

Mutual legal assistance to strengthen Indonesia-ASEAN forest governance

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Key points

- With diverse transboundary links in environmental crimes increasingly prominent, there is a need to identify tools to enhance international or regional cooperation in order to strengthen forest enforcement.
- Mutual legal assistance (MLA) has particular potential to facilitate cooperation across jurisdictions.
- Provisions on dual criminality and predicate offenses often limit the scope for MLA on forest-related crimes, both within Indonesia and in partner countries.
- Proactive establishment of bilateral MLA agreements could strengthen MLA use, including with countries where the financiers and traders often reside and bank.
- Existing platforms provide opportunities to operationalize country commitments to international cooperation on environmental topics.

Introduction

Environmental crime often extends beyond a single nation's jurisdiction. In particular, experience in the Indonesian forestry sector has highlighted the role of overseas financiers, trade and banking institutions. Moreover, pressing regional issues such as transboundary haze, illegal wildlife and timber trade, and increasing regional investment, have underscored the need for improved, collaborative approaches to enforcement. Notably, mutual legal assistance (MLA) agreements provide opportunities for gathering and exchanging information (witnesses, statements and evidence) among partner countries. In the context of forest governance, MLA potentially allows enforcement agencies to access the financiers and masterminds of illegal forest activities, that often span jurisdictions.

Based on a literature and legal review, and interviews with Indonesia's central authority for mutual legal assistance¹, other key government officials² and focus group³ discussions,

we review Indonesia's use of MLA to allow law enforcement agencies to access witnesses, information, evidence and assets in other countries. Despite considerable challenges to regional environmental cooperation among the Association for Southeast Asian Nations (ASEAN) (Jones and Smith 2007; Elliott 2010), MLA represents a realistic collaborative opportunity to help strengthen forest governance in the region.

The importance of MLA to addressing forest-related crimes is increasingly recognized, and there are compelling reasons for pursuing collaborative enforcement beyond single jurisdictions (Walters 2010; Government of Indonesia 2013). Notably, localized environmental degradation has the potential to impact the broader region, and so merit increased regional collaboration. For example, Singapore's new Transboundary Haze Pollution Bill will hold companies liable for fires in Indonesia that result in transboundary haze (Government of Singapore 2014). In fact, regional environmental cooperation is enshrined in a number of ASEAN agreements (Elliott 2010), which further highlights the potential and need for greater cooperation. This is particularly important because many regional environmental challenges also go hand-in-hand with regional trade links of timber and other wildlife (Smith et al. 2007; UNODC 2010, 2013; Nguyen 2012). In these types of cases, MLA is particularly well-suited to help enforcement agencies across jurisdictions to access information, evidence and suspects internationally (see Box 1).

¹ Indonesia's central authority for mutual legal assistance is the Ministry of Law and Human Rights under the Directorate of International Law and Central Authority.

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³ Interpol Indonesia, Ministry of Law and Human Rights, Anti-Corruption Commission, Ministry of Foreign Affairs, PPATK, Transparency International Indonesia and Trisakti University.

Importantly, many regional environmental links are financial. For example, evidence suggests that many logging, mining and agriculture operations that encroach on Indonesian forests draw on overseas investment and/or rely heavily on overseas financial infrastructure (Van Gelder and Kouwenhoven 2011; Environmental Investigation Agency 2013; Friends of the Earth 2013; UNODC 2013). Evidence suggests strongly that the proceeds of forest-related crimes often lie beyond Indonesian jurisdiction — notably in financial institutions in Singapore, Malaysia and Hong Kong (Walters 2010; Goncalves et al. 2012). These sums are potentially quite sizeable. Indonesian Supreme Audit Agency (BPK) reported losses of USD 2.42 million due to illegal activities in the forestry sector in Riau and Central Kalimantan provinces (BPK 2009). While no data exist on how much of these assets are transferred overseas, Indonesian overseas investments are growing dramatically (Tampubolon 2012), and ASEAN is a global center of national money laundering (Dorn and Levi 2008). In these types of cases, MLA may provide opportunities not only for tracking financial flows and information exchange, but also for recovering assets.

