

MLA IN CRIMINAL MATTERS AS ASSET RECOVERY'S TOOL *

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Abstract

Indonesia has the Act No. 1 of 2006 Concerning Mutual Legal Assistance in Criminal Matters, and has ratified Treaty on MLA in Criminal Matters (ASEAN Treaty) with Act No. 15 of 2008, the act mandated to Ministry of Justice and Human Rights as the Central Authority. Modus operandi and crime increasingly sophisticated as technological developments, in such a way that cause difficulties to search, seize and transmit properties from the requested country to the requesting country, so that is needed bilateral or multilateral cooperation. Indonesia must be better cooperation among relevant agencies in accordance with established procedures.

Keywords: *mutual legal assistance, asset recovery.*

Intisari

Indonesia memiliki Undang-Undang Nomor 1 Tahun 2006 tentang Bantuan Timbal Balik dalam Masalah Pidana dan meratifikasi Perjanjian tentang *MLA in Criminal Matters (ASEAN Treaty)* dengan Undang-Undang Nomor 15 Tahun 2008, dan mandat kepada Kementerian Kehakiman dan Hak Asasi Manusia sebagai otoritas pusat. Modus operandi kejahatan makin canggih seiring perkembangan teknologi, sedemikian rupa yang menyebabkan kesulitan untuk mencari, menyita dan mengirimkan hasil kejahatan dari negara diminta kepada negara peminta, sehingga perlu kerjasama bilateral atau multilateral. Di Indonesia harus ada kerjasama yang lebih baik antar instansi terkait sesuai dengan prosedur yang ditetapkan.

Kata Kunci: bantuan timbal balik, pengembalian aset.

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A. Introduction

United Nations Convention against Corruption was adopted in the Diplomatic Conference in Merida, Mexico in December 2003 and opened for signature by the States Parties to the Convention. The Government of Indonesia has been actively participating in the preparatory meeting of the Ad Hoc Negotiating Committee discuss the draft convention.¹ Nowadays, Indonesia has the Law Number 1 of 2006 Concerning Mutual Legal Assistance in Criminal Matters. And also has ratified Mutual Legal Assistance in Criminal Matters Treaty (treaty of the ASEAN) with Law Number 15 of 2008, which on its implementation has given the mandate to the Ministry of Law and Human Rights as the Central Authority, that has play its role in the implementation on Mutual legal assistance in Criminal Matters Coordination.²

The Indonesia Government realize that corruption and proceeds of crime have been widely spread, as well as the level of crime. In the globalization era and in the development of science and technology in particular the development of transportation, communication and information makes no border between one country to another, so that people or goods moved from one country to other country shall be carried out easily and rapidly. This also makes the development of criminal activities and their modus operandi is more sophisticated hence that its prevention needs bilateral, multilateral or international cooperation.

Crime specially those having transnational or cross State nature result in legal problems between one state and other state requiring treatment trough good relationship based on the law of respective countries.³ Indonesia is still seeking states and concentrate on cooperations on

mutual legal assistance in criminal matters (MLA) to the states called as “save” or “heaven” countries like Singapore, Hong Kong, Swiss, “tax heaven” countries in Caribia, the “high risk” countries as Kenya or another countries in Africa that might be classified as “money laundering” countries.

South Korea is a country that is not considered as a state that protects the corruptors and the crime of Money Laundering from abroad. Therefore, Indonesia and South Korea are still put forward the extradition agreement than the agreement of MLA in Criminal Matters. The Government of the Republic of Indonesia and the Government of the Republic of Korea has signed an Extradition agreement in Jakarta on 28 November 2000, and Indonesia has ratified Treaty on Extradition Between the Republic of Indonesia and the Republic of Korea with the Law Number 42 of 2007⁴, in terms of cooperation for mutual assistance in criminal matters between the Government of the Republic of Indonesia and the Government of the Republic of Korea, have signed the Agreement on Mutual Legal Assistance in Criminal Matters dated March 30, 2002 in Seoul. Generally the State of the Republic of Indonesia shall be a Rule of Law State, based on PANCASILA (Indonesian Five Principles) and the 1945 Constitution of the Republic of Indonesia supporting and guaranteeing legal certainty. Pancasila also stressed that Indonesia helped build security and peace of the world.

