Background paper (Legal and institutional challenges in mutual legal assistance, Wednesday 14:30 – 15:45)

Assessment of the UNCAC on Asset Recovery and Mutual Legal Assistance
From the Indonesian Law Perspective

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Introduction

The United Nation Convention Against Corruption (2003) has been ratified by the Government of Indonesia (GOI) by Law number 7, 2006. The GOI is very interested and was actively involved in the negotiation process of the UNCAC draft. Therefore, the GOI is proactive in preparing and accommodating the implementation of the UNCAC into Indonesian Criminal Law. The ratification reflects a strong commitment of the GOI to enhance their efforts in combating corruption which efforts have been undertaken since 1960's, and is still being developed until today. To accomplish this, the GOI has established a working group (WG) under the administration of the National Development Planning Agency. The WG reflects 6 (six) thematic clusters, such as, prevention; law enforcement and criminalization; asset recovery; international cooperation; review mechanism and reporting, and data base and information. The objective of the working group establishment is to compose a comprehensive draft of A National Plan of Action on Combating Corruption in Indonesia (NPACC-INDONESIA) so as to comply with UNCAC norms and principles.

Pursuant to the ratification, the GOI has been drafting a comprehensive new bills related to the eradication of corruption. This new laws are called, "Three Laws on Anti Corruption Package", namely, a draft revision of law on the eradication of corruption; a draft law on the Anti Corruption Court, and, a draft law on the Eradication of Corruption. This package will hopefully be submitted to the Parliament next year.

International cooperation (Chapter IV) and asset recovery (Chapter V) are indispensable since we have experienced unsuccessful efforts in returning the asset of corruption through our existing of mutual legal assistance treat with some countries. We hope that during the discussion in the next few days, we will be sharing information and experience among experts and law practitioners of Asia Pacific regions and beyond.

Indonesian law on anti corruption

Indonesia adopted the Civil law system which was inherited from the Dutch Colonial system and heavily relies on the codification principle. But, after the fall of Sukarno which left Indonesia in a huge economic crisis, the Suharto regime, in 1968, opened the foreign investment policy and has turned Indonesia into an indispensable country in Asia, and gained strong support from international institutions. The policy had great impact on Indonesia's recovery from the crisis. Since then, Indonesia has been involved actively in

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international business, and subsequently the common law system has become a new model within Indonesian Law system, particularly in the process of law making. The adoption of a new model is not without legal impact to Indonesia's criminal law system. Eventually, the codification principle is no longer persistently adopted among judges. More judges today are in favor to implement the judge-made law process and the Judicial Act 4, 2004, also obliges judge to consider society's values beside strong evidence before him/her.

In the criminal law system, the exclusion of the codification principle is greater than in the commercial law system, even though, the legislature and the judges are sill reluctant to implement it. Based on Article 103 of Indonesian Penal Code, regardless of the codification principle, the GOI could enact a special law based on the principle, "lex speciali derogate lege generali". There are more or less 15 (fifteen) special laws, including, terrorism, corruption, money laundering, and human trafficking which were enacted since 1998. Among the special laws, the law on anti corruption is the most comprehensive and substantially improved.

The response of Law of 1999 to corruption is clear where corruption is regarded as a serious crime and a violation of the societies' right to development. Based on this view, the GOI had reformed the law to counter corruption, and adopted five significant changes. These changes are as follows:

- First, Law number 31/1999, recognizes the reversal of burden of proof during the investigation process (article 28), and during the trial process (article 37).[1]
- Second, the law recognizes a criminal-based confiscation as well as a civil-based confiscation.[2]
- Third, the law permits the use of wiretapping and electronic devices as evidence in the court trial (article 26, Law number 20/2001).
- Fourth, the need of society's participation in the prevention as well as in the law enforcement is stipulated in Chapter V of Law number 31/1999, and has also been stipulated in Article 15 of the Law on the Corruption Eradication Commission Number 30/2002.
- Fifth, to a certain extent, the law 31/1999, could apply to corruption beyond Indonesia' s boundaries such as, to restrain property in other countries through mutual legal assistance treaty (Law Number 1/2006) and to extradite Indonesian national from the other countries (Law on Extradition Number 1/1979). However, the law number

