ANTI CORRUPTION AND TRANSPARENCY TASK FORCE

JANUARY 2010

Anti-Corruption Cooperation-Stocktaking of Bilateral and Regional Arrangements on Anti-Corruption Matters between/among APEC Member Economies

ANTI CORRUPTION AND TRANSPARENCY TASK FORCE

JANUARY 2010

Anti-Corruption Cooperation-Stocktaking of Bilateral and Regional Arrangements on Anti-Corruption Matters between/among APEC Member Economies

ACT01/2007T

Produced for
APEC Secretariat
35 Heng Mui Keng Terrace Singapore 119616
Tel: (65) 6891-9600 Fax: (65) 6891-9690
Email: info@apec.org Website: www.apec.org

© 2009 APEC Secretariat
APEC#209-SO-01.9

TABLE OF CONTENTS

Table of Contents. iii
Abbreviations and Acronyms ix
KPK Commissioner (Opening Statement) xiii
Foreword xv
Executive Summary xix

PART 1
Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in the Asia-Pacific Region—a comparative overview of APEC jurisdictions not included in the ADB/OECD Anti-Corruption Initiative for Asia-Pacific 1

INTRODUCTION 1
I. THE LEGAL BASIS FOR RENDERING EXTRADITION AND MLA 3
A. Treaty-based Cooperation 3
1. Bilateral Treaties. 3
2. Multilateral Treaties 4
a. United Nations Convention against Corruption 4
b. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 5
c. Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty 5
d. United Nations Convention against Transnational Organized Crime 5
e. Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters 6
B. Non-treaty Based Arrangements 6
1. Cooperation Based on Domestic Law 6
Table 1: Selected Members of the Initiative and Additional APEC economies with Legislation Allowing Extradition and MLA without a Treaty. 6

II LEGAL LIMITATIONS AND PRECONDITIONS TO COOPERATION 9
A. Extradition of Citizens 9
Table 3: Selected Legislation and Treaties which Deny Extradition of Citizens. 9

B. Extradition and MLA Offenses—Severity and Dual Criminality 12

1. Severity 12

Table 4: Selected Extradition Treaties and Legislation with a Severity Criterion 12

2. Dual Criminality 14

Table 5: Selected Legislation and Treaties with a Conduct-Based Definition of Dual Criminality 15

Table 6: Dual Criminality in Selected MLA Arrangements 15

C. Reciprocity 18

Table 7: Selected Legislation which Requires Reciprocity for MLA without a Treaty 18

D. Evidentiary Tests 19

Table 8: Evidentiary Tests in Selected Extradition Legislation and Treaties. 19

E. Specialty and Use Limitation 22

Table 9: Selected Extradition Legislation and Treaties which Require Speciality 22

Table 10: Selected MLA Legislation and Treaties which Impose Use Limitation for Incoming Requests. 23

F. Grounds for Denying Cooperation 23

1. Essential and Public Interests 23

Table 11: Selected MLA Legislation and Treaties in which Essential Interests are Considered 24

2. Political Offenses. 25

Table 12: Selected Extradition Legislation and Treaties which Allow Denial of Cooperation for Political Offences. 25

Table 13: Selected MLA Legislation and Treaties which Allow Denial of Cooperation for Political Offences 26

Table 14: Selected Extradition Legislation and Treaties which Exclude the Political Offences Exception Due to Obligations under Multilateral Instruments. 27

3. Double Jeopardy/On-going Proceedings and Investigations in the Requested State 28

Table 15: Selected Legislation and Treaties which Deny Extradition on Grounds of Double Jeopardy and/or Concurrent Proceedings 28

Table 16: Selected Legislation and Treaties which Deny MLA on Grounds of Double Jeopardy 29

Table 17: Selected Legislation and Treaties which Allow MLA to be Denied or Delayed Because of Ongoing Proceedings in the Requested State. 29

4. Offense Committed Wholly or Partly in the Requested State 30

Table 18: Selected Legislation and Treaties which May Deny Extradition for an Offence Committed Wholly or Partly in the Requested State. 30

Table 19: Selected Legislation and Treaties which May Deny Extradition for an Offence Over which the Requested State Has Jurisdiction to Prosecute 31

5. Nature and Severity of Punishment 32

Table 20: Selected Legislation and Treaties which Deny Extradition Because of the Death Penalty (Unless the Requesting State Provides Assurances) 32

Table 21: Selected Legislation and Treaties which Deny Extradition Because of Torture or Cruel, Inhuman or Degrading Punishment 32

Table 22: Selected Legislation and Treaties which Deny MLA in Relation to an Offence Punishable by Death 33

6. Bank Secrecy 33

III. PROCEDURES AND MEASURES TO FACILITATE EXTRADITION AND MLA 35

A. Preparing, Transmitting and Executing Requests 35

1. Preparation of Outgoing Requests 35

2. Language of the Request and Translation 36

Table 23: Selected Countries That Accept Incoming MLA Requests In English (Subject to Treaty) 36

3. Formal Transmission of Requests for Cooperation and Evidence 36

a. Transmission through the Diplomatic Channel 36

Table 24: Selected Extradition and MLA Legislation and Treaties which Require Communication Through Diplomatic Channels (Except Possibly in Urgent Cases) 37

b. Transmission through Central Authorities 37

Table 25: Selected MLA Legislation and Treaties Which Allow Direct Transmission of Requests Between Central Authorities 38

Table 26: Information Available On The Internet 39

c. Transmission between Law Enforcement Agencies 39

4. Urgent Procedures for Extradition and MLA 40

a. Provisional Arrest as an Emergency Measure for Extradition 40

Table 27: Selected Extradition Legislation and Treaties Which Provide For Provisional Arrests 40

b. Urgent MLA Requests 41

Table 28: Selected MLA Legislation and Treaties With Urgent Procedures 42

5. Approval and Execution of Incoming Requests 42

6. Participation of Foreign Authorities in Executing Requests 43

Table 29: Selected MLA Legislation and Treaties which Allow Requesting State to Participate in Proceedings to Take Evidence 43

7. Use of Liaison Personnel 44

B Procedural Measures for Enhancing Extradition and MLA 45

1. Simplified Extradition through Endorsement of Warrants and Consent Extradition 45

Table 30: Selected Legislation and Treaties That Provide For Consent Extraditions 46

2. Appeals 46

Table 31: Selected Extradition Legislation Which Gives Requesting States A Right Of Appeal 46

3. Time Requirements. 47

Table 32: Selected Legislation That Imposes Time Limits On Government For Surrender . 47

C. Alternatives to Formal MLA and Extradition 48

IV. RECOVERY OF PROCEEDS OF CORRUPTION IN CRIMINAL PROCEEDINGS 49

A. Legal Basis for Assistance 49

Table 33: Selected Legislation and Treaties Which Expressly Provide MLA In Relation To Proceeds Of Crime 50

B. Procedures 51

1. Tracing and Identification of Assets 51

Table 34: Selected Legislation And Treaties Under Which Signatories Endeavour to Trace and Identify Proceeds of Crime Upon Request 51

2. Freezing and Seizure 52

Table 35: Selected Legislation And Treaties Under Which Signatories Must Freeze Proceeds Upon Discovery 52

Table 36: Prerequisites For Enforcing A Foreign Freezing Order In Selected Members Of The Initiative and additional APEC economies 53

3. Confiscation to the Requested State 53

Table 37: Prerequisites For Enforcing A Foreign Confiscation Order In Selected Legislation And Treaties. 54

4. Repatriation to the Requesting State 55

CONCLUSIONS AND RECOMMENDATIONS 57

PART 2
Frameworks and Practices for Mutual Legal Assistance, Extradition and Recovery of Proceeds in Additional APEC Economies. 63

BRUNEI DARUSSALAM 63

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption 63

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption) 65

The Legal Framework for Extradition and MLA 66

Additional Contact and Urgent Requests 67

Statistics for Extradition and Mutual Assistance Cases 2002 to 2007 67
Recovery of Proceeds of Corruption in Criminal Proceedings 67
Central Authority 67
Recommendations for a Way Forward 67
Conclusion 68
For Extradition and MLA: 68
Relevant Laws and Documentation 68

CANADA 69
The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption 69
Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption) 72
Statistics for Extradition and Mutual Assistance Cases 2002 to 2007 73
Prerequisites for Cooperation 73
Grounds for Denying Cooperation 74
Recovery of Proceeds of Corruption in Criminal Proceedings 75
Urgent Requests for Cooperation 75
Central Authority 75
Direct Communication between Law Enforcement Agencies. 75
Recommendations for a Way Forward 75
Conclusion 76
Relevant Laws and Documentation 76

CHINESE TAIPEI 77
The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption 77
Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption) 77
Statistics for Extradition and Mutual Assistance Cases 2002 to 2007 78
Recovery of Proceeds of Corruption in Criminal Proceedings 78
Central Authority 78
Additional Contact 79
Recommendations for a Way Forward 79
Conclusion 79
Relevant Laws and Documentation 79

PERU 81

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption 81

Bilateral and Multilateral Treaty Relationships 81

The Legal Framework for Extradition and MLA 82

Legal Preconditions for Extradition and MLA 83

Prerequisites for Cooperation 84

Grounds for Denying Cooperation 85

Urgent Requests for Cooperation 86

Recovery of Proceeds of Corruption in Criminal Proceedings 86

Statistics for Extradition and Mutual Assistance Cases 2002 to 2007 86

Central Authority 87

Additional Contact 87

Recommendations for a Way Forward 88

Conclusion 88

Relevant Laws and Documentation 88

RUSSIAN FEDERATION 89

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption 89

Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption) 92

Recovery of Proceeds of Corruption in Criminal Proceedings 96

Procedures and Institutional Framework for Extradition and MLA 97

Urgent Requests for Cooperation 98

Central Authority 98

Additional Contact 98

Conclusion 98

Recommendations for a Way Forward 98

Relevant Laws and Documentation 99

Appendix A

EXTRADITION 101

Appendix B

MLA 103

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

CEC COMMISSIONER OPENING STATEMENT

Policy analysis conducted through the means of thematic review is an important mechanism by which to support the anti-corruption efforts made by both governments and international organizations in the Asia-Pacific region and beyond.

The Anti-Corruption Initiative for Asia-Pacific, under the joint leadership of the Asian Development Bank (ADB), and the Organization for Economic Co-operation and Development (OECD), together with the Anti-Corruption Transparency Experts' Task Force (ACT), under the leadership of the Asia-Pacific Economic Cooperation (APEC), have identified mutual legal assistance (MLA), extradition, asset forfeiture and recovery as priority issues in the fight against corruption.

This complementary thematic review of these priority issues in five additional APEC economies: Brunei Darussalam, Canada, Chinese Taipei, Peru, and the Russian Federation, represents an important contribution to policy analysis of existing frameworks and practices in the Asia-Pacific region.

CEC Commissioners
Corruption Eradication Commission
of The Republic of Indonesia

FOREWORD

Corruption has been an issue of increasing concern to many governments and international organisations. Specific anti corruption legislation has been enacted in many APEC jurisdictions. This legislation has complemented existing provisions which may have been part of the criminal law of individual jurisdictions. In addition there has been the development of the UN Convention against Corruption. The international dimension of modern day corruption necessitates enhanced international cooperation to repress and prevent corruption more effectively.

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 result was a report, *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (the ADB/OECD Review) which reflected the findings of the thematic review. The report was adopted in September 2007 by the Steering Group at its 10th meeting and subsequently published.

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.

The ADB/OECD Review of MLA, extradition and assets recovery frameworks was 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 the 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.

As that report identified, '*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.'

The ADB/OECD Review was based on responses provided by member governments 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.

The ADB/OECD Review reflects findings of the Steering Group as of September 2007.

While there is considerable overlap between the membership of the ADB/OECD Anti Corruption Initiative and APEC there were significant APEC jurisdictions which were not covered by the ADB/OECD Review. These jurisdictions were:

1. Brunei Darussalam
2. Canada
3. Chile
4. Chinese Taipei
5. Mexico
6. New Zealand
7. Peru
8. Russian Federation
9. United States of America

Consequently the APEC Anti-Corruption and Transparency Experts Task Force decided that a complementary review should be conducted of the nine jurisdictions which were not covered by the initial review. The decision to undertake this review of the remaining APEC members was made by the 18th APEC Ministerial Meeting at its meeting on 16-17 November 2006. The Secretariat was asked to engage consultants to undertake the review. The APEC Secretariat engaged ITC Ltd to conduct a review of the remaining APEC jurisdictions not included in the ADB/OECD Review to enable APEC members to have the benefit of a similar analysis of all APEC jurisdictions.

It was agreed in consultation with the APEC Secretariat that this review process should follow the same methodology that was adopted by the ADB/OECD Review. The intention was to produce a report which, when read in conjunction with the earlier review, would provide a comprehensive analysis of the position in the Asia Pacific region. Each of the nine jurisdictions was contacted by the Secretariat and advised that the consultants would, on behalf of the Secretariat, be seeking their responses to a questionnaire and of the reasons for the process being undertaken. Notwithstanding the responses provided by all jurisdictions to the ADB/OECD Review a number of the additional APEC economies have been unable to complete the questionnaire despite extensions of time and follow up correspondence. The end result was that completed responses were received from

- Brunei Darussalam
- Canada
- Chinese Taipei
- Peru
- Russian Federation

The results have been collated and included in this report. To assist APEC members to place the findings of this review within the context of the earlier report we have incorporated the information concerning the 5 additional jurisdictions in tables taken from the ADB/OECD Review.

In this report references to the Initiative members are references to the countries covered by the original report. The 5 additional countries covered in this report are referred to as 'additional APEC economies'.

In addition, for ease of reference, this report has reproduced (with the agreement of the ADB and OECD) the explanatory material from the ABD/OECD Review concerning the legal basis for rendering mutual legal assistance and extradition, the legal limitations and preconditions to cooperation, procedures and measures to facilitate extradition and MLA and recovery of proceeds of corruption in criminal proceedings. However, as this report is designed to assist APEC economies some tables and comments have been modified to reflect the particular position in the APEC economies.

The Indonesia economy is grateful to the five APEC economies Brunei Darussalam, Canada, Chinese Taipei, Peru and the Russian Federation for their participation in this complementary thematic review. Indonesia is also very grateful to co-sponsors APEC economies Korea and Chile.

Indonesia also expresses its sincere gratitude to the APEC Secretariat and consultants Illawarra Technology Corporation for conducting the review process and collating the results that form the basis of this report.

The report was prepared under the supervision of the Corruption Eradication Commission of the Republic of Indonesia, guided by the KPK Commissioners, with active contributions from Waluyo, Project Overseer, Sujanarko, Director of Fostering Networks, Giri Suprapdiono, acting Project Overseer, Syafira Putri Larasati, Stephanie Black, as well as from other valued individuals.

The findings, interpretations, and conclusions expressed in this report do not necessarily represent the views of the APEC Secretariat. The Secretariat does not guarantee the accuracy of the data included in this publication and accept no responsibility whatsoever for the consequences of their use. The terms 'country' and 'jurisdiction' in this report refer 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 the APEC Secretariat and its member economies. The present document is current as of July 2008. 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

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. Bribery of foreign public officials has also become a widespread phenomenon in international business transactions, including trade and investment, as well as humanitarian aid.

Asia-Pacific countries 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. This was recognised by 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. Bhutan became the 28th member of the Initiative in September 2007 after the thematic review began and is not included in the review findings.

The findings of the thematic review were contained in the Final Report of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific entitled *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* which was published in 2007 (the 2007 Report).

While there is considerable overlap between the membership of the ADB/OECD Anti Corruption Initiative and APEC there were significant APEC jurisdictions which were not covered by the ADB/OECD Review. These jurisdictions were:

- Brunei Darussalam
- Canada
- Chile
- Chinese Taipei
- Mexico
- New Zealand
- Peru

- Russian Federation
- United States of America

Consequently the APEC Anti-Corruption and Transparency Experts Task Force decided that a complementary review should be conducted of the nine jurisdictions which were not covered by the initial review. It was also agreed that the same methodology should be adopted. This involved the use of a questionnaire and the development of tables reflecting the responses.

Each of the nine jurisdictions was contacted by the APEC Secretariat and advised that consultants would, on behalf of the Secretariat, be seeking their responses to a questionnaire and of the reasons for the process being undertaken. While all of the members of the ADB/OECD Review provided responses, a number of the additional APEC economies have been unable to complete the questionnaire despite extensions of time and follow up correspondence. The end result was that completed responses were received from

- Brunei Darussalam
- Canada
- Chinese Taipei
- Peru
- Russian Federation

The results have been collated and included in this report. To assist APEC members to place the findings of this review within the context of the earlier report we have incorporated the information concerning the 5 additional jurisdictions in tables taken from the ADB/OECD Review.

This report is structured as follows. In Part 1, 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. Part 2 includes detailed information for the additional APEC economies taken from the material provided by each economy in its responses to the questionnaire.

Most of the material in Part 1 has been adopted from the 2007 report. The analysis of the key issues remains valid and useful. Where appropriate this report updates information such as the countries which have ratified the relevant conventions since the 2007 Report.

Each of the additional APEC economies has taken steps to implement the key international instruments in their domestic law. While the extent of progress varies it is clear that there is growing recognition of the need for enhanced international cooperation if there is to be a satisfactory response to corruption and the recovery of the proceeds of corruption.

That said there is still much to be done. The findings of the 2007 Report show that every member of the Initiative could take additional steps to enhance their capacity to assist other members to respond to the issue of corruption and the same is true of the additional APEC economies. In particular there is a need to ensure that each country has effective and comprehensive criminal laws which adequately cover corrupt conduct. These offenses need to cover both those who institute and undertake corrupt activities. They must

deal with those in government and those in the private sector. The legislation to deal with the location, seizing, freezing and confiscation of proceeds of crime must apply to the proceeds of corruption. The broader legislative framework which deals with extradition and mutual legal assistance must also fully apply to those involved in corruption offenses.

While the UN Convention against Transnational Organized Crime and the UN Convention against Corruption are the major international instruments relevant to the provision of extradition, MLA and recovery of proceeds from corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty are also relevant. The UN Conventions provide a comprehensive framework for effective responses to corruption if fully implemented in domestic law and practice. The fact remains that many nations which have ratified the conventions have not yet fully implemented the conventions. This is the case in both the Initiative members and the additional APEC economies. More work is needed.

