

Background paper (Wednesday 5 September, 14:30-15:45)

## Trends in MLA and Asset Recovery in Asia and the Pacific

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### Introduction

Corruption is often a crime with an international dimension. Many offenders use foreign bank accounts to keep slush funds for bribery or to launder the proceeds of corruption. Bribery of foreign public officials has become a widespread phenomenon in international business transactions. To prosecute corruption cases effectively, countries therefore need to seek evidence and recover proceeds of corruption from other states. Consequently, international co-operation in corruption cases has become more important than ever before.

In the fall of 2007, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific completed a review of extradition and mutual legal assistance in criminal matters (MLA) in corruption cases in 27 member countries.<sup>1</sup> The purpose of the exercise was to assess the members' legal frameworks and practices for international co-operation and to identify areas for improvement. The review was based on publicly-available material and information provided by the Initiative's members. The following are some of the review's major findings concerning MLA, including assistance relating to the proceeds of corruption.<sup>2</sup>

### Treaty Basis for MLA

A country has no obligation to provide MLA to another country under customary international law; such obligations must be created through treaties. Like countries in other parts of the world, many states in Asia and the Pacific have concluded bilateral treaties for this purpose. The number of treaties is not high, however. As of fall 2007, 27 bilateral MLA treaties were in force among the 27 members of the Initiative, an average of two treaties per member. The figure is higher - 71 treaties or an average of 2.63 treaties per member - for bilateral treaties in force between the Initiative's members and the 37 Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>3</sup> Yet

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<sup>1</sup> The review covered the following 27 members of the Initiative: 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. The review did not cover Bhutan, which became the Initiative's 28th member in September 2007 when the review was near completion.

<sup>2</sup> The full report is available at: [www.oecd.org/pages/0,2966,en\\_34982156\\_34982385\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,2966,en_34982156_34982385_1_1_1_1_1,00.html).

<sup>3</sup> The 37 Parties to the OECD Convention are: Argentina; Australia; Austria; Belgium; Brazil; Bulgaria; Canada; Chile; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Korea; Luxembourg; Mexico; Netherlands; New Zealand; Norway; Poland; Portugal; Slovak Republic; Slovenia; South Africa; Spain; Sweden; Switzerland; Turkey; United Kingdom; and United States.

this figure is somewhat deceiving since two members of the Initiative account for 32 treaties, and the remaining 25 members average only 1.56 treaties with Parties to the OECD Convention. In short, most members of the Initiative have very few or no bilateral MLA treaties at all.

It is not totally clear why so many members of the Initiative have so few bilateral MLA treaties. The cost and time involved in bilateral treaty negotiations could be challenging for some countries. Yet this should not be a problem for many others, considering the size of their economies on an absolute and *per capita* basis. Many of these countries are also closely integrated into the international economy and would presumably benefit from a more extensive treaty network. In other words, many members of the Initiative should have both the means and the need to negotiate more bilateral MLA treaties.

The situation is somewhat ameliorated by multilateral conventions that can be used to seek and provide MLA in corruption cases. As of September 2007, the provisions on MLA in the United Nations Convention against Corruption (UNCAC) apply to 11 members of the Initiative, and may soon apply to a further ten members.<sup>4</sup> Three members of the Initiative are also Parties to the OECD Convention. The seven members of the Initiative that are also members of the Association of Southeast Asian Nations (ASEAN) have signed a regional Treaty on Mutual Legal Assistance in Criminal Matters. However, only three of those members have ratified the Treaty. Nine members of the Initiative are party to the United Nations Convention against Transnational Organized Crime, and two are party to the Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters. On the whole, the level of participation in multilateral instruments by the Initiative's members is encouraging. Nonetheless, the treaty framework for MLA in corruption cases would be significantly enhanced if more members of the Initiative ratify these multilateral instruments.

Another means of dealing with the absence of treaties is to allow MLA to be provided to foreign states in the absence of a treaty. Within the Initiative, 21 jurisdictions (78%) may do so under their domestic laws. It should be noted, however, that domestic legislation does not create international obligations to provide assistance and hence is not a complete substitute for treaties and conventions.