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[1] Article 28 Law number 31 /1999: "For the interest of investigation, a suspect is oblige to inform all his/her properties and property of his wife or her husband, his/her sons, and another person's property or corporation which is known or suspect to linkage with his/her crime of corruption".
Article 37 para 1, Law number 31/1999: "A defendant has the right to proof that he or she is does not commit a crime of corruption"
Article 37 para 3, Law number 31/1999:" A defendant is oblige to inform all his/her properties and property of his wife/her husband, and another person's property or corporation which is known or suspect to linkage to his/her crime of corruption".

[2] Article 18 Law Number 31/ 1999: "Additional sentence as stipulated in the Penal Code, are: a. seizure of property owned by a convicted person; b. paying monies as a substitute; c. closing his/her corporation for a maximum one year"; d. the revocation of all or part of his/her certain rights or diminishing his/her certain benefits as has been given by the government to him/her".
The Law also protect the right of a bonafide third party such as stipulate in article 19 para 1:" The court shall not decide to seize property is not belong to the defendant if it damage or harm the right of bona fide third party". The Criminal Law Procedure, Law number 8 /1981, also stipulate a criminal based confiscation.
The law 31 /1999 also stipulate a civil based confiscation (article 32 – article 34).

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31/1999 as amended by law 20/2001 does not yet comprehensively regulate all aspects of criminalization, and asset recovery comprehensively, as stipulated in the UNCAC (see GAP Analysis, 2006).

Asset recovery and mutual legal assistance under UNCAC and its adoption under Indonesia legal system.

Chapter V of the UNCAC on Asset Recovery is related to Article 31 on Freezing, Seizure, and Confiscation. The UNCAC stipulates a clear definition about Confiscation: "the permanent deprivation of property by order of a court or other competent authority" (Article 2(g)). However, the convention does not give a specific definition on asset recovery. Instead of having a definition, the UNCAC describes on how the asset should be recovered from one country to another. It means that Chapter V mainly addresses all forms of advantages from corruption or corruption related offences which is transnational in nature.

The main theme of Article 53 under Chapter V on Asset Recovery is the recognition of State Parties as victims of corruption themselves, and of consequent rights to recover property that has been exported. It is deemed a major breakthrough in the fight against corruption world-wide which stresses the importance of instrument of mutual legal assistance. Since it is a new strategy to handle the benefit derived from corruption, the criminal law system of State parties should be appropriately updated and armed with this new legal device.

Department of Law and Human Rights is drafting a new law on anti corruption so as to comply with international standard as stipulated in the UNCAC. The draft law includes new types of corruption such as, bribery of foreign public officials and official of public international organizations (article 16), trading in influence (article 18), illicit enrichment (article 20), and embezzlement of property by a public official (article 17). The draft law also inserts articles on asset recovery.

Illicit enrichment and its linkage with asset recovery are indispensable as new type of criminalization. To prove illicit enrichment is quite difficult, and it needs to seriously consider the burden of proof. One method acknowledged in every legal system is that defendant should prove beyond reasonable doubt; and the other method, as an alternative is the reverse of burden of proof to the defendant. However, the second method is contrary to the principle of "presumption of innocence" and "non-self-incriminating evidence". If we look into the definition of "illicit enrichment" of the UNCAC, it is very clear that if someone has a very significant increase in his/her property, and subsequently, he or she is obliged to give explanation on his/her wealth in relation to his or her lawful income *(see article 20 UNCAC).* It is unnecessary to be too cautious in assuming that the burden should be on the defendant instead of on the prosecutor because the property belongs to him or her. Therefore, to prove beyond reasonable doubt of his or her lawful income does not, mutatis mutandis, prove that he or she is guilty or not guilty.[3]

[3] The question of whether a so called "reverse onus" provision is consistent with the presumption of innocence was examined in Hong Kong, where Hong Kong Bill of Rights Ordinance 1991 had entrenched the international Covenant on Civil and Political Rights in the constitution of that territory. Section 10 of the Prevention of Bribery Ordinance of Hong Kong which preceded Bill of Rights, provides that any person who, being or having been a public servant, (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives satisfactory explanation to the court as to how he was able to maintain such standard of living or how such pecuniary resources or property came under his control, be guilty of an

