which contains a description of the Vietnamese extradition and MLA process, copies of relevant legislation and treaties, contact information for the central authority, and sample documents.

Procedures for urgent requests, such as allowing Vietnamese nationals to be provisionally arrested, could be useful. Potential delays could also be reduced by accepting urgent requests for MLA or provisional arrest that are made outside the diplomatic channel, such as by facsimile or Interpol. Vietnam could also consider accepting urgent MLA requests made orally with subsequent written confirmation (e.g., see Article 46(14) of the UNCAC).

Recovery of Proceeds of Corruption in Criminal Proceedings

As with MLA generally, treaties and legislation on MLA relating to proceeds of crime could greatly improve Vietnam's ability to seek and provide cooperation. Cooperation could also be strengthened by reducing some threshold requirements. Allowing property to be restrained before a charge has been laid could enhance the preservation of assets for later confiscation. Under the current law, confiscation is available only if a person has been convicted of an offense that is punishable by at least seven years' imprisonment. In line with other jurisdictions, consideration could be given to eliminating this requirement or reducing it to one year's imprisonment. Permitting foreign confiscation orders to be enforced without a conviction (e.g., when an offender cannot be prosecuted because of death, flight, absence etc.) would bring the regime in line with Article 54(1)(c) of the UNCAC.

Procedural changes could also enhance cooperation, such as allowing the enforcement of foreign restraining, confiscation and pecuniary penalty orders by direct registration in a Vietnamese court. Registration of faxed orders in urgent cases could also be useful. Finally, express provisions on the repatriation of proceeds of corruption could provide greater certainty and accountability. Particular consideration could be given to the factors referred to in Article 57 of the UNCAC.

Information for Seeking Assistance

Central Authority

For Extradition under the Treaty with Korea: the diplomatic channel

For All Other Extradition Requests: Information not available.

For MLA under the Treaty with Korea:

Prosecutor-General of the People's Supreme Procuracy

For MLA under the Southeast Asian MLAT:

Ministry of Public Security

International Cooperation Department

No. 60 Nguyen Du

Hanoi, Vietnam

Tel: +84 4 0694 0197

Fax: +84 4 4942 4381

For All Other MLA Requests:

Ministry of Justice

56-58-60 Tran Phu

Hanoi, Vietnam

Tel: +84 4 7336 213

Fax: +84 4 8431 431

Relevant Laws and Documentation

Criminal Procedure Code (No. 19/2003/QH11) and the Penal Code (No. 15/1999/QH10): vbqappl.moj.gov.vn

Nguyen, T.V., "Vietnamese Law on Extradition in Comparison with Article 44 of the UN Convention against Corruption", American Bar Association–Asia: www.abanet.org/aba-asia/docs/aba_asia_thanh_nguyen.pdf

Annexes

- A. Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative
- B. Matrix on MLA Arrangements between Members of the ADB/OECD Anti-Corruption Initiative
- C. Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention
- D. Matrix on MLA Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention

A. Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative

Requested State \ Requesting State	Australia	Bangladesh	Cambodia	P.R. China	Cook Islands	Fiji Islands	Hong Kong, China	India	Indonesia	Japan	Kazakhstan	Korea	Kyrgyzstan
Australia	-	CL	T	CDT	BTW	W	BCT	CDT	BCT	CDOT	T	BCDOT	CT
Bangladesh	CDL	-	-	CD	L	L	C	CD	C	CD	T	CD	C
Cambodia	DT		-	BDT	DT	D	T	DT	T	DT	T	DT	T
P.R. China	CDT	C	BT	-	DT	D		CDT	CT	CDT	BT	BCDT	BCT
Cook Islands	BDLT		T	DT	-	BW	T	BDT	T	DT	T	DT	T
Fiji Islands	DL	L		D	BW	-		D		D		D	
Hong Kong, China	BCDT	C	T		DT	D	-	BCDT	BCT	CDT	T	BCDT	CT
India	CDLT	CL	T	CDT	BT	L	BCT	-	CT	CDT	T	BCDT	CT
Indonesia	BCDT	C	T	CDT	DT	D	BCT	CDT	-	CDT	T	BCDT	CT
Japan	CDOT	C	T	CDT	DT	D	CT	CDT	CT	-	T	BCDOT	CT
Kazakhstan	DT		T	BDT	DT	D	T	DT	T	DT	-	DT	BI PT
Korea	BCDOT	C	T	BCDT	DT	D	BCT	BCDT	BCT	BCDOT	T	-	CT
Kyrgyzstan	CDT	C	T	BCDT	DT	D	CT	CDT	CT	CDT	BI PT	CDT	-
Macao, China	CDT	C	T		DT	D		CDT	CT	CDT	T	CDT	CT
Malaysia*	BCDLT	CL	T	CDT	LT	L	BC	CDT	BCT	CDT	T	CDT	CT
Mongolia	CD	C		BCD	D	D	C	BCD	C	CDT	B	BCD	C
Nepal	CDT	C	T	CDT	DT	D	CT	BCDT	CT	CDT	T	CDT	CT
Pakistan	BCDLT	C	T	BCDT	LT	L	CT	CDT	CT	CDT	T	CDT	CT
Palau	CD	C		CD	W	W	C	CD	C	CD		CD	C
Papua New Guinea	CDL	CL		CD	W	W	C	CD	C	CD		CD	C
Philippines**	BDT		T	BDT	DT	D	BT	BDT	BT	DT	T	BDT	T
Samoa	DL	L		D	W	W		D		D		D	
Singapore	CDLT	CL	T	CDT	LT	L	BCT	CDT	CT	CDT	T	CDT	CT
Sri Lanka	CDLT	CL	T	CDT	LT	L	BCT	CT	CT	CT	T	CT	CT
Thailand	BCDT	BC	BT	BCDT	BT	B	CT	CDT	BCT	CDT	T	BCDT	CT
Vanuatu	DLT	L	T	DT	TW	W	T	DT	T	DT	T	DT	T
Vietnam	CDT	C	T	CDT	DT	D	CT	CDT	CT	CDT	T	BCDT	CT

Key

- Gray denotes treaty not yet ratified or in force
- B Bilateral Treaty
- C United Nations Convention against Corruption
- D Domestic legislation
- I1, I2 Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters (22 Jan. 1993 and 7 Oct. 2002)
- L Scheme for Extradition within the Commonwealth (the London Scheme)
- O OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

- T United Nations Convention against Transnational Organized Crime
- W Endorsement of Warrant
- * Malaysia has also ratified the UNTOC, but has declared that it does not take the UNTOC as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation.
- ** The Philippines has ratified the UNCAC but has declared that it does not take the UNCAC as the legal basis for extradition with other States Parties.

Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative (continued)

Requested State	Macao, China	Malaysia*	Mongolia	Nepal	Pakistan	Palau	Papua New Guinea	Philippines**	Samoa	Singapore	Sri Lanka	Thailand	Vanuatu	Vietnam
Australia	CDT	BCDT	C	CT	BCDLT	CD	CD	BT		CLT	CT	BCDT	TW	CT
Bangladesh	CD	CD	C	C	CD	CD	C			CL	CL	BCD	L	C
Cambodia	DT	DT		T	T	D		T		T	T	BDT	DT	T
P.R. China		CDT	BC	CT	BCDT	CD	C	BT		CT	CT	BCDT	DT	CT
Cook Islands	DT	DT		T	DT	D	W	T		T	T	BDT	TW	T
Fiji Islands	D	D			D	D	W			L	L	B	W	
Hong Kong, China		BCD	C	CT	CDT	CD	C	BT		BCT	BCT	CDT	DT	CT
India	CDT	CDT	BC	BCT	CDT	CD	C	BT		CDT	CLT	CDT	LT	CT
Indonesia	CDT	BCDT	C	CT	CDT	CD	C	BT		CT	CT	BCDT	DT	CT
Japan	CDT	CDT	C	CT	CDT	CD	C	T		CT	CT	CDT	DT	CT
Kazakhstan	DT	DT	B	T	DT	D		T		T	T	DT	DT	T
Korea	CDT	CDT	BC	CT	CDT	CD	C	BT		CT	CT	BCDT	DT	BCT
Kyrgyzstan	CDT	CDT	C	CT	CDT	CD	C	T		CT	CT	CDT	DT	CT
Macao, China	-	CDT	C	CT	CDT	CD	C	T		CT	CT	CDT	DT	CT
Malaysia*	CDT	-	C	CT	CDT	CD	C	T		CLTW	CLT	BCD	LT	CT
Mongolia	CD	CD	-	C	CD	CD	C			C	C	CD	D	C
Nepal	CDT	CDT	C	-	CDT	CD	C	T		CT	CT	CDT	DT	CT
Pakistan	CDT	CDT	C	CT	-	CD	C	T		CT	CT	CDT	LT	CT
Palau	CD	CD	C	C	CD	-	CW			C	C	CD	W	C
Papua New Guinea	CD	CD	C	C	CD	CD	-			CL	CL	CD	W	C
Philippines**	DT	DT		T	DT	D		-		T	T	BDT	DT	T
Samoa	D	D			D	D	W		-	L	L	D	W	
Singapore	CDT	CTW	C	CT	CDT	CD	C	T		-	CLT	CDT	LT	CT
Sri Lanka	CDT	CD	C	CT	CDT	CD	C	T		CLT	-	CT	LT	CT
Thailand	CDT	BCDT	C	CT	CDT	CD	C	BT		CT	CT	-	DT	CT
Vanuatu	DT	DT		T	DT	D	W	T		LT	LT	DT	-	T
Vietnam	CDT	CDT	C	CT	CDT	CD	C	T		CT	CT	CDT	DT	-

