

CREATING AN EFFECTIVE MUTUAL LEGAL ASSISTANCE (MLA) REQUEST

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I. INTRODUCTION

As one of the primary forms of international cooperation, mutual legal assistance (MLA) requests play a very important role to recover assets that have been stashed abroad, either assets that belong to the perpetrator or that are considered as proceeds of corruption. Such requests have become the basis for the requested states to provide assistance in obtaining information, intelligence, evidence, provisional measures, confiscation, and eventual return of assets. Thus, an effective MLA request is very crucial to ensure the effectiveness of the whole process of asset recovery. In order to deal with this, the international community has concluded a number of multilateral treaties or instruments requiring states parties to cooperate with one another on investigations, production of evidence, provisional measures and confiscation, and asset return.¹

Even though there are many references available that can be used to formulate MLA requests, it is unfortunate that creating such requests is not a simple process, especially for countries submitting MLA requests for the first time, not only because it often depends on assistance given by the requested state, but also because it can be slowed and complicated by differences in legal traditions, law and procedures, languages, capacities, and even time zone. Therefore, it requires strategic considerations, and characteristics of various options that can be used to create an effective MLA request. The Indonesian Anti-Corruption Commission (KPK) has experienced numerous cases of successful international cooperation with other jurisdictions in investigating and prosecuting corruption cases.² One of the keys to success that can be learned by those experiences is the use of an effective MLA request, which was conducted by combining both the informal request for assistance and formal MLA request. Inspired by those cases, KPK is now moving forward to deal with international cooperation related to asset recovery. Recently, KPK through the Indonesian Central Authority has been requesting assistance from other jurisdictions to identify, freeze, seize, and confiscate the proceeds of corruption. Due to the ongoing process of the investigation, this paper will not explain the detail of the requested assistance. Therefore, this paper will seek to describe mechanisms and strategies that can be used to formulate an effective MLA request.

* The Corruption Eradication Commission (KPK).

¹ Brun, Jean-Pierre, Gray, Larissa, Scott, Clive, Stephenson, Kevin, *Asset Recovery Handbook, A Guide for Practitioners*, p. 121.

² For example: The Alstom case, The Innospec case, and the arrest of fugitives in several jurisdictions.

II. KEY PRINCIPLES IN DEVELOPING INTERNATIONAL COOPERATION

International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. Efforts to develop international cooperation should consider these four key principles:³

- a. Incorporate international cooperation into each stage of the case
It is important for the law enforcement agency to immediately focus on international cooperation efforts when the case reaches beyond domestic borders. Any delay of this effort may give the corrupt official the chance to transfer funds or to hide assets in uncooperative jurisdictions.
- b. Establish and Maintain Personal Connections
Developing personal connections with foreign counterparts is very crucial to ensure the success of asset recovery cases. A telephone call, an e-mail, a video conference, or a face-to-face meeting with foreign counterparts will go a long way to moving the case to completion.⁴ Even though establishing personal connections can be difficult, the time and effort spent making such connections will be worth the result.
- c. Engage in informal assistance channels before, during, and after transmitting an MLA request
Prior to the drafting of the MLA request, some important information can be obtained more quickly and with fewer formalities through direct and informal communication with counterparts abroad. Thus, more proper considerations for MLA requests can be provided and all the requirements are met.
- d. Awareness of Potential Barriers
In order to obtain international cooperation, law enforcement agencies may face numerous obstacles, and appropriate measures are needed to overcome those barriers. Differences in legal traditions and confiscation systems, jurisdiction issues, variations in procedural, legal obstacles and delays are among those barriers. Thus, law enforcement agencies should consider and take actions to overcome those barriers.

III. MEASURES FOR CREATING AN EFFECTIVE MLA REQUEST

Mutual Legal Assistance (MLA) is a process through which jurisdictions seek and provide assistance, and this can be done at any stage of investigation, prosecution, or court proceeding. Thus, it has become an indispensable part of international cooperation. The success of international cooperation in asset recovery might depend on the effectiveness of the MLA request. In order to create an effective MLA request, the combination of both the informal request for assistance and formal MLA request is needed.

³ Brun, Jean-Pierre, Gray, Larissa, Scott, Clive, Stephenson, Kevin, *Asset Recovery Handbook, A Guide for Practitioners*, p. 123.

⁴ Ibid, p. 123.

IV. EARLY COMMUNICATION

As a part of informal assistance, an early notification and consultation is essential. Two initial questions that must be asked are who should be contacted in order to obtain sufficient assistance and what mechanism should be used. The first person that should be contacted is the legal attache officer from the embassy of the requested country, or other related officer such as police liaison officer. Instead of government-to-government and organization-to-organization mechanisms, there are numerous mechanisms available such as the Egmont Group of FIUs, The Global Focal Point Initiative, the Camden Asset Recovery Inter-Agency Network (CARIN), or the Interpol channels. The process, then, may occur over the telephone, email, video conference, or even face-to-face meeting between counterparts. It may incorporate non-coercive investigative measures, such as gathering publicly available information, conducting visual surveillance, and obtaining information from financial intelligence units; and it may extend to spontaneous disclosures of information, conducting a joint investigation, or asking the authorities in another jurisdiction to open a case.⁵ Thus, information gathered during this phase can be used to develop further investigation and may also lead to a formal MLA request.