The Law 31/1999, designates the importance of state damage or state loss as a corroborating evidence in crime of corruption (see Article 2 and 3). Article 2 is addressed to everyone who unlawfully has enriched him/herself or another person or a corporation resulting to State damage or loss of property, and article 3 is addressed to public officials who misuse his/her position for his/her benefit or another person's or a corporation's benefit. The difference of view on what constitute a crime of corruption as mentioned above is very crucial to our effort in composing a new law on anti corruption. It is quite difficult because article 3 para 2 of the UNCAC, has clearly stated that, *"for the purpose of implementing this Convention, it shall not necessary, except as otherwise stated herein, for the offence set forth in it to result in damage or harm to State property".*

Releasing the damage or harm to State property as corroborating evidence of corruption is a fundamental change from the old paradigm of *state-interest based-policy to the individual and state interest based policy*, which will eventually, affect the policy on the procedure of recovery of asset including the legal status of the asset itself.

A Mutual legal assistance treaty is a treaty of cooperation between State Party either bilaterally or multilaterally in the prevention as well as in the law enforcement to address crimes which are transnational in nature. The UN Model on the Treaty on Mutual Assistance in Criminal Matters (1990)[4] stated that the parties shall, in accordance with the present Treaty, afford to each other the widest possible measures of mutual assistance in investigations or court proceedings in respect of offences, the punishment of which at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State. The UN Model elaborate further the scope of the treaty that may be afforded by the State party, includes, inter alia, taking evidence or statements from persons; effecting service of judicial documents; executing search and seizures; providing information and evidentiary items; and providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business record. Indonesia has promulgated Law number 1 year of 2006 on Mutual Legal Assistance which stipulates the scope and the procedure of cooperation in mutual assistance in criminal matters. The law is deemed an umbrella act to conclude a treaty between Indonesia and another State party.

The implementation of model treaty between State parties varies, and its success depends on the legal system of the State parties and sometimes, political commitment of the said government may affect the effectiveness of a treaty. Our experience has shown that the success of international cooperation related with assistance in criminal matters does not solely depending upon the existence of the treaty itself.

Indonesia has signed the treaty on mutual assistance in criminal matters with Australia, China, South Korea, and 7 (seven) member countries of ASEAN, including Singapore

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offence". The validity of section 10 was challenged on the grounds of inconsistency with the constitutionally guaranteed presumption of innocence. The court decision upheld section 10 was consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary. The court's decision is not triggered by incommensurateness or disproportion but by unreasonable in the circumstances. Further, the Court's opinion is that where corruption is concerned, there is need, within reason, for special powers of investigation and an explanation requirement. Specific corrupt acts are inherently difficult to detect, even prove in the normal way. The true victim, society as a whole; is generally unaware of the specific occasions on which it is victimized (see Nihal Jayawickrama, Jeremy Pope and Oliver Stolpe in Forum on Crime and Society, Vol.2, No 1, December 2002; page 28-29).

[4] General Assembly Resolution 45/117 of 14 December 1990; International Legal Materials, 1991, 1421

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(2006). But not one of those treaties on mutual assistance has successfully been implemented, and yet the reason is unknown.

For example, the effort of GOI to confiscate the asset of Hendra Rahardja in Australia, had failed although both government has entered into a treaty on mutual legal assistance. Recently, The Attorney General Office has not yet successfully applied the treaty on mutual legal assistance and the treaty on extradition with the government of Australia against two fugitives who were involved in BLBI case. The request for assistance and extradition to the government of Australia has taken more than one year, but the negotiation has not been finalized yet.

