Mutual legal assistance treaties and money laundering

Query:

How can a Mutual Legal Assistance Treaty help in dealing with money laundering? What are country experiences in this area?

Purpose:

Money laundering is increasing in developing countries where the legal system on banking supervision is limited. The spread of corruption in these countries is exacerbating this problem as corrupted money is transferred out of the country and laundered somewhere else. I am exploring possibilities in international co-operation among countries to deal with this problem.

Content:

Summary:

Individual countries cannot fight against corruption alone as corruption and money laundering cases are often and increasingly transnational. This is particularly true for many developing countries that lack the expertise, resources, capacity and legal framework to effectively tackle money laundering offences. Mutual legal assistance treaties (MLATs) could potentially address some of these challenges provided the legal, practical and political obstacles that generally hamper the effective provision of legal assistance can be overcome. A review of the various mechanisms that allow international cooperation in money laundering matters indicates that MLATs are best suited to address these challenges as they create a binding obligation to cooperate. However, the existence of MLATs does not alone guarantee the successful and effective provision of mutual legal assistance (MLA). In practice, factors such as procedural delays, lack of training on effective means to request cooperation and difficulties relating to differences between legal systems may affect the effectiveness of formal legal assistance, revealing the need for alternative and more informal forms of assistance and cooperation.

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Part 1: The Potential of Mutual Legal Assistance Mechanisms in Corruption and Money Laundering Matters

The Potential of MLA in the fight against Money Laundering

Mutual legal assistance is a process by which states seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases. Forms of assistance covered by MLA typically include the power to summon witnesses, to compel the production of evidence and other relevant documents, to issue search warrants and to serve process. Mutual legal assistance (MLA) has intensified in recent years in response to emerging global threats such as terrorism,

organised crime and corruption. In times of economic globalisation, criminal networks expand their activities across borders, taking advantage of offshore centres to launder the proceeds of their crimes and seek safe haven in foreign jurisdictions. Corruption cases often –and increasingly- involve a transnational element as well; in the case of foreign bribery, for example, or when corrupt officials conceal evidence and embezzled funds abroad. In this context, MLA is recognised as critical for effective prosecution and deterrence of corrupt practices and a variety of instruments have been developed in recent years to facilitate international cooperation in this area. Yet, borders remain a major obstacle for law enforcement authorities to gather evidence and bring successful criminal proceedings as they are bound by the principle of sovereignty and can't conduct investigations on the territory of another State.

In addition, countries must have both the judicial capacity and legal infrastructure in place to effectively address transnational bribery and money laundering issues, with laws and practices dealing with MLA, money laundering and the proceeds of crime and a Financial Intelligence Unit (FIU) or a similar body with sufficient expertise and capacity to identify and track funds and illegal transactions. Many developing countries do not have this domestic framework in place and lack basic human and financial resources, expertise, and legal infrastructure to effectively tackle money laundering. Very often, they are still struggling to complete the required infrastructure to fight money laundering and develop the capacity to conduct such complex and resource-intensive investigations.

In the absence of an adequate domestic framework, international cooperation could provide an option to track illegal funds that have been transferred and laundered in other countries. For example, MLA could be particularly useful in the case of money flowing to a developing country that has the political will but lacks the resources and capacity to effectively fight money laundering. In such a case, the partner country that has stronger instruments, systems and capacity in place to deal with money laundering can assist the weaker one and contribute to build its capacity through the provision of MLA. The best approach to do so effectively would be to set up an arrangement such as a joint operation or a task force in which the stronger country can boost the weaker one's capacity rather than relying on the country's weak system for MLA.

Obstacles to Effective MLA in Corruption and Money-laundering Matters

Such an approach is, however, challenged by the various legal, practical and political obstacles that generally hamper the effective provision of legal assistance. International corruption case proceedings take place in a complex environment where different national legal systems, including different institutions and models of investigation and prosecution provide obstacles to effective legal cooperation across borders. The absence of uniform procedures for granting MLA results in lengthy and cumbersome procedures with no guarantee of timely and successful provision of the requested assistance. There have been some cases where pieces of evidence were finally provided long after the trial had been completed. In addition to different and sometimes incompatible transnational and national systems for police co-operation, investigation and prosecution, MLA faces challenges of organisation, efficiency and effectiveness in many developing countries. Last but not least, the outcome of MLA greatly depends on political factors affecting the decision of the requested State, including issues of national interest and security.

