

Legislative Impact Assessment Report

Mutual Legal Assistance Bill

1. Title of the proposal: Mutual Legal Assistance Act

Lead Ministry/Commission/Agency: Department of Law and Order, Ministry of Home and Cultural Affairs

Date of approval of Legislative Proposal: Approved vide Lhengye Zhungtshog dated 19th April, 2022.

Expected Date of Adoption Day/Month/Year: July, 2022

2. THE BACKGROUND OF THE PROPOSAL:

As per information obtained from the Royal Monetary Authority (RMA), Bhutan received support from the Asian Development Bank in the form of loan in 2006 to strengthen and promote Anti-Money Laundering (AML)/Countering the Financing of Terrorism (CFT) measures and develop action plan. Subsequently, Bhutan joined the Asia Pacific Group (APG) on AML and CFT in 2011. The APG on AML/CFT as an associate member of Financial Action Task Force (FATF) follows 40 recommendations of the FATF while evaluating the member countries.

As per recommendation. 37 and 38 of the FATF, MLA as a domestic legal mechanism, is required to strengthen international cooperation amongst the law enforcement agencies of the states to deal with money laundering, associated predicate offences and terrorist financing investigations, prosecutions and related proceedings.

Bhutan was evaluated by APG for the first time in 2016. In the mutual evaluation, APG pointed out several technical deficiencies both in terms of legal mechanism and effectiveness which included having a comprehensive law on AML/CFT, Counter Terrorism and MLA. In keeping with the review findings, Bhutan put in place all necessary legal mechanisms and fulfilled almost all technical compliance deficiencies except the MLA mechanism. Bhutan's technical compliance will be fully met upon enactment of a MLA Act.

Since Bhutan was subject to mutual evaluation in 2016 upon joining APG in 2011, a Note was submitted to the Lhengye Zhungtshog. The Cabinet decided and directed the Office of Attorney General (OAG) to explore the possibility of converging all the proposed laws, namely, the AML/CFT bill, Counter Terrorism and MLA bill under one legal framework as one Act vide its letter no. C-3/94/181 dated 14th January, 2016. The OAG vide its letter no. OAG/LSD/2238 dated March 22, 2018 advised that the consolidation of all the proposed laws under one legal framework would entail certain unwarranted procedural complexities since the subject matters are different and involves different competent authorities to implement these laws. Therefore, the OAG recommended a separate Act on MLA.

The proposed MLA Act is expected to have broader scope which would outline process of collaboration/cooperation between countries for obtaining assistance in the investigation or prosecution for various transnational organized crime.

Subsequently, the Royal Government of Bhutan approved the Department of Law and Order (DLO) as Central Authority for MLA during the 150th Lhengye Zhungtshog held on 9th January, 2018 vide Cabinet letter no. C-3/150/847 dated 26th February, 2018.

3. MAIN OBJECTIVE OF THE PROPOSAL:

The main objectives of the proposed Act, amongst others are as follows:

1. Enhance international cooperation and strengthen criminal justice system
2. Delineate clear roles and responsibilities of Central Authority and Competent Authorities and relevant law enforcement agencies to deal with matters of MLA by having a uniform application of law on MLA.
3. Enhance the domestic mechanism in areas of criminal justice system and fulfill the technical compliance under international assessment mechanisms, elevate rating in the international review mechanism and avoid getting international sanctions.
4. Give a legal status to the DLO as a Central Authority for MLA as approved by the Royal Government of Bhutan (RGoB).

4. POLICY RATIONALE FOR THE PROPOSAL:

Technically, in the absence of a specific legal framework to enforce MLA in criminal matters, it has led to numerous issues and challenges in solving cases by law enforcement agencies like Anti-Corruption Commission (ACC), Department of Revenue and Customs (DRC), Office of Attorney General (OAG), Bhutan Narcotics Control Agency (BNCA) and RMA. The ACC, DRC, OAG and RMA have reported dropping some cases in the absence of a MLA mechanism to collaborate with foreign law enforcement authorities to effectively assist each other in investigations, prosecutions and judicial proceedings.