Key

- Gray denotes treaty not yet ratified or in force
- B Bilateral Treaty
- C United Nations Convention against Corruption
- D Domestic legislation
- II, I2 Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters (22 Jan. 1993 and 7 Oct. 2002)
- L Scheme for Extradition within the Commonwealth (the London Scheme)
- O OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

- T United Nations Convention against Transnational Organized Crime
- W Endorsement of Warrant
- * Malaysia has also ratified the UNTOC, but has declared that it does not take the UNTOC as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation.
- ** The Philippines has ratified the UNCAC but has declared that it does not take the UNCAC as the legal basis for extradition with other States Parties.

B. Matrix on MLA Arrangements between Members of the ADB/OECD Anti-Corruption Initiative

Requested State \ Requesting State	Australia	Bangladesh	Cambodia	P.R. China	Cook Islands	Fiji Islands	Hong Kong, China	India	Indonesia	Japan	Kazakhstan	Korea	Kyrgyzstan
Australia	-	C	T	BCDT	DT	D	CBDT	CDT	BCT	CDT	T	BCDT	CT
Bangladesh	CD	-		CD	D	D	CD	CD	C			CD	C
Cambodia	DT		-	DT	DT	D	DT	DT	AT	DT	T	DT	T
P.R. China	BCDT	C	T	-	DT	D	-	CDT	BCT	CDT	BT	BCDT	BCT
Cook Islands	DT		T	DT	-	D	DT	DT	T	DT	T	DT	T
Fiji Islands	D			D	D	-	D	D		D		D	
Hong Kong, China	BCDT	C	T	-	DT	D	-	CDT	CT	CDT	T	BCDT	CT
India	CDT	C	T	CDT	DT	D	CDT	-	CT	CDT	BT	BCDT	BCT
Indonesia	BCDT	C	AT	BCDT	DT	D	CDT	CDT	-	CDT	T	BCDT	CT
Japan	CDT	C	T	CDT	DT	D	CDT	CDT	CT	-	T	BCDT	CT
Kazakhstan	DT		T	BDT	DT	D	DT	BDT	T	DT	-	DT	BI ¹ I ² T
Korea	BCDT	C	T	BCDT	DT	D	BCDT	BCDT	BCT	BCDT	T	-	CT
Kyrgyzstan	CDT	C	T	BCDT	DT	D	CDT	BCDT	CT	CDT	BI ¹ I ² T	CDT	CT
Macao, China	CDT	C	T	-	T		-	CT	CT	CT	T	CT	CT
Malaysia	BCDT	C	AT	CDT	DT	D	CD	CDT	ACT	CDT	T	CDT	CT
Mongolia	CD	C		BCD	D	D	CD	BCD	C	CD	B	BCD	BC
Nepal	CDT	C	T	CDT	DT	D	CDT	CDT	CT	CDT	T	CDT	CT
Pakistan	CDT	C	T	CDT	DT	D	CDT	CDT	CT	CDT	BT	CDT	CT
Palau	CD	C		CD	D	D	CD	CD	C	CD		CD	C
Papua New Guinea	CD	C		CD	D	D	CD	CD	C	CD		CD	C
Philippines	BCDT	C	AT	BCDT	DT	D	BCDT	CDT	ACT	CDT	T	BCDT	CT
Samoa	D			D	D	D	D	D		D		D	
Singapore	CDT	C	AT	CDT	DT	D	BCDT	BCDT	ACT	CDT	T	CDT	CT
Sri Lanka	CDT	C	T	CDT	DT	D	CDT	CDT	CT	CDT	T	CDT	CT
Thailand	CDT	C	AT	BCDT	DT	D	CDT	BCDT	ACT	CDT	T	BCDT	CT
Vanuatu	DT		T	DT	DT	D	DT	DT	T	DT	T	DT	T
Vietnam	CDT	C	AT	CDT	DT	D	CDT	CDT	ACT	CDT	T	BCDT	CT