The findings, interpretations, and conclusions expressed in this report do not necessarily represent the views of the APEC Secretariat. 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.

PART 1

Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in the Asia-Pacific Region—a comparative overview of APEC jurisdictions not included in the ADB/OECD Anti-Corruption Initiative for Asia-Pacific

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 and additional APEC economies have created a network of extradition and MLA bilateral and multilateral treaties that may be used in corruption cases (see Annexes A and B to be read together with Annexes A to D of the ADB/OECD Report 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 and additional APEC economies 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 and additional APEC economies, as at September 2008, there are at least 60 and 39 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 Conven-

tion. 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 December 2008, twenty members of the Initiative and the additional APEC jurisdictions have signed and ratified or acceded to the UNCAC: Australia; Bangladesh; Brunei Darussalam; Cambodia; Canada; P.R. China; Fiji; India; Indonesia; Kazakhstan; Korea; Kyrgyzstan; Malaysia; Mongolia; Pakistan; Papua New Guinea; Peru; Philippines; Russian Federation 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. Six other members of the Initiative have signed the UNCAC but have yet to ratify: Japan; Nepal; Palau; Singapore; Thailand; and Vietnam. Four additional APEC economies have signed the UNCAC, Brunei Darussalam, Canada, Peru and the Russian Federation (with some reservations).

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. Canada is also a party to the 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. Other than Canada none of the additional APEC economies are members of the OECD and are not therefore parties to the OECD Convention.

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, Brunei Darussalam and Vietnam have signed and ratified the treaty. Since the completion of the ADB/OECD Review, Lao PDR and Indonesia have ratified the Treaty. As of September 2008, the Philippines, Thailand, Cambodia and Myanmar have not yet ratified the Treaty. 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) is also relevant in corruption cases. As of September 2008, the following sixteen members of the Initiative and APEC Member Economies had signed and ratified (or acceded to) the UNTOC: Australia; Brunei Darussalam; Cambodia; Canada; P.R. China; Cook Islands; Kazakhstan; Kyrgyzstan; Malaysia; Mongolia; Peru; Philippines; Russian Federation; Singapore; Sri Lanka; and Vanuatu. Malaysia has 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. Of the additional APEC economies, Brunei Darussalam, Canada, Peru and the Russian Federation have signed and ratified the UNTOC. Eight other members of the Initiative have signed but have not ratified the UNTOC: India; Indonesia; Japan; 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. There is a trend towards countries being prepared to offer assistance on the basis of reciprocity which might be based on domestic legislative provision or through executive decision making.

1. Cooperation Based on Domestic Law

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

EXTRADITION		MLA	
Australia	Macau, China Malaysia	Australia	Malaysia
Bangladesh	Pakistan	Brunei Darussalam	Pakistan
Brunei Darussalam	Palau	Canada**	Palau
Canada	Papua New Guinea	PR China	PNG
PR China	Peru	Cook Islands	Peru
Chinese Taipei	Russian Federation	Fiji	Russian Federation
Cook Islands	Samoa	Hong Kong, China	Samoa
Fiji	Thailand	India	Singapore
India	Vanuatu	Indonesia	Sri Lanka*
Indonesia	Viet Nam	Japan	Thailand
Japan		Kazakhstan	Vanuatu
Kazakhstan		Korea	Viet Nam
Korea		Macau, China	

* Designated Commonwealth Countries Only
** Can enter administrative agreement to obtain evidence gathering orders

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	Fiji	Macau, China	Philippines
Bangladesh*	Hong Kong, China	Malaysia*	Russian Federation
Brunei Darussalam	India*	Mongolia	Samoa
Canada	Indonesia	Pakistan	Singapore*
PR China	Kazakhstan	Palau	Sri Lanka
Chinese Taipei	Korea	Papua New Guinea	Vanuatu
Cook Islands	Kyrgyzstan	Peru	

TREATIES		
Australia-Hong Kong, China	Canada - Philippines	Indonesia-Korea
Australia-Indonesia	Canada - Thailand	Indonesia-Malaysia
Australia-Korea	Chinese Taipei-AIT	Indonesia-Philippines
Australia-Malaysia	Fiji-Thailand**	Indonesia-Thailand
Australia-Philippines	Hong Kong, China-India	Japan-Korea
Australia-Thailand**	Hong Kong, China-Indonesia	Korea-India
Bangladesh-Thailand	Hong Kong, China-Korea	Korea-Mongolia
Cambodia-Thailand	Hong Kong, China-Malaysia*	Korea-Philippines
PR China-Korea	Hong Kong, China-Philippines	Korea-Thailand
PR China-Mongolia	Hong Kong China-Singapore*	Korea-Vietnam
PR China-Philippines	Hong Kong, China-Sri Lanka	Malaysia-Thailand**
PR China-Thailand	India-Mongolia	Philippines-Thailand
Canada - Korea	India-Philippines*	Russian Federation – PR China
Canada - Peru		

* 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 CITIZENS

Many Asia-Pacific countries may refuse to extradite their citizens 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 Citizens

	REFUSAL TO EXTRADITE		DECISION TO PROSECUTE			
	Mandatory	Discretionary	Mandatory	Discretionary	Jurisdiction to Prosecute	Upon Request
LEGISLATION						
Australia		X		X		
Brunei Darussalam		X		X		
Cambodia	X			X		
PR China	X				X	
Chinese Taipei	X		X			
Cook Islands		X		X		
Fiji		X		X		
Hong Kong, China		X			X	
Indonesia		X		X		
Japan[3]	X					
Kazakhstan[3]	X					X
Korea		X				
Kyrgyzstan	X					X
Macau, China[4]	x			X		
Malaysia		X			X	
Mongolia	X					X

	REFUSAL TO EXTRADITE		DECISION TO PROSECUTE			
	Mandatory	Discretionary	Mandatory	Discretionary	Jurisdiction to Prosecute	Upon Request
Palau[5]		X	X			
Papua New Guinea[2]		X		X		
Russian Federation	X					
Vanuatu		X				
Vietnam	X			X		
TREATIES						
Australia-Hong Kong, China		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
PR China-Korea		X				X
PR China-Mongolia	X					X
PR China-Philippines		X		X		
PR 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			
Korea-India		X				X
Korea-Mongolia	X					X
Korea-Philippines		X		X		
Korea-Thailand		X		X		
Korea-Viet Nam		X				X

	REFUSAL TO EXTRADITE		DECISION TO PROSECUTE			
	Mandatory	Discretionary	Mandatory	Discretionary	Jurisdiction to Prosecute	Upon Request
Malaysia-Thailand		X				
Philippines-Thailand		X			X	X
ASEAN						
OECD		X	X			
UNCAC	X					X
UNTOC		X				X

1. For Hong Kong, China, the prohibition applies to citizens of the PR 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) citizens of the PR China who are not resident in Macau, China, and (2) residents of Macau, 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 citizens only if required to do so under a treaty or if the requesting state provides an assurance of reciprocity (see Section II.C). 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 citizens: a requested state is only bound to extradite its citizens; the treaty does not apply to extradition of non-citizens.

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. In some cases countries will not provide assistance (particularly extradition) where there are revenue, taxation or duty offences.

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

	List	Minimum Penalty	Hybrid
LEGISLATION			
Australia[1]		X	
Bangladesh[2]			X
Brunei Darussalam		X	
Canada		X	
PR China		X	
Chinese Taipei		X	
Cook Islands		X	
Fiji		X	
Hong Kong, China			X
India[4]	X		
Indonesia	X		
Japan[5]		X	
Korea		X	
Macau, China		X	
Malaysia		X	
Pakistan[2]	X		
Palau		X	
Papua New Guinea		X	
Peru		X	
Russian Federation		X	

	List	Minimum Penalty	Hybrid
Samoa		X	
Singapore (Non-Commonwealth)	X		
Singapore (Commonwealth)[3]			X
Sri Lanka (Commonwealth)			X
Thailand[7]		X	
Vanuatu		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	
Canada – Korea		X	
Canada - Philippines		X	
PR China-Korea		X	
PR China-Mongolia		X	
PR China-Philippines		X	
PR China-Thailand		X	
Fiji-Thailand[8]	X		
Hong Kong, China-India			X
Hong Kong, China-Indonesia			X
Hong Kong, China-Korea[6]			X
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		
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-Viet Nam		X	
Russian Federation – PR China			

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 offence in question.

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

1. Two years for Commonwealth countries, one year for others
2. List includes corruption offences but not money laundering
3. List includes corruption offences 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 offences, 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 Southeast Asian Mutual Legal Assistance Treaty does not contain such a limitation. 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 Legislation and Treaties with a Conduct-Based Definition of Dual Criminality

LEGISLATION			
Australia	Fiji	Pakistan	Singapore
Bangladesh	Hong Kong, China	Palau	Sri Lanka
Brunei Darussalam	Indonesia	Papua New Guinea	Thailand
Canada	Japan	Peru	Vanuatu
PR China	Kazakhstan	Russian Federation	
Cook Islands	Macau, China	Samoa	
TREATIES			
Australia-Korea	PR China-Mongolia	Hong Kong, China-Sri Lanka	Russian Federation – PR China
Australia-Hong Kong, China	PR China-Philippines	India-Mongolia	UNCAC
Australia-Indonesia	PR China-Thailand	Indonesia-Korea	
Australia-Malaysia	Hong Kong, China-India	Japan-Korea	
Australia-Philippines	Hong Kong, China-Indonesia	Korea-India	
Canada – Korea	Hong Kong, China-Korea	Korea-Mongolia	
Canada - Thailand	Hong Kong, China, Malaysia	Korea-Philippines	
Cambodia-Thailand	Hong Kong, China-Philippines	Korea-Thailand	
PR China-Korea	Hong Kong, China-Singapore	Korea-Viet Nam	

Table 6:
Dual Criminality in Selected MLA Arrangements

	Not required	Mandatory	Discretionary	Silent
LEGISLATION				
Australia			X	
Brunei Darussalam			X	
Canada[5]		X		
PR China			X	
Chinese Taipei	X			
Cook Islands		X		
Fiji	X			
Hong Kong, China		X		
India				X
Indonesia			X	
Japan		X		
Kazakhstan	X			
Korea			X	

	Not required	Mandatory	Discretionary	Silent
Kyrgyzstan				X
Macau, China[1]		X		
Malaysia		X		
Mongolia				X
Pakistan		X		
Palau		X		
Papua New Guinea[4]		X		
Peru[6]		X		
Russian Federation	X			
Samoa		X		
Singapore		X		
Sri Lanka		X		
Thailand[3]		X		
Vanuatu		X		
Viet Nam	X			
TREATIES				
Australia-Hong Kong, China		X		
Australia-Indonesia			X	
Australia-Korea			X	
Australia-Malaysia				
Australia-Philippines			X	
PR China-Indonesia	X			
PR China-Korea			X	
PR China-Philippines			X	
PR China-Thailand			X	
Hong Kong, China-Korea		X		
Hong Kong, China-Philippines		X		
Hong Kong, China-Singapore		X		
India-Korea			X	
India-Mongolia	X			
India-Thailand	X			
Indonesia-Korea		X		
Korea-Mongolia			X	
Korea-Philippines			X	
Korea-Thailand			X	
Korea-Viet Nam			X	
OECD[2]	X			
Southeast Asian MLAT			X	
UNCAC[4]			X	
UNTOC			X	

1. Macau, 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 offence for which MLA is sought falls within the scope of the treaty.
3. Subject to treaty.
4. Discretionary for coercive 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.
5. Only required for enforcement of forfeiture orders.
6. Mandatory for preventative measures such as freezing of accounts and asset confiscation.

Dual criminality could possibly be an issue for members of the Initiative and the additional APEC economies 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 a member of the Initiative or the additional APEC economies. If the foreign state seeks cooperation from such states 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. The need for some flexibility in the application of dual criminality requirements is a common problem. For example an offence might be seen as not meeting dual criminality requirements if it is described as a taxation offence but might meet these requirements if seen as a fraud offence. 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. Indeed the few cases to date mean that there is little practical jurisprudence on these issues.

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 or the additional APEC economies 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 on-going 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. Canadian legislation allows the declaration of a country as an extradition partner where there is no treaty relationship. Canada has designated a number of Commonwealth countries, Costa Rica and Japan as well as the International Criminal Court and the international tribunals concerned with the prosecution of persons responsible for violations of international law in Rwanda and the former Yugoslavia.

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

	Mandatory	Discretionary
Brunei Darussalam		X
PR China	X	
Hong Kong, China	X	
India	X	
Indonesia	X	
Japan	X	
Kazakhstan	X	
Korea	X	
Macau, China*	X	
Malaysia		X
Palau		X
Peru	X	
Russian Federation	X	
Singapore	X	
Thailand	X	
Viet Nam	X	

* Except where the assistance is for the benefit of an accused or resident of Macau, China or where the assistance relates to a serious offence.

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
LEGISLATION		
Australia (Commonwealth only)	X	
Bangladesh	X	
Brunei Darussalam	X	
Canada	X	
Chinese Taipei		X
Cook Islands[1]	X	
Fiji[1]	X	
Hong Kong, China	X	
India	X	
Indonesia	X	
Japan		X
Korea		X
Malaysia[2]	X	
Pakistan	X	
Palau[3]		X
Peru		X
Philippines	X	
Russian Federation	X	
Samoa[4]	X	
Sri Lanka	X	
Singapore	X	
Thailand	X	
Vanuatu[1]	X	
TREATIES		
Australia-Fiji	X	
Australia-Hong Kong, China	X	
Australia-Korea		X
Australia-Thailand	X	
Bangladesh-Thailand	X	

	Prima Facie Case	Probable Cause
Cambodia-Thailand	X	
Canada – Korea		X
Canada – Thailand	X	
PR China-Thailand	X	
Fiji-Thailand	X	
Hong Kong, China-India	X	
Hong Kong, China-Indonesia	X	
Hong Kong, China-Malaysia	X	
Hong Kong, China-Philippines	X	
Hong Kong, China-Singapore	X	
Hong Kong, China-Sri Lanka	X	
India-Nepal (1953)	X	
Japan-Korea		X
Korea-India		X
Korea-Mongolia		X
Korea-Philippines		X
Korea-Thailand		X
Korea-Viet Nam		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 test also applies 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 and the additional APEC economies 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 III.B.1).

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 Speciality

LEGISLATION		
Australia	Bangladesh	Brunei Darussalam
Canada	PR China	Cook Islands*
Fiji**	Hong Kong, China	India
Indonesia	Korea	Macau, China
Malaysia	Pakistan	Palau
Papua New Guinea**	Peru	Russian Federation
Samoa	Singapore	Sri Lanka
Vanuatu		
TREATIES		
Australia-Hong Kong, China	Australia-Indonesia	Australia-Korea
Australia-Malaysia	Australia-Philippines	Australia-Thailand
Bangladesh-Thailand	Cambodia-Thailand	Canada - Korea
PR China-Korea	PR China-Mongolia	PR China-Philippines
PR China – Russian Federation	PR China-Thailand	Fiji-Thailand
Hong Kong, China-Indonesia	Hong Kong, China-India	Hong Kong, China-Korea
Hong Kong, China-Malaysia	Hong Kong, China-Philippines	Hong Kong, China-Singapore
Hong Kong, China-Sri Lanka	India-Mongolia	India-Nepal (1953)
India-Philippines	Indonesia-Korea	Indonesia-Malaysia
Indonesia-Philippines	Indonesia-Thailand	Japan-Korea
Korea-Mongolia	Korea-India	Korea-Philippines
Korea-Thailand	Korea-Viet Nam	Malaysia-Thailand
Philippines-Thailand		

* 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		
Brunei Darussalam	Indonesia	Macau, China
Malaysia	Peru	Singapore
TREATIES		
Southeast Asian MLAT	Australia-Hong Kong, China	Australia-Indonesia
Australia-Korea	Australia-Malaysia	Australia-Philippines
PR China-Indonesia	PR China-Korea	PR China-Philippines
PR China-Thailand	Chinese Taipei-AIT	Hong Kong, China-Korea
Hong Kong, China-Philippines	Hong Kong, China-Singapore*	India-Korea
India-Mongolia	India-Thailand*	Indonesia-Korea
Korea-Mongolia	Korea-Philippines	Korea-Thailand
Korea-Viet Nam	UNCAC*	UNTOC*

* 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	Kyrgyzstan	Russian Federation
Brunei Darussalam	Macau, China	Samoa
Cook Islands	Malaysia	Singapore
Fiji	Mongolia	Sri Lanka
Hong Kong, China*	Palau	Thailand
Indonesia	Papua New Guinea	Vanuatu
Kazakhstan	Peru	Viet Nam
Korea		
TREATIES		
Southeast Asian MLAT	PR China-Philippines	Indonesia-Korea
Australia-Hong Kong, China*	PR 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-Viet Nam
Australia-Philippines	India-Korea	UNCAC
PR China-Indonesia	India-Mongolia	UNTOC
PR 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 PR 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 "distin-

guished 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. However, Brunei Darussalam has specifically limited its definition of political offences so that it does not cover offences specifically covered by treaties, those involving attacks on Head of State or Government or Ministers of a government or their immediate families. Peru has limited the application of the political offense exception so that it does not cover 'acts of violence, terrorism or attacks against humanity' 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 Offences

LEGISLATION		
Australia	India	Palau
Bangladesh	Indonesia	Papua New Guinea*
Brunei Darussalam	Japan	Peru
Canada	Korea	Samoa
PR China	Macau, China	Singapore
Chinese Taipei	Malaysia	Sri Lanka
Hong Kong, China	Nepal	Thailand
Fiji*	Pakistan	Vanuatu*
TREATIES		
Australia-Korea	PR China-Thailand	Indonesia-Korea
Australia-Hong Kong, China	Fiji-Thailand	Indonesia-Malaysia
Australia-Indonesia	Hong Kong, China-India	Indonesia-Philippines
Australia-Malaysia	Hong Kong, China-Indonesia	Indonesia-Thailand
Australia-Philippines	Hong Kong, China-Korea	Korea-India
Australia-Thailand	Hong Kong, China-Malaysia	Korea-Mongolia
Bangladesh-Thailand	Hong Kong, China-Philippines	Korea-Philippines
Cambodia-Thailand	Hong Kong, China-Singapore	Korea-Thailand
Canada - Korea	Hong Kong, China-Sri Lanka	Korea-Viet Nam
PR China-Korea	India-Nepal (1953)	Malaysia-Thailand
PR China-Philippines	India-Philippines	Philippines-Thailand

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

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

	MANDATORY	DISCRETIOANRY
LEGISLATION		
Australia	X	
Brunei Darussalam**	X	
Hong Kong, China*	X	
Indonesia	X	
Japan	X	
Korea		X
Malaysia	X	
Macau, China	X	
Papua New Guinea	X	
Peru	X	
Singapore	X	
Sri Lanka	X	
Thailand		X
Vanuatu	X	
TREATIES		
Australia-Hong Kong, China	X	
Australia-Indonesia	X	
Australia-Korea		X
Australia-Malaysia		X
PR China-Indonesia		X
PR China-Korea		X
PR China-Philippines		X
PR China-Thailand	X	
Hong Kong, China-Korea	X	
Hong Kong, China-Philippines		
Hong Kong, China-Singapore	X	
India-Korea		X
India-Thailand		X
Indonesia-Korea	X	
Japan-Korea		X
Korea-Mongolia		X
Korea-Philippines		X
Korea-Thailand		X
Korea-Viet Nam	X	
Macau, China	X	
Southeast Asian MLAT	X	

* Also applies to letters rogatory.
** Uses the term 'Political Opinions'.