Legal principles restricting MLA

The decision to grant MLA depends on the requested State's legal framework as well as its willingness to cooperate. In principle, international standards establish that grounds upon which a request may be denied should be kept minimal and exercised sparingly. In practice, there are varying principles that provide grounds for refusal and make it difficult to obtain speedy assistance. Some States require dual criminality for all requests, meaning that they will only execute a request for assistance from another country when the crime under investigation is also an offence under

domestic law. This can constitute a serious impediment in cases of corruption. For example, all countries have not criminalised private-to-private corruption or even bribery of foreign public officials and use different definitions of corruption. Legislation on money laundering also remains deficient in many countries and differs across countries, which further challenges the provision of MLA.

Some offshore jurisdictions also limit the scope of their cooperation to certain types of offences, where offences are fiscal in nature for example. In the related field of asset recovery, for example, England does not cooperate unless there is evidence that the stolen assets are located in the country. Switzerland does not try to identify accounts held under pseudonym or refuse to assist in fiscal proceedings. (Please see: http://www.assetrecovery.org/kc/node/6b04bffc-a340-11dc-bf1b-335d0754ba85.html.

Other procedural impediments

Execution of requests for legal assistance can also be hampered by a series of procedural impediments, such as the principle of reciprocity as a precondition for granting MLA or the principle of speciality whereby the information obtained can only be used for the requested purpose. Other provisions or lack thereof can also cause considerable delays and compromise the successful outcome of the process. For example, failure to identify or designate a responsible central authority to facilitate the implementation of MLA is likely to seriously impede the effectiveness of the process. MLA denial or additional delays can be caused by the requesting State failing to comply fully with the procedural requirements governing the provision of legal assistance. For example, France has refused to help Nigeria because the request was in English.

In many countries, the person targeted by the request for mutual assistance is allowed to appeal against the sharing of evidence with the requesting country, which may ultimately cause considerable delays in the provision of required evidence. This is particularly true in some countries that are considered “tax havens” such as Luxembourg, Liechtenstein and Switzerland, where national legislation on MLA offers defendants many opportunities to appeal against decisions that would allow the disclosure of their financial information. Contrary to widespread belief, bank secrecy provisions do not always constitute grounds to deny a request for mutual legal assistance and banks involved in money laundering schemes are increasingly held responsible for what they should have known about suspicious transactions. For example, Swiss bank employees are facing serious penalties in civil cases associated with the Abacha case. (Please see: http://www.adb.org/Documents/Books/Controlling-Corruption/chapter7.pdf).

Judicial capacity

Effective implementation of MLA requires well trained staff in the applicable laws, principles and practices as failure to meet the standards of requested states can greatly compromise the successful outcome of MLA requests. Many developing countries lack the capacity to prepare indictments, collect, preserve and present evidence, properly adjudicate cases and obtain convictions, as well as trace the proceeds of corruption and obtain freezing, confiscation and repatriation of stolen assets. This constitutes an important roadblock as the justice system may lack the capacity to request or grant MLA in a manner that meets internationally accepted standards.

Complexity of money laundering-related offences

The capacity of the judicial system is further challenged by the level of sophistication of money-laundering related offences. It is not uncommon that corrupt officials use the services of financial intermediaries that are specialised in money laundering strategies and can eliminate paper trails. The use of offshore centres and shell companies makes such strategies even more effective while legal authorities in tax havens are not always willing to cooperate in legal investigations.

As a result, investigating money laundering transactions is a time consuming, challenging and complex endeavour that requires the mobilisation of considerable resources and expertise and active cooperation from various foreign jurisdictions. In most cases, neither prosecutors nor judges have the capacity and instruments to uncover these practices. Money laundering crimes often require financial investigators and forensic accountants to unravel complex transactions. In addition, developing countries are rarely familiar with the legal specificities of recipient countries and need technical support to acquire the level of expertise required by financial centre countries in this area. For greater effectiveness, treaties and conventions aimed at facilitating international cooperation should promote the provision of technical assistance to strengthen countries' capacity to deal with money laundering-related offences.

Other obstacles specific to corruption and money laundering cases

In corruption cases involving high level officials, it is not uncommon that legal assistance be denied although all material and formal conditions are fulfilled. Diplomatic immunity is frequently invoked in international corruption cases involving diplomatic or military officials. In some countries, individuals under investigation are influential public figures or the law makers themselves who have the means and power to conceal evidence or interfere with the judicial process to prevent successful prosecution. In many developing countries, the judiciary is not granted the necessary resources and independence from the executive power to perform effectively.