Key

Gray denotes treaty not yet ratified or in force

A Southeast Asian MLA in Criminal Matters Treaty

B Bilateral Treaty

C United Nations Convention against Corruption

D MLA available through domestic legislation

11, 12 Commonwealth of Independent States (CIS) Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters dated 22 January 1993 and 7 October 2002

T United Nations Convention against Transnational Organized Crime

Matrix on MLA Arrangements between Members of the ADB/OECD Anti-Corruption Initiative (continued)

Requested State \ Requesting State	Macao, China	Malaysia	Mongolia	Nepal	Pakistan	Palau	Papua New Guinea	Philippines	Samoa	Singapore	Sri Lanka	Thailand	Vanuatu	Vietnam
Australia	CT	B CDT	C	CT	CT	CD	CD	BCT	D	CT	CT	CDT	DT	CT
Bangladesh	C	C	C	C	C	CD	CD	C	D	C	C	CD	D	C
Cambodia	T	ADT		T	T	D	D	AT	D	AT	T	ADT	DT	AT
P.R. China	-	CDT	BC	CT	CT	CD	CD	BCT	D	CT	CT	BCDT	DT	CT
Cook Islands	T	DT		T	T	D	D	T	D	T	T	DT	DT	T
Fiji Islands		D				D	D		D			D	D	
Hong Kong, China		CD	C	CT	CT	CD	CD	BCT	D	BCT	CT	CDT	DT	CT
India	CT	CDT	BC	CT	CT	CD	CD	CT	D	BCT	CT	BCDT	DT	CT
Indonesia	CT	ACDT	C	CT	CT	CD	CD	ACT	D	ACT	CT	ACDT	DT	ACT
Japan	CT	CDT	C	CT	CT	CD	CD	CT	D	CT	CT	CDT	DT	CT
Kazakhstan	T	DT	B	T	BT	D	D	T	D	T	T	DT	DT	T
Korea	CT	CDT	BC	CT	CT	CD	CD	BCT	D	CT	CT	BCDT	DT	BCT
Kyrgyzstan	CT	CDT	BC	CT	CT	CD	CD	CT	D	CT	CT	CDT	DT	CT
Macao, China	-	CT	C	CT	CT	C	C	CT	D	CT	CT	CT	T	CT
Malaysia	CT	-	C	CT	CT	CD	CD	ACT	D	ACT	CT	ACDT	DT	ACT
Mongolia	C	CD	-	C	C	CD	CD	C	D	C	C	CD	D	BC
Nepal	CT	CDT	C	-	CT	CD	CD	CT	D	CT	CT	CDT	DT	CT
Pakistan	CT	CDT	C	CT	-	D	CD	CT	D	CT	BCT	CDT	DT	CT
Palau	C	CD	C	C	C	-	CD	C	D	C	C	CD	D	C
Papua New Guinea	C	CD	C	C	C	CD	-	C	D	C	C	CD	D	C
Philippines	CT	ACDT	C	CT	CT	CD	CD	-	D	ACT	CT	ACDT	DT	ACT
Samoa		D				D	D		-			D	D	
Singapore	CT	ACDT	C	CT	CT	CD	CD	ACT	D	-	CT	ACDT	DT	ACT
Sri Lanka	CT	CDT	C	CT	BCT	CD	CD	CT	D	CT	-	BCDT	DT	CT
Thailand	CT	ACDT	C	CT	CT	CD	CD	ACT	D	ACT	BCT	-	DT	ACT
Vanuatu	T	DT		T	T	D	D	T	D	T	T	DT	-	T
Vietnam	CT	ACDT	BC	CT	CT	CD	CD	ACT	D	ACT	CT	ACDT	DT	-