The treaty on mutual assistance in criminal matters between the GOI and the government of China (July, 24, 2000) is much more different in the substance as well as in the procedure, than with the same treaty between the GOI and seven countries of ASEAN including the Republic of Singapore (November, 29 2006). The treaty with the China government has explicitly provided a widest measure to each State party to search and seizure (Article 17) and to transfer of proceeds of crime (Article 18).[5] On the contrary, the treaty with the seven countries of ASEAN which does not provide a widest measure to the State party to the forfeiture of the property derived from the commission of an offence (Article 22) as well as to the search and seizure procedure (Article 18).[6]

On the contrary, in the case of the Nigerian government to recover their asset in Switzerland, they have successfully cooperated with the Switzerland government. Although Nigeria and Switzerland have no treaty on mutual legal assistance, Switzerland can provide mutual legal assistance based on national law and a declaration of reciprocity[7]. In addition to freezing $ 660 million, the Swiss judicial authority currently handling the case has also indicted Mohammed Abacha and all his followers, and the judicial authority is also examining the possibility of pressing charges against Swiss financial intermediaries.

Based on the case above, the effectiveness of asset recovery through mutual legal assistance in criminal matters should be seen as per case by case basis. Many factors could

[5] For example Article 17 para 1 stated:" The requested Party, shall, insofar as its law permits, and the rights of third parties are protected, carry out requests for search and seizure and delivery of materials to the requesting parties for evidentiary purposes..." In Para 2 :"The requested Party shall provide such information as many be required by the requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the material seized".
Article 18 para 1:"Each the Parties to the Treaty shall transfer to the other Party the money and objects illicitly obtained by the offenders in the event of the envisaged crime in the territory of the requesting Party but found in the territory of the requested Party. Such transfer shall not infringe upon the legitimate rights of the requested Party or the third party in relation to the above mentioned proceed".
[6] Article 22 para 1,:"The requested Party shall, subject to its domestic laws, endeavor to locate….or confiscate property derived from the commission of an offence and instrumentalities of crime for which such assistance can be given provided that the Requesting Party provides all information which the Requested Party consider necessary" In para 3, " A request for assistance under this Article shall be made only in respect of orders and judgments that are made after the coming into force of this Treaty".
Para 4 stated," Subject to the domestic laws of the Requested Party, property forfeited or confiscated pursuant to this Article may accrue to the Requesting Party unless otherwise agrees in each particular case".
Para 5 stated:" The requested Party shall subject to its domestic laws, pursuant to any agreement with the requesting Party transfer to the requesting Party the agreed share of the property recovered under this Article subject to the payment of costs and expenses incurred by the Requested Party in enforcing the forfeiture order".
[7] Bola Ige, Abacha and the Bankers: "Cracking the Conspiracy"; Forum on Crime and Society; Vol 2, Number, 1, December 2002; page 113.

influence it, and moreover, it could be sufficient factors to success than mere necessary factors. But one thing is true, that the existence of those treaties is not a guarantee for success; the success is more upon the political commitment of the government of each State party. The differences of legal system that are always assumed to be true, in fact, are not solely the cause.

What would make Asset Recovery operational through Mutual Legal Assistance?

There is no satisfactory answer to that question, because cooperation between State parties is not just merely legal process, but also a diplomatic process. The world has seen corruption as a wide-scale octopus that brings about misery and poverty to the world society. By the same token, most State parties seriously consider their national interests and security which frequently hampers law enforcement against transnational crime. There is skeptical and pessimistic response to mutual legal assistance which related to asset recovery among State parties. Beside political factors, legal factors still give impact to effectuate the implementation of mutual legal assistance such as, the dual criminality principle; treaty based and non-treaty based arrangements; non-political offence; rules of specialty principles; and non-discrimination principle, which in fact, delayed the procedure of such cooperation between State parties.

Since most of the society in the world has yet become 'world cluster society' in terms of regionally and internationally, subsequently, the successful operation of asset recovery through mutual legal assistance should be undertaken through a regional cooperation in mutual assistance in criminal matters. Their bilateral treaty was signed, but regional agreements or arrangements will eventually make such cooperation much stronger. For example, the ASEAN Convention on Counter Terrorism that was adopted last year has successfully revealed terrorism networking within the regions. One step forward in the implementation of the UNCAC within the Asia-Pacific region or ASEAN is the ASEAN Forum Against Corruption. In the long run, perhaps the adoption the ASEAN Convention Against Corruption is one of the strategic issues that needs to be discussed urgently.