Political commitment

The success of international judicial cooperation does not solely depend on the existence of a MLA treaty or agreement. Cooperation is not only a technical and legal matter but a complex political process taking place in some cases via diplomatic channels. Issues of national interest and security often hamper law enforcement against transnational crime, as some countries may invoke conflicting interests or inconsistency with state public policy, for example, to deny MLA. A request can be denied in some countries if the proceedings concern political or military acts, or threaten public order or the higher interest of the requested country.

Corruption cases with an international dimension may also have sensitive aspects of a commercial nature. The country where the money has been laundered may draw economic benefits from money-laundering related activities and have little interest or incentive to effectively fight against it.

In end effect, little can be achieved without the political will and effective cooperation of requested countries. In major asset recovery cases, successful repatriation of funds usually occur more for political reasons than due to legal obligations. The importance of international cooperation and political will has been demonstrated in a dazzling manner when comparing the 18 years it took the Philippines to recover Marco's assets with the three years it took Nigeria to repatriate assets stolen by Abacha.

Comparative Advantage of MLATs as a Mechanism to provide MLA

Considering the legal, political and practical difficulties involved in requesting MLA, the effectiveness of using MLA against money laundering for countries who lack the necessary capacity and legal infrastructure depends on the extent to which countries are willing to assist other countries. This readiness to cooperate is likely to vary from country to country, depending on their own domestic laws, the relationships between the respective countries and the mechanisms in place to provide MLA.

There are various ways to request and grant MLA but they are not all equally effective in promoting international cooperation. The effectiveness of using MLA as a strategy to tackle money laundering offences depends on the capacity of the MLA mechanism in place to address the challenges involved in providing legal assistance in the first place. In principle, MLA can be handled without a treaty[1]. In such cases, however, MLA is not mandatory and the requested state may deny legal assistance at various stages of the process, which brings some uncertainty regarding the outcome of the request. A comparative assessment of the various mechanisms indicates that MLA treaties present a number of advantages to address some of the above-mentioned obstacles and many countries are increasingly signing multi- or bilateral treaties or conventions to enable MLA to be rendered. (Please see: http://www.acpf.org/Activities/public%20lecture2000/lectureHarriss(E).html

Letters rogatory

MLA can be requested through a letter of request from a judge in a country to another judge in another country. Such procedure was originally developed to enable cooperation between judges, but letters rogatory may also be issued on behalf of the police or prosecutors. In the absence of a treaty or convention between the requesting and requested state, MLA may be provided in a non mandatory manner. Each country has its own legislation and practices for the execution of letters rogatory and the outcome of the request mostly depends on the comity of courts towards each other and usages of the court of the other nation.

The execution of letters rogatory constitute a lengthy, cumbersome and uncertain process, as the judge in the requested country is under no obligation to execute the request and must do so in strict compliance with the domestic law. There are many factors of uncertainty and risks of refusal at the various stages of the process:

- Letters Rogatory are usually transmitted via diplomatic channels and have to be processed through both the court and the diplomatic corp. The latter is entitled to refuse to act if the letter is believed to be inconsistent with state public policies;
- Requests have to contain certain information such as a description of the facts, specified details of people and companies involved, the legal framework or rubric, a translation, etc… It is not uncommon that requests are returned to the requesting country for further clarification;
- In some cases, countries refuse to execute letters rogatory before formal criminal charges are filed in the requesting State and the case has been brought to court, making this procedure inapplicable during the investigation period where it is most needed;
- In some countries, bank secrecy laws do not permit bank records to be obtained via letters rogatory.

Multilateral treaties and conventions

There are several international instruments and conventions that cover various aspects of MLA. For example, the “Model Treaty on Mutual Assistance in Criminal Matters” (MTMA) is a model treaty that has been developed under the auspices of the United Nations and was adopted in 1991. A growing number of conventions combating specific forms of criminal activity also require State parties to grant each other mutual assistance at an international level such as the article 9 of the OECD convention on combating bribery of foreign officials in international business transactions. Further examples of such approaches include the UN conventions against terrorism, transnational organised crime and drug trafficking. Regional conventions such as the European Convention on Mutual Assistance in

[1] Some argue that effective internal legislation can substitute for bi- or multilateral agreements in the area of judicial cooperation and several countries such as Switzerland, Luxembourg or Liechtenstein have adopted internal legislation regulating international mutual assistance.