Key

Gray denotes treaty not yet ratified or in force

A Southeast Asian MLA in Criminal Matters Treaty

B Bilateral Treaty

C United Nations Convention against Corruption

D MLA available through domestic legislation

I1, I2 Commonwealth of Independent States (CIS) Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters dated 22 January 1993 and 7 October 2002

T United Nations Convention against Transnational Organized Crime

C. Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention

Requested State \ Requesting State	Argentina	Australia***	Austria	Belgium	Brazil	Bulgaria	Canada	Chile	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece
Australia	BCOT	—	BCOT	BOT	BCOT	COT	DOT	BCOT	BO	CDOT	DOT	BCOT	BCOT	BOT	BO
Bangladesh	C	***	C		C	C		C		C		C	C		
Cambodia	T	***	T	T	T	T	T	T		T	T	T	T	T	T
P.R. China	CT	***	CT	T	CT	CBT	T	CT		CT	T	CT	CT	T	
Cook Islands	BT	***	BT	BT	BT	T	LT	BT	B	T	T	BT	BT	BT	
Fiji Islands		***					L								
Hong Kong, China		***					B								
India		***		B		B	B						B	B	
Indonesia	C	***	C		C	C		C		C		C	C		
Japan	O	***	O	O	O	O	O	O	O	O	O	O	O	O	O
Kazakhstan		***													
Korea	BO	***	O	O	BO	O	BO	BO	O	O	O	O	O	O	O
Kyrgyzstan	CT	***	CT	T	CT	CT	T	CT		CT	T	CT	CT	T	
Macao, China	CT	***	CT	T	CT	CT	T	CT		CT	T	CT	CT	T	
Malaysia*		***													
Mongolia	C	***	C		C	C		C		C		C	C		
Nepal		***													
Pakistan	BC	***	C	B	C	C		C		BC		C	BC		B
Palau		***													
Papua New Guinea	C	***	C		C	C	L	C		C		C	C		
Philippines**	CT	***	CT	T	CT	CT	BT	CT		CT	T	CT	CT	T	
Samoa		***													
Singapore		***	T	T	T	T	LT	T		T	T	T	T	BT	
Sri Lanka	CT	***	CT	T	CT	CT	T	CT		CT	T	CT	CT	T	
Thailand		***		B			B								
Vanuatu	T	***	T	T	T	T	LT	T		T	T	T	T	T	
Vietnam		***													

Key

- B Bilateral Extradition Treaty
- C United Nations Convention against Corruption
- D Reciprocal Designation
- L Scheme for Extradition within the Commonwealth (the London Scheme)
- O OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- T United Nations Convention against Transnational Organized Crime
- W Endorsement of Warrant
- * Malaysia has also ratified the UNTOC, but has declared that it does not take the UNTOC as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation.
- ** The Philippines has ratified the UNCAC but has declared that it does not take the UNCAC as the legal basis for extradition with other States Parties.
- *** Please refer to Matrix A.

Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention (continued)