Some members of the Initiative and the additional APEC economies 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. Peru limits the concept to non violent activities.

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 Offences Exception Due to Obligations under Multilateral Instruments

LEGISLATION		
Australia	Fiji	Papua New Guinea
Brunei Darussalam	Korea	Vanuatu
Canada	Macau, China	
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
Canada - Korea		

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	Japan	Papua New Guinea*
Bangladesh	Korea	Peru
Brunei Darussalam	Kazakhstan	Russian Federation
Canada	Kyrgyzstan	Samoa
PR China	Macau, China	Singapore
Fiji*	Nepal	Sri Lanka
Indonesia	Pakistan	Thailand
Hong Kong, China	Palau	Vanuatu*
TREATIES		
Australia-Korea**	PR China-Thailand	Indonesia-Korea
Australia-Indonesia**	Fiji-Thailand	Indonesia-Malaysia
Australia-Malaysia	Hong Kong, China-India	Indonesia-Philippines
Australia-Philippines	Hong Kong, China-Indonesia	Indonesia-Thailand
Australia-Thailand	Hong Kong, China-Korea	Korea-India
Bangladesh-Thailand	Hong Kong, China-Philippines	Korea-Mongolia
Cambodia-Thailand	Hong Kong, China-Singapore	Korea-Philippines
Canada - Korea	Hong Kong, China-Sri Lanka	Korea-Thailand
PR China-Korea**	India-Mongolia	Korea-Viet Nam
PR China-Mongolia	India-Nepal (1953)	Malaysia-Thailand
PR China-Philippines	India-Philippines	Philippines-Thailand

* For non-Pacific Island Forum countries.
* May also refuse extradition if requested state has decided 'in the public interest to refrain from prosecuting the person' for the offence in question.

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

LEGISLATION		
Australia	Korea	Singapore
Brunei Darussalam*	Macau, China	Sri Lanka
Canada*	Malaysia	Vanuatu
Hong Kong, China	Papua New Guinea	Viet Nam
Indonesia		
TREATIES		
Southeast Asian MLAT	Australia-Philippines	Hong Kong, China-Singapore
Australia-Hong Kong, China	PR China-Philippines*	India-Korea
Australia-Indonesia	PR China-Thailand*	Korea-Philippines
Australia-Korea*	Hong Kong, China-Korea	Korea-Viet Nam
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 Ongoing Proceedings in the Requested State

LEGISLATION		
Brunei Darussalam*	Malaysia	Peru
Chinese Taipei	Macau, China	Singapore
Cook Islands	Palau	Thailand
Fiji	Papua New Guinea	Vanuatu
Indonesia		
TREATIES		
Southeast Asian MLAT	PR China-Philippines	Korea-Mongolia
Australia-Hong Kong, China	PR China-Thailand	Korea-Philippines
Australia-Indonesia	Hong Kong, China-Korea	Korea-Thailand
Australia-Korea	Hong Kong, China-Philippines	Korea-Viet Nam
Australia-Malaysia	Hong Kong, China-Singapore	UNCAC
Australia-Philippines	India-Korea	UNTOC
PR China-Indonesia	India-Mongolia	
PR China-Korea	India-Thailand	

* If it prejudices ongoing criminal matter, refusal is mandatory.

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 Offence Committed Wholly or Partly in the Requested State

LEGISLATION		
Brunei Darussalam	Kazakhstan	Papua New Guinea
Chinese Taipei	Korea	Russian Federation
Fiji	Macau, China	Vanuatu[1]
Indonesia	Palau	
TREATIES		
Australia-Fiji	Hong Kong, China-Korea	Korea-India[2]
Australia-Indonesia	Indonesia-Korea	Korea-Mongolia
Australia-Japan[3]	Indonesia-Malaysia	Korea-Philippines
Australia-Korea	Indonesia-Philippines	Korea-Thailand
Australia-Malaysia	Indonesia-Thailand	Korea-Viet Nam
Bangladesh-Thailand	Japan-Korea	Philippines-Thailand
PR China-Korea[2]		

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 Offence Over which the Requested State Has Jurisdiction to Prosecute

LEGISLATION		
Brunei Darussalam	Kyrgyzstan	Macau, China
Russian Federation		
TREATIES		
Cambodia-Thailand*	PR China-Mongolia	Hong Kong, China-Sri Lanka
PR China-Philippines*	Hong Kong, China-Indonesia	India-Mongolia*
PR 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 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	Hong Kong, China	Peru
Canada	Indonesia	Samoa[4]
Cook Islands[1]	Macau, China	Sri Lanka[3]
Fiji[1]	Palau[2]	Vanuatu1
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 citizens 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 offence.
4. Only if the offence 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]	Hong Kong, China	Russian Federation[6]
Canada[5]	Indonesia	Samoa[4]
PR China	Macau, China	Sri Lanka[3]
Cook Islands[3]	Palau[2]	Vanuatu[1]
Fiji[1]	Peru	
TREATIES		
Australia-Indonesia	Australia-Philippines[4]	

1. Australia's Extradition (Torture) Regulations, which cover extraditions to PR 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.
5. Minister of Justice must refuse if the surrender would be unjust or oppressive having regard to all the circumstances.
6. May deny extradition.

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

LEGISLATION		
Australia[1]	Indonesia	Peru
Hong Kong, China[2]	Macau, 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. Canada will refuse to extradite in the absence of assurances in all but ‘exceptional cases’, the nature of which has not been defined by the Supreme Court of Canada.

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 conduct 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 and the additional APEC economies 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. Even where there is no formal requirement it is often the case that informal arrangements operate so that requests are prepared by investigators or prosecutors in close cooperation with other agencies and the Central Authority.

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). Other 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); Peru (extradition and MLA – Criminal Division of the Supreme Court); 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 and the additional APEC economies 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.

Table 23:
Selected Countries That Accept Incoming MLA Requests In English (Subject to Treaty)

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

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

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 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	Indonesia	Pakistan
PR China	Japan	Peru
Chinese Taipei	Malaysia	Philippines
India	Nepal	Thailand
EXTRADITION TREATIES		
Australia-Indonesia	PR China-Thailand	Indonesia-Thailand
Australia-Korea	Fiji-Thailand	Japan-Korea
Australia-Malaysia	Hong Kong, China-Korea	Korea-India
Australia-Philippines	India-Mongolia	Korea-Mongolia
Australia-Thailand	India-Philippines	Korea-Philippines
Bangladesh-Thailand	Indonesia-Korea	Korea-Thailand
Cambodia-Thailand	Indonesia-Malaysia	Malaysia-Thailand
PR China-Korea	Indonesia-Philippines	Philippines-Thailand
PR China-Philippines		
MLA LEGISLATION		
Chinese Taipei	Korea	Peru
Indonesia	Malaysia	Palau
Japan	Macau, China	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. However, the existence of a central authority does not always mean that requests are passed directly between the central authorities. Often the diplomatic channel is used as a means of authenticating (at least *prima facie*) the request.

However, increasingly countries will forward copies of requests electronically in advance of the formal request.

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.

Table 25:
Selected MLA Legislation and Treaties Which Allow Direct Transmission of Requests Between Central Authorities

LEGISLATION		
Australia	Hong Kong, China	Mongolia
Brunei Darussalam	Indonesia	Pakistan
Canada	Kazakhstan	Russian Federation
Cook Islands	Kyrgyzstan	Singapore
Fiji	Macau, China*	
TREATIES		
Australia-Hong Kong, China	PR China-Thailand	Korea-Thailand
Australia-Indonesia	Hong Kong, China-Korea	Korea-Viet Nam
Australia-Korea	Hong Kong, China-Singapore	OECD Convention
Canada - Korea	India-Mongolia	Southeast Asian MLAT
PR China-Indonesia	India-Thailand	UNCAC
PR China-Korea	Indonesia-Korea	UNTOC
PR China-Philippines	Japan-Korea	

* 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. Furthermore, many central authorities are located within the portfolios of the Justice Ministry and therefore have close contact with the Minister responsible for the agencies involved in making or responding to requests.

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

	Website for Central Authority	Available in English	Relevant Legislation	Relevant Treaties	Contact Information	Requirements for Coopera-tion	Sample Documents
Australia	X	X	X	X	X		
Canada*			X				
PR China	X	X	X				
Chinese Taipei	X	X	X				
Hong Kong, China		X	X	X	X		
India	X	X				X	
Indonesia							
Japan	X	X	X		X	X	
Macau, China**					X		
Malaysia	X	X	X		X	X	X
Mongolia							
Pakistan		X					
Peru	X				X	X	X
Russian Federation	X	X			X		
Thailand	X	X	X	X	X		

* While there is no separate website for the Central Authority information such as the text of relevant legislation is available through the Department of Justice website
** Information refers to the Office of the Prosecutor General of Macau, China, which is the Central Authority under the legislation of Macau, China. The Office of the Secretary for Administration and Justice is the Central Authority under 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 and the additional APEC jurisdictions 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 agen-

cies 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 allow for the 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		
Brunei Darussalam		X
Canada		X
PR China		X
Chinese Taipei	X	
Cook Islands		X
Fiji		X
India		
Indonesia	X	X
Japan		
Kazakhstan	X	
Korea		
Macau, China	X	X
Malaysia		X
Nepal*		
Palau	X	X
Papua New Guinea		X
Peru**		X
Philippines	X	X
Russian Federation		X

	Alternate Media	Outside Diplomatic Channel
Samoa		
Singapore		
Sri Lanka		
Thailand		
Vanuatu		X
TREATIES		
Australia-Hong Kong, China		X
Australia-Korea	X	
Australia-Indonesia		X
Australia-Malaysia	X	X
Australia-Philippines	X	X
Australia-Thailand		
Bangladesh-Thailand		X
Cambodia-Thailand		X
Canada – Korea		X
Canada – Philippines		X
PR China-Korea		X
PR China-Mongolia		X
PR China-Philippines		X
PR China-Thailand		X
Fiji-Thailand		
Hong Kong, China-India		X
Hong Kong, China-Indonesia		X
Hong Kong, China-Korea	X	X
Hong Kong, China-Malaysia		X
Hong Kong, China-Philippines		X
Hong Kong, China-Singapore		X
Hong Kong, China-Sri Lanka		X
India-Mongolia		X
India-Philippines	X	X
Indonesia-Korea		X
Indonesia-Malaysia	X	X
Indonesia-Philippines	X	X
Indonesia-Thailand	X	X
Japan-Korea		
Korea-India		X
Korea-Mongolia		X
Korea-Philippines	X	
Korea-Thailand	X	
Korea-Viet Nam		
Malaysia-Thailand		
Philippines-Thailand	X	X

* For non-Nepal citizens only.
** Criminal Procedure legislation allows only Interpol requests.

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. In many cases urgent requests are dealt with through informal processes (usually police to police) and the use of MLA processes is confined to the collection of evidence in admissible form. However, there is always a risk that informal processes may compromise subsequent formal requests. Increasingly financial intelligence units are exchanging information on financial transactions outside of the formal MLA arrangements.

Table 28:
Selected MLA Legislation and Treaties With Urgent Procedures

	Oral or Fax Request	Bypass Diplomatic Channel
LEGISLATION		
Brunei Darussalam	X[2]	
Fiji	X	
PR China	X[4]	
Indonesia		X
Japan		X
Korea		X
Macau, China	X	X
Russian Federation	X[4]	
TREATIES		
Australia-Hong Kong, China	X	
Australia-Philippines		X
PR China-Philippines	X	
PR China-Thailand	X[1]	
Hong Kong, China-Korea	X	
Hong Kong, China-Philippines	X	
India-Mongolia	X[1]	
India-Thailand	X[1]	
Korea-Philippines	X	
Korea-Thailand	X	
Korea-Thailand	X	
Macau, China	X	X
Southeast Asian MLAT		X[3]
UNCAC	X	X[2]
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); Canada (extradition and MLA); 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 Home Affairs); 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 Canada, 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. Where court orders are required to execute the request this may be the time when the requests becomes public.

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*	Indonesia	Papua New Guinea
Brunei Darussalam*	Kazakhstan	Peru*
Canada*	Kyrgyzstan	Russian Federation
Cook Islands*	Macau, China	Samoa
Fiji*	Malaysia	Vanuatu*
Hong Kong, China*		
TREATIES		
Australia - Canada	PR China-Indonesia	India-Mongolia
Australia-Hong Kong, China	PR China-Korea	India-Thailand
Australia-Indonesia	PR China-Thailand	Indonesia-Korea
Australia-Korea	Chinese Taipei-AIT	Korea-Mongolia
Australia-Malaysia	Hong Kong, China-Korea	Korea-Philippines
Australia-Philippines	Hong Kong, China-Philippines	Korea-Thailand
Canada – PR China	Hong Kong, China-Singapore	Korea-Viet Nam
Canada - Peru	India-Korea	Southeast Asian MLAT
Canada – Russian Federation		

* 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 investi-

gation, 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 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 and additional APEC economies 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. Canada has posted liaison officers in a number of Asia-Pacific countries. It has also posted staff from its Central Authority in Brussels and Paris.

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	Papua New Guinea
Brunei Darussalam	Macau, China	Peru
Canada	Malaysia	Russian Federation
Cook Islands	Palau	Vanuatu
Fiji		
TREATIES		
Australia-Indonesia	Hong Kong, China-Korea	Korea-Philippines
Australia-Philippines	Hong Kong, China-Malaysia	Korea-Thailand
Australia-Korea	Hong Kong, China-Singapore	Korea-Viet Nam
Bangladesh-Thailand	India-Korea	Peru-USA
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	Fiji	Papua New Guinea
Brunei Darussalam	Hong Kong, China*	Philippines
Canada	Malaysia*	Thailand
Cook Islands	Palau	Vanuatu

* 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 Philip-

pines, 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 On Government For Surrender

	Time To Order Surrender (days)	Time To Effect Surrender (months)
Australia		2
Brunei Darussalam		2
Bangladesh		2
Canada*	3	
Chinese Taipei		2
Cook Islands		2
Fiji		2
Hong Kong, China	75	1
India		2
Indonesia		15 days
Japan	10	1
Korea		1
Kyrgyzstan		1
Macau, China		20 days
Nepal		2
Pakistan		2
Palau		2
Papua New Guinea		2
Peru		2
Russian Federation		30 days
Samoa	60	1
Singapore	60	
Sri Lanka		2
Thailand		3
Vanuatu		2

* Can be extended in certain circumstances.

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.A.7). 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 a number of members of the Initiative and 4 of the additional APEC economies) 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 III.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	Philippines[6]
Brunei Darussalam[8]	Korea[6]	Russian Federation
Canada[9]	Macau, China	Samoa
Chinese Taipei[6]	Malaysia[1,7]	Singapore[5]
Cook Islands[2]	Palau[1]	Sri Lanka[1]
Fiji[3]	Papua New Guinea	Thailand[6]
Hong Kong, China[4,6]	Peru	Vanuatu[1]
TREATIES		
Southeast Asian MLAT	Canada – Peru	India-Korea
Australia - Canada	Canada – Russian Federation	India-Mongolia
Australia-Hong Kong, China	Canada -Thailand	India-Thailand
Australia-Indonesia	PR China-Korea	Korea-Mongolia
Australia-Korea	PR China-Philippines	Korea-Philippines
Australia-Malaysia	PR China-Russian Federation	Korea – Russian Federation
Australia-Philippines	PR China-Thailand	Korea-Thailand
Canada - China	Hong Kong, China-Korea	Korea-Viet Nam
Canada – Hong Kong, China	Hong Kong, China-Philippines	UNCAC
Canada - Korea	Hong Kong, China-Singapore	UNTOC

1. Only for proceeds of offences punishable by at least 1 years imprisonment.
2. Only for proceeds of offences punishable by at least 1 years imprisonment or NZD 5,000.
3. Only for proceeds of offences punishable by at least 6 months imprisonment or FJD500.
4. Only for proceeds of offences punishable by at least 2 years imprisonment.
5. Only for proceeds of listed offences (which includes corruption).
6. Requesting state must provide an assurance of reciprocity.
7. Requesting state may be asked to provide an assurance of reciprocity.
8. Only for proceeds of offences punishable by at least 5 years imprisonment.
9. Only for proceeds of offences that would be indictable offences in Canada.