As these diverse transboundary links become increasingly prominent, tools are needed to enhance regional cooperation to strengthen forest enforcement. This Info Brief provides an overview of the legal frameworks that facilitate MLA cooperation, specifically within ASEAN and Indonesia. A review of recent experiences in Indonesia is used to explore barriers to, and recommendations for, more effective international enforcement of environmental law through MLA.

Mutual legal assistance frameworks

International MLA mechanisms were first adopted in 1988 with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Similar cooperative mechanisms were adopted in the UN Convention against Transnational Organized Crime (UNTOC 2000) and the UN Convention against Corruption (UNCAC 2003). These conventions mandate signatories to cooperate with one another on investigations, prosecutions and judicial proceedings to resolve criminal offenses listed in the conventions (Box 1). While not specifically focused on the environment, these global agreements nevertheless provide frameworks for MLA related to forest-related crimes. In 2007, to highlight this relationship, the United Nations Office on Drugs and Crime (UNODC) specifically encouraged member states to strengthen law enforcement in order to prevent, combat and eradicate illicit international trafficking in forest products⁴.

Regional MLA among ASEAN states is also articulated in the ASEAN MLA Treaty (AMLAT), which seeks to enhance cooperation to prevent and prosecute transnational crimes across member states. The Treaty, first established in 2004, had been signed by all ASEAN nations by 2006. Like the other international conventions that refer to MLA, AMLAT requires that Parties designate a central authority (CA) to handle all MLA requests. However, given that

Box 1. What is MLA?

Mutual legal assistance (MLA) agreements include multilateral (regional or global) and bilateral treaties to facilitate the exchange of information between law enforcement agencies in different countries. Requests for assistance can include taking evidence or statements; executing searches and seizures; freezing assets; providing information and/or documents; identifying or tracing proceeds, properties or other objects of value to serve as evidence; and facilitating seizures, forfeitures and extraditions (Prost 1998; UNCAC 2003). A designated central authority usually serves as a contact point for sending and receiving MLA requests to relevant domestic law enforcement agencies.

written requests take five days to forward, the Treaty also provides specific exceptions so that urgent requests can be made orally via Interpol or ASEANAPOL.

AMLAT does not designate specific crimes for collaboration, but does clarify limitations to MLA, excluding cooperation on crimes that

- are of political nature;
- would have constituted a military offense under the laws of the state requested for MLA;
- can cause prejudice to a person on account of the person's race, religion, sex, ethnic origin, or nationality or political opinions;
- have already been convicted, acquitted or pardoned by a competent court or other authority;
- would have constituted an offense against the laws of the state requested for MLA (i.e. crimes that lack dual criminality, see Box 3).

Notably, however, the Treaty mandates Parties to provide as much MLA as possible even in cases of dual criminality, so long as it is permitted under their domestic laws⁵. To this end, Indonesia has also included international illegal timber trade crime in the newest illegal logging law as the basis for Indonesian law enforcement agencies to pursue evidence or perpetrators overseas⁶.

Other international cooperative mechanisms also facilitate MLA, including those related to forest and wildlife crimes. Notably, the 2002 ASEAN Agreement on Transboundary Haze binds the Parties to mutual assistance and cooperation related to haze pollution, including responding to requests for relevant information and legal measures to implement obligations of the Agreement⁷. This could provide an obvious platform for future MLA. Critically, however, Indonesia has yet to ratify the Agreement. Still, Indonesia is part of the Association of Southeast Asian Nations' Wildlife Enforcement Network (ASEAN-WEN). Established in 2004, the group serves as a regional intergovernmental law enforcement network focused on wildlife trade. Although not explicitly an MLA agreement, the

⁵ AMLAT, Article 3 paragraph 1(e).

⁶ Law No. 18/2013 on Prevention and Eradication of Forest Destruction, Article 19.

⁷ The ASEAN Agreement on Transboundary Haze. Although not referring specifically to MLA, the Agreement refers to "mutual assistance" and to "legal measures".

⁴ See Resolution 16/1 The Commission on Crime and Prevention and Criminal Justice, which refers to trade of timber, wildlife and other forest biological resources.

Table 1. Indonesia’s bilateral and multilateral agreements on mutual legal assistance

Country	AMLAT	UNTOC	UNCAC	Bilateral with