Requested State \ Requesting State	Hungary	Iceland	Ireland	Italy	Japan***	Korea**	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Poland	Portugal	Slovak Republic	Slovenia
Australia	BCOT	DO	BO	BOT	***	***	BO	BCOT	BCOT	TOW	BCOT	BCOT	BOT	BCOT	DOT
Bangladesh	C				***	***		C	C		C	C		C	
Cambodia	T			T	***	***		T	T	T	T	T	T	T	T
P.R. China	CT			T	***	***		CT	CT	T	CT	CT	T	CT	T
Cook Islands	BT	B		BT	***	***	B	BT	BT	BWT	T	BT	BT	BT	T
Fiji Islands					***	***				W					
Hong Kong, China					***	***			B	B			B		
India					***	***			B			B	D		
Indonesia	C				***	***		C	C		C	C		C	
Japan	O	O	O	O	-	***	O	O	O	O	O	O	O	O	O
Kazakhstan					***	***									
Korea	O	O	O	O	***	-	O	BO	O	BO	O	O	O	O	O
Kyrgyzstan	CT			T	***	***		CT	CT	T	CT	CT	T	CT	T
Macao, China	CT			T	***	***		CT	CT	T	CT	CT	BT	CT	T
Malaysia*					***	***									
Mongolia	C				***	***		C	C		C	C		C	
Nepal					***	***									
Pakistan	C			B	***	***	B	C	BC		C	C	B	C	
Palau					***	***									
Papua New Guinea	C				***	***		C	C	W	C	C		C	
Philippines**	CT			T	***	***		CT	CT	T	CT	CT	T	CT	T
Samoa					***	***									
Singapore	T			T	***	***		T	T	LT	T	T	T	T	T
Sri Lanka	CT			BT	***	***		CT	CT	T	CT	CT	T	CT	T
Thailand					***	***				B					
Vanuatu	T			T	***	***		T	T	TW	T	T	T	T	T
Vietnam					***	***									

Key

- B Bilateral Extradition Treaty
- C United Nations Convention against Corruption
- D Reciprocal Designation
- L Scheme for Extradition within the Commonwealth (the London Scheme)
- O OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- T United Nations Convention against Transnational Organized Crime
- W Endorsement of Warrant
- * Malaysia has also ratified the UNTOC, but has declared that it does not take the UNTOC as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation.
- ** The Philippines has ratified the UNCAC but has declared that it does not take the UNCAC as the legal basis for extradition with other States Parties.
- *** Please refer to Matrix A.

Matrix on Extradition Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention (continued)

Requested State \ Requesting State	South Africa	Spain	Sweden	Switzerland	Turkey	United Kingdom	United States
Australia	COT	BCOT	BOT	BOT	BCOT	CDOT	BCOT
Bangladesh	C	C			C	CL	C
Cambodia	T	T	T	T	T	T	T
P.R. China	BCT	CT	T	T	CT	CT	CT
Cook Islands	T	BT	BT	BT	T	LT	BT
Fiji Islands						L	
Hong Kong, China						B	B
India	B	B	D	B	B	B	B
Indonesia	C	C			C	C	C
Japan	O	O	O	O	O	O	BO
Kazakhstan							
Korea	O	BO	O	O	O	O	BO
Kyrgyzstan	CT	CT	T	T	CT	CT	CT
Macao, China	CT	CT	T	T	CT	CT	CT
Malaysia*						L	B
Mongolia	C	C			C	C	C
Nepal							
Pakistan	C	C		B	BC	C	BC
Palau							D
Papua New Guinea	C	C			C	CL	C
Philippines**	CT	CT	T	BT	CT	CT	BCT
Samoa							
Singapore	T	T	T	T	T	LT	BT
Sri Lanka	CT	CT	T	T	CT	CLT	BCT
Thailand						B	B
Vanuatu	T	T	T	T	T	LT	T
Vietnam							

Key

- B Bilateral Extradition Treaty
- C United Nations Convention against Corruption
- D Reciprocal Designation
- L Scheme for Extradition within the Commonwealth (the London Scheme)
- O OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- T United Nations Convention against Transnational Organized Crime
- W Endorsement of Warrant
- * Malaysia has also ratified the UNTOC, but has declared that it does not take the UNTOC as the legal basis for extradition with other States Parties. It will instead continue to rely on its domestic legislation.
- ** The Philippines has ratified the UNCAC but has declared that it does not take the UNCAC as the legal basis for extradition with other States Parties.
- *** Please refer to Matrix A.