V. DRAFTING MLA REQUESTS

When the process subsequently will lead to a formal MLA request, communication should be focused on what will be needed to execute the request and to address potential barriers. Then, the process can be continued by drafting the MLA request before it is formally submitted. It is very important to ensure the involvement of the central authorities from both the requesting and requested countries when a formal MLA request is being prepared. Important matters which should be considered by both requesting and requested states while drafting the MLA request are:

a. Legal Basis for International Cooperation

There are several legal bases that can be used by a requested state to proceed with an MLA request, and they must be clearly specified in the request. Those legal bases are:

1. Multilateral conventions, treaties, and agreements.
2. Bilateral treaties and agreements.
3. Reciprocity undertakings.
4. The use of domestic legislation of the requested state

b. Principle of Dual Criminality

The principle means that both requesting and requested states have criminalized the specified criminal conduct. Moreover, details of criminal offences and a summary of criminal conduct should be addressed in the request.

⁵ Ibid, p. 128.

- c. The Description of Assistance or Material Sought and the Reason Why It is Sought
Requirements for assistance vary among jurisdictions. Although most jurisdictions will permit requests during the investigation stage, others will require more considerations, especially for the provisional seizure or restraint of assets. Moreover, other jurisdictions will not provide assistance if the criminal proceedings have been concluded.⁶

It is also very important to address any particular requirements/procedures to be followed to provide the assistance requested. Practically, request for assistance must contain sufficient information in order for the requested state to understand what is being sought and its connection with the underlying facts. Thus, the requested state is able to act on behalf of the requesting state within its jurisdiction.

- d. Assurance and Undertakings (Reciprocity, Confidentiality, Limits on Use/Speciality, and Commitment to Pay Costs or Damages)

Many jurisdictions require a reciprocity assurance, a written statement that the requesting jurisdiction will provide the requested jurisdiction with the same type of cooperation in similar cases in the future. Others may also require the requesting jurisdiction to specify if it wishes the request to be treated as confidential.

Furthermore, jurisdictions may require an assurance that the requesting state will use the information given by the requested state only for the case described in the request of assistance. Lastly, some jurisdictions may require a commitment to pay any costs or damages incurred by the requested party during the course of executing of the request.⁷

- e. Evidentiary Requirements

The requesting state usually has to provide sufficient admissible evidence to officials in the requested state to enable them to meet the evidentiary threshold mandated by their courts in executing the request.⁸ The involvement of a prosecutor during the process is very crucial in order to ensure the admissibility of the evidence before the courts.

- f. Form and Content Requirements

MLA requests must be in writing and must meet the language, content, and format requirements of the requested state.⁹

- g. Refusal Grounds

There are several reasons why the requested state may refuse an MLA request in certain circumstances when the execution of the request would prejudice the essential interests of the requested state. There are also other reasons such as assets of de minimis value, double jeopardy, capital punishment, immunities, and lack of due process of law in the requesting state.¹⁰

⁶ Ibid, p. 141.

⁷ Ibid, p. 142.

⁸ Ibid, p. 143.

⁹ Ibid, p. 143.

¹⁰ Ibid, p. 147.

h. Particular Time Frames for the Execution of the Request

This drafting process and resulting assistance helps to ensure that all the requirements are met and to avoid unnecessary delays of refusal of assistance. It also gives the requested state a chance to prepare its responsive actions.

VI. THE SUBMISSION OF AN MLA REQUEST

After the draft is finalized, an MLA request must be signed by the appropriate authorities—often the central authority of the requesting state, which is then transmitted to the requested state through specified channels. Some jurisdictions may use optional diplomatic channels when transmitting the MLA request.

After the submission, the requesting state must ensure that the request is executed by the requested state. Another informal communication is needed to clarify whether any terminology or translation issues have occurred or additional information is needed. A supplementary MLA request may be required to overcome those issues and to provide additional information.

VII. CONCLUSION

An important part of international cooperation in the recovery of proceeds of corruption is the MLA request, which is used by jurisdictions to seek and provide appropriate assistance. The process of creating an effective MLA request is not an easy task and requires a combination of both the informal requests for assistance and formal MLA requests. By creating an effective MLA request, international cooperation in the recovery of proceeds of corruption can be successful.

Reference: *STAR Asset Recovery Handbook, A Guide for Practitioners*, Jean-Pierre Brun, Larissa Gray, Scott, Clive Scott, Stephenson, Kevin M. Stephenson.