B. Research Methods

For the purposes of writing this paper used a normative legal research focusing on documents and literatures studies and the approach is used the statutory approach, include case and comparative approach.⁵ The data collected from this study

¹ Romli Atmasasmita, 2005, *United Nation Convention Against Corruption (UNCA)*, Perum Percetakan Negara RI, Jakarta, p. 1.

² 6th Meeting of the Senior Officials on the Treaty on Mutual Legal Assistance in Criminal Matters, 5-7 November 2012, Bandung, Indonesia.

³ Chapter IV Article 43 United Nation Convention Against Corruption (UNCAC), 2003.

⁴ Carapedia, “Undang-Undang Pengesahan Perjanjian Ekstradisi Antara Republik Indonesia dan Republik Korea (Treaty on Extradition between the Republic of Indonesia and the Republic of Korea) (Undang-Undang Nomor 42 Tahun 2007)”, <http://carapedia.com/pengesahan.perjanjian.ekstradisi.antara.republik.indonesia/info1732>, accessed on 20 January 2013.

⁵ Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Kencana, Jakarta, p. 93.

is secondary data, among others are statutory regulations, various legal documents, and other references that are relevant with mutual legal assistance in criminal matters.

C. Discussion

1. Mutual Legal Assistance in Criminal Matters and Asset Recovery

The Mutual Legal Assistance in Criminal Matters and asset recovery have been regulated under the United Nations Convention Against Corruption, 2003, in Article 46, as follows:

States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention (Article 46 [1]). Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes: (a) taking evidence or statements from persons; (b) effecting service of judicial documents; (c) executing searches and seizures, and freezing; (d) [...] etc. up to point (j); (k) the recovery of assets, in accordance with the provisions of chapter V of this Convention. (Article 46 [3]).

Mutual Legal Assistance in criminal matters (MLA) is an essential form of such international cooperation. 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 crimes (including corruption), as reflected from Indonesian Law Number 1 of 2006 concerning MLA, Article 3:

Article 3: (1) Mutual legal Assistance in criminal matters, hereinafter referred to as Assistance, shall be a request for Assistance in relation with the investigation, prosecution and examination before the Court in accordance with domestic laws and regulations of the Requested State.

(2) The Assistance as referred to in paragraph (1) may be in the following forms: (a) identifying and locating persons; (b) obtaining statements or other forms

thereof; (c) providing documents or other forms thereof; (d) making arrangements for persons to provide statement or to assist in the investigation; (e) delivering letters; (f) executing the inquiry of search warrant and seizure; (g) the forfeiture of proceeds of crime; (h) the recovery of pecuniary penalties in respect to the crime; (i) the restraining of dealings in property, the freezing of property that may be recovered or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect to the crime; (j) locating property that may be recovered, or may be needed to satisfy pecuniary penalties imposed, in respect to the crime, and/or; (k) other assistance in accordance with this Law.

Indonesia, as elsewhere in the world, particularly in the ASEAN region, is inseparable from corruption problems and strive to asset recovery to the state. Indonesia also involved to promote of asset recovery through the International Cooperation on Mutual Legal Assistance in Criminal Matters. Based on the Indonesian Government experiences, for asset recovery and also Indonesia has established some agreement both with ASEAN Countries and other foreign countries.

2. Indonesia as the Requesting Country

Many MLA provisions are required to execute of Asset recovery, for example only for proceeds of listed offenses (which includes corruption). The authorities of the requested state could use these provisions to search, seize and transmit property acquired by the person sought as a result of corruption. Another issue that may arise is whether the definition of proceeds of corruption includes "indirect" proceeds (Indirect proceeds are essentially proceeds derived or converted from the proceeds of corruption. For example, if a public official accepts a bribe and uses the bribe to purchase property, the bribe is "direct" proceeds and the property is "indirect" proceeds). Members of the Initiative that may provide MLA in relation to indirect proceeds of corruption include Australia; P.R. China; Cook Islands; Fiji Islands; Hong Kong, China; India; Indonesia; Japan; Malaysia; Nepal;

Pakistan; Palau; Papua New Guinea; the Philippines; Samoa; Singapore; Sri Lanka; Thailand; and Vanuatu.⁶ Indonesia's Mutual Assistance for the asset recovery to 13 (thirteen) Jurisdiction (Hong Kong, United Kingdom, Australia, the Bahamas, Bahrain, British Virgin Islands, Jersey, Luxembourg, Mauritius, Saudi Arabia, Singapore, Switzerland, and the United Arab Emirates), associated with criminal offenses we call **Century Case** (the case of Century Bank in Indonesia), and Mutual Assistance for the Asset Recovery to the Swiss Government related crime in Bank Cases.⁷