As noted earlier (see Section I.A and I.B), 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 and the additional economies that may provide MLA in relation to indirect proceeds of corruption include Australia; Canada; 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 Endeavour to Trace and Identify Proceeds of Crime Upon Request

Australia-Hong Kong, China	PR China-Thailand	Korea-Philippines
Australia-Indonesia	Hong Kong, China-Korea	Korea-Thailand
Australia-Korea	Hong Kong, China-Philippines	Korea-Viet Nam
Australia-Malaysia	India-Korea	Macau, China (legislation)
Australia-Philippines	India-Mongolia	UNCAC
PR China-Korea	India-Thailand	UNTOC
PR 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	PR China-Thailand	Korea-Mongolia
Australia-Indonesia	Chinese Taipei-AIT	Korea-Philippines
Australia-Korea	Hong Kong, China-Korea	Korea-Thailand
Australia-Malaysia	Hong Kong, China-Philippines	Korea-Viet Nam
Australia-Philippines	Hong Kong, China-Singapore	Macau, China (legislation)
PR China-Korea	India-Korea	UNCAC
PR China-Philippines	India-Thailand	UNTOC

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 and additional APEC economies

	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		
Brunei Darussalam	X			X		
Canada		X		X		
Chinese Taipei	X					
Cook Islands	X	X	X		X	
Fiji	X	X	X		X	
Hong Kong, China	X				X	
Indonesia	X					
Japan	X				X	
Korea	X					
Macau, China	X			X	X	
Malaysia	X				X	
Palau	X	X	X		X	
Papua New Guinea	X	X	X		X	
Peru				X		
Philippines						X
Samoa	X	X				
Singapore	X				X	
Sri Lanka		X				
Russian Federation	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 Offenceo Or Derived Therefrom	Used Or Intended To Be Used In Connection With An Offence	In Respect Of The Offence	Final Conviction	Final Confiscation Order	Notice To Third Parties	Public Or Essential Interests
LEGISLATION										
Australia		X	X			X	X*		X	
Brunei Darussalam	X			X				X		X
Canada		X	X+				X	X	X	X
PR China	X				X		X			
Chinese Taipei	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		
Macau, China	X		X	X	X		X	X	X	X
Malaysia		X	X	X				X	X	X
Palau		X		X				X		

	Court Application	Direct Registration	Foreign Fine Orders	In Connection With An Offenceo Or Derived Therefrom	Used Or Intended To Be Used In Connection With An Offence	In Respect Of The Offence	Final Conviction	Final Confiscation Order	Notice To Third Parties	Public Or Essential Interests
Papua New Guinea		X	X			X	X	X		
Peru							X			
Philippines							X			X
Russian Federation	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			
TREATIES										
Australia-Philippines		X								
Australia-Malaysia			X		X			X		
Chinese Taipei-AIT	X									
Hong Kong, China-Korea		X								
Hong Kong, China-Philippines			X							
Hong Kong, China-Singapore		X								
Korea-Philippines				X	X					
Korea-Viet Nam			X	X						
UNCAC	X	X								

* Except for certain designated countries
\+ Fine Order of International Criminal Court only.

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 to 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 and the additional APEC economies 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.

Each of the additional APEC economies has taken steps to implement the key international instruments in their domestic law. While the extent of progress varies it is clear that there is growing recognition of the need for enhanced international cooperation if there is to be a satisfactory response to corruption and the recovery of the proceeds of corruption.

That said there is still much to be done. The findings of the 2007 Report show that every member of the Initiative could take additional steps to enhance their capacity to assist other members to respond to the issue of corruption and the same is true of the additional APEC economies. In particular there is a need to ensure that each country has effective and comprehensive criminal laws which adequately cover corrupt conduct. These offenses need to cover both those who institute and undertake corrupt activities. They must deal with those in government and those in the private sector. The legislation to deal with the location, seizing, freezing and confiscation of proceeds of crime must apply to the proceeds of corruption. The broader legislative framework which deals with extradition and mutual legal assistance must also fully apply to those involved in corruption offenses.

While the UN Convention against Transnational Organized Crime and the UN Convention against Corruption

are the major international instruments relevant to the provision of extradition, MLA and recovery of proceeds from corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty are also relevant. The UN Conventions provide a comprehensive framework for effective responses to corruption if fully implemented in domestic law and practice. The fact remains that many nations which have ratified the conventions have not yet fully implemented the conventions. This is the case in both the Initiative members and the additional APEC economies. More work is needed.

As noted above, the development and use of bilateral treaties seems to provide a much more effective basis for cooperation than occurs where countries are parties to the multilateral instruments. Given the comprehensive nature of the UN Conventions this is somewhat anomalous but the reality is that there is greater cooperation between bilateral treaty partners. Accordingly APEC economies should explore the potential for more bilateral arrangements.

PART 2

Frameworks and Practices for Mutual Legal Assistance, Extradition and Recovery of Proceeds in Additional APEC Economies

BRUNEI DARUSSALAM

THE LEGAL FRAMEWORK FOR EXTRADITION, MLA AND RECOVERY OF PROCEEDS OF CORRUPTION

Extradition, MLA and recovery of the proceeds of crime are mainly governed by the Mutual Assistance in Criminal Matters Order 2005 and the Extradition Order 2006. Brunei Darussalam has a number of bilateral relationships covering extradition, MLA and proceeds of crime and is party to several multilateral treaties and non treaty arrangements. There have been few requests made by Brunei Darussalam and few received from other countries.

Brunei Darussalam has signed and acceded to the UN Convention against Transnational Organized Crime which has been in force since 24 April 2008. Brunei Darussalam enacted the Mutual Assistance in Criminal Matters Order 2005 and the Extradition Order 2006 to be in line with the provisions of the UN Convention against Transnational Organized Crime. Other existing laws such as the Penal Code contain provisions which implement the Convention.

Brunei Darussalam signed the UN Convention against Corruption on 11th December 2003 and ratified the Convention in December 2008. Brunei Darussalam enacted the Prevention of Corruption Act which came into force on 1st January 1982 and was last revised in 2002. It advises that this Act already satisfies many mandatory requirements in the Convention itself and the remaining matters not yet covered are being considered.

Brunei Darussalam signed the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty on 24th November 2004 and ratified the Treaty on 15th February 2006. The enactment of the Mutual Assistance in Criminal Matters Order 2005, which came into force on 1st January 2006 was prepared simultaneously with the negotiations of the ASEAN Treaty so the provisions of the Treaty and the legislation are consistent. The legislation came into force a month before Brunei ratified the treaty. Mutual Assistance in Criminal Matters Regulations have also been enacted. These contain sample forms to be used in making requests under the Order and established a Secretariat to deal with such requests.

On MLA, Brunei Darussalam has acceded to the Agreement on Information Exchange and Establishment of Communication Procedure which also involves Cambodia, Indonesia, Malaysia, the Philippines and Thailand.

The domestic legislation allows Brunei Darussalam to make requests for extradition, MLA and/or recovery of POC to jurisdictions with which it does not have treaty arrangements and to receive such requests from other jurisdictions subject to the conditions set out in the legislation. For MLA requests, s.22 of the Mutual Assistance in Criminal Matters Order 2005 allows for requests where there is in force a treaty, memorandum of understanding or other agreement or convention between countries. Even if there is not, ad hoc requests can be made subject to conditions. There are numerous criteria which are dependent on the type of request and are laid out in the law.

For POC, the Criminal Conduct (Recovery of Proceeds) Order, 2000 applies to countries designated under section 31. The criteria can be found in Part III of the Order and its Schedule.

As a member of the Commonwealth, Brunei Darussalam gives effect to the London Scheme for Extradition within the Commonwealth (1966) and the Scheme Relating to Mutual Assistance in Criminal Matter within the Commonwealth (the Harare Scheme) (1990) on the basis that

these are consistent with the legislation referred to above.

Brunei Darussalam is not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It is not a member of the Pacific Islands Forum.

At a bilateral level Brunei Darussalam has bilateral arrangements in extradition with only Malaysia and Singapore for the purposes of extradition and provisions on these arrangements are in the Extradition (Malaysia and Singapore) Act (CAP 154) and bilateral arrangements on MLA and the provisions on these arrangements can be found in the Summonses and Warrants (Special Provisions) Act (CAP 155).

For extradition, the Extradition Order 2006, may apply to a Commonwealth country, a treaty country, a designated country or a country certified to be an extradition country for the purpose of a particular extradition request. The criteria are mainly found in sections 4 and 17. The Extradition Order 2006 repealed the previous Extradition Act. Under the previous law, there were a number of countries that the UK had entered bilateral extradition treaties with and extended these to Brunei Darussalam through Orders made under the old law. Although the Extradition Act has been repealed, all orders made under that Act continue in force as if it was made or done under the current Extradition Order, until it is amended, revoked or repealed under the 2006 Order.

While there is no specific agreement made on matters pertaining to Extradition, MLA or POC Brunei Darussalam has entered into bilateral agreements or arrangements of less than treaty status (for example, Memoranda of Understanding (MOUs)) with other APEC members to establish relationships to deal with corruption. On 15 December 2004, the Anti-Corruption Bureau, Brunei Darussalam together with the Corrupt Practices Investigation Bureau (CPIB) of the Republic of Singapore, the Anti Corruption Agency (ACA) of Malaysia, and the Corruption Eradication Commission (CEC) of the Republic of Indonesia formally signed an MOU called the 'MOU on Cooperation for Preventing and Combating Corruption'.

Subsequently, on 11 September 2007 the Office of the Ombudsman of the Republic of the Philippines, the Government Inspectorate of the Socialist Republic of Vietnam, the Anti-Corruption Unit of the Royal Kingdom of Cambodia and the National Counter Corruption Commission of Thailand also agreed to sign this MOU as full Members. In addition, the Anti-Corruption Bureau of Brunei Darussalam had also established an MOU with the Anti-Corruption Agency, Malaysia in 2001 for the purpose of enhancing mutual cooperation in combating corruption related offences between the two countries.

Letters Rogatory are not specifically recognized in domestic law in Brunei Darussalam but are usually treated as a mutual assistance request and processed accordingly.

LEGAL PRECONDITIONS FOR EXTRADITION AND MLA (INCLUDING IN RELATION TO PROCEEDS OF CORRUPTION)

Brunei Darussalam can extradite its citizens. The decision will be based on the application of the mandatory and discretionary grounds for refusal especially whether or not the courts in Brunei Darussalam have jurisdiction over the matter. While there is no obligation to consult the requesting state Brunei Darussalam would do so administratively where it is sought to have the national prosecuted locally or where specific assurances are sought.

Dual criminality is required for extradition requests and is determined on a conduct based test. For extradition, there are exceptions to the conduct based test requirement for offences relating to taxation, customs duties or other revenue matters or to foreign exchange control. For MLA, the requirement is discretionary and all factors of the case will be considered, before deciding to waive the requirement or otherwise.

There is no specific provision in the Prevention of Corruption Act regarding the bribery of foreign public officials. However, a national of Brunei Darussalam committing an offence of corruption anywhere in the world is liable for prosecution in Brunei Darussalam. While companies registered in Brunei Darussalam can be prosecuted, the extent to which the involvement of a corporation in a corruption offence amounted to a criminal offence would be dependent on how the act took place.

The evidentiary test for extradition request is a prima facie case test and in relation to MLA it is a prima facie case or a record of the case.

Brunei Darussalam will usually require a specialty undertaking although it can be waived by the Attorney General. In relation to a MLA request, an assurance to only use the material provided for the purpose of the proceedings which underpin the MLA request is mandatory. The assurances can be given by the requesting state's diplomatic representative.

Brunei Darussalam will refuse MLA requests where these are considered to be adverse to its national interest. National interest considerations will also be taken into account in extradition requests where there are discretionary grounds for refusal. The severity of the offence is also a discretionary ground for refusal.

Brunei Darussalam applies a political offence exception in relation to both extradition and MLA requests. The request will be refused in any case where the underlying offence is regarded as a political offence. This is defined as an offence 'that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include

(a) an offence –
   (i) that is constituted by conduct of a kind referred to in a multilateral treaty to which Brunei Darussalam is a party; and
   (ii) for which parties have an obligation to extradite or prosecute;

(b) the offence of genocide;

c) an offence of –
   (i) murder, kidnapping or any other attack on the person or liberty; or
   (ii) threatening or attempting to commit, or participating as an accomplice in, murder, kidnapping or any other attack on the person or liberty, on the Head of State, the Head of Government or a Minister of the Government of that country or a member of his immediate family; or

(d) any other offence that Brunei Darussalam and that other country have agreed will not be treated as a political offence for the purposes of extradition;

Brunei Darussalam has advised that it has not made or received a request in respect of which the political offence exception has arisen.

THE LEGAL FRAMEWORK FOR EXTRADITION AND MLA

This is set out in the Mutual Assistance in Criminal Matters Order 2005 and the Extradition Order 2006. There are few requests received by Brunei Darussalam and it makes few requests for extradition or MLA.

For MLA, section 23 of the Mutual Assistance in Criminal Matters Order, 2005 sets out the requirements. These are that the request shall

(a) be made in writing or by any other means capable of producing a written record, in the English language;

(b) be made orally only in urgent circumstances but shall subsequently be confirmed in writing in the English language;

(c) specify the purpose of the request and the nature of the assistance being sought;

(d) identify the person who initiated the request; and

(e) be accompanied by —

(i) a statement from that country that the request is made in respect of a criminal matter;

(ii) a description of the nature of that criminal matter and a statement setting out a summary of the relevant facts and law;

(iii) where the request relates to —

(A) the location of a person who is suspected to be involved in or has benefited from the commission of an offence; or

(B) the tracing of property that is connected with a criminal matter, the name, identity, nationality, location or description of that person, or the location and description of the property, if known, and a statement setting out the basis for suspecting the matter referred to in sub-paragraph (A) or (B);

(iv) a description of the offence to which the criminal matter relates, including its maximum penalty;

(v) details of the procedure that that country wishes to be followed by Brunei Darussalam in giving effect to the request, including details of the manner and form in which any information, article or thing is to be supplied to that country pursuant to that request;

(vi) a statement setting out the wishes of that country concerning the confidentiality of the request and the reason for those wishes;

(vii) details of the period within which that country wishes the request to be met;

(viii) if the request involves a person travelling from Brunei Darussalam to that country, details of allowances to which the person will be entitled, and of the arrangements his accommodation while he is in that country pursuant to that request;

(ix) any other information required to be forwarded with the request under any treaty, memorandum of understanding or other agreement between Brunei Darussalam and that country; and

(x) any other information that may assist in giving effect to the request or which is required under the provisions of this Order.

For extradition, a copy of the arrest warrant from the requesting country, the person's description, statement of the acts that constitute the offence, the text of the law for that offence and the penalty, but where the penalty is not prescribed, a statement of the penalty that can be imposed.

The procedure for outgoing requests is that the relevant agency prepares the request and forwards it to the Attorney General who will consider the request and formally make the request to the requested state. Requests are followed up both formally and informally by officers of the originating agency.

In the case of incoming requests these are transmitted to the Attorney General who is the designated Central Authority under treaty or other arrangements. The Attorney General will then refer the request to the relevant government agency.

Mutual Assistance can be provided in relation to service of documents; obtaining unsworn and sworn witness statements; taking evidence through video-link; transfer of prisoners to assist in an investigation or proceeding; obtaining of banking records; and search and seizure.

In relation to surreptitious surveillance, the requesting state needs to specify the scope of assistance which it is seeking. While general external surveillance can be done, there is no capacity to undertake wire tapping.

MLA requests can be refused by the Attorney General while extradition requests may be determined by either the Attorney General or the court depending on the issues involved. The grounds of refusal, both mandatory and discretionary are specified in the legislation.

All requests are treated confidentially, especially where confidentiality is requested. Only the minimum number of people required to execute the request will be made aware of it and the documents are classified accordingly.

The central authority does not maintain a website nor does it provide sample documents or precedents. Given the few requests dealt with by Brunei Darussalam resources are made available on an as required basis. The Central Authority (the Attorney General) is assisted by departmental staff who are law graduates and bilingual (Malay and English). Translation services are available between these 2 languages only. There is limited experience in carrying out or making requests. Overseas training has been attended by the central authority's officers who are also prosecutors. Seminars have been provided to law enforcement officials on MLA and extradition on request. No training has been provided to the judiciary.

ADDITIONAL CONTACT AND URGENT REQUESTS

Informal requests can be made for MLA but these are not regarded as being made under the Mutual Assistance in Criminal Matters Order 2005. No records of these requests are maintained by the Central Authority. Such requests can not deal with the use of coercive powers, which can only be made available under the Order.

Urgent requests can be made to the Attorney General but these must be confirmed in writing. The INTERPOL channel can be used to seek provisional arrest.

STATISTICS FOR EXTRADITION AND MUTUAL ASSISTANCE CASES 2002 TO 2007

Brunei Darussalam reported that it had received no requests relating to corruption matters.

RECOVERY OF PROCEEDS OF CORRUPTION IN CRIMINAL PROCEEDINGS

No proceedings for the recovery of proceeds in relation to corruption offences have yet been undertaken in Brunei Darussalam.

CENTRAL AUTHORITY

The Attorney General is the Central Authority for all extradition and MLA request. No website is maintained. The resources available to give effect to a request are those that are modest as there are few requests.

The Central Authority can provide assistance that is 'not contrary to the law and within the resources of the Central Authority'.

RECOMMENDATIONS FOR A WAY FORWARD

While the legal framework provides a basic structure for the making and receiving of extradition and MLA request, Brunei Darussalam has little experience in making or receiving requests. Given that Brunei Darussalam has now ratified both the United Nations Convention against Corruption and the United Nations Treaty Against Organized Crime this should assist it to respond to requests for assistance.

CONCLUSION

Brunei Darussalam has a basic framework to receive and make extradition and mutual assistance requests. It has treaty relationships with other ASEAN member states covering MLA and some agreements relating to cooperation in relation to corruption. It can deal with requests from non treaty parties on the basis of reciprocity subject to conditions set out in the relevant domestic legislation. Its grounds for refusing extradition and MLA requests (including in relation to corruption matters) are generally in line with international norms.

FOR EXTRADITION AND MLA:

Relevant Laws and Documentation

Prevention of Corruption Act 1982
Criminal Conduct (Recovery of Proceeds) Order, 2000
Mutual Assistance in Criminal Matters Order 2005
Extradition Order 2006

CANADA

THE LEGAL FRAMEWORK FOR EXTRADITION, MLA AND RECOVERY OF PROCEEDS OF CORRUPTION

Canada has a comprehensive legal framework covering extradition, MLA and proceeds of crime. The Extradition Act and the *Mutual Legal Assistance in Criminal Matters Act* (the MLACMA) provide the basic legal framework. This is supported by a body of legislation, parliamentary rules and administrative provisions to prohibit corruption, including 2006's *Accountability Act,* Canada's *Income Tax Act* and the *Corruption of Foreign Public Officials Act*.

Canada signed the UN Convention against Transnational Organised Crime on December 14, 2000 and ratified this convention on May 13, 2002.

Canada signed and ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on December 17, 1998.