Criminal Matters or on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime also attempt to regulate the provision of MLA at international level. In the area of money laundering, the UNODC intergovernmental working group on countering money laundering and promoting judicial cooperation recommends that countries implement at the earliest opportunity the rather comprehensive provisions of the 1988 Convention against Transnational Organised Crime (UNTOC) in this regard.

In addition, all major monitoring bodies (FATF, the 8 or so FATF-style regional bodies, IMF, WB etc.) have endorsed recommendations on anti-money laundering in addition to their own standards. Within the framework of the Financial Action Task Force's 40 recommendations against money laundering, international cooperation and MLA are addressed under Recommendations 35 to 40[2]. (Please see: http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#r35). The document called "Methodology" translates these recommendations assessable elements for evaluation and monitoring purposes. (Please see: http://www.fatf-gafi.org/dataoecd/16/54/40339628.pdf).

The major advantage of multilateral treaties is that they contain binding rules that oblige signatories to provide MLA in connection with the offences covered by the various instruments. Treaties and domestic legislation contain certain preconditions such as reciprocity, mutual criminality, severity of the offence before MLA can be granted. They also clearly specify grounds upon which cooperation may be denied -such as political offence exception, state interest, trial fairness- which brings more predictability to the process. The most comprehensive conventions such as the UNTOC and the UN Convention against Corruption (UNCAC) promote alternative and innovative means of promoting international cooperation by encouraging the use of joint investigation teams to facilitate the effective implementation of MLA. However, experience indicates that although multilateral treaties have been very instrumental in encouraging signatory countries to harmonise their criminal legislation, they are not often used in actual cases as practical vehicles to obtain MLA. Although they contain mandatory provisions, they are usually formulated in rather general a term, which leaves room for differing interpretation by countries and authorities. (Please see: http://www1.oecd.org/daf/asiacom/pdf/ws3b_bertossa.PDF).

In spite of these reservations, the UNCAC constitutes a groundbreaking landmark in seeking to overcome legal differences and provides a set of common principles for providing MLA in corruption matters. The UNCAC addresses a wide range of issues that are relevant to MLA and money laundering, including provisions on international cooperation, bank secrecy, MLA, law enforcement cooperation and joint investigations. In principle, all MLA requests in international corruption cases can be based on the convention, making MLA possible with all other parties to the convention. This can be considered a major step forward in combating international corruption, especially between countries where there is no bilateral treaty. In addition, although the convention deals with the same basic field of cooperation as some previous instruments, the convention seeks to overcome the obstacles associated with the principle of dual criminality. As some countries could not criminalise certain forms of corruption for constitutional or jurisprudential reasons, a compromise was negotiated with a view to ensuring that those countries would still be obliged to provide legal assistance to the others. Dual criminality is considered fulfilled if the offence constitutes a criminal offence in both countries, even if the wording of the offence is not identical. The convention calls on states parties to consider assisting one another in civil or administrative proceedings as well.

[2] If these guidelines generally do reflect the most relevant international instruments, the FATF standards in Recommendation 38 encourage the principle of "sharing of assets" with regards to the proceeds of corruption. The UNCAC goes one step further with the principle of "repatriation of assets" in case of corruption.

Bilateral MLA treaties

There are also many bilateral treaties that have been negotiated between countries. MLA treaties (MLATs) - whether bi- or multilateral- seek to improve the effectiveness of judicial assistance and to regularise and facilitate its procedures. MLATs contain unambiguous obligations to provide assistance in connection with criminal investigations. In money laundering matters, they may contain specific provisions that facilitate complex investigations and entitle the requesting state to receive assistance in acquiring bank records and other financial information. Generally, measures covered by these treaties are only available to the prosecutor, while the defence must proceed with the regular methods of obtaining evidence under the laws of the requested countries. MLATs present a set of advantages over other mechanisms regulating the provision of MLA. They:

- Create unambiguous and binding obligation to provide assistance at the international level, making the MLA process both reliable and predictable. As such, obligations are imposed on both parties, it gives the requested state a better guarantee of reciprocity.
- Speed up the MLA process by authorizing direct correspondence between judicial authorities instead of channelling the request through the intermediary of central offices or diplomatic channels.
- Can overcome the dual criminality principle by introducing more flexible provisions.
- Create a privileged relation between two States. When the judicial capacity of the requested State is overloaded by MLA requests, priority is generally given to requests emanating from countries where there is a MLAT.
- Are tailored to the respective needs of both States and can be customised to fit their relationship and specific needs. For example, the US negotiated with Switzerland special procedures to obtain bank records of organised crime leaders, which was a major concern for the US. Likewise, the Philippines was especially eager to obtain US assistance in locating and repatriating assets stolen during the Marco era and negotiated specific provisions accordingly.
- Can be formulated in a flexible way that allows the execution of more sophisticated requests that had not been envisaged during the negotiation process, which can be useful in complex money laundering investigations. For example, such provisions have been used for video linked depositions or to search and seize information from internet providers or computer hard drives.
- Are quicker and easier to negotiate and amend than comprehensive multilateral treaties involving a wide number of parties with different and sometimes conflicting interests.
- Moreover, the MLATs' negotiation process provides an opportunity to get acquainted with the legislation of the other State which may also help facilitate the provision of MLA.

The major constraint attached to using bilateral treaties for MLA is that it would take years to negotiate bilateral treaties with all the countries of the world. A realistic approach would be to negotiate targeted bilateral agreements with countries where the assistance is likely to be most needed and rely on regional and multilateral treaties for other countries. However, the countries requesting assistance may not always be the countries from which assistance is most needed.

Another constraint is that MLATs should in principle be limited to countries whose legal system is trusted and whose judicial system is perceived to be fair, independent and equipped with adequate resources and capacity, which could potentially exclude a fair number of developing countries who most need such assistance to recover the proceeds of corruption.

Part 2: Lessons learnt from Experience with Mutual Legal Assistance Treaties

Countries' Experience with MLATs

The United States has gained considerable experience with MLATs since its first treaty was negotiated with Switzerland in 1977[3]. This experience has demonstrated that MLATs provide a more substantive basis for cooperation than many of the other mechanisms available and the US has since negotiated a rapidly expanding network of bilateral MLATS. (Please see: http://travel.state.gov/law/info/judicial/judicial_690.html). MLATs regulate mutual legal assistance with US major partners, including most European countries and many of the world's major bank secrecy jurisdictions. For example, since its implementation in 1990, the United States/Cayman MLAT had allowed more than 300 requests to be granted and processed as of May 2006, many involving not only the provision of evidence but also the restraint and forfeiture of the proceeds of crime as well as the repatriation of assets to the US[4]. (Please see for a more detailed documentation of cases: http://www.gov.ky/portal/page?_pageid=1142,1687298&_dad=portal&_schema=PORTAL).

The Philippines' saga to recover the assets stolen by the Marco family from Switzerland from 1986 onwards illustrates the challenges involved in obtaining MLA in the absence of a MLAT and a clear political commitment to the process. (Please see: http://www.assetrecovery.org/kc/node/5881e61f-a33e-11dc-bf1b-335d0754ba85.html)

In the Asia Pacific region, the trend has been to address the need for MLA in corruption cases through a mixture of the various mechanisms available. Over 60 bilateral MLATs have been concluded between member countries of the ADB/OECD Anti-corruption Initiative for Asia-Pacific. More recently, Asia Pacific countries have tended to put greater emphasis on regional and multilateral agreements and a growing number of countries have signed and ratified the UNCAC. Some member countries are also members of the OECD convention on Combating Bribery of Foreign Public Officials in International Business Transactions and to the regional treaty on mutual legal assistance in criminal matters. In addition, many countries have enacted domestic legislation complementing these treaties and agreements. These schemes of cooperation appear sufficiently broad to cover most corruption and related offences, with for example a relatively low threshold of severity of offence as a prerequisite for cooperation. (Please see: http://www.oecd.org/document/9/0,3343,en_34982156_34982460_37892041_1_1_1_1,00.html).

However, although MLATs have proven to be highly effective in practice in some countries, their existence does not guarantee successful and effective provision of MLA. For example, Indonesia has experienced unsuccessful efforts to return the proceeds of corruption in spite of existing MLATs with some countries. Indonesia has signed a treaty on mutual assistance in criminal matters with Australia, South Korea and seven countries of ASEAN, including Singapore in 2006, but none of these treaties has successfully been implemented for unknown reasons. For instance, efforts to confiscate the assets of Hendra Rahadja, an Indonesian banker who embezzled almost $US300 million, in Australia have failed though both countries have entered into a MLAT. (Please see: http://www.baselgovernance.org/fileadmin/docs/pdfs/Bali/Romli_Atmasasmita.pdf).