## **National MLA Legislation**

Many countries in Asia and the Pacific have passed legislation to provide a domestic legal framework for MLA. In some countries, a concluded treaty does not immediately become part of the domestic legal order; legislation is necessary to implement the treaty. Even for jurisdictions in which treaties automatically become domestic law, legislation may still be necessary to address issues that treaties generally do not cover, such as the procedures for obtaining a search warrant, compelling the attendance of a witness, or appealing a decision of judicial or law enforcement authorities. If a country wishes to provide assistance in the absence of a treaty, then legislation may be even more important. In short, a complete framework for MLA usually includes not only treaties but also some form of legislation.

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<sup>4</sup> As of September 2007, ten members of the Initiative are States Parties to the UNCAC. Nine other members have signed but have not yet ratified the Convention. In addition, the People's Republic of China (which is a State Party) has declared that the UNCAC applies to Macao, China and Hong Kong, China. Orders by Hong Kong, China's Chief Executive to give effect to P.R. China's declaration were expected to come into force shortly.

The complexity of the MLA legislation among members of the Initiative varies. Only 16 members (59%) have passed comprehensive legislation detailing the types of assistance available, the procedure for rendering co-operation, and the grounds for denying MLA. Most of the remaining members have legislation that is much briefer. Some apply their domestic criminal procedure laws with such modifications as necessary. But since these laws were designed for domestic investigations, they fail to address some issues that arise in MLA but not in domestic cases, e.g. grounds for denying co-operation, or channels of communication with foreign states. Several of the Initiative's members have no legislation whatsoever that applies to MLA. On the whole, many members need to enact new MLA framework laws or bolster existing ones.

## Dual Criminality

The review also examined some specific features of the members' MLA legislation, such as whether dual criminality is a precondition for assistance. Recent multilateral instruments advocate a more flexible and inclusive approach to dual criminality, for instance, by making the requirement optional or eliminating it for non-coercive forms of assistance.<sup>5</sup> Based on available information, dual criminality is mandatory for MLA in 14 members (52%) of the Initiative, discretionary in 6 members (22%), and not required in 3 members (11%).<sup>6</sup> In almost all cases, whether dual criminality is required does not depend on whether the assistance sought is coercive in nature.

Dual criminality could pose problems when the offence under investigation exists in the state requesting MLA but not in the requested state. This situation could arise in corruption cases, since many members of the Initiative have not criminalised certain types of corrupt conduct. For example, only seven members (26%) of the Initiative have created an offence of illicit enrichment,<sup>7</sup> and six members (22%) have created an offence of bribery of foreign public officials.<sup>8</sup> Fortunately, all of the members whose legislation requires dual criminality have adopted a conduct-based definition to the concept. In other words, when assessing dual criminality, the question is whether the *conduct* underlying the extradition request is criminal in both states. It is not whether the conduct is punishable by the same *offence* in the two states, or whether the offences in the two states have the same *elements*. By taking this conduct-based approach, the Initiative's members are more likely to be able to provide MLA even if they have not created the offence under investigation in requesting state.

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<sup>5</sup> For example, see Article 46(9) of the UNCAC.

<sup>6</sup> Information for the remaining members was not available.

<sup>7</sup> Article 20 of the UNCAC defines the offence of illicit enrichment as "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."

<sup>8</sup> One caveat: the review did not examine the constituent elements of the offences of illicit enrichment and bribery of foreign public officials in the Initiative's members. Hence, the offences in the members' legislation may differ in scope from those defined in international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UNCAC.

## Central Authorities

It is generally acknowledged as good practice for a country to designate a central authority to process all incoming and outgoing MLA requests.<sup>9</sup> Almost all members of the Initiative have appointed a particular government ministry or office for this purpose. Eleven members (41%) of the Initiative have gone further by creating a department within their ministry of justice or prosecutor's office that specialises in MLA. Using specialised units is advisable because it is more likely to result in greater economies of scale and concentration of expertise.