Canada signed the UN Convention against Corruption on May 21, 2004 and ratified this convention on October 2, 2007. Canada's implementing legislation, the *Corruption of Foreign Public Officials Act* ("CFPOA") received Royal Assent on 10 December 1998 and came into force on 14 February 1999. Subsequent amendments were made to the CFPOA in January 2002 as a consequence of amendments to Canada's *Criminal Code*. These amendments are of a technical nature.

The CFPOA implements Canada's obligations set out in the Convention. The main offence of bribery of foreign public officials represents an effort to marry the Convention wording and requirements with wording that was found already in the corruption provisions of the *Criminal Code*. The CFPOA calls for an annual report by the Minister of Foreign Affairs, the Minister of International Trade, the Minister of Justice and the Attorney General of Canada on the implementation of the Convention and on the enforcement of the CFPOA.

The offences under the CFPOA are included in the list of offences under section 183 of the *Criminal Code*. As a result, it is possible for police, through the lawful use of a wiretap and other electronic surveillance, to gather evidence in the bribery of foreign public officials cases, and in the possession and laundering of proceeds from these cases.

Other corruption provisions are found in the *Criminal Code*, including sections 119 to 121 (bribery of Canadian officials and frauds on the government), 123 to 125 (municipal corruption and selling or influencing appointments to office), and 426 (secret commissions by an agent).

Canada does not require enabling legislation to make requests for mutual legal assistance. Requests for mutual legal assistance are made via police channels, through the submission of non-treaty requests and by court-issued letters rogatory.

In the absence of a treaty arrangement, extradition may be engaged on the basis of a general designation of the requesting state or entity as an extradition partner under the *Extradition Act* thereby allowing the extradition partner full recourse to the provision of the *Extradition Act* notwithstanding the absence of an extradition agreement. Canada has designated a number of the members of the Commonwealth, Costa Rica, Japan, as well as the International Criminal Court, and the International Tribunals concerned with the prosecution of persons responsible for violations of international law in Rwanda and in the former Yugoslavia.

Where there is no treaty relationship Canada can provide assistance through police channels and can respond to court-issued letters of request. The evidence gathering orders provided for in Canada's Mutual Legal Assistance in Criminal Matters Act (the MLACMA) are only available to mutual legal assistance treaty partners or designated entities. However, where there is no treaty between Canada and a foreign jurisdiction, Canada may enter into an administrative agreement with the foreign jurisdiction which would permit Canada to obtain evidence gathering orders as provided for in the MLACMA.

Canada's bilateral treaty relationships with APEC jurisdictions are shown in the following table.

COUNTRY	EXTRADITION	MLA	POC
Australia	Designated as extradition partner in the Extradition Act	Yes – March 14, 1990	
Brunei Darussalam			
Chile	Bilateral – August 22, 1898		
People's Republic of China		Yes – July 1, 1995	
Hong Kong, China	Designated as extradition partner in the Extradition Act	Yes – March 1, 2002	
Indonesia			
Japan	Designated as extradition partner in the Extradition Act		
Republic of Korea	Bilateral – January 29, 1995	Yes – February 1, 1995	
Malaysia			
Mexico	Bilateral – October 21, 1990		
New Zealand	Designated as extradition partner in the Extradition Act		
Papua New Guinea	Designated as extradition partner in the Extradition Act		

Peru	Bilateral – May 20, 1907	Yes – January 25, 2000	
Philippines	Bilateral – November 12, 1990		
Russia		Yes – December 18, 2000	
Singapore			
Chinese Taipei			
Thailand	Bilateral – November 24, 1911	Yes – October 3, 1994	
United States	Bilateral – March 22, 1976	Yes – January 24, 1990	Yes – Agreement regarding the sharing of forfeited assets and equivalent funds
Viet Nam			

Canada has 'inherited' extradition treaties with Australia, New Zealand, Papua New Guinea, Chile, Thailand and Peru. In relation to Australia, New Zealand and Papua New Guinea Canada's historical position as a member of the Commonwealth gave rise to obligations to other Commonwealth countries to return fugitives from justice to those countries. Surrender was not made under treaty obligations but rather as a matter of courtesy to countries which recognized the Queen as Head of State. Canada's Extradition Act now designates Australia, New Zealand and Papua New Guinea as extradition partners and Canada's obligations to them are thus continued.

Canada's extradition treaty with Chile (1898), Peru (1907) and Thailand (1911) were entered into by the United Kingdom at a time when Canada as a member of the British Empire was subject to such an Imperial treaty.

Canada is not a party to the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty and does not have any other treaty relationships with APEC countries in relation to extradition, MLA and proceeds of crime.

Canada is a member of the Commonwealth but has not enacted legislation to give effect to either the London Scheme for Extradition within the Commonwealth or the Harare Scheme.

LEGAL PRECONDITIONS FOR EXTRADITION AND MLA (INCLUDING IN RELATION TO PROCEEDS OF CORRUPTION)

Requests for cooperation are drafted by the competent authority which, depending on the circumstance can be either the prosecution service responsible for the prosecution, or the police force responsible for the investigation. The drafters have access to precedents through the central authority which also ensures that the request is translated into the language of the requested state.

In corruption cases, outgoing requests are normally prepared by the investigative agency and then reviewed by the corresponding prosecution office. All requests must be vetted and approved by the central authority (the International Assistance Group in the Federal Department of Justice). Follow ups to the requested state are made by the central authority.

The procedures for executing incoming requests for extradition and MLA in corruption cases are similar. These are handled by the International Assistance Group (IAG) within the Department of Justice.

All requests are received by the IAG which will assess whether more information is required and if the request should be acted upon. Depending on the nature of the request, it will be forwarded to the police or the relevant prosecutor's office for action. The request is executed by the police or the prosecutor's office where the evidence or person is located after receiving authorization from the central authority.

The central authority on behalf of the Minister of Justice is empowered to refuse a request. This is done on the basis set out in the treaty which usually includes (in the case of MLA) a provision that provides for refusal of a request on the basis that it would not be in the public interest.

The executing authority is required to report back to the central authority with respect to the progress of the request.

All requests are kept confidential until such time as there is a requirement for a court order.

Direct Communication between Law Enforcement Agencies are appropriate in the ML A context and encouraged in cases where there will be no requirement for the obtaining of a court order to obtain the evidence. However, all extradition requests (both incoming and outgoing) must be channelled through the central authority. Records are kept of all requests.

Urgent MLA requests are assessed on a case by case basis (see below). The Canadian *Extradition Act*, specifically provides for provisional arrest in cases of urgency. Canada has advised that it has not, in general, encountered problems with urgent requests made by it or to it.

Liaison with other countries occurs from central authority to central authority and through RCMP liaison officers who are located around the world in Canadian embassies.

Canada can provide all of the following types of MLA to treaty and non-treaty partners:

- service of documents;
- obtaining unsworn and sworn witness statements;
- taking evidence through video-link;
- transfer of prisoners to assist in an investigation or proceeding;
- obtaining of banking records;

Canada cannot provide wiretapping.

STATISTICS FOR EXTRADITION AND MUTUAL ASSISTANCE CASES 2002 TO 2007

The number of extradition and MLA requests that Canada has made and received in the last 5 years are set out in the tables below.

Extradition

	2002/03	2003/04	2004/05	2005/06	2006/07
Incoming	187	200	178	183	124
Outgoing	37	41	36	31	44

Mutual Legal Assistance

	2002/03	2003/04	2004/05	2005/06	2006/07
Incoming	321	279	332	351	312
Outgoing	70	79	80	86	109

Canada has not reported any particular problems in seeking or providing MLA or extradition, either generally or in corruption cases.

PREREQUISITES FOR COOPERATION

Dual criminality is not required for MLA except when dealing with the enforcement of forfeiture orders. Dual criminality is always required for extradition and is a conduct based test. There are no instances in which this requirement can be waived. Offence matching is not required.

Illicit enrichment is not an offence under the criminal law of Canada. This means that while assistance could be provided in relation to a MLA request, it would not be possible to extradite without proof of some other offence. No examples are available.

Bribery of foreign public officials is an offence under the criminal law of Canada and therefore there are no problems with requests for either MLA or extradition based on such offences.

As Canada imposes criminal liability of legal persons it is possible to seek MLA in relation to offences committed by legal persons.

There are different evidentiary tests applied in relation to extradition and MLA requests. In the case of a person sought for prosecution, the requesting state must satisfy the court, on a *prima facie* standard, that the alleged acts committed would constitute criminal conduct in Canada.

Canada's evidentiary requirements in support of extradition requests have created problems for requesting states with different legal systems. To address these difficulties, in 1999, Canada enacted a new *Extradition Act* which allows, notwithstanding Canadian evidentiary rules which generally exclude hearsay, for the admissibility of a summary of evidence prepared by a foreign judge or prosecutor. The judge or prosecutor must certify that the evidence is available for trial and was obtained in accordance with the country's law or is sufficient to justify prosecution. While the evidentiary provisions of the 1999 *Extradition Act* have made things considerably easier for requesting states,

problems concerning presentation of admissible evidence required to satisfy Canadian rules of evidence persist.

In relation to MLA for the most common types of assistance sought (production orders and search and seizure), a Canadian court must be satisfied before it will issue an order that there are grounds to believe that an offence has been committed and that evidence of the commission of the offence will be found in Canada. The request for assistance must set out sufficient information for a Canadian judge to be satisfied on these two points.

Canada has reported that some requesting states have had difficulty in understanding and meeting the grounds required under the MLACMA.

Canada has reported that it has on occasions encountered evidentiary problems when making requests for extradition or MLA. For extradition, Canada requires that the requesting state provides certification from a judge or prosecutor that the evidence was obtained in accordance with the law in the requesting state and is sufficient to justify a prosecution in the requesting state. For MLA the Canadian court must be satisfied that an offence has occurred in the requesting state and that there is grounds to believe that evidence of the commission of that offence which will be found in Canada.

GROUNDS FOR DENYING COOPERATION

Section 46 of the Extradition Act sets out the mandatory grounds of refusal of an extradition request unless these are modified by a bilateral extradition treaty. It provides that the Minister of Justice shall refuse to order surrender of a person sought for extradition if the Minister is satisfied that the conduct in respect of which extradition is sought is a political offence or an offence of a political character. Essentially, all serious violent conduct is excluded from the definition of political offence or offence of a political character. Furthermore, conduct which constitutes an offence mentioned in a multilateral treaty for which Canada, as a party, is obliged to extradite the person or submit the matter to its appropriate authority for prosecution does not constitute a political offence or offence of a political character.

In relation to MLA – as a general rule, Canada's mutual legal assistance treaties do not recognize the political offence doctrine as an express ground of refusal to execute a request for assistance. Nonetheless, certain treaties may create exceptions in specific cases.

Canada has reported that it has not encountered problems with the political offence exception in relation to incoming or outgoing extradition or MLA requests.

In relation to ongoing investigations, such as where a person in Canada is being investigated at the same time as investigations are taking place in a requesting country, Canada will determine requests on a case by case basis. It will not refuse requests simply because it has an ongoing investigation involving related issues. Even where Canada has already tried and acquitted a person this will not preclude Canada providing MLA to a requesting state.

Where conduct may constitute an offence in both the requesting state and Canada the fact that the offence may be prosecuted in Canada is not a basis for refusing MLA to the requesting state.

Canada does not impose the death penalty. In relation to extradition where the accused may face the death penalty the Supreme Court of Canada held in *United States v. Burns* (2001), 151 C.C.C. (3d) 97 (S.C.C.), that the Minister of Justice is constitutionally required to seek assurances that the death penalty will not be imposed by the requesting country in all but "exceptional cases". The Supreme Court did not define "exceptional case".

In addition, section 44(1) of the *Extradition Act* obligates the Minister of Justice to refuse to make a surrender order if the Minister is satisfied that the surrender of the person sought would be unjust or oppressive having regard to all the relevant circumstances.

For MLA, Canada's MLA treaties do not require Canada to refuse MLA on the basis of penalty but assistance may be refused if it were determined that it would not be in the public interest to provide the assistance. Each matter is assessed on a case by case basis.

Where Canada intended to invoke a ground for denying extradition or MLA (e.g. on the basis of political offence, essential interest, double jeopardy, nature and severity of punishment) Canada is not obliged to consult the requesting state.

RECOVERY OF PROCEEDS OF CORRUPTION IN CRIMINAL PROCEEDINGS

Canada is able to return proceeds of crime to a requesting state in accordance with Section 9 of the Mutual Assistance in Criminal Matters Act 1985 . Over the last five years, Canada has received 31 MLA requests pertaining to proceeds of crime. Over the same period, Canada has made 40 requests pertaining to proceeds of crime.

URGENT REQUESTS FOR COOPERATION

Urgent MLA requests are assessed on a case by case basis. The Canadian *Extradition Act*, specifically provides for provisional arrest in cases of urgency. Urgency is established based on public interest including flight risk. The central authority receives all provisional arrest requests and counsel for the Attorney General of Canada is responsible for executing the request.

The provisional arrest request must provide the name, citizenship, and location of the person sought, as well as the offence or sentence for which the extradition is sought, along with a brief description of the underlying facts of the offence. The requesting state must also undertake to make a formal request within the time limit required by the treaty (usually 60 days), provide sufficient information to identify the person sought and explain the grounds for the urgency.

Requesting states are advised of the requirements as requests are made.

CENTRAL AUTHORITY

The International Assistance Group in the Federal Department of Justice is the Central Authority for Canada. It handles all incoming and outgoing extradition and MLA requests, including those for corruption cases under all legislation and treaties. The Central Authority does not maintain a separate website. However, the text of relevant legislation is available through the Department of Justice website.

The Central Authority has approximately 30 staff located in Ottawa. The staff profile includes 18 lawyers, 6 paralegals and support staff. The lawyers, for the most part, have a background in criminal litigation. In addition there are two lawyers posted abroad (one in Brussels and one in Paris who are a resource to European partners in the preparation of requests to Canada) Members of the central authority travel from time to time to other states to provide assistance in the preparation of requests.

Officials in the central authority provide training to law enforcement agencies, and prosecutors on an ad hoc, as needed basis.

DIRECT COMMUNICATION BETWEEN LAW ENFORCEMENT AGENCIES

Canada encourages police to police requests in the MLA context where there will be no requirement for the obtaining of a court order to obtain the evidence.

All extradition requests (both incoming and outgoing) must be channelled through the central authority. Records are kept of all requests.

RECOMMENDATIONS FOR A WAY FORWARD

Canada has one of the more comprehensive legislative frameworks relating to extradition and MLA and for dealing with corruption issues. Canada has bilateral treaty relationships with a number of APEC economies but there

are gaps. Canada has a bilateral treaty with the United States covering proceeds of crime but does not have a similar arrangement with any other APEC economy.

CONCLUSION

Overall Canada has one of the more complete anti corruption frameworks within the Initiative jurisdictions and the additional APEC economies. This is supported by comprehensive MLA and extradition legislative arrangements. Of course, there is always room to improve arrangements, particularly through bilateral arrangements directed at anti corruption issues.

RELEVANT LAWS AND DOCUMENTATION

The relevant legislation (see below) is supported by a body of legislation, parliamentary rules and administrative provisions to prohibit corruption.

The Extradition Act
Criminal Code
Mutual Legal Assistance in Criminal Matters Act
Accountability Act 2006,
Income Tax Act
Corruption of Foreign Public Officials Act 1998.

CHINESE TAIPEI

THE LEGAL FRAMEWORK FOR EXTRADITION, MLA AND RECOVERY OF PROCEEDS OF CORRUPTION

The Law of Extradition 1954 (amended in 1980), the Law in Supporting Foreign Courts in Consigned Cases and the Money Laundering Control Act 1996 (amended in 2003, 2006 and 2007) provide the legal framework for extradition, MLA and the recovery of proceeds of crime between Chinese Taipei and other APEC members. Under this framework Chinese Taipei will provide assistance to requesting countries in the absence of a treaty relationship. It also responds to letters rogatory.

Chinese Taipei is not a party to the UN Convention against Corruption, the UN Convention against Transnational Organized Crime, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty or other multilateral treaties or agreements. It does not have any agreements with other APEC countries relating to extradition, MLA or proceeds of crime. However it does have 3 bilateral MOUs: the Agreement on Mutual Legal Assistance in Criminal Matters between the Taipei Economic and Cultural Representative Office in the United States and the American Institute in Chinese Taipei; a Memorandum of Understanding between the Money Laundering Prevention Center (MLPC) and the Financial Intelligence Unit (KoFIU) of the Republic of Korea concerning Cooperation in the Exchange of Financial Intelligence related to Money Laundering; and a Memorandum of Understanding with the Philippines concerning Cooperation in the Exchange of Financial Intelligence related to Money Laundering and Financing of Criminal Activities related to Terrorism.

LEGAL PRECONDITIONS FOR EXTRADITION AND MLA (INCLUDING IN RELATION TO PROCEEDS OF CORRUPTION)

The Extradition Law provides for extradition based on the principle of dual criminality and the requirement that the offence must be punishable by a term of imprisonment of at least 12 months in Chinese Taipei. It is available in relation to offences committed both within and outside the territory of the requesting state. Extradition may be refused on the basis that the offence is of a political, military or religious nature and must be refused if the person is a citizen of Chinese Taipei or is covered by the circumstances set out in Article 5 dealing with decisions not to prosecute, pardons, acquittals and finding of not guilty in Chinese Taipei.

Where extradition of a national is sought it is mandatory for the person to be prosecuted in Chinese Taipei. However, no such requests have been received in recent years.

In relation to issues such as the application of the grounds of refusal or the extent to which dual criminality would be an issue in corruption cases, Chinese Taipei has advised that it is unclear what the position would be because of the absence of any precedents. It appears that these issues would be dealt with on a case by case basis in the courts as the legislation does not provide a detailed framework to address these issues.

There is a speciality limitation in the MLA agreement between the USA and Chinese Taipei but this is not included in the Extradition Law or in the Law in Supporting Foreign Courts in Consigned Cases. Nor is there any public interest or essential national interest basis for refusing an extradition or MLA request.

In general terms the law in Chinese Taipei does not contain the 'usual' grounds for refusal of MLA requests.

Extradition requests from Chinese Taipei are prepared by the relevant prosecutor, cleared through the Ministry of Justice and transmitted via diplomatic channels to the requested state. Requests to Chinese Taipei come via the Ministry of Foreign Affairs as required by Article 9 of the Law of Extradition.