In some cases, effective MLA has been provided without referring to an existing bilateral agreement between two countries. For example, a judicial letter of request from Peru to the Cayman Islands was acted upon to obtain an order of restraint upon certain bank accounts alleged to contain the proceeds of official corruption. These proceeds were subsequently frozen and repatriated to Peru pursuant to

[3] This was the first treaty ever negotiated between a common law nation and a civil law nation.
[4] According to a speech by the Chief Justice and the MLA authority of the Cayman Islands.

the request from this country in 2001 in the Montesinos-Torres matter. (Please see: http://www.gov.ky/portal/page?_pageid=1142,1687298&_dad=portal&_schema=PORTAL).

The asset recovery of Abacha's embezzled funds held in Switzerland is another case of successful cooperation between governments in the absence of a formal bilateral agreement between Nigeria and Switzerland.

How can MLA be improved?

There is little doubt that MLATs have the potential to facilitate and ease the provision of legal assistance in corruption and money laundering-related offences by creating binding obligations to cooperate. UNODC encourages States to expand wherever possible the number of States with which they have such treaty relationships. (Please see: http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf). UNODC further recommends that States experiencing difficulty in negotiating an extensive network of bilateral MLATs consider developing regional MLATs to create a modern legal framework for cooperation.

However, in spite of the potential of MLATs, the successful execution of assistance requests remain a case-by-case matter depending on a series of legal, political, and practical factors. A recent report of the working group on countering money laundering and promoting judicial cooperation, set up within the framework of the Commission on Narcotic Drugs, established that although most States had laws in place and had entered into bilateral and multilateral treaties, judicial cooperation was still facing major implementation challenges, with insufficient law enforcement cooperation at the interregional level, lack of training on effective means to request or grant cooperation and remaining difficulties relating to differences between legal systems, procedural delays and language problems. The report also noted that most of the progress made in adopting bilateral and multilateral agreements took place within regional frameworks rather than at the global level. (Please see: http://daccessdds.un.org/doc/UNDOC/LTD/V08/537/35/PDF/V0853735.pdf?OpenElement).

Negotiation of MLATs

The first precondition for the effectiveness of MLA in dealing with money laundering offences is to negotiate a solid legal framework that allows the provision of broad legal assistance. The US' extensive experience with MLAT highlights key elements to consider in the negotiation of the MLATs for the successful implementation of legal assistance. (Please see: http://www.acpf.org/Activities/public%20lecture2000/lectureHarriss(E).html)

- The treaty should clearly specify the scope of the MLA obligation to provide assistance. It is recommended that cooperation be provided at the earliest stage of the investigation, prior to the filing of criminal charges.
- Many US negotiated MLATs include a clause permitting forms of assistance not prohibited under the law of the requested State. This type of provision allows MLAT to grow over time to enable forms of assistance that may not have been envisaged during the negotiation process. Such provisions have been used to conduct undercover investigations or electronic surveillance or information seizure from computer hard drives where these were permitted by the law of the requested State.
- The specific grounds on which assistance can be denied should also be clearly specified. It is recommended not to specify the types of crime for which assistance could be granted, to avoid refusals for crimes that are not included in the specified offences. The broadest approach would be to allow assistance for any crime that would be an offence in either the requesting or the requested State, bearing in mind that it is often difficult at an early stage of the investigation to predict what crime will ultimately be charged.
- The most effective approach consists in having each party designate a central authority (person or agency) charged with the execution of the requests. Experience shows that an efficient central authority is key to the capacity of MLAT to expedite cooperation.

Implementation of MLATs

At the implementation stage of the process, UNODC recommends a series of actions to be taken in order to facilitate the provision of effective MLA. (Please see: http://www.unodc.org/pdf/crime/corruption/toolkit/AC_Toolkit_chap8.pdf).These actions also apply to assistance provided within the framework of a MLAT and include:

- Strengthening the effectiveness of central authorities through measures aimed at ensuring the dissemination of up-to-date contact information, ensuring round-the-clock availability, reducing delays, etc;
- Ensuring awareness of national legal requirements and best practices through training, lectures, information dissemination, etc;
- Expediting cooperation through the use of alternatives such as informal networks when appropriate;
- Preparing effective requests for mutual assistance to fulfil requirements while avoiding being too detailed or prescriptive;
- Reducing impediments to execution by interpreting legal requirements flexibly, minimising grounds for refusal, reducing the use of limitations, etc;
- Making use of modern technology to expedite transmission of requests;
- Making use of modern mechanisms for providing MLA such as taking evidence via video link, exchange of financial intelligence, interception of communications, etc;
- Using joint investigation teams between officers of the various States involved when there is a transnational dimension to the offence to make full use of the benefits of the exchange of financial intelligence, for example;
- Maximising availability and use of resources including by providing central authorities with adequate resources to fulfil their mandate.