Furthermore, this proposed Act will address the following issues:

1. The rating in the evaluation process under the review mechanism of APG on AML and CFT could be elevated as Bhutan would be meeting the technical compliances. Bhutan will be able to increase its standing in the international community and uphold international reputation of financial integrity, thereby, avoiding negative impact on foreign direct investment, international banking relations and prevent from being under international naming and shaming mechanism through the review process. Besides, Bhutan will also be able to demonstrate its commitment and support to the international and regional initiatives.
2. In the absence of MLA Act, the DLO is not able to facilitate legal assistance to the requesting state. DLO has so far recorded 66 requests from a neighboring country for various MLA services. The MLA Act would provide legal basis to refuse or execute those requests upon invoking the provisions on ground of refusal and conditions under which incoming and outgoing requests can be implemented. Similarly, the MLA cases involving foreign jurisdiction, which the competent authorities like RBP, ACC, BNCA, RMA and OAG would have to pursue, could achieve successful investigation and prosecution. MLA will help Bhutan enter into bilateral or multilateral treaties, drawing its basis from the MLA, if enacted.

3. The Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) has been established in 1997. There are 14 priority sectors of cooperation under BIMSTEC and each of these sectors has been assigned one lead shepherd (lead country). The MLA is one of the priority concerns related to areas of cooperation falling under Counter Terrorism and Transnational Crimes (CTTC). This sector's lead shepherd is India. In this regard, India has already proposed the BIMSTEC Convention on MLA in criminal matters and all member states have conveyed their readiness to sign it. Ultimately, the convention was signed this year in March 2022. Therefore, putting in place a domestic legal framework on MLA has become critical to implement both regional and international conventions.
4. Bhutan has also ratified the BIMSTEC Convention on Cooperation in Combating International Terrorism, Transnational Organized Crime and Illicit Drug Trafficking, 2009. Under this convention, MLA is one of the important elements necessary to strengthen regional cooperation to fight against various transnational organized crimes. To enforce this convention, a domestic legal mechanism on MLA is necessary.
5. Similarly, Bhutan has also ratified the United Nations Convention against Corruption (UNCAC). MLA is an important part of UNCAC which is necessary to enhance international cooperation for countering corruption. Articles 46, 53, 54, 55 and 57 of the UNCAC are on MLA which provide for international cooperation in the areas of recovery, return and disposal of assets. A domestic legal mechanism is required to be put in place consistent with the provisions of the international conventions.
6. Bhutan is also in the process of ratifying the United Nations Convention against Transnational Organized Crime and its protocol: Protocol to Prevent, Suppress and Punish Trafficking in Persons (TIP), especially Women and Children. Like in other conventions, MLA is a critical part of these conventions for which a domestic legal mechanism on MLA is required to be put in place.
7. As a member of the international community, Bhutan is subject to many global review mechanisms. Under the international instruments, MLA is regarded as a basic legal framework required to be put in place to enhance international cooperation and strengthen the criminal justice system. Such basic international requirements would have to be met to secure better ranking under various review mechanisms, avoid facing sanctions, build international rapport and demonstrate Bhutan's commitment and support to the global initiatives.
8. The proposed law will benefit the country at a global scale by facilitating exchange of MLA services with other countries and help achieve successful conviction through efficient investigation and prosecution. It, therefore, strengthens the criminal justice system. In an increasingly globalized world, where criminal offences are becoming more and more transnational in nature, the criminal justice system can fail in the absence of international cooperation mechanisms such as MLA.

5. OPTIONS TO ACHIEVE THE OBJECTIVES:

Bhutan has gained membership to various international legal instruments. Under these instruments, it has notably recognized the MLA as a basic law necessary to enhance international cooperation in the field of the criminal justice system. MLA is an internationally

recognized basic legal mechanism to implement international cooperation in the field of criminal proceedings.

Besides the MLA, other forms of mechanism will not have same level of legal standing in the international arena. For instance, the ACC, during the consultation meeting, informed about invoking letter of rogatory to request for some international cooperation in dealing a case. However, this mechanism could not help ACC receive the necessary legal assistance from the foreign jurisdiction in the absence of a MLA law. When legal mechanism such as MLA is not there, Bhutan is not able to take full advantage to exercise its own right to accept or reject a request of MLA.