When an extradition request is received it is referred to the Ministry of Justice for review and a trial will be conducted in accordance with Articles 15-23 of the Law of Extradition to decide whether the person should be extradited. Extradition requests can be refused under Articles 21 and 22 of the Law of Extradition. The court will determine whether to refuse the case in accordance with Articles 9-11 of the law.

In relation to MLA, if there is no bilateral agreement, the Ministry of Foreign Affairs will review and approve a request according to Article 3 of the Law in Supporting Foreign Courts On Consigned Cases. The case is then referred to the Ministry of Justice which assigns the case to the Prosecutors' Office that has jurisdiction over the case. The Ministry of Justice provides assistance to these individuals or bodies.

Decisions to accede to MLA requests under bilateral agreements are considered by the Ministry of Justice. If there is no bilateral agreement, the Ministry of Foreign Affairs will consider the case initially and then refer it to relevant agencies that may refuse the request. However, no requests outside the bilateral agreements have been received. Decisions to refuse are made on the basis included in the legislation, usually on the basis that there is no reciprocity.

MLA requests are monitored by the Ministry of Justice. Extradition proceedings are monitored in accordance with the provisions of Articles 16-21of the law.

Chinese Taipei will afford confidentiality to the request where this is sought by the requesting state.

STATISTICS FOR EXTRADITION AND MUTUAL ASSISTANCE CASES 2002 TO 2007

Chinese Taipei has advised that is has not made or received extradition requests in recent years.

Under the MOU with the USA, executed in 2002, Chinese Taipei has received 30 requests of which 25 had been executed at the time of their response to the questionnaire. None of these related to corruption cases. During the same period Chinese Taipei had made 28 requests to the USA of which 22 had been executed. 5 of these requests related to corruption cases.

In relation to MLA from other countries, Chinese Taipei has received 24 requests during the period 2005-2007. It did not report making any requests during this period.

RECOVERY OF PROCEEDS OF CORRUPTION IN CRIMINAL PROCEEDINGS

Article 11 of the Law Against Accepting Bribes makes it an offense to bribe a "foreign public servant with regard to transnational trade or other commercial activities". Article 10 of the Law provides that any bribes are to be returned to the 'victim'. This raises the issues of determining who the victim might be.

The law in Chinese Taipei does not provide for criminal actions to be taken against legal entities in corruption cases.

CENTRAL AUTHORITY

The Central Authority for both extradition and MLA is the Ministry of Justice. Its website is *http://www.moj.gov.tw/mp001.html* However, this site does not include sample documents or precedents for making requests. The English language site is *http://www.moj.gov.tw/mp095.html*. The work of the Central Authority is undertaken by the International Office within the Department of Prosecuto-

rial Affairs in the Ministry of Justice. It has three staff, each of whom is a prosecutor. The staff of the Central Authority speak English and all have prosecutorial or investigative experience as they are drawn from regional prosecutors' offices. The Ministry conducts training on MLA for prosecutors.

ADDITIONAL CONTACT

In practice requests are sometimes sent directly to law enforcement agencies and while this is not the preferred approach it is acceptable to the Ministry of Justice, particularly given the limited extent to which Chinese Taipei has formal diplomatic relations with other countries.

RECOMMENDATIONS FOR A WAY FORWARD

The deficiencies in the scope of the legislative framework, outlined above, need to be addressed. The absence of bilateral relationships and the fact that Chinese Taipei is not a signatory to the relevant international arrangements make it difficult for requests to be made to Chinese Taipei.

CONCLUSION

There are obvious limitations on the extent to which Chinese Taipei has developed bilateral or multilateral arrangements to deal with extradition, MLA and proceeds of crime. Its lack of diplomatic relations with many countries contributes to this situation. However, the legal framework is also deficient and would make it more difficult to seek assistance from Chinese Taipei should APEC member economies wish to do so.

The absence of established bilateral treaty relationships with APEC jurisdictions and the fact that Chinese Taipei is not a signatory to the relevant United Nations conventions mean that there is no underpinning framework for requests for extradition and MLA.

RELEVANT LAWS AND DOCUMENTATION

Law of Extradition 1954
Law in Supporting Foreign Courts in Consigned Cases and Money Laundering Control Act 1996

PERU

THE LEGAL FRAMEWORK FOR EXTRADITION, MLA AND RECOVERY OF PROCEEDS OF CORRUPTION

Bilateral and Multilateral Treaty Relationships

Requests for extradition, MLA and recovery of the proceeds of crime are dealt with in accordance with the procedures set out in the Criminal Procedure Code and are based on reciprocity. The Code allows Peru to make requests for and receive requests relating to extradition, MLA and the recovery of POC to jurisdictions with which it does not have treaty arrangements.

In relation to the key multilateral treaties Article 55 of Peru's Constitution states that "treaties concluded by the government and now in effect are part of national law." The UN Convention against Corruption was signed on 5 October 2004 and ratified on19 October 2004. It came into full effect on 14 December 2005.

However, some specific legislation was necessary for the full application and implementation of the Convention.

For example

- Implementation of the new Procedure Penal Code was adopted by Legislative Decree No. 957 of 29 July 2004. The Code is being introduced gradually.
- The Criminal Procedural Code includes measures to be taken in matters of international cooperation (Book VII). Before this Code was approved, there was no organization of norms on international matters.
- Participated in international networks, such as the GROOVE System in the Organization of American States, for the exchange of information regarding requests on mutual legal assistance and extradition.

Peru also has established:

- A Financial Intelligence Unit;
- The Provincial and Superior Prosecutors' Offices against Organized Crime;
- The International Cooperation and Extradition Unit as the organizing entity within the National Prosecutor's Office; and
- A Peruvian Work Group dedicated to the study and implementation of Palermo's Conventions and their Protocols in our domestic law.

It is also important to note that Peru is participating in the development of the Pilot Program of the implementation of the Convention against Corruption, sponsored by the United Nations Office on Drugs and Crime. The progress report can be found on the website http://www.pcm.gob.pe/Prensa/ActividadesPCM/2009/Febrero/NP-04-02-09.htm

Peru is not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, however, has recently applied for membership.

In addition Peru has signed and ratified

- The UN Convention against Transnational Organized Crime was signed on 14 December 2000 and ratified on 23 January 2002.
- The Interamerican Convention against Corruption (ratified on 4 April 1997); and

- The Organization of American States Convention on Mutual Legal Assistance on Criminal Maters - Rogatory Letters (ratified on 4 March 1995).
- Decision 668 approving the Andean Plan to Fight Corruption of the Andean Community of Nations

Peru has entered into bilateral extradition treaty relationships with the following APEC members:

1. Chile;
2. Mexico;
3. People's Republic of China;
4. Republic of Korea; and
5. United States of America

It has bilateral MLA treaty relationships with Canada and Mexico. It has not signed any bilateral treaties with other APEC members to establish proceeds of crime relationships. Nor has it entered into any arrangements of less than treaty status.

Peru does not have any inherited extradition treaties with other APEC members.

THE LEGAL FRAMEWORK FOR EXTRADITION AND MLA

Peru has enacted domestic legislation to allow it to make requests for extradition, MLA and/or recovery of POC to jurisdictions with which it does not have treaty arrangements.

In such cases Peru applies the Principle of Reciprocity, which is contained in article 47 of the Constitution. Based on this principle, Peru may make requests for extradition, MLA and recovery of POC to other states, providing that such requests are based on similar legal grounds of the legislation of the requested state, regardless of the nomen juris.

Where Peru seeks to make a request the Criminal Procedural Code provides that the Peruvian judge responsible for the matter will determine the nature of the offence and the relevant offence in the requested state. (See Book VII Sections II and III (Articles 525, 526 and 527) of the Criminal Procedure Code).

Where Peru is the requested state the request is determined in accordance with Book VII Sections II and III (Articles 516-524 and Articles 528 and 529) of the Criminal Procedure Code.

These procedures apply to extradition, MLA and POC on the basis of reciprocity but are also supplemented by the relevant convention or treaty provisions where these apply. Each case is dealt with on a case by case basis.

Peru can provide the following types of MLA to treaty and non-treaty partners:

- service of documents;
- obtaining unsworn and sworn witness statements;
- taking evidence through video-link;
- transfer of prisoners to assist in an investigation or proceeding;
- obtaining of banking records; search and seizure;
- surreptitious surveillance; and
- wiretapping.

Peru is not a party to any Commonwealth, ASEAN, OECD or other arrangements relating to extradition, MLA or POC.

Peru also provides MLA under Letters Rogatory. Again this is based on the principle of reciprocity and is governed by Book VII of the Code of Criminal Procedure.

This assistance can extend to the following in accordance with domestic legislation on criminal procedure:

- Notification of resolutions and sentences, as well as summoning of witnesses and expert witnesses to provide testimony;
- Taking of testimony or statements from persons;
- Service and transmittal of judicial documents or copies thereof;
- Transmittal of documents and reports;
- Conducting enquiries and inspections;
- Examination of objects and places;
- Blocking of [bank] accounts, immobilizations, sei-

zure and sequestration of criminal assets, freezing of assets, home searches, raids, communications control, identification or location of the proceeds of property acquired through the offence or instrumentalities of a crime and other measures to limit rights;

- Transmittal of information and evidence;
- Temporary transfer of persons held in custody who are facing criminal proceedings or of convicted persons, if they are required to attend court as a witness, as well as of persons at large;
- However, requests for extradition, requests for the transfer of convicted persons and requests for the controlled delivery of criminal property must follow special procedures and cannot be requested through letters rogatory or mutual assistance.

LEGAL PRECONDITIONS FOR EXTRADITION AND MLA

Requests from Peru follow the same procedures for both extradition and MLA (including those relating to POC). Corruption related cases are also dealt with in the same way.

Requests are prepared in the language of the requested state.

In the case of extradition, once the public prosecutor responsible for the preparatory investigation has been notified that the person sought for extradition has been located or arrested the extradition request will be prepared. This must specify that the person has been located or arrested and include material to prove probable cause for the offence for which extradition is being sought.

In the case of MLA requests or for matters specifically relating to corruption a similar process is followed.

This request is then considered by the criminal division of the Supreme Court which can either accept or reject the request. If it is accepted by the court it is legalized and the Court's resolution is forwarded to the Ministry of Justice. Issues concerning the legality and form of the request are determined by the court. Supreme Court Decree 016-2006-JUS provides a model form for an extradition request.

The Ministry of Justice, in consultation with the Ministry of Foreign Affairs prepares the formal request. The request is monitored by liaison officers from the Ministry of Foreign Affairs, by means of direct communication with the Peruvian embassy in the requested country, or to the embassy of the requested party in Peru, by means of Diplomatic Notes.

Incoming requests for extradition or MLA, together with the supporting documentation, are forwarded through the diplomatic channel to the Public Prosecutor's Office to be later submitted to the public prosecutor responsible for the preparatory investigation. In turn, if the public prosecutor responsible for the preparatory investigation finds the request appropriate, he or she will progress the request. In the case of extradition, the public prosecutor issues an order for the extradition of the requested person, provided that the person has been detained in response to a request for provisional arrest. The extradition is subject to the completion of the necessary processes.

The extradition request is considered by the Criminal Division of the Supreme Court. The person whose extradition is sought has the right to legal representation or to be heard personally before the Supreme Court. If it is satisfied that the request is in order it will issue an appropriate order. However, the final decision as to whether to extradite is made by the Council of Ministers following receipt of the report of the Official Commission on Extradition and Transfer of Convicted Persons. Where the Supreme Court rejects the extradition application this decision is binding on the Executive Government. The requesting State will be notified of a favourable decision of the Council of Ministers by the National Public Prosecutor's Office.

A request for MLA must be made in writing and must contain the following details:

- name of the foreign investigative authority in charge of the investigations or in charge of trying the accused;

- a description of the facts to which the request refers; and
- a precise description of the assistance requested.

In Peru requests for MLA or letters rogatory can only be made if the crimes being investigated or prosecuted are punishable with a maximum prison sentence of not less than one year and are not exclusively subject to military law.

MLA requests are submitted by the Public Prosecutor's Office to the public prosecutor who will be responsible for the preparatory investigation. The public prosecutor has a period of two days within which to decide on the application for assistance. A decision to refuse the request may be appealed to a superior court.

The implementation of assistance is the responsibility of the public prosecutor who is responsible for the preparatory investigation and/or the criminal judge, ordered by the Provincial Prosecutor and summoned by the Embassy of the requesting country to be represented by a lawyer. The intervention of lawyers, who defend the interests of the parties to the proceedings that are the basis of the letter rogatory, is also admissible.

Once the request has been satisfied, the public prosecutor will submit the records to the Public Prosecutor's Office to be delivered to the requesting authority through the Ministry of Foreign Affairs.

The progress of extradition and MLA request are monitored by the Central Authority or in response to a request from the requesting state. The policy of the Central Authority in Peru is to communicate frequently with other central authorities. It seeks to maintain consultation and coordination and to follow-up on particular cases utilising electronic mail, telephone, fax or restricted networks such as GROOVE.

Peru has advised that incoming requests are kept confidential

PREREQUISITES FOR COOPERATION

Peru has no prohibition against the extradition of its citizens.

Dual Criminality is required for extradition. It is assessed by analysing the conduct involved, irrespective of how that conduct may be described in the national criminal law.

In relation to MLA, the test of dual criminality is applied where the type of assistance being sought involves the acquisition of property (freezing of accounts or seizure of assets) or accessing personal communications. Other forms of assistance can be provided even where dual criminality is not established. Peru does not impose criminal liability on legal persons but Peru has advised that it may be possible to seek some penal and civil sanctions against legal persons involved in corruption such as the use of 'civil repair'.

Illicit Enrichment is an offence in Peru (Criminal Procedural Code, article 401). Accordingly there would be no difficulties in seeking MLA in relation to such offences in the requesting state.

Peru has recently approved through Law No. 29316 the crime of transnational bribery, which was a requirement to implement the UN Convention against Corruption and the Free Trade Agreement with the United States. To date there is no further information on the application of the rule.

In extradition cases Peru requires that the request demonstrate probable cause or reasonable grounds and advises it has not encountered any problems in the application of this evidentiary test. For MLA requests all that is required is a description of the criminal act involved. In relation to requests made by Peru it has advised that it has not encountered difficulties with MLA requests but has sometimes found it difficult to meet higher threshold requirements for extradition. The Commission on Extradition (which advises the Executive Government) has on some occasions decided not to pursue a request for assistance on the basis that the request authorised by the court has insufficient grounds to proceed.

Under its treaty relationships Peru requires (and provides) a specialty undertaking (in the case of extradition) and a use limitation undertaking (in the case of MLA) in incoming requests. There is no requirement separately contained in domestic legislation.

Peru has experienced problems with time requirements for both extradition and MLA requests. It has advised that the Judicial Branch has difficulties meeting deadlines due to challenges faced in the preparation of the file, excessive time frames in the Executive Branch, and translation times.

In extraditions this has meant that, in some cases, the extradition requests are dealt with beyond the expected deadlines established in international treaties. Some older treaties establish particularly short deadlines for such proceedings or restrictive lists of crimes pertinent for extradition.

In the case of MLA, Peru has advised that delays also occur.

GROUNDS FOR DENYING COOPERATION

The grounds for refusing an extradition or MLA request are set out in treaties or in domestic legislation in Peru.

Requests for assistance may be refused if

- the person who is the subject of the request has already been acquitted, convicted, pardoned or provided with an amnesty in relation to the offence which is the basis for the request;
- it is deemed that the criminal proceedings where initiated for the purpose of prosecuting or punishing a person on the grounds of gender, race, religion or nationality; or
- when public order, sovereignty, homeland security or other essential Peruvian interests are undermined.

Peru has not reported any difficulties with the application of grounds of refusal in relation to either incoming or outgoing requests.

Extradition or MLA will be refused where the offence is regarded as a 'political offence'. Peru defines political offences to 'be the actions conducted by an individual or individuals to express their disagreement with the prevailing regime, without constituting acts of violence, terrorism or attacks against humanity'. In other words requests will not be refused on this ground where the conduct involves acts of violence, terrorism or attacks against humanity.

Peru has advised that it has not encountered problems with this ground of refusal.

In relation to the bribery of a Peruvian official by a person in another jurisdiction, Peru has advised that any request for MLA to assist the investigation in the requesting country would be dealt with by the judicial authorities on the basis that proceedings had not been commenced in Peru against the person located in the requesting state. Peru would prefer to deal with that person in Peru. Where the corrupt conduct took place in Peru it would refuse an extradition request from the requesting state on the basis that the person should be prosecuted in Peru.

Under the Peruvian Constitution, Peru will refuse to extradite a person if Peru believes that the person may be tortured or put under cruel or humiliating punishment in the requesting State. It will also refuse extradition where the death penalty may be imposed in relation to the offence for which extradition is sought. There is an exception to this rule when the requesting State grants formal assurances that the death penalty or torture or cruel and inhuman punishment will not be applicable.

Similar principles apply if MLA is requested for a criminal case that could impose capital punishment, torture or cruel or inhuman punishment, unless the Central Authority of the requesting State provides a written assurance that such a punishment will not be applied in that particular case.

Where a request for extradition or MLA is refused there is no requirement in Peruvian law for prior consultation with the requesting state.

URGENT REQUESTS FOR COOPERATION

Peru has no specific agreements with respect to the reception or execution of urgent requests for mutual legal assistance or provisional arrests. However, Article 523 C) of Peru's criminal procedural legislation provides the mechanism for carrying out the provisional arrest of a person who is located within Peru's national territory and whose provisional arrest is urgently requested through the INTERPOL channel.

In relation to MLA requests there are inter institutional agreements between the Peruvian Public Prosecutors Office and its counterparts in Chile, Colombia and Brazil, which allow steps to be taken towards resolving certain urgent requests for judicial assistance (of lower importance).

The urgency of the requests must be clearly stated in the request. In the case of a request for provisional arrests, it is necessary to explain that there is a risk that the individual might escape. In the case of judicial assistance (for example, to allow for the freezing of funds to prevent their imminent movement) urgent requests will be considered. Reasonable evidence and good faith serve to support the request.