In a background paper presented within the framework of a conference organised in 2003 by the ADB/OECD Anti-Corruption initiative for Asia-Pacific, former Swiss Attorney General Bernard Bertossa made further recommendations with the view to facilitating cooperation at the international level:

- In case of international bribery, the requested State should open its own proceedings and both States could define a common strategy, especially with regard to exchange of evidence. If the requested State is concerned because its financial centre was used, relevant authorities should open their own proceedings for money laundering.
- When the person targeted by the proceedings lives abroad, the proceedings may be delegated to the country of residence, and all the evidence sent with the case file. This allows the country of residence to obtain all documents concerning money laundering carried out within its own borders.
- As the confiscation of the proceeds of corruption plays a major role in combating corruption, autonomous procedures may be opened in any country to which financial proceeds have been traced.

(Please see: http://www1.oecd.org/daf/asiacom/pdf/ws3b_bertossa.PDF).

The Use of Informal Channels of Cooperation

Considering the various challenges involved in seeking assistance in cases of international bribery through formal procedures, formal means of cooperation are not always sufficient to address the need for international cooperation. In many cases, except for coercive measures that require formal judicial authorisation, relevant central authorities may be willing to provide the requested information without a formal procedure. There are also various channels that can be used to obtain informal

assistance and nothing prevents relevant authorities from using direct contact and informal networks to obtain evidence. For example, INTERPOL, EUROPOL and ASEANPOL have proven to be common and efficient channels of communication among law enforcement agencies. In some countries such as ASEAN countries, numerous memorandums of understanding have been signed to allow the exchange of information between member countries.

Financial Intelligence Units (FIU) also provide a useful alternative to formal forms of MLA. FIUs are central public agencies that specifically deal with money laundering related issues. Among other responsibilities, FIUs obtain financial reports and disclose them to relevant government authorities with the view to supporting national anti-money laundering efforts. FIUs are often part of larger international networks such as the Egmont Group that specifically aims at improving cooperation and exchange of information through a variety of means including systematic exchange of financial intelligence information, expertise and capacity building and better communication through information technology. (http://www.egmontgroup.org/info_paper_final_oct_2004.pdf). There are some examples of cooperation where FIUs have contributed to provide valuable leads before a formal investigation was even initiated. (Please see: http://www.oecd.org/document/56/0,3343,en_34982156_34982460_37504184_1_1_1_1,00.html).

There are also initiatives that complement MLA in addressing developing countries' capacity issues in the fight against money laundering and contribute to promote common standards in the processing, analysing and reporting of suspicious money transactions. UNODC recently developed an IT tool called *goAML* to help financial intelligence and law enforcement agencies step up their fight against money laundering and organised crime. The software can analyse large volumes of data and help identify and understand complex patterns of financial transactions. It also aims to introduce an element of standardisation in practices for gathering and processing financial intelligence information worldwide, in order to make international cooperation easier in the fight against financial crime. The software was installed at the end of July in the Financial Intelligence Centre (FIC) of Namibia, with the view to provide developing countries with affordable IT tools against money laundering. (http://www.unodc.org/).

Other countries such as Australia respond to the need of cooperation in transnational corruption cases by forming a "task force" with agencies in the other country to facilitate cooperation and pooling of information between countries. The task force can also bring specific benefits to countries with limited powers to restrain or forfeit the proceeds of corruption under their domestic laws, by taking advantage of other member countries' proceeds of crime laws and MLA relationships with other countries. A side effect of this task force approach is that it contributes to facilitate skill transfer among task force members from different countries. (Please see: http://www.oecd.org/document/56/0,3343,en_34982156_34982460_37504184_1_1_1_1,00.html).