3. Procedures⁸

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.

a. 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. From the chart/table of selected Legislation and Treaties under which Signatories Endeavor to Trace and Identify Proceeds of Crime upon Request, are like Australia-Hong Kong, China-Thailand, Korea-Philippines, Australia-Indonesia, Korea-Thailand, Australia-Korea, China-Philippines, Korea-Vietnam, Australia-Malaysia, India-Korea, Australia-Philippines, India-Mongolia, India-Thailand, **bilateral agreements with many Countries Were very important.**

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, 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. Another tool to trace proceeds of corruption is the monitoring of an account at a financial institution. At the request of a foreign country, Several Requested Countries may seek a monitoring order from a court.

b. Freezing and Seizure

After 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. Several Countries included 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. Indonesia had a bilateral agreement with Australia about it.

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

⁶ ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 2007, *MLA, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, Secretariat ADB/OECD, Seoul, p. 81.

⁷ Interview with Mrs. Chairijah, Ph.D., Director of International Affairs of Directorate International Law and Central Authority, Ministry of Law and Human Rights the Republic of Indonesia, in Jakarta, on 14 June 2012.

⁸ ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Ibid.*, p. 81.

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.

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.

Several countries needed prerequisites for enforcing a foreign freezing order. Australia ask for Court application, direct registration, faxed order, proceedings Institute or about to be instituted, and reasonable grounds to believe proceedings will be Institute. Indonesia need Court application for enforcing a foreign freezing order. Several Countries need Court application and final conviction and confiscation order.

c. Confiscation to the Requested Country

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. A 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.

d. Repatriation to the Requesting Country

The fourth 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). Indonesia's legislation has a provision that applies to the proceeds of confiscated assets that have been auctioned, and has permits their Attorneys General or another body to enter into arrangements with the requesting state for reciprocal sharing. When there are no applicable treaties or conventions, governments may have specific policies to deal with the repatriation of assets.

4. Indonesia as the Requested Country

There are more than 100 MLA requests from other countries, namely countries: The United States; Australia; Austria; Netherlands; Belgium; Brazil, Finland; HKSAR; England; Germany; Republic Korea; France; Malaysia; Poland; PRC; Spain, Switzerland, and others.

5. Several Agreements

- a. Bilateral Agreements with Australia, signed in Jakarta on October 27, 1995, ratified by Act Number 1 of 1999 (Treaty Between the Republic of Indonesia and Australia on Mutual Assistance in Criminal Matters).
- b. Bilateral Agreement with the People's Republic of China, signed in Jakarta on July 24 of 2000, ratified by Act Number 8 of 2006 (Treaty Between The Republic of Indonesia and The People's Republic of China on Mutual Legal Assistance in Criminal Matters).
- c. Multilateral Agreement (ASEAN) with

the Government of Brunei Darussalam, the Kingdom of Cambodia, Republic of Indonesia, Lao People's Democratic Republic, Malaysia, Union of Myanmar, the Republic of Philippines, Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam, signed in Kuala Lumpur on November 29, 2004, ratified by Act Number 15 of 2008.

- d. Bilateral Agreement with the Republic of Korea, signed at Seoul on March 30, 2002, has not been ratified.
- e. Bilateral Agreements with Hong Kong SAR, signed in Hong Kong on the 3 April 2008.
- f. Ratification of Agreement Between The Government of The Republic of Indonesia and The Government of The Hong Kong Special Administrative Region of The People's Republic of China Concerning Mutual Legal Assistance In Criminal Matters, Act Number 3 of 2012, dated 28 March 2012.

For the purpose of asset recovery, Indonesia has an Asset Recovery Task Force, with its instances Ministry of Justice and Human Rights (Immigration Office, Directorates General for Legal Administrative Affairs), Attorney General, Police Headquarters, Interpol, Ministry of Foreign Affairs, Corruption Eradication Commission, Ministry of Coordination for Politic Law Defence and Security, Commission for Financial Intelligence Unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions.

