

Technical Meeting on
Co-operation in Bribery Investigations and Prosecutions

28 September 2006
Santiago de Chile, Chile

Preliminary draft issues paper on Frameworks for Extradition and Mutual
Legal Assistance in Corruption matters

Working Document



Preamble

1. The present preliminary issues paper is a background document to the Technical Meeting to be held in Chile on 28 September on “Co-operation in Bribery Investigations and Prosecutions”. It is conceived to provide a structured overview of legal and institutional frameworks for seeking and providing extradition and mutual legal assistance in corruption matters.
2. The organizers/OECD would wish to seek information by participating countries and partner international organizations in view of turning this background document into a comprehensive report taking stock and reviewing policies, legislation and initiatives addressing mutual legal assistance in Latin America as of the third quarter of 2006.
3. Upon finalization, the report could provide assistance to practitioners from Latin America as well as from other OECD countries who investigate and prosecute corruption cases and who may have to seek international legal assistance. The document could enhance comprehension of the main challenges which countries from Latin America face, based on a better mutual understanding. It could finally assist the identification of measures that might enhance the effectiveness of cooperation and ultimately enhance investigations and prosecution of corruption and related crimes.
4. The issues paper covers two main areas: the legal basis and preconditions for rendering extradition and MLA as well as measures that facilitate international cooperation. The approach used in this study is a general one. It presents main developments in the area of mutual legal assistance. It includes processes and measures aimed at bolstering the ability of countries to seek and render mutual legal assistance. It also includes the legal conditions governing rendering and requesting of assistance, as well as measures to facilitate international cooperation.
5. This draft preliminary report was prepared by the Anti-Corruption Division (OECD Directorate for Financial and Enterprises Affairs). Nicola Ehlermann-Cache, as Project Leader for Latin America adapted the document from an initial study prepared for the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.
6. The organizers of the Technical Meeting would hope to obtain comprehensive answers by experts to the thematic questions at the end of each sub-section. The compilation and comparison of these answers will help determine the current state of play in Latin America. The organisers would hope to be able to establish comparative tables and identify similarities and differences between countries.



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Introduction

7. As with other regions in the world, the fight against corruption in Latin America has taken an international dimension. Countries in this region increasingly need to gather evidence abroad and to seek the return of fugitives for trial in corruption cases.

8. Countries increasingly recognize the need for international cooperation to fight and repress corruption more effectively. Extradition and mutual legal assistance 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. Mutual legal assistance in criminal matters (MLA) is a formal process to obtain and provide assistance in gathering evidence for use in criminal cases. 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.

9. The purpose of this issues paper is to provide an overview of the legal and institutional framework for extradition and MLA in corruption cases. Indeed, countries may adopt different types of legal frameworks to address the need for effective extradition and MLA in corruption cases. Some are based on bilateral treaties. Others, more recently, may have placed great emphasis on multilateral instruments. Many countries of the American Hemisphere are signatories to the Inter-American Convention against Corruption. Some are also Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. A number of countries have signed and/or ratified the United Nations Convention against Corruption. Countries may also have enacted domestic legislation that complements these treaty-based arrangements.

10. Whether based on treaties or legislation, the key question for an effective fight against corruption is whether the schemes of cooperation are sufficiently broad to cover most corruption and related offences and grant for effective investigation and prosecution. As the issues paper illustrates, several aspects may delay or hamper extradition or MLA requests.

11. The document is structured as follows: Section I of the report examines the legal basis and preconditions for rendering extradition and MLA. Section II considers some measures that facilitate international cooperation.



I. Rendering and Requesting Cooperation

A. *The Legal Framework for Rendering Extradition and MLA*

12. Countries may seek or provide extradition and MLA in corruption cases through different types of arrangements. The most common ones are bilateral and 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 type of the assistance sought and the country whose assistance is sought.

1. *Treaty-based Cooperation*

13. By entering into treaties – whether bilateral or multilateral -- countries enjoy the advantages of treaty-based cooperation. A treaty obliges a requested state to cooperate under international law. It provides some certainty, including with regard to the procedure and parameters of cooperation. It can also expressly provide for forms of cooperation that may otherwise be unavailable.

a. *Bilateral Treaties*

14. Countries may create many bilateral treaties to establish extradition and MLA relations among themselves. While bilateral treaties tend to demand a great deal of time and resources to negotiate, they can be designed to meet the specific needs of the signatories. They are also easy to amend to meet new developments or needs.

b. *Multilateral Treaties*

15. In recent years, countries from around the world have increasingly resorted to multilateral treaties in international cooperation. There are various multilateral conventions which provide MLA and/or extradition in corruption cases and which count among their signatories American countries.

i. United Nations Convention against Corruption

16. Some countries have ratified the United Nations Convention against Corruption (UNCAC), which came into force on 14 December 2005. 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.

17. In addition, UNCAC provides the legal basis for extradition in three ways. 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.

18. The UNCAC also provides a legal basis for MLA. 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 includes provisions which detail the conditions and procedure for requesting and rendering assistance. These provisions are comparable to those found in most bilateral treaties.

ii. United Nations Convention against Transnational Organized Crime

19. Some countries have also signed the United Nations Convention against Transnational Organized Crime (UNTOC), which came into force on 23 September 2003. The UNTOC requires States Parties to criminalize bribery of their officials where the offense is transnational in nature and involves an organized criminal group.

20. 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).



iii. Inter-American Convention against Corruption:

21. A large number of American countries have ratified the Inter-American Convention against Corruption, which is in force since 6 March 1997. That Convention is drafted as a binding legal instrument, although some specific provisions contain elements of discretion with respect to their application. Generally, criminalization of corruption acts is mandatory but States Parties may consider implementing other preventive measures.

22. The Conventions contain provisions that regulate extradition, criminal prosecution and MLA. The convention's extradition provisions apply to offenses established by the parties in accordance with the convention but would not apply to the acts of corruption described in article VI, illicit enrichment, transnational bribery, or the acts described under "progressive development" unless both party States that wish to cooperate with respect to these acts have criminalized such acts under their domestic law. In general, the convention extends existing extradition treaties among parties to include the offenses under this convention and provides that the convention may serve as the legal basis for extradition among parties that do not have extradition treaties among themselves or that do not require extradition treaties. The convention requires parties, as appropriate, to assist each other in legal proceedings and measures regarding the investigation or prosecution of acts of corruption, and to assist each other in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with the convention. The convention also requires the parties to engage in mutual technical cooperation to prevent, detect, investigate, and punish acts of corruption.

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

23. Another relevant multilateral instrument is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. As its title suggests, the OECD Convention requires its signatories to criminalize the bribery of foreign public officials in international business transactions: the reach of the OECD Convention is more limited than that of 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.

24. As with the UNCAC, the OECD Convention may provide a legal basis for extradition and MLA in relation to offences that fall within the Convention. Bribery of foreign public officials is deemed an extradition offense under the laws of the signatory states and in extradition treaties between them. As for MLA, a signatory to the OECD Convention must provide prompt and effective assistance to other signatories to the fullest extent possible under its laws and relevant treaties and arrangements. However, unlike the UNCAC, the OECD Convention does not operate as a "standalone" MLA treaty.

2. *Non-treaty Based Arrangements*

25. 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 and to engage into co-operation via other disposable means. These may however offer less certainties as they do not contain as clear definitions or procedural provisions as may treaty based assistance.

a. Cooperation Based on Domestic Law

26. Countries may enact legislation to provide extradition and/or MLA to countries with which they have no treaty relations. Under these schemes, the legislation of the requested state usually prescribes the procedure for sending, receiving, considering and executing requests. The procedure is often similar to those in treaty-based schemes, though some additional conditions may apply. A country may designate a foreign state as eligible for receiving assistance, or it may consider each incoming request on a case-by-case basis.

27. Domestic legislation based cooperation has certain advantages but also disadvantages over treaties. On the one hand, such schemes are often quicker and cheaper to implement. On the other hand, unlike treaties, domestic legislation does not create binding obligations under international law. A state which enacts such legislation has no international obligations to assist a foreign state. In the same vein, foreign states are not



obliged to render assistance to countries which have enacted such legislation. In many cases, a requested state will cooperate without a treaty only if the requesting state provides an undertaking of reciprocity (see Section I.B.3). In practice, however, the absence of treaty-based obligations does not necessarily result in less cooperation.

b. Judicial Assistance and Letters Rogatory

28. Letters rogatory is one of the oldest means of seeking formal international assistance in criminal matters. It remains useful today, particularly between countries with no MLA treaties. In its most traditional form, a letter rogatory is a request for assistance issued by a judge in the requesting state to a judge in the requested state. The process is based upon the comity of nations and aims to enable judges in different jurisdictions to assist one another. In most instances, a judge may also be willing to issue letters rogatory on behalf of the police or a prosecutor to gather evidence for a case.

29. There are drawbacks to this form of cooperation compared to treaty-based assistance. The scope of assistance available is generally much more restricted, *e.g.* limited to service of documents or obtaining testimony and documents from a witness. This is particularly so if the requested state is a common law country and hence judges are generally not involved in an investigation. Letters rogatory may also be more cumbersome and time-consuming than other forms of assistance, since it may involve applications to a court and/or transmission through diplomatic channels. Unlike a request under a treaty, a requested state has no obligation to assist.

3. MLA in Extradition Treaties and Legislation

30. An interesting development is the inclusion of MLA features in some extradition arrangements. The extradition legislation of some jurisdictions permits the authorities to search for evidence relevant to the corruption offense that underlies an extradition request. The requested state may then send the seized evidence to the requesting state, sometimes even if the person sought is not ultimately surrendered. Some jurisdictions go further by also allowing search, seizure and transmission of property acquired by the person sought as a result of the offense. These provisions could conceivably be used to recover the proceeds of corruption.

Questions:

1. *Has your country signed bilateral extradition and MLA treaties with American or other countries? If so, which? When were those treaties signed?*
2. *Please indicate whether your country has signed and ratified multilateral treaties? If so, please mention which ones and mention the date of signature/ratification?*
3. *Has your country legislation which allows extradition and MLA without a treaty?*
4. *Has your country legislation specifically regulating letters rogatory requests? If so, where is this legislation to be found? Are specific requests associated with letters rogatory such as for instance that it be forwarded to an attorney general or minister of justice for execution in the same manner as a regular MLA request? Is so, which?*
5. *Please indicate whether your country's extradition legislation and treaties permit search, seizure and transmission of evidence and property derived from corruption and related offences. (Please specify for each arrangement your county is committed to).*
6. *Would you consider that your country has an effective legal basis to provide extradition and MLA which provides for effective investigations and prosecution of corruption and related crimes? Would you say that there is a difference between countries/regions and if so which?*



B. Legal Limitations and Preconditions to Cooperation

31. Legal frameworks for international cooperation may prescribe prerequisites before extradition or MLA will be granted. The following are some that could apply in corruption cases.

1. Extradition of Nationals

32. Countries may refuse to extradite their nationals 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. 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.

2. Extradition and MLA Offenses - Severity and Dual Criminality

33. Many extradition and MLA arrangements restrict cooperation to certain types of offenses. Whether a particular corruption offense qualifies for cooperation may depend on two criteria: first, whether the offence 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).

a. Severity

34. The severity criterion may be implemented in different ways. One 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. The list may furthermore not cover new types of offenses that develop over time. Some treaties attempt to 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.

35. To overcome the disadvantages with the list approach, treaties and legislation may adopt a minimum-penalty approach, *i.e.* the conduct in question must be punishable by a certain length of imprisonment. Another way forward is to adopt a hybrid approach: parties will cooperate only if the underlying offense falls within list of crimes *and* is punishable by a certain minimum penalty.

36. The severity requirement may diverge between extradition and MLA, mostly because MLA does not impinge upon an individual's liberty.

b. Dual Criminality

37. Dual criminality is a frequent requirement in extradition arrangements. 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.

38. There are some approaches to implementing the dual criminality test which tend to be more restrictive, such as matching the names or the essential elements of the offences in the two states. To avoid these problems, treaties and arrangements can take a more 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 impugned conduct is punishable by the same offense in the two states. Nor is the question whether the offence that applies in each state have the same elements.

39. Dual criminality is less common in MLA arrangements. Under many MLA treaties and legislation, dual criminality is either not required or it is only a discretionary ground for refusing assistance.



3. *Reciprocity*

40. 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.

41. Whereas extradition and MLA treaties generally implicitly embody this principle (by requiring each contracting state to provide the same cooperation to others on the same terms), countries often require a requested state to expressly provide an assurance of reciprocity in non-treaty based cooperation.

4. *Evidentiary Tests*

42. Extradition and MLA arrangements may 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 that is required may vary depending on the jurisdiction in question and the nature of cooperation that is sought. Assistance of a more intrusive nature generally requires more supporting evidence.

43. Evidentiary tests are ostensibly to protect the interests of an individual sought for extradition. By requiring some evidence of the underlying crime, an individual will not be extradited based on groundless allegations or requests made in bad faith. However, the requirement of evidence is frequently cited as a cause for delay. Indeed, requesting states often have difficulty producing admissible evidence for the sole reason of differences in legal systems and evidentiary rules. Judicial hearings in the requested state to determine whether the test has been met (and appeals of the courts' rulings) can cause further delay.

44. Evidentiary tests may be based on *prima facie* i.e. there must be evidence which would justify a person to stand trial had the conduct been committed in the requested state or on *probable cause* i.e. there must be sufficient information as would provide reasonable grounds to suspect that the person sought has committed the offense.

45. 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 offence. 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.

46. Countries may take different approaches on this issue. Legislation may be vague. However it may also be specific and expressly allow the person sought to tender evidence relevant to technical matters (e.g. identity) but not to challenge the allegations against him/her. It may also provide the opposite and oblige 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.

47. To avoid difficulties posed by evidentiary tests, extradition arrangements may require little or no evidence of the underlying offence (though information about the offence 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 offence that underlies the extradition request. Evidence of the underlying crime is not necessary.

48. Evidentiary requirements are also sometimes imposed for MLA, ostensibly 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, legislation may require reasonable grounds to believe that evidence is located in the requested state

5. *Specialty and Use Limitation*

49. 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.



50. The principle of use limitation is similar to specialty but applies to MLA. Under some MLA arrangements the requesting state may use information acquired under the arrangement only in the case or investigation referred to in the request for assistance.

6. *Grounds for Denying Cooperation*

51. Many MLA and extradition arrangements allow a requested state to deny cooperation in corruption cases on certain grounds, some of which are enumerated below.

a. Essential and Public Interests

52. Jurisdictions may 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.

53. 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, then the effectiveness of extradition and MLA would suffer.

b. Political Offences

54. Jurisdictions may deny extradition for political offenses or offenses of a political character. Although the concept of political offences is found in many arrangements, the definition of such offenses is usually nebulous. There is no consensus about its scope, and hence the application of this doctrine is unclear. It is clear that it could conceivably cover corruption offences in some cases.

55. But obligations under multilateral instruments may also affect the application of the political offence exception. To deal with the unclear definition of political offences, the UNCAC provide a “negative” definition by stating that corruption and related offences can never be political offenses.

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

56. Many extradition and MLA arrangements refer to the principle of double jeopardy. In other words, the 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 instances, 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.

57. 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 offences, such as laundering his/her ill-gotten gains. The issues could also arise in transnational corruption cases. 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 country which outlaws such conduct may thus 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 and request his/her extradition. The result is concurrent proceedings against the briber in both states, which may prevent or delay extradition or MLA. If the briber is tried and convicted/acquitted first in his/her home country, the doctrine of double jeopardy could also bar his/her extradition or the provision of MLA to the country of the bribed official.



d. Offense Committed Wholly or Partly in the Requested State

58. Countries may refuse extradition if the subject conduct constitutes an offence committed wholly or partly in their territory. In some cases, the requested state must however undertake to prosecute the accused in place of extradition. 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. 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.

e. Nature and Severity of Punishment

59. Some Asia-Pacific countries deny extradition for a corruption offence if the offence is punishable in the requesting state by a severe penalty, such as death, unless the requesting state provides sufficient assurance that the penalty will not be carried out. Many countries also deny extradition where an accused may face torture or cruel and unusual punishment, which could conceivably be raised in death penalty cases.

Question:

7. *Does your country provide for extradition of nationals? If so, is extradition mandatory or discretionary? If your country refuses extradition, please clarify on which grounds? Please also indicate whether the person can be prosecuted in place of extradition and whether the decision to prosecute is (i) mandatory, (ii) discretionary, (iii) upon request. Please also mention whether a difference is made between the extradition of nationals and non-nationals.*
8. *Please indicate whether your country's arrangements (legislation or treaties) impose severity criteria? If so, which criteria are applicable and how are they applied? Is a distinction made between extradition and MLA? Are corruption and related offences covered by these criteria or can assistance be denied for corruption offences? (Please specify for each arrangement your country is committed to).*
9. *Please mention whether your country's extradition and MLA legislation and treaties contain a conduct-based definition of dual criminality (please specify for each arrangement your country is committed to)? Please indicate how they are applied and whether corruption and related offences are covered?*
10. *Please indicate whether any treaty to which your country is committed does not implicitly embody the reciprocity principle but expressly requires reciprocity? Please indicate how your country addresses reciprocity in case of non-treaty based cooperation (extradition and MLA). For instance is reciprocity a mandatory requirement in the legislation or is it discretionary and what is the country's practice?*
11. *Are evidentiary tests imposed in case of extradition request and if so which (prima facie, probable cause, other)? Are evidentiary tests also imposed for MLA? Please clarify how your country applies the evidentiary tests.*
12. *Does your country's extradition legislation and the treaties to which your country is a party require specialty? Do your country's MLA legislation and the treaties to which your country is a party impose use limitation?*
13. *Do your country's extradition and MLA arrangements (legislation or treaties):*
 - *refer to the notion of "essential interests" and if so how are they defined (defense, foreign affairs, sovereignty, security, public order, national interests, others)?*
 - *deny cooperation for political offences and/or exclude the political offences exception due to obligations under multilateral instruments?*



- *deny cooperation on grounds of double jeopardy and can concurrent proceedings prevent or delay extradition or MLA?*
- *deny cooperation for an offense committed wholly or partly in the requested state or for an offense over which the requested state has jurisdiction to prosecute?*
- *deny cooperation because of the death penalty, of torture or cruel, inhuman or degrading punishment?*

II. Procedures and Measures to Facilitate International Cooperation

A. *Procedures that Facilitate Effective International Cooperation*

1. *Formal Transmission of Requests for Cooperation and Evidence*

60. 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 ones. However, other ways have been imagined recently to overcome the limitations of the latter.

a. *Transmission through the Diplomatic Channel*

61. The diplomatic channel is a traditional conduit for extradition and MLA requests among 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 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.

62. Experience shows that the diplomatic channel may be time-consuming, creating delay. Even more delays occur when diplomatic authorities have heavy workloads or are inadequately staffed.

b. *Transmission through Central Authorities*

63. Arrangements may designate a “central authority”. Such 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.

64. Central authorities can increase the effectiveness of international cooperation. It avoids delays caused by the diplomatic channel. Being a law enforcement body, the competent authority may execute the request itself immediately, or it may be better positioned (than the diplomatic authorities) to identify the body most suited for executing the request. This is particularly important if a requested state has numerous law enforcement agencies. 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, as well as advising foreign authorities on incoming requests. Finally, central authorities can monitor a request and ensure its execution. The use of central authorities may be more common in MLA than in extradition.

65. There could be drawbacks to using central authorities. If their resources are inadequate the execution of requests could be delayed. Some countries also designate different bodies as central authorities for different treaties and conventions. This may cause confusion to requesting states and dilute the concentration of expertise.

c. *Transmission between Law Enforcement Agencies*

66. Some arrangements 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. In some jurisdictions, the law enforcement agencies involved are required to send a copy of the request to their respective central authorities.

67. 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.

2. Urgent Procedures for Extradition and MLA

a. Provisional Arrest as an Emergency Measure for Extradition

68. Provisional arrest is an emergency measure 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 usually required to make a full extradition request within a certain time period. Otherwise, the person is released.

69. To facilitate expeditious transmission, some extradition treaties and legislation 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. Other extradition arrangements allow the parties to communicate outside the diplomatic channel, such as Interpol or between central authorities.

b. Urgent MLA Requests

70. 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 for instance allow urgent requests to be communicated through Interpol.

3. Simplified Extradition through Endorsement of Warrants and Consent Extradition

71. Extradition may follow 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.

72. Extradition may be streamlined through 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.

73. 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, usually the court 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 generally based on domestic law, not treaties. A requested state is therefore not strictly bound under international law to accede to an extradition request.

74. Another measure 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.



4. Appeals

75. Appeals may be necessary in the interests of justice, but they can also prolong proceedings and lead to further delay. Jurisdictions may 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.

76. Proceedings can be further prolonged if the person sought can tender additional evidence on appeal. Some legislation expressly precludes appellants from tendering additional evidence.

77. In addition to appeals of the decision of an extradition judge, some countries 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 is multiple and somewhat convoluted appeal proceedings that could cause delay.

78. Appeals of MLA requests in the requested state are less common.

5. Time Requirements

79. To ensure proceedings are expeditious, extradition legislation may contain very short time requirements for certain steps to be taken. However, despite 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 commencing and then being adjourned or drawn out for lengthy periods of time.

80. Sometimes provisions require certain steps to be completed by a certain time. Imposing relative short deadlines could expedite proceedings, but there may be one drawback: in exceptionally complex cases, the court, the government and the litigants may not have sufficient time to properly prepare and consider the case.

Question:

14. Please indicate whether your country's extradition and MLA arrangements (legislation or treaties) provide for formal transmission of requests for cooperation and evidence and which (communication through diplomatic channels, transmission through central authorities, transmission between law enforcement agencies, other)?
15. Please mention the formal extradition and co-operation channels in your country.
16. Do your country's co-operation arrangements provide for urgent procedures and if so which? Please also clarify how these provisions are implemented.
17. Do your country's co-operation arrangements provide for simplified extradition and if so, what procedures exist?
18. Do your country's co-operation arrangements provide for appeal by the person sought or by the requesting state?
19. Do your country's co-operation arrangements provide for time requirements to order or effect surrender?

B. Measures to Facilitate Effective International Cooperation

1. Use of Liaison Personnel

81. The law enforcement agencies may designate 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 main role is to serve as a contact point and to



provide advice to domestic and foreign law enforcement officials who are seeking international cooperation. In some cases, liaison personnel may be posted in a foreign country.

82. Law enforcement officials are well-advised to contact liaison personnel when preparing a request for assistance, even when 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 a 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. The software tool prepared by UNODC (available at www.unodc.org/mla) can assist in drafting the request.

83. Inter-governmental bodies can also serve as forums for liaison. Law enforcement representatives from Parties to the OECD Anti-Corruption Convention regularly meet in the context of the meetings of the OECD Working Group on Bribery. Law enforcement agencies from parties to the Inter-American Convention against Corruption do alike in the context of the OAS. Countries may also post liaison personnel with the International Criminal Police Organization (Interpol).

2. *Participation of Foreign Authorities in Executing Requests*

84. 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. Of course, the requesting state could submit a list of supplemental questions after the examination of the witness, but this would greatly delay the investigation. The supplemental questions could also generate further follow-up questions.

3. *Alternatives to Formal MLA and Extradition*

85. In practice, it is important that practitioners also consider whether assistance outside regular MLA treaties and legislation can meet their needs. This is often available for 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.

86. 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.B.1).

87. There are also non-police channels of assistance. Instead of extradition, immigration authorities in the requested state may be able to deport the person sought. As for MLA, financial intelligence units (FIUs) may undertake to cooperate and share information. Individual FIUs may have memoranda of understanding or letters to accomplish the same. Another source of information is company and securities regulators. 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. One limitation, however, is that some jurisdictions may refuse to provide information through such regulatory channels for use in a criminal investigation.

Question:

20. Please indicate whether your country has designated liaison personnel to coordinates and deal with inquiries from abroad or local consulate officials or event posted liaison personnel overseas?



21. *Do your country's co-operation arrangements provide for participation of officials of the requesting state to participate in the execution of the request? What kind of participation is provided for?*
22. *Would you say that alternative ways of co-operation are available in your country and if so, which?*
23. *Please provide an overall assessment of the effectiveness of your countries arrangements to deal with extradition and MLA in corruption cases and related offences. Please also mention means and ways by which impediments could be reduced and effectiveness enhanced.*