To effectively combat cross-border criminal activity, Canadian and American law enforcement are also taking an international and integrated approach to their investigations, conducting joint operations involving Integrated Border Enforcement Teams (IBETs) and other key American and Canadian law enforcement partner agencies. IBET agencies share information and work together daily with other local, state and provincial law enforcement agencies on issues relating to national security, organised crime and other criminality transiting the Canadian and US borders. (Please see for a sample of joint operations: http://www.rcmp-grc.gc.ca/security/ibets_success_e.htm).

Experience demonstrates that although formal legal assistance such as MLATs is important to provide a general framework and create binding obligations for cooperation, it has serious practical limitations in facilitating effective and speedy provision of legal assistance. Informal channels of cooperation can provide useful alternatives that should not be neglected. In some cases, international cooperation outside the formal channels has proven to be the fastest and most effective way to obtain the required information and the best practical solution to move the investigations forward.

Part 3: Further Reading

Recovering Stolen Assets (2008)
This book by Mark Pieth constitutes the first comprehensive work on asset recovery, written by renowned practitioners and academics representing different legal systems and countries, all of whom have extensive experience in the asset recovery field. The authors notably discuss the 'success stories' of the past (the recovery of the assets of Sani Abacha, Ferdinand Marcos and Vladimiro Montesinos) and the concrete challenges for the future with regard to search, seizure, confiscation and repatriation of stolen assets. The book also provides perspectives on the role of technical assistance and donors in asset recovery and the likely impact of the UNCAC.
http://www.assetrecovery.org/kc/node/6e3e3ecd-c83f-11dc-8b14-1fa3f95f28cb.html

Countering Money Laundering and Promoting Judicial Cooperation (2008)
This report from UNODC's open-ended working group on countering money laundering and promoting judicial cooperation presents the results attained by Member States in achieving goals and targets set in the areas of countering money laundering and promoting judicial cooperation for drug related offences as well as the limitations and problems encountered along the way.
http://daccessdds.un.org/doc/UNDOC/LTD/V08/537/35/PDF/V0853735.pdf?OpenElement

Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific (2007)
This publication is the outcome of a review of frameworks and practices for requesting and granting MLA in 27 countries of the Asia and Pacific region. The review analysed policies, institutions involved in MLA in corruption cases as well as mechanisms for international cooperation in these areas and their application in practice. The paper covers three main areas: the legal basis for extradition and MLA; procedures and measures that facilitate international cooperation and the mechanisms for recovering the proceeds of corruption.
http://bvc.cgu.gov.br/bitstream/123456789/1893/1/37900503.pdf

Denying Safe Haven to the Corrupt and the Proceeds of Corruption (2004)
This book captures the legal and practical challenges of mutual legal assistance and extradition, as well as solutions for improvement, discussed during a March 2006 training seminar in Kuala Lumpur, Malaysia. Experts from 26 Asia-Pacific countries and countries party to the OECD Anti-Bribery Convention attended this ADB/OECD Anti-Corruption Initiative for Asia and the Pacific seminar on "Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition, and the Recovery and Return of the Proceeds of Corruption".
http://www.oecd.org/document/56/0,3343,en_34982156_34982460_37504184_1_1_1_1,00.html

Mutual Legal Assistance and Repatriation of Proceeds of Corruption (2004)
This publication is based on papers presented during the 4th regional conference of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific held in Kuala Lumpur in December 2003. The chapter on MLA includes presentations of Pakistan's experience on MLA, recommendations on improving procedures for MLA and mechanisms for gathering evidence abroad.
http://www.adb.org/Documents/Books/Controlling-Corruption/chapter7.pdf

UNODC Anti-Corruption Toolkit (2001)
Chapter VIII of the UNODC toolkit deals with various aspects of international legal cooperation, including mutual legal assistance, extradition, the tracing, freezing, confiscation and return of assets, law enforcement cooperation, etc. The section on MLA spells out recommendations made by a UN expert working group to facilitate the effective provision of mutual legal assistance.
http://www.unodc.org/pdf/crime/corruption/toolkit/AC_Toolkit_chap8.pdf

Mutual Legal Assistance Treaties: Necessity, Merits and Problems Arising in the Negotiation Process (2000)
This paper presents the experience of the US with MLA treaties to improve law enforcement cooperation. It first discusses the various existing mechanisms for international law enforcement cooperation against which MLATs can be assessed and presents the comparative advantage of MLATs in promoting effective assistance.
http://www.acpf.org/Activities/public%20lecture2000/lectureHarriss(E).html