6. Problems of Asset Recovery

a. Local Problems

Agreement between Indonesia and ASEAN countries including Singapore in

the "Treaty on MLA in Criminal Matters" which was signed on 29 November 2004, it also does not provide advantages or benefits to Indonesia to the return of assets resulting from past crimes (before year 2004) unless the perpetrators through an extradition treaty. This is caused by the Mutual Assistance Treaty in Criminal Matters (ASEAN Treaty) does not apply retroactively, especially for requests confiscation and asset recovery proceeds of crime, including corruption BLBI (central bank liquidity support) that occurred before 2004, and other crimes. Agreement between Indonesia and Singapore is not on the reservation (modified or rejected) by the two countries, which explicitly contained in Article 29 of the bilateral agreement on MLA "The Treaty shall not subject to reservation".⁹

There are egoism among institutions of Ministry of Justice and Human Rights, Attorney General, and Police Headquarters. The Police Headquarters sometimes act separately without informing the Ministry of Justice and Human rights (as the Central Authority) for the purpose of gain reputation and other benefits. This is of course contrary to the provisions set forth in article 46, paragraph 13 of Convention:

Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of the State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the State Parties agree, through the International Criminal Police Organization, if possible.

And also Article 9 Paragraph (2) of Indonesian MLA in Criminal Matters:

⁹ Ahmad Sobari, 2010, *Non Retroactive Principle on Mutual Legal Assistant in Criminal Matters towards Implementation of Indonesian Law Enforcement (According to the Law Number 1 of 2006 on MLA in Criminal Matters)*, Thesis, Past Graduated Programme Universitas Negeri Jakarta, Jakarta, p. 13.

“The request for Assistance as referred to in paragraph (1) shall be conveyed by the Minister [Minister of Justice and Human Rights as Central Authority] based on an inquiry from Kapolri [Chief of Police Headquarters] or Attorney General”. Request supporting documents from the Central Authority (Ministry of Justice and Human rights) were submitted to the Attorney General for filing “formal request” MLA to the United States, did not respond at all, even though the “formal request” is filed at the time of the prosecution of perpetrators of crimes in court South Jakarta, was not taken seriously, Indonesian bureaucrats working slow, unprofessional and even impressed inhibit (Deputy Attorney General for Attorney General).¹⁰

Simultaneously with the enactment of Law Number 1 of 2006 on MLA in Criminal Matters, the Supreme Prosecutor’s Office has registered the organization institutionally Attorney General as a member of The International Association of Prosecutor’s (IAP), which is based in The Hague, Netherlands, in this organization, there are more than 150 institutions of prosecution different parts of the world, which in practice MLA agreed in a joint declaration on the implementation of **direct cooperation** between prosecution agencies in mutual support of fellow members of MLA requests IAP.¹¹ This state is one of the causes of coordination does not run due process, again because of the problems for the purpose of gain reputation and other benefits.

Paradigm of law enforcement officials who have not been oriented to rescue state

assets, but more oriented toward punishment for perpetrators.¹² In association on the application of mutual legal assistance in criminal matters with cases of **cyber crime**, especially crime credit card (**carding**), and fraud through the internet (**cyber fraud**) is characterized in the form of cooperation the police and Interpol. The modus operandi of carding and cyber fraud is very fast, in a matter of minutes even seconds can occur both legal and illegal transactions that led to the crime, cyber criminals crime also easily relocate or flee from city to city and even between countries. Specific cases of cyber crime in the Indonesian banking, the bank much more to be silent, if the damages are not great. If exposed or reported to the police, the bank is very concerned that aspects of internal security is very weak, so it can affect public confidence.¹³ It would further complicate asset recovery, if the affected carding cyber crime or cyber fraud.

So it can be said that the crime statistics available from the Criminal Police Headquarters on Carding, can be regarded as not as present existence in society, especially the losses suffered by Indonesian banks. Center for Financial Transaction Reports and Analysis Center (*Pusat Pelaporan dan Analisa Transaksi Keuangan/PPATK*) as a State institution that can help in tracing the assets of corruption under the Act on Money Laundering, the authority has only limited to the processing and analysis of the information it receives. Center for Financial Transaction Reports and Analysis Center (PPATK) does not have the authority to perform termination mutation or transfer of

¹⁰ Risma Indriyani, “Studi Kasus tentang BNI Permintaan BTBMP Kepada Amerika Serikat”, *Paper*, presented on the seminar concerning BTBMP, Bandung, 29-30 August 2006, p. 6.