Particular features of central authorities could further enhance the MLA process. The legislation in ten members (37%) of the Initiative allows central authorities to send/receive MLA requests to/from their foreign counterparts directly. Delays caused by communication through the diplomatic channel are therefore avoided. Also useful are special measures for urgent cases, such as after-hours telephone hotlines, or accepting urgent requests that are made orally, by facsimile, or outside the diplomatic channel. Only four members (15%) have legislation that contains such special measures, but this figure is augmented by similar provisions in many bilateral and multilateral treaties. A central authority can also help foreign requesting states by maintaining high visibility and providing easily-accessible information. This could be accomplished by maintaining a Web site in English that contains copies of the relevant legislation and treaties, sample requests for assistance, a description of the requirements for co-operation, and contact information. The central authorities of 11 members (41%) have their own Web sites on MLA, but only a few of the sites contain all of the information described above. To conclude, most members of the Initiative could do more to make their central authorities more effective.

## MLA Relating to Proceeds of Corruption

As with MLA generally, some countries in Asia and the Pacific have passed legislation that specifically deals with MLA relating to proceeds of crime, including corruption. Over half of the Initiative's members (56%) have comprehensive legislation for tracing, freezing and confiscating proceeds of crime upon the request of a foreign state. Many members that do not have such legislation may resort to their domestic proceeds of crime legislation and/or applicable treaties to provide at least some assistance.

International instruments such as the UNCAC suggest ways to make MLA relating to proceeds of corruption more efficient. One example is enforcing foreign confiscation orders by direct registration with a local court. This reduces delay by eliminating the need to apply for a second confiscation order in the jurisdiction where the proceeds are located. Only eleven members (41%) of the Initiative have adopted this approach. The UNCAC also recommends that countries allow enforcement of foreign confiscation orders in the absence of a conviction under certain circumstances.<sup>10</sup> Just eight members (30%) of the Initiative have legislation to this effect. In sum, many of the Initiative's members have room for improving their laws on MLA concerning proceeds of corruption.

As for sharing confiscated assets with foreign countries, 15 members (56%) of the Initiative have legislation that touches upon the subject. In almost all cases, the legislation gives the

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<sup>9</sup> Multilateral instruments therefore generally require a party to designate a central authority, e.g., see Article 11 of the OECD Convention, Article 46(13) of the UNCAC, and Article 4 of the MLA Treaty among ASEAN member countries.

<sup>10</sup> Article 54(1)(c) of the UNCAC.

requested state wide discretion on whether to share assets, without identifying what factors may be considered in making that decision. However, this discretion will be somewhat circumscribed when assets are confiscated pursuant to a request under the UNCAC.<sup>11</sup>

## **Conclusion**

The systems for MLA in the 27 members of the Initiative exhibit a wide range of differences. This is to be expected, considering the size of the group, the diversity of the members' legal history, and their different stages of legal and economic development. Consequently, the strengths and weaknesses of each system vary considerably, as do the needs for reform or improvement. Most jurisdictions could benefit from a larger network of treaty relationships. On the domestic front, many countries have not passed comprehensive legislation on MLA, including assistance relating to proceeds of crime. Creating a domestic legal framework would add functionality, certainty, and transparency. Countries that already have such frameworks may only need some fine tuning, such as by adding certain types of assistance, or relaxing some requirements for co-operation. Some members could benefit from institutional reform by creating specialised central authorities for dealing with MLA. Others may only need to strengthen certain aspects of their existing central authorities. In short, each jurisdiction requires its own unique blend of reform measures.

There is nevertheless one fairly widespread trend among the 27 members of the Initiative. With very few exceptions, the Initiative's members appear to have quite a low level of practice in MLA, especially MLA involving corruption offences or the proceeds of corruption. The reason for this phenomenon is not entirely clear. Regardless of the cause, this lack of practice makes it difficult to evaluate how the MLA systems in these jurisdictions function in practice. As more cases arise, unforeseen obstacles could appear. Further monitoring and evaluation may therefore be beneficial.

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<sup>11</sup> See Article 57 of the UNCAC.