Urgent requests may be submitted in advance via e-mail or fax, provided that the requests are later presented through the regular channel, specifying the reason for the urgency and, where necessary, establishing a reasonable basis for complying with the request. Peru has noted that urgent requests are much more likely to be facilitated if there has been prior consultation and coordination with the relevant authorities of the requesting State.

RECOVERY OF PROCEEDS OF CORRUPTION IN CRIMINAL PROCEEDINGS

Peru can return POC where there is an authorization from the judge who processed the MLA request. There must be a prior sentence of the competent authority in the requesting country. In other words confiscation and transfer of assets is conviction based.

Article 511, paragraph (h) of the Code of Criminal Procedure authorizes international judicial cooperation in the area of asset recovery, including the "blocking of accounts," the "seizure or confiscation of the proceeds of crime," and the "freezing of assets." Peru has also streamlined its asset recovery process by the recently adopted Legislative Decree 992, which came into effect in January 2008 and which authorizes the extinction of rights and/or titles to illicitly obtained property, without payment or compensation of any kind.

Peru also has a well-developed history of engaging in international asset recovery activities.

In particular, it has established a fund for the administration of assets, the Special Fund for the Administration of Funds Obtained Illegally (FEDADOI), which works closely with the Commission for the Administration of Seized and Confiscated Assets (COMABID) within the Ministry of Justice. Peru has been especially successful in recovering funds from the United States of America, where many proceeds of corruption from Peru have been historically transferred, as well as repatriating stolen assets from the Cayman Islands and Switzerland, two other historical destinations for such funds.

Where assets are transferred it is a matter for the requesting state to determine the disposition of the assets. Transfer will only occur after there is a final judicial determination that 'establishes the illegality of the origin of the funds'.

STATISTICS FOR EXTRADITION AND MUTUAL ASSISTANCE CASES 2002 TO 2007

Since the creation of the International and Extradition Unit of the Office of the National Public Prosecutor (in February 2006), Peru has not received any requests for passive MLA. It has however received one request from Mexico (2007) to freeze a bank account.

In 2008 it has received a request to freeze assets from Austria and 3 requests to repatriate assets, two from the USA and one from Mexico.

Over the last 5 years Peru has been involved in 521 extradition and MLA requests. The other jurisdictions that have been involved are Germany, Argentina, Bolivia, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Chile, Ecuador, United Arab Emirates, Spain, Mexico, The United States, France, Israel, Italy, Great Britain, Ireland, Japan, Panama, Portugal, The Netherlands, Serbia and Montenegro, Uruguay, and Venezuela.

Of these 521 requests, 34 have been executed, and 6 relate to corruption offences. The timeframes involved in the cases range from 1 to 3 years.

CENTRAL AUTHORITY

Article 512 of the Code of Criminal Procedure designates the Public Prosecutors Office as the Central Authority for every act of international judicial cooperation. The Central Authority maintains a website *(www.mpfn.gob.pe)*. This website is in Spanish. Extradition requests can be made using the form which is contained in Supreme Decree Nº 016-2006-JUS, Rules on Judicial and Governmental Behavior.

The Central Authority does not have its own budget, and relies on the Public Prosecutors Office for funding. All of the staff of the central authority are lawyers. Training is provided continuously both locally and through international contacts. For example, staff regularly attend working group meetings of the Organisation of American States for mutual legal assistance and extradition.

Currently, the Central Authority relies on trained personnel who possess proficiency certificates in the English and French languages. Nevertheless, the gradual qualification of all the staff in the English language continues to be one of the objectives of the Central Authority. The Central Authority does not intervene in corruption and organized crime cases. These are the responsibility of the public prosecutors and judges specialized in these matters. However, the Central Authority does follow-up on the status of all requests for judicial assistance and extradition related to these crimes.

The Central Authority has the capacity to carry out coordination of requests, provide answers to and/or formulate consultation for the efficient and effective execution of acts of international judicial cooperation.

The Central Authority, together with other State agencies and international cooperation partners (United Nations, OAS and bilateral donors such as Switzerland) has provided training to its staff, prosecutors, judges and law enforcement officials. The Ministry of Justice also organizes seminars and training courses on the drafting of requests, and provides judges with model requests in line with international standards. However, Peru has noted that there is still much more that needs to be done in this field.

ADDITIONAL CONTACT

Requests for assistance by Peru must come from the relevant prosecutors or judges and there is no scope for direct contact with law enforcement agencies where extradition, MLA or the recovery of POC are sought.

If the National Police of Peru, as a law enforcement agency, considers a request necessary, it will raise it for consideration by the Provincial Public prosecutor in charge of the investigation, who will evaluate the requirement. If the prosecutor deems it necessary, the prosecutor will formulate a request for assistance.

With regard to extradition, the National Police of Peru does not take part in the extradition process, but it does, however, provide support. It will be responsible for locating and arresting the person to be extradited and surrendering him/her to the pertinent authorized body once the request for extradition has been granted.

Peru does not maintain records of informal request made to Peruvian law enforcement authorities.

RECOMMENDATIONS FOR A WAY FORWARD

Requests for MLA, and particularly those which involve the locating and recovery of proceeds of corruption, usually require speedy and effective responses if they are to be successful. Peru has acknowledged that it has difficulty in responding quickly to some requests. This is a major step towards resolving these problems but clearly it is an issue that Peru needs to address.

Recovery of the proceeds of corruption (as with the recovery of other proceeds of crime) is conviction based. Peru should give consideration to the development of civil forfeiture regimes to complement the existing provisions.

CONCLUSION

Peru has put in place a reasonably comprehensive system for responding to requests for assistance in extradition, MLA and the recovery of the proceeds of corruption. While a party to the key international conventions it has yet to fully implement the provisions of these Conventions. The amendments to the Criminal Procedure Code which were made in 2004 have not yet been fully implemented and this is an area where priority should be given.

RELEVANT LAWS AND DOCUMENTATION

Criminal Procedure Code

RUSSIAN FEDERATION

THE LEGAL FRAMEWORK FOR EXTRADITION, MLA AND RECOVERY OF PROCEEDS OF CORRUPTION

The Russian Federation is a party to the UN Convention against Corruption. It signed the convention on 9 December 2003 (with some reservations). The Convention was ratified on 8 March 2006 and the instrument of ratification was deposited with the UN Secretary-General on 9 May 2006. The Convention entered into force in Russia on 8 June 2006.

In accordance with Presidential Decree Number 129 of 3 February 2007, an interagency working group was set up to formulate proposals to incorporate provisions of both the UN Convention against Corruption and the 1999 Council of Europe Criminal Law Convention on Corruption into Russian legislation. The group has drafted federal laws to carry this out. The draft laws will

- set a legal framework for fighting corruption in the Russian Federation;
- define key concepts;
- develop an implementation framework for a comprehensive government policy on combating corruption, the establishment of a dedicated anti corruption body and the creation of public supervisory mechanisms to oversee its activities;
- provide for anti-corruption assessments of new and existing legal instruments with a view to identifying and eliminating provisions that may facilitate corruption;
- amend certain legislation to clarify the status of judges, members of legislative (representative) bodies of federal and local government, members of electoral commissions, Chairman, deputy Chairman and auditors of the Accounts Chamber of the Russian Federation and employees of the Bank of Russia under the proposed Federal Law on Combating Corruption; and
- amend existing legislation to ensure consistency with the Conventions and the proposed Federal Law on Combating Corruption.

In December 2008 the President of the Russian Federation Dmitry Medvedev signed a block of anticorruption laws, which include federal law N273-FL "On fighting corruption", federal law N274-FL "On introduction of alterations to individual legislative acts of the Russian Federation in connection with adoption of federal law "On fighting corruption" and federal law N280-FL "On introduction of alterations to individual legislative acts of the Russian Federation in connection with ratification of the United Nations Convention on corruption counteraction of October 31, 2003 and Convention on criminal liability for corruption of January 27, 1999 and adoption of federal law "On fighting corruption". These laws implement the corruption-related provisions of the UN Convention against Corruption as well as some provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Russia is also proposing to amend the Criminal Code of the Russian Federation to eliminate existing gaps in legal control over the confiscation of property.

In accordance with Article 8, Paragraph 2, of the Convention (which relates to codes of conduct for public officials), Russia's legislation criminalizes some forms of corruption, including corruption in the private sector (see Articles 201 - Abuse of Authority, 204 – Bribery in A Profit Making Organization and 285 – Abuse of Of-

ficial Powers, of the Criminal Code). Russia's legislation is also in line with the requirements of Article 23 of the Convention, which criminalizes the obstruction of justice. Thus, Articles 294, 297 and 309 of the Criminal Code criminalize the obstruction of justice, disrespect for the court, infringement on life of persons conducting pre-trial investigation, corruption of the victim or a witness with a view to obtaining his/her testimony or an expert with a view to obtaining his/her opinion.

The Russian Federation is also a party to the UN Convention against Transnational Organized Crime which it signed on 12 December 2000 (with some reservations) and ratified on 26 April 2004 (with declarations). The Convention entered into force in Russia on 25 June 2004.

In accordance with Article 7 of the Convention which provides for measures to combat money laundering, the Russian Federation has established a system that prevents the legalization of proceeds of crime and the financing of terrorism. The Federal Financial Monitoring Service (Rosfinmonitoring), a national financial intelligence body, is the key element of this system.

Russia's anti money laundering law (Federal Law № 115-ФЗ) was promulgated on 7 August 2001. It seeks to prevent money laundering and the financing of terrorism as well as requiring banks and other credit institutions to establish internal control procedures and take other measures to counter the legalization of criminal proceeds. Legalization of criminal proceeds, financing of terrorism and non-compliance with the corresponding preventive measures now incur administrative, civil or criminal liability.

Articles 174 and 174-1 of the Criminal Code of the Russian Federation criminalize actions to legalize the property that has been actually obtained through a criminal act. The predicate offence may be any acts criminalized under the Criminal Code, with the exception of tax-related crimes and non-payment of customs duties (fiscal offences).

In order to implement the Convention and its protocols, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 127.1, Trafficking in Persons and Article 127.2, Use of Slave Labor have been incorporated into the Criminal Code.

In the context of the fight against transnational crime, Russia's Criminal Procedure Code includes a provision (Article 455 of the Code of Criminal Procedure), according to which, evidence obtained in a foreign State has the same legal status as that obtained in Russia.

The Russian Federation is not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions or the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty. It is not a party to any Commonwealth multilateral arrangements.

The Russian Federation is a party to the European Convention on Extradition. Russia signed the Convention on 7 November 1996 (with reservations and declarations) and ratified the convention (with reservations and declarations) by Federal Law № 190-ФЗ of 25 October 1999. It is also a party to the European Convention on Mutual Assistance in Criminal Matters. It signed the Convention on 7 November 1996 (with reservations) and it was ratified by Federal Law № 193-ФЗ of 25 October 1999.

The Russian Federation has entered into a number of bilateral treaties with APEC members to establish Extradition, MLA and POC relationships.

In 1992, the Russian Federation and the Peoples' Republic of China concluded the Treaty on Mutual Legal Assistance in Civil and Criminal Matters. The parties committed to carry out requests in criminal cases to

1. examine witnesses, victims, experts, indictees;
2. conduct search, expert evaluation, inspection and other proceedings related to the collection of evidence;
3. transfer material evidence and documents, valuables obtained as a result of crime, and documents related to the proceedings; and
4. inform each other of the outcome of the proceedings.

In 1995 the Russian Federation and the Peoples' Republic of China concluded a Treaty on Extradition. The parties committed to extradite on request persons located in their territory, for a criminal prosecution or to implement a sentence already imposed. Extradition is available in respect of any offence punishable by imprisonment for one year or more or by a more severe form of punishment.

In 1999 the Russian Federation and the Republic of Korea concluded a Treaty on Mutual Legal Assistance in Criminal Matters. The legal assistance includes:

- receiving testimony and evidence or complaints from individuals;
- providing information, documents, materials and material evidence;
- establishing the whereabouts of persons or objects and identification thereof;
- service of documents;
- execution of requests to conduct search and seizure of objects;
- obtaining testimony from imprisoned persons and other persons, as well as ensuring their assistance in investigation;
- other forms of assistance not prohibited under the legislation of the requesting party.

However, this Treaty does not touch upon such issues as extradition, implementation of sentences or the transfer of prisoners.

The Russian Federation and the United Mexican States concluded a Treaty on Mutual Legal Assistance in Criminal Matters of 21 June 2005, which includes:

- service of process;
- obtaining evidence;
- establishment of persons and objects and identification thereof;
- summoning witnesses, victims and experts for voluntary attendance in a competent authority of the requesting Party;
- temporary transfer of persons in custody for their participation in criminal court proceedings in the territory of the requesting Party as witnesses, complainants or for other proceedings specified in the request;
- taking measures with regard to property;
- transfer of documents, objects and other evidence;
- granting permission to competent authorities of the requesting Party to witness execution of a request; and
- any other forms of legal assistance that do not contradict legislation of the requesting Party.

On 10 December 1981 the Union of Soviet Social Republics and the Socialist Republic of Vietnam concluded a Treaty on Legal Assistance in Civil, Family and Criminal Matters. This Treaty also contains provisions on extradition or to enable the transfer of persons to serve a sentence. This was augmented by a Treaty concluded between the Russian Federation and the Socialist Republic of Vietnam in 1998 and a protocol signed on 23 July 2003.

The Russian Federation concluded a Treaty on Mutual Legal Assistance in Criminal Matters with Canada on 20 October 1998, the Republic of Korea on 28 May 1999 and the United States of America on 17 June 1999.

The Russian Federation and the People's Republic of China concluded a Treaty on Transfer of Inmates on 2 December 2002 and a similar treaty was concluded with the United Mexican States on 7 June 2004.

The Russian Federation has entered into a number of bilateral agreements or arrangements of less than treaty status with APEC members relating to MLA, Extradition, and POC.

In 2005, a Memorandum of Understanding between the Government of the Russian Federation and the Government of Japan on Cooperation in Providing Mutual Legal Assistance in Criminal Matters and Law Enforcement Activities was signed. The countries agreed to enhance bilateral cooperation between the law enforcement bodies and justice agencies of the two states and to hold consultations on concluding a treaty on mutual legal assistance in criminal matters, which would deal with the usual range of issues dealt with in such treaties.

The Prosecutor General's Office of the Russian Federation has concluded the following interagency agreements and memoranda with the following competent authorities of the APEC Member Economies:

1. Agreement on Cooperation between the Prosecutor General's Office of the Russian Federation and the Supreme People's Procuracy of the Socialist Republic of Vietnam of 31 October 2007;
2. Memorandum of Understanding on Cooperation between the Prosecutor General's Office of the Russian Federation and the Prosecutor General's office of the Republic of Indonesia of 1 December 2006;
3. Agreement on Cooperation between the Prosecutor General's Office of the Russian Federation and the Supreme People's Procuracy of the People's Republic of China of 29 March 1997; and
4. Agreement on Cooperation between the Prosecutor General's Office of the Russian Federation and the Supreme Procuracy of the Republic of Korea of 28 May 2007.

These agreements include provisions on cooperation in extradition and legal assistance in criminal cases, information exchange on legislation, law enforcement practice and experience in fighting crime.

LEGAL PRECONDITIONS FOR EXTRADITION AND MLA (INCLUDING IN RELATION TO PROCEEDS OF CORRUPTION)

In accordance with the Constitution of the Russian Federation Russia cannot extradite Russian citizens. Refusal is mandatory. Part 1 of Article 13 of the Criminal Code provides that Russian citizens who commit crimes in the territory of a foreign jurisdiction shall not be subject to extradition to that jurisdiction. Part 1 of Article 464 of the Code of Criminal Procedure also provides that a person cannot be extradited if the person is a national of the Russian Federation. Accordingly Russia is not obliged to consult the requesting jurisdiction before refusing a request.

However, in accordance with Article 459 of the Code of Criminal Procedure, a request made by the competent authority of the requesting state to bring a criminal charge against a Russian citizen who committed a crime in the territory of the requesting state and who has returned to the Russian Federation is considered by the Prosecutor General's Office. Preliminary investigation and court proceedings in such cases are carried out in accordance with the procedures specified in the Code of Criminal Procedure.

Furthermore, if a Russian citizen commits a crime in the territory of a foreign state and returns to the Russian Federation before a criminal prosecution is brought against him in that state a criminal case can be opened and investigated on the basis of the evidence provided by the relevant competent authority of the requesting state to the Prosecutor General's Office in accordance with the Code of Criminal Procedure.

Article 461 of the Code of Criminal Procedure contains regulations on the scope of criminal liability of a person extradited to the Russian Federation.

A person extradited to the Russian Federation by a foreign jurisdiction can not be detained, charged or convicted without the consent of the extraditing jurisdiction or transferred to a third jurisdiction for committing a crime not specified in the request for extradition.

The consent of the foreign jurisdiction is not required if:

- the person extradited by this jurisdiction has not left the Russian Federation in the course of 44 days after the day when court proceedings were completed or sentence served or after the person was released from penalty on any lawful ground. This term does not include the period of time when the extradited person could not leave the Russian Federation due to circumstances beyond his/her control;
- the extradited person left the Russian Federation but then voluntarily returned to the Russian Federation.

Likewise, consent of the foreign jurisdiction is not required if the crime was committed by the specified person after he/she had been extradited.

The extradition of persons charged with offences as well as the transfer of convicts to serve a sentence in other States can only be carried out under a federal law or an international treaty to which Russia is a party. Thus, under Article 462 of Russia's Code of Criminal Procedure, the Russian Federation, in conformity with an international treaty to which it is a party or on the basis of reciprocity, may extradite a foreigner or a stateless person staying in the territory of the Russian Federation to a foreign State for criminal prosecution or serving a sentence for acts that are punishable under the criminal laws both in Russia and in the requesting State.

The preconditions to extradition are that the person sought:

- Is not a Russian citizen;
- Is accused of an offence punishable by imprisonment for more than one year or by a more severe penalty;
- Is not being prosecuted for a political offence;
- Has been convicted and sentenced to at least six months of imprisonment or to a more severe penalty;
- Will be prosecuted only for the offence indicated in the request and that after completing the court proceedings and serving the sentence such a person will be free to leave with the consent of the Russian Federation; and
- The offence involved is constituted by an act or omission which would be an offence under Russian law (dual criminality).

Foreign public officials can be extradited in cases of illicit enrichment or bribery as long as similar crimes are criminalized in the Russian legislation.