¹¹ Suharyo, 2010, *Laporan Penelitian Penerapan Bantuan Timbal Balik dalam Masalah Pidana terhadap Kasus-Kasus Cyber Crime*, BPHN, Jakarta, p. 51.

¹² National Law Development Agency (BPHN), 2008, *Analysis and Evaluation Final Report of the Law against Law No. 1 of 2006 on BTBMP*, BPHN, Jakarta, p. 9.

¹³ Suharyo, *Op.cit.*, p. 78.

assets suspected of proceeds of crime. This is in contrast with (AMLO) Thai who has the authority to halt the mutation or transfer of assets, even managing the property assets under their control.¹⁴

Due PPATK not have the authority to perform mutation termination or transfer of assets suspected of proceeds of crime, then the proceeds of crime including crimes Corruption will be difficult to prevent the transfer of assets to the perpetrators of corruption along with other countries, especially foreign destination by the corrupt is a country that does not have a relationship MLA treaty and diplomatic relations as well as relations or based on an extradition treaty with the country of Indonesia. Expressed by Yunus Husien (former Head of PPATK):

Coordination between law enforcement corruption is still less than the maximum and less harmonious. Coordination is minimal evidence that we can see from the case files back and forth from investigator to the public prosecutor as in the case of Adrian Herling Waworuntu (L/C fictitious PT. Gramarindo in Bank BNI Kebayoran Baru) some time ago in which the relevant case files up to seven times back and forth before finally declared complete (P-21). We also often see the phenomenon of “fight the case” illustrates the more impressed “arrogance” rather than the desire to resolve the case as well as possible. In fact, what is needed is cooperation and synergy eradication of corruption, because it is impossible to eradicate corruption which is rampant in the absence of cooperation and synergy. Even the co-operation and synergies should also be realized by non-law enforcement institutions such as the concerned government agencies,

regulators of financial institutions, financial service providers, the media and the public at large.

As for the other impediments are as follows:¹⁵

- a) **Cultural impediments** - the impediments are sourced from the negative habits that developed in the community. Are included in this group, among others: the persistence of the “reluctant attitude” and tolerant among government officials that could hamper the handling of corruption.
- b) **Instrumental impediments** - the impediments that comes from the lack of a supporting instrument in the form of legislation which makes the handling of corruption is not running as it should. Are included in this group, among others: there are many laws that overlap, giving rise to corruptive actions in the form of bubbles fund government agencies;
- c) **Structural impediments** - weakness of Apparatus Law Enforcement; Similarly, the Indonesian government is less progressive than in making agreements with other countries (Mutual Legal Assistance/MLA) also seemingly unpreparedness of the law in this country, and also because of the limited understanding of Indonesian law enforcement agencies about crimes mode economy increasingly complicated and complex because it involves financial institutions, banking, capital markets, and other instruments that are cross-country intervention coupled with enormous power and are still common to the law enforcement officers.

¹⁴ Hukum OESOE’83, “Bantuan Hukum Timbal Balik dalam Menyita dan Merampas Aset Korupsi di Luar Negeri”, <http://hukumoesoe83.blogspot.kr>, accessed on 20 January 2013.

¹⁵ *Ibid.*

b. Regional Problems

Return on assets from the proceeds of crime in the Treaty on MLA of ASEAN is “optional” or not “mandatory”. Besides the differences between the common law legal systems (Singapore, Malaysia) and civil law (Indonesia) which cause problems in the process of investigation, seizure and evidence, as well as part of the G-8 as well as the countries become financial centers (such as Singapore) has not ratified the UNCAC. In case of Singapore, Constraints can also arise in cases of disagreement on *asset sharing*. So the effort to pursue the assets of corruption that was allegedly kept in Singapore would be difficult to materialize. So in fact, unlikely to asset recovery in terms of foreign policy, we ask the assets of the countries that signed the ASEAN Treaty MLA.

Other issues are factor of differences in running practice of law, factor of the banking and financial system in which the asset is located, factor of whether or not there is resistance from third parties who want to take their assets by local governments and political factors. The MLA in Criminal Matters Treaty (ASEAN) was a **like-minded countries** and since then it's not to be a frame work of ASEAN yet, there are still many substantive challenges issues for the implementation of asset recovery, among others: issue of non-complied letters of request, dual criminality, in absentia court proceedings, perception Differences of judicial authority documents.