One of the other options that we can think of is collaborating with the foreign jurisdiction through diplomatic channel or bilateral treaties. However, in the absence of internal process through MLA mechanism, such process would remain ineffective and impractical. Besides, it would impede the uniform enforcement of MLA measures.

The other option could be to use the bilateral forums such as the Border District Coordination Meeting (BDCM) between Bhutan and Indian States of West Bengal and Assam and Bhutan-India Meeting on Border Management and Security. However, while few urgent cases of national importance could be pursued through such forums, it cannot act as a formal and dedicated forum for MLA cases.

6. IMPACTS EXPECTED FROM THE DIFFERENT OPTIONS IDENTIFIED:

Identifying other options for MLA may entail following issues:

1. No legal basis to enforce MLA
2. No legal recognition in the international arena
3. Services could be inefficient and time consuming
4. Impede uniformity in the enforcement of MLA
5. Undermine the mandate of the bilateral or multilateral forums established for other intended purpose in the event other forums are used for MLA services
6. No other probable options can form legal basis to enter into bilateral or multilateral treaties on MLA

The only option is to have a MLA Act to deal with mutual legal assistance services in keeping with international standards. The MLA Act, if enacted, could have the following positive impacts and negative impacts:

Positive Impacts:

1. Delineate clear roles and powers of the relevant agencies pertaining to MLA in criminal Matters
2. Provide a comprehensive mechanism for:
 - a. the provision of legal assistance to foreign countries upon request
 - b. the making of requests for legal assistance to foreign countries by the Kingdom of Bhutan;

- c. ensuring the admissibility of evidence transmitted to the Kingdom of Bhutan pursuant to an outgoing request;
 - d. describing the nature of assistance that may be provided in response to an incoming request;
 - e. complying with obligations relating to the need for enhancing international cooperation as required by international instruments to which the Kingdom of Bhutan is a party.
2. Strengthen MLA and related services delivery capacity of relevant agencies including DLO as Central Authority for MLA.

Negative Impacts:

1. Cost

The MLA process may incur expenses since it would have to transmit evidence to foreign countries. It may also entail installation of adequate equipment to carry out the required functions.

2. Resources

Resources both in terms of human and finance may have to be strengthened including capacity building for law enforcement officials. For instance, some of the MLA matters would require intelligence input and data collection.

7. JUSTIFICATION OF THE PREFERRED OPTION (THE MLA ACT)

The need to put in place the MLA law is in keeping with the international standard. As a member of international community, Bhutan is subject to many global review mechanisms. Under many international instruments, MLA is regarded as a basic legal framework required to be put in place to enhance international cooperation and strengthen criminal justice system. Such basic international requirements would have to be met to secure better ranking under various review mechanisms, avoid facing sanctions, build international rapport and demonstrate Bhutan's commitment and support to the global initiatives.

Reciprocity is an important aspect while executing MLA requests. Therefore, Bhutan will not be reciprocated well in the field of international cooperation if Bhutan fails to provide the necessary legal assistance to the requesting foreign states owing to the lack of domestic process in MLA. In an increasingly globalized world, where criminal offences are becoming more and more transnational in nature, criminal justice system can fail in the absence of international cooperation mechanism such as MLA.

Having a MLA law would form strong legal basis to enforce MLA. It can achieve legal recognition in the international arena and receive legal assistance from the foreign jurisdiction. We will be able to put in place uniform MLA mechanism in the country that can help facilitate efficient delivery of MLA services, thereby, strengthening the criminal justice system.

The MLA law will help provide clear process in handling cases requiring MLA in term of processing our request to other states whenever necessary for successful legal proceedings.

It would also help fulfill those requests made by foreign states, thereby, enhancing international cooperation in the areas of countering transnational crime and strengthening security conditions. The MLA Act would delineate clear roles and functions of the DLO as a Central Authority and relevant law enforcement agencies to deal with matters of MLA including grounds for refusal and conditions for accepting MLA requests.

The bilateral or multilateral treaties or other forms of arrangements on MLA would be rendered meaningless if there is no dedicated law on MLA that would clearly outline the process of handling MLA requests, both while receiving or sending it. MLA is indeed a basis for bilateral or multilateral treaties on MLA.