The decision to extradite a foreigner or a stateless person staying in the territory of Russia is taken by the Prosecutor General of the Russian Federation or by his Deputy. Once a decision to extradite has been made the person must be notified in writing and advised of the right of appeal under Article 463 of the Code of Criminal Procedure of the Russian Federation. A decision on extradition shall enter into legal force in ten days after the notification of the person to be extradited. In case of appeal, extradition shall not be carried out until the court judgment enters into legal force. Where there are multiple requests for extradition the Prosecutor General or his Deputy will decide which request is to be fulfilled and the decision is notified to the 'corresponding person' within 24 hours.

Russia's legislation can be used to provide extradition, MLA and/or recovery of POC to APEC member jurisdictions under an international treaty concluded with APEC Member Economies or on the basis of reciprocity on a case by case basis.

While most requests for MLA received by Russia involve the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocol to it, the European Convention on Extradition and the Additional Protocol to it, the European Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, and other treaties on cooperation, including in relation to specific offences, Russian law also allows for MLA to be provided under letters rogatory on a reciprocal basis. This is confirmed by a written undertaking of the competent authorities of the Russian Federation to provide legal assistance on behalf of Russia to a foreign State in completing certain proceedings. In such cases the usual procedure of forwarding Letters Rogatory through the central agencies of the Russian Federation and a foreign State is followed. The principle of reciprocity is also applied in accordance with Article 5 paragraph 2 of the European Convention of 1959.

Under Article 407 of the Code of Civil Procedure, Russian courts execute letters rogatory requesting procedural actions (service of notices and other documents, seeking information or explanations from persons, obtaining the testimony of witnesses, expert opinions, inspection, etc.), sent to them by foreign courts in line with the procedures specified in the treaty signed by the Russian Federation or in Federal Law. Where Russia requests legal assistance on a reciprocal basis, the request and/or accompanying documents include the assurance that the Prosecutor General's Office or other competent authority of the Russian Federation in compliance with international principles for the provision of mutual legal assistance in criminal matters, are prepared to render assistance to the competent authorities and officials of the requested State upon their

request for assistance in any territory under the jurisdiction of the Russian Federation.

Russia can provide a wide range of MLA in response to letters rogatory. It advises that this extends to the of the kind of assistance specified in the European Convention on Mutual Assistance in Criminal Matters of 1959 (Articles 1, 3 and 5), the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993 and the Protocol to it (Article 6), as well as in the relevant articles of bilateral treaties of the Russian Federation.

Under Article 453 of the Code of Criminal Procedure of the Russian Federation, Russia may request the questioning of persons, inspection, seizure, search, forensic examination or other procedural actions in the territory of a foreign State. In such cases a court, a prosecutor, an investigator, or a preliminary investigator makes a request for those to be conducted by a competent authority or official of the foreign State based on the principle of reciprocity and in accordance with international agreements and treaties.

A request by the Russian Federation for the conduct of procedural actions will be made in writing and must be signed by the requesting official and authenticated with the official stamp of the relevant authority. It must include:

- name of the requesting authority;
- name and location of the requested authority;
- name of the criminal case and the nature of the request;
- information on persons with regard to whom the request is made, including their date and place of birth, nationality, occupation, place of residence and stay, and the name and location of the registered office for legal entities;
- the facts to be determined, as well as the list of the requested documents, material and other types of evidence; and
- factual information pertaining to the crime committed, classification of the offence, the language of the relevant article of the Criminal Code and, if necessary, the amount of damage resulting from the crime in question.

The request for procedural actions is forwarded through:

- The Supreme Court of the Russian Federation, on matters within the jurisdiction of the Supreme Court;
- Ministry of Justice of the Russian Federation, on matters within the jurisdiction of any court except for the Supreme Court of the Russian Federation;
- Ministry of the Interior of the Russian Federation, Federal Security Service, State Committee of the Russian Federation for Control over Narcotic and Psychotropic Substances, if the procedural actions in question do not require court decision or prosecutor's approval; or
- The Prosecutor General's Office of the Russian Federation, in all other cases.

The request and the documents attached to it are translated into the official language of the requested State to which they are addressed (Article 453 of the Code of Criminal Procedure of the Russian Federation).

Under Article 457 of the Code of Criminal Procedure the judge, prosecutor, or investigator will implement the request according to established procedure for procedural actions, forwarded to them by the relevant competent authorities and officials of a foreign State, in accordance with international treaties of the Russian Federation, international agreements, or based on the principle of reciprocity. Usually the procedures are those set out in the Code of Criminal Procedure. However, the procedural rules of the foreign legislation can be applied if required by the treaty or on the basis of reciprocity. Similarly foreign representatives can be present when executing a request, if it is provided for by the treaties signed by the Russian Federation or by a written obligation to cooperate on the basis of reciprocity.

The grounds for refusal of extradition are specified by Article 464 of the Code of Criminal Procedure of the Russian Federation. In addition to preventing the extradition of Russian citizens, extradition requests shall also be denied if:

- The person has come from a foreign state and has been granted asylum in the Russian Federation because of the possibility of his persecution in the given state on account of race, religion, citizenship, nationality, affiliation with a certain social group, or because of his political views;
- The person has already been sentenced in Russia for the same offence or proceedings in a criminal case relating to the same offence have been terminated;
- In conformity with the legislation of the Russian Federation, the criminal case cannot be instituted or the sentence cannot be executed because of the expiry of a term of legal limitation or on another legal ground; or
- There is the decision of the court of the Russian Federation, which has passed into legal force, on the existence of obstacles to the extradition of the given person in conformity with the legislation and the international treaties of the Russian Federation.

Extradition may be refused if:

- The act which is the ground for the extradition request is not a crime under the criminal law;
- The act which is the ground for the extradition request, is committed on the territory of the Russian Federation, or against the interests of the Russian Federation outside its territory;
- A criminal prosecution of the person for which extradition is being sought is being conducted for the same act in the Russian Federation;
- The criminal prosecution of the person, with respect to whom an inquiry for the extradition is entered, was instituted by way of a private charge.

In relation to MLA similar grounds exist to refuse a request.

Under Russian law the nature or severity of punishment for an offence is not, of itself, a ground for refusal of a MLA or extradition request.

If the request cannot be executed, the documents are returned, and the reasons for its failed execution are clearly stated to the requesting foreign competent authority.

The Russian legal system does not recognize the concept of "political offences". When the Russian Federation signed the European Convention on Extradition it did so with a number of reservations. The Russian Federation noted, inter alia, that when making its decision on extradition it will not consider the following crimes as "political offences" and "ordinary offences related to political offences" along with the offences listed in the Additional Protocol of 1975 to the European Convention of 1957:

1. Crimes against humanity, as specified in Articles II and III of the Convention on the Suppression and Punishment of the Crime of Apartheid (1973) and Articles 1 and 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
2. Offences specified in Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) and Articles 1 and 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977);
3. Offences specified in the Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988), supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971);
4. Serious offences specified in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973);
5. Offences specified in the International Convention against the Taking of Hostages (1979);
6. Offences specified in the Convention on the Physical Protection of Nuclear Material (1980);
7. Offences specified in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); and other offences referred to in the multilateral international treaties.

While the law of the Russian Federation does not recognise the concept of political offences with regard to extradition, Russia may refuse an extradition request in the following circumstances:

- if the extradition of a person is requested in order to bring him/her to justice in an extraordinary court or by summary proceedings or to carry out the sentence rendered by an extraordinary court or by summary proceedings, and when there are grounds to believe that the person will not be or has not been provided the minimum guarantees specified in Article 14 of the International Covenant on Civil and Political Rights. However, the terms "extraordinary court" and "summary proceedings" are not applied to any international criminal court whose powers and jurisdiction are recognized by the Russian Federation;
- if there are substantial grounds to believe that the person requested to be extradited has been, or will be, subjected to torture or other cruel, inhuman or degrading treatment or punishment in the requesting state, or this person while being prosecuted was not, or will not be, provided with the minimum guarantees specified in Article 14 of the International Covenant on Civil and Political Rights;
- based on humanitarian considerations, when there are grounds to believe that extradition of a person will entail serious complications for him/her due to his/her old age or state of health.

To avoid a situation of double jeopardy for a person who committed an offence outside the Russian territory, if the offence is punishable under Russian criminal laws Article 12 of the Criminal Code of the Russian Federation stipulates that the person shall be brought to criminal justice unless he/she was convicted for such an offence in a foreign state. Reinvestigation due to reversal of a sentence is not considered to be double jeopardy.

If the Russian Federation has tried and acquitted a person, even though, under Article 457, Part 2 of the Code of Criminal Procedure of the Russian Federation, the rules of the Code are applicable to the requests, MLA may still be provided as the procedural rules of laws of a foreign state may be applicable in accordance with international treaties and agreements to which the Russian Federation is a party or on the basis of the principle of reciprocity, unless this contradicts the legislation and international obligations of the Russian Federation.

When an offence is committed wholly or partly in the Russian Federation and a state requests extradition, Russia may refuse extradition. Under Article 464, Paragraph 2 of the Code of Criminal Procedure of the Russian Federation, extradition of a person may be refused, in the following circumstances:

- the act which has served as a ground for directing an inquiry for the extradition, is not a crime under the criminal law;
- the act, in connection with which an inquiry for the extradition is forwarded, is committed on the territory of the Russian Federation, or against the interests of the Russian Federation outside its territory;
- the criminal prosecution of the person, with respect to whom an inquiry for the extradition is sent is being conducted for the same act in the Russian Federation;
- the criminal prosecution of the person, with respect to whom an inquiry for the extradition is entered, is instituted by way of a private charge.

RECOVERY OF PROCEEDS OF CORRUPTION IN CRIMINAL PROCEEDINGS

Russian criminal law provides for state expropriation upon court decision of the following property (Articles 104.1-104.2 of the Criminal Code):

a. money, valuables and other property acquired as a result of committing crimes, including corruption, and any proceeds from such property, except for the property and its proceeds that are subject to return to their rightful owner;
b. money, valuables and other property fully or partially converted or transformed from the property acquired as a result of committing a crime and proceeds from such property;

c. money, valuables and other property used or meant for financing terrorism, an organized group, an illegal armed gang, or criminal society (criminal organization); or
d. tools, equipment or other means used for criminal purposes that belong to the defendant.

In addition, there is an opportunity to forfeit an amount of money equal to the value of the property that is unavailable for expropriation due to the fact that it has been used, sold or is otherwise unrecoverable.

Proceeds of corruption may be returned to the requesting state in accordance with a bilateral agreement on legal assistance. For instance, the 1992 Agreement on Legal Assistance between the Russian Federation and the People's Republic of China provides for the transfer of material evidence as well as of documents and valuables acquired as a result of a crime. In such cases the proceeds will be returned to the requesting state.

There does not appear to be a capacity to return the proceeds of crime on the basis of reciprocity unsupported by a treaty relationship.

PROCEDURES AND INSTITUTIONAL FRAMEWORK FOR EXTRADITION AND MLA

In relation to requests to the Russian Federation, the Prosecutor General's Office of the Russian Federation is the competent body for executing requests for extradition and providing legal assistance in criminal cases.

Part 1 of Article 457 of the Code of Criminal Procedure stipulates that the court, the Prosecutor or the investigator shall execute requests for procedural actions received from the competent bodies or officials of the requesting state in compliance with the international treaties of the Russian Federation or on the basis of reciprocity if they are received in due order. The Department of Extradition and the Department of Legal Assistance of the Main International Legal Cooperation Branch of the Prosecutor General's Office of the Russian Federation verify whether the request for extradition or mutual legal assistance in criminal cases comply with the requirements of the relevant international treaty and Russian legislation. It then arranges and monitors execution of the requests within the established time-limit although the status of requests to Russia is not required to be monitored by Russian legislation.

Direct communication is established between the competent authorities of the states concerned. The requests for extradition and legal assistance are sent by the Prosecutor General's Office of the Russian Federation directly to the competent authorities of the foreign states. Incoming requests are submitted to the Prosecutor General's Office. Requests for extradition can also be filed through diplomatic channels.

The Prosecutor General's Office and the Supreme Court decide on the possible application of the criminal procedure law of the requesting state to the legal proceedings. They must be satisfied that any procedure required by the requesting state is consistent with the Code of Criminal Procedure and the Constitution of the Russian Federation.

Incoming requests are kept confidential. This is ensured by organizing the special storage of the documents and their appropriate classification.

Part 3 of Article 460 of the Code of Criminal Procedure of the Russian Federation establishes the procedure for requests made by the Russian Federation. All necessary material is provided to the Prosecutor General's office, where the issue of filing a request for an extradition of a person located in the territory of the foreign state, to the appropriate authorities of the given state, is decided upon. Part 4 of the same Article specifies the information which the extradition request should contain, including the need for the request to be translated into the language of the requested state.

The Main International Legal Cooperation Branch has 99 officers, 67 of which are field officers with higher legal education. Some field officers have knowledge of foreign languages, generally English. All field officers have a level of experience in reviewing extradition and legal assistance requests, including in corruption cases.

In extradition cases the Russian Federation also utilises the Interpol channel to facilitate cases. Despite different legal systems, Russia has reported good levels of cooperation with some European jurisdictions but has indicated requests to other jurisdictions can take long periods to be considered. The lack of a bilateral agreement on extradition with the United States of America makes it impossible for Russia to extradite from the USA. However, Russia has advised that efforts taken by the Main International Legal Cooperation Branch have resulted in a parol agreement reached recently with the US Ministry of Homeland Security aimed at promoting the work on deportation of such persons from the USA to Russia. Russia has not specifically commented on extradition or MLA relationships with other APEC members

URGENT REQUESTS FOR COOPERATION

Judicial bodies of the requesting state can send urgent requests directly to judicial bodies of the Russian Federation. This process is in accordance with the reservation made by the Russian Federation to Article 24 of the 1959 European Convention. Judicial bodies of the Russian Federation include courts and prosecution bodies. In such cases a copy of the request should be simultaneously transmitted to the appropriate central authority.

In urgent or other cases allowed by the requested party, a request can be sent by fax or any other agreed means of electronic communication, but it should be duly confirmed as soon as possible by its original in writing.

Urgent requests (and supporting documentation) submitted to the Russian Federation should be translated into Russian and urgent Russian requests will be translated into the language of the requested state unless other arrangements are specified in a bilateral agreement.

CENTRAL AUTHORITY

In order to implement provisions of the UN Convention on combating transnational organized crime by Presidential Decree № 1362 of 26 October 2004 the Ministry of Justice of the Russian Federation was designated as the Central Authority, in relation to civil law matters, including civil law aspects of criminal cases, and the Prosecutor General's Office of the Russian Federation, was the designated Central Authority with respect to criminal law matters.

ADDITIONAL CONTACT

Informal requests for cooperation can be facilitated through the INTERPOL channel.

CONCLUSION

While the Russian Federation has signed and ratified the UN Convention against Transnational Organized Crime and the UN Convention against Corruption it still has to make a number of changes to its domestic legislation and practice to fully implement the conventions. It is, however, undertaking the necessary work to do so. While the legislative framework reflects the usual grounds for refusal of both extradition and MLA requests the Russian Federation will not extradite citizens.

RECOMMENDATIONS FOR A WAY FORWARD

There are a number of areas where improvements could be made to the current arrangements in place for both extradition and MLA involving the Russian Federation. Extradition and MLA would be facilitated if the Russian Federation had bilateral treaties with the relevant state. As with many countries this is an area which Russia could pursue.

There is no offence of bribery of foreign officials under Russian law, nor does the criminal law recognize a crime of unjust enrichment. These are areas to be addressed if the Russian Federation is to be able to respond fully to foreign requests in relation to corruption cases.

RELEVANT LAWS AND DOCUMENTATION

Criminal Code of the Russian Federation
Criminal Procedure Code of the Russian Federation

Appendix A

EXTRADITION

	Rus	Per	Ch. Tai.	Can	Bru
Australia	ct	ct		bcot	ct
Bangladesh	c	c		c	
Brunei Darussalam	t	t		t	
Cambodia	ct	ct		ct	ct
Canada	ct	bct			ct
PR China	bct	bct		ct	ct
Chinese Taipei					
Cook Islands	t	t		t	t
Fiji	c	c		c	c
Hong Kong, China	ct	ct		bct	ct
India	c	c		c	c
Indonesia	c	c		c	c
Japan				bo	
Kazakhstan	ct	ct		ct	ct
Korea	c	bc		bo	c
Kyrgyzstan	ct	ct		ct	ct
Macau, China	ct	ct		ct	ct
Malaysia					b
Mongolia	ct	ct		ct	ct
Pakistan	c	c		c	c
Papua New Guinea	c	c		bc	c
Peru	ct			bct	ct
Philippines	t	t		bt	t
Singapore	t	t		bt	bt
Sri Lanka	ct	ct		ct	ct
Thailand				b	
Russian Federation		ct		ct	ct
Vanuatu	t	t		t	t
Viet Nam	b				

b bilateral treaty

c United Nations Convention against Corruption

o OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

t United Nations Convention against Transnational Organized Crime

Appendix B

MLA

	Rus	Per	Ch. Tai.	Can	Bru
Australia	ct	ct		bct	ct
Bangladesh	c	c		c	
Brunei Darussalam	t	t		t	
Cambodia	ct	ct		ct	act
Canada	bct	bct			ct
PR China	bct	ct		bct	ct
Chinese Taipei					
Cook Islands	t	t		t	t
Fiji	c	c		c	c
Hong Kong, China	ct	ct		bct	ct
India	c	c		c	c
Indonesia	c	c		c	ac
Japan					
Kazakhstan	ct	ct		ct	ct
Korea	bc	c		bo	c
Kyrgyzstan	ct	ct		ct	ct
Macau, China	ct	ct		ct	ct
Malaysia	ct	ct		ct	act
Mongolia	ct	ct		ct	ct
Pakistan	c	c		c	c
Papua New Guinea	c	c		c	c
Peru	ct			bct	ct
Philippines	ct	ct		ct	ct
Singapore	t	t		t	at
Sri Lanka	ct	ct		ct	ct
Thailand				b	
Russian Federation		ct		bct	ct
Vanuatu	t	t		t	t
Viet Nam	b				a

a ASEAN Treaty on MLA
b bilateral treaty
c United Nations Convention against Corruption
t United Nations Convention against Transnational Organized Crime