Nevertheless, Article 22 paragraph (4) Treaty on MLA of ASEAN states “*Subject to the domestic laws of the Requested Party, property forfeited or confiscated pursuant to this article may occur to the Requesting Party unless otherwise agreed in each particular case*”. This article gives the opportunity for asset seizure or confiscation of proceeds

of crime by the State are asked for help by settling a case by case (case by case basis).

c. MLA and Recovery of Proceeds Republic of Korea

MLA and the recovery of proceeds in Korea are principally governed by treaties. MLA to identify and trace proceeds of crime (including corruption) is provided under the general provisions of the Act on International Judicial Mutual Assistance in Criminal Matters (AIJMACM), includes the procedures, prerequisites, types of assistance (e.g. search and seizure) and grounds of denial. Foreign requests to freeze or confiscate proceeds of crime are governed separately by the Proceeds of Crime Act (POCA). In the absence of a treaty, MLA is available on the basis of reciprocity.

Dual criminality is mandatory for extradition, discretionary for MLA, and freezing or confiscating proceeds of Crime, also for money laundering. Korea has established an offense of bribery of foreign public officials; requests involving this offense will therefore more likely have dual criminality. In order to freeze or confiscate funds in a bank account, the requesting state must provide full details of the account, e.g., account number, location of the bank etc.

Illicit enrichment is not an offense in Korea; it is not clear whether dual criminality would prevent MLA in cases involving this offense. It is precisely this issue of Illicit enrichment, either by individuals or by legal persons is very often the case in crimes of corruption in Indonesia. ***Korea does not impose liability against legal persons for corruption*** (except bribery of foreign public officials).¹⁶ It is therefore also unclear whether dual criminality would impede MLA when a legal person is the target of a corruption investigation not involving bribery of foreign

¹⁶ ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Op.cit.*, p. 186.

public officials. Act on International Judicial Mutual Assistance in Criminal Matters does not prescribe evidentiary thresholds for rendering assistance. Therefore dual criminality will prevent cooperation in cases involving illicit enrichment or where a legal person is the target of a corruption investigation.

The Act on International Judicial Mutual Assistance in Criminal Matters requires all incoming MLA requests to be transmitted through the diplomatic channel (except in urgent cases or if an applicable treaty provides otherwise), although Korea also adopted the use of Central Authority for MLA that are actually communicating problems to cut through the bureaucratic term, therefore, Korea requires bilateral agreements for MLA.

Building on the Joint Statement on East Asia Cooperation of 1999 and cooperation between the Southeast and Northeast Asian countries has accelerated with the holding of an annual summit among the leaders of ASEAN, China, Japan, and the Republic of Korea within **the ASEAN Plus Three** process, and continued especially with the Republic of Korea in years 2006 and 2007.¹⁷

ASEAN Plus Three relations continue to expand and deepen in the areas of security dialogue and cooperation, transnational crime, trade and investment, environment, finance and monetary, agriculture and forestry, energy, tourism, health, labour, culture and the arts, science and technology,

information and communication technology, social welfare and development, youth, and rural development and poverty eradication. There are now thirteen ministerial-level meetings under the ASEAN Plus Three process. Based on such Joint Statement on East Asia Cooperation, deepen in the areas of security dialogue and cooperation, transnational crime and ASEAN as potential markets or investment partners, South Korea could consider revising the acts (flexible).

D. Conclusion

The challenge on the work of MLA in Criminal Matters (ASEAN) Treaty is still coming from legal administration and procedure which required by each national legislation and not occur from the gap of legislation, so it's important by State Parties to consider the measures to reduced the challenge with made study analysis for research the good ideas in: (1) making the standard and easy information in the request form; (2) communication to understanding of dual criminality in the fact underlying the requests; (3) more understanding on document from each competent authority o judicial authority which supporting the request. Republic of Korea could consider revising the Act on International Judicial Mutual Assistance in Criminal Matters (AIJMACM) and Proceeds of Crime Act (POCA), in conjunction with purposes of bilateral or multilateral agreements for MLA and freezing or confiscating of proceeds, particularly with countries that are important, potential market or investment partners.

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