D. Matrix on MLA Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention

Requested State \ Requesting State	Argentina	Australia*	Austria	Belgium	Brazil	Bulgaria	Canada	Chile	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Iceland	Ireland	Italy
Australia	BCT	-	BCT	T	CT	CT	BT	CT		CT	T	BCT	BCT	T	B	BCT			BT
Bangladesh	C	*	C		C	C		C		C		C	C			C			
Cambodia	T	*	T	T	T	T	T	T		T	T	T	T	T		T			T
P.R. China	CT	*	CT	T	CT	BCT	BT	CT		CT	T	CT	CT	T	B	CT			T
Cook Islands	T	*	T	T	T	T	T	T		T	T	T	T	T		T			T
Fiji Islands		*																	
Hong Kong, China		*		B			B			B			B						
India		*					B						B						
Indonesia	C	*	C		C	C		C		C		C	C			C			
Japan		*																	
Kazakhstan		*																	
Korea		*			B		B						B						
Kyrgyzstan	CT	*	CT	T	CT	CT	T	CT	B	CT	T	CT	CT	T		CT			T
Macao, China	CT	*	CT	T	CT	CT	T	CT		CT	T	CT	CT	T		CT			T
Malaysia		*																	
Mongolia	C	*	C		C	C		C		C		C	C			C			
Nepal		*																	
Pakistan	C	*	C		C	C		C		C		C	C			C			
Palau		*																	
Papua New Guinea	C	*	C		C	C		C		C		C	C			C			
Philippines	CT	*	CT	T	CT	CT	T	CT		CT	T	CT	CT	T		CT			T
Samoa		*																	
Singapore	T	*	T	T	T	T	T	T		T	T	T	T	T		T			T
Sri Lanka	CT	*	CT	T	CT	CT	T	CT		CT	T	CT	CT	T		CT			T
Thailand		*					B						B						
Vanuatu	T	*	T	T	T	T	T	T		T	T	T	T	T		T			T
Vietnam		*																	

Key

- B Bilateral MLA Treaty
- C United Nations Convention against Corruption
- T United Nations Convention against Transnational Organized Crime
- * Please refer to Matrix B.

Matrix on MLA Arrangements between Members of the ADB/OECD Anti-Corruption Initiative and Parties to the OECD Convention (continued)

Requested State \ Requesting State	Japan*	Korea*	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Poland	Portugal	Slovak Republic	Slovenia	South Africa	Spain	Sweden	Switzerland	Turkey	United Kingdom	United States
Australia	*	*	B	BCT	BCT	T	CT	CT	BT	CT	T	BCT	BCT	BT	BT	CT	BCT	BCT
Bangladesh	*	*		C	C		C	C		C		C	C			C	C	C
Cambodia	*	*		T	T	T	T	T	T	T	T	T	T	T	T	T	T	T
P.R. China	*	*		CT	CT	T	CT	BCT	T	CT	T	BCT	CT	T	T	BCT	CT	BCT
Cook Islands	*	*		T	T	T	T	T	T	T	T	T	T	T	T	T	T	T
Fiji Islands	*	*																
Hong Kong, China	*	*			B	B		B	B						B		B	B
India	*	*													B	B	B	B
Indonesia	*	*		C	C		C	C		C		C	C			C	C	C
Japan	-	*																
Kazakhstan	*	*														B		
Korea	*	-		B		B												B
Kyrgyzstan	*	*		CT	CT	T	CT	CT	T	CT	T	CT	CT	T	T	CT	CT	CT
Macao, China	*	*		CT	CT	T	CT	CT	BT	CT	T	CT	CT	T	T	CT	CT	CT
Malaysia	*	*																
Mongolia	*	*		C	C		C	C		C		C	C			C	C	C
Nepal	*	*																
Pakistan	*	*		C	C		C	C		C		C	C			C	C	C
Palau	*	*																
Papua New Guinea	*	*		C	C		C	C		C		C	C			C	C	C
Philippines	*	*		CT	CT	T	CT	CT	T	CT	T	CT	CT	T	BT	CT	CT	BCT
Samoa	*	*																
Singapore	*	*		T	T	T	T	T	T	T	T	T	T	T	T	T	T	T
Sri Lanka	*	*		CT	CT	T	CT	CT	T	CT	T	CT	CT	T	T	CT	CT	CT
Thailand	*	*					B										B	B
Vanuatu	*	*		T	T	T	T	T	T	T	T	T	T	T	T	T	T	T
Vietnam	*	*																

Key

- B Bilateral MLA Treaty
- C United Nations Convention against Corruption
- T United Nations Convention against Transnational Organized Crime
- * Please refer to Matrix B.

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