Given the increasing requests on MLA received by DLO and drawing lessons from the cases which failed to receive the desired criminal proceeding outcome in the absence of MLA process, a comprehensive mechanism in the areas of facilitating legal assistance in criminal matters is highly necessary.

8. POWERS AND FUNCTIONS, DECISION MAKERS, DELEGATES AND REVIEW OF DECISIONS

The proposed MLA Act has seven chapters and 135 sections. The law outlines the roles and responsibilities of the Central Authority and Competent Authorities.

The proposed MLA Act shall identify DLO as the Central Authority for MLA matters and shall be mandated to ensure that every incoming and outgoing request on MLA is routed through DLO as the identified Central Authority.

The Central Authority has the responsibility to certify the documents to be used as evidence in the court of law in the foreign jurisdiction. The Central Authority may have to facilitate sharing evidence via audio visual, transmit document, record, article or any other material required by the Central Authority of the Requesting State party and facilitate movement of identified legal service provider to the Requesting State. The Central Authority may initiate entry into bilateral or multilateral treaties on MLA in consultation with the Competent Authorities and Ministry of Foreign Affairs.

The proposed Act shall also give power to Central Authority to refuse requests and set conditions to a requesting state before executing a request for MLA by any law enforcement agencies for both incoming and outgoing requests. The proposed Act will provide procedures to execute MLA requests pertaining to judiciary by a competent court of jurisdiction.

9. STAKEHOLDER CONSULTATION

During the drafting of the MLA Bill, several rounds of bilateral and group meetings were held among the Technical Committee (TC) members for Anti-money Laundering (AML) and Countering Financing of Terrorism (CFT) formed under the Royal Monetary Authority. The TC-AML/CFT comprise of members from the ACC, RMA, Dept. of Immigration, Dept. of Law and Order, DRC, MoEA, OAG, RBP, MFA and BNCA. An expert from the International Monetary Fund, who made the initial draft, organized focused group meetings with relevant TC member agencies such as OAG and DLO from 6-10 January 2020. Once

the draft has been finalized, the Bill was handed over to the DLO as a Central Authority for further review and consultations.

The, DLO after receiving the Bill, organized the first consultation meeting with the relevant stakeholders on 14th November, 2019 followed by second round of consultation meeting in January 7th, 2021. Stakeholders included representatives from ACC, OAG, Judiciary, Ministry of Foreign Affairs, Bhutan Narcotic Control Agency, Royal Bhutan Police and RMA.

The meeting agreed, in principle on the content of the draft as well as on the need for such law in the country. Given that Bhutan is party to several international and regional conventions and treaties, the meeting agreed that MLA law has become critical to enforce these conventions and to also enhance our domestic mechanisms in the areas of criminal justice system.

The meeting discussed the contents of the draft law in detail following which the draft was also shared with the stakeholders. All the comments have been incorporated in the draft and finalized.

The DLO also made presentation to the Hon'ble Home Minister on 17th March 2022. Director of Financial Intelligence Department, RMA, Legal Expert, RMA and representatives from the Policy and Planning Division of the MoHCA attended the meeting.

The MLA Bill was further presented to the TC members from the ACC, RMA, Dept. of Immigration, Dept. of Law and Order, DRC, MoEA, OAG, RBP, MFA, BNCA, CSOA and Choede Lhentshog during the 23rd TC Meeting on 24th March 2022. The MLA Bill was further shared with the TC members for comments. All the comments were incorporated.

Drawing lessons from the past experiences, the members who attended the meeting agreed that MLA law is critical to facilitate investigation, prosecution and criminal proceedings of cases involving need for legal services from the foreign jurisdiction. It was informed that some of the cases had failed in achieving successful investigation, prosecution and criminal proceedings owing to the absence of MLA law in the country which is necessary to avail legal service from the foreign jurisdiction. The members informed that lack of MLA laws adversely impacted investigation, prosecution and criminal proceedings of some cases that they dealt-with, in the past.

10. Conclusion

The MLA law is critical to enhance international cooperation, strengthen criminal justice system, fulfill international requirements and facilitate successful investigation, prosecution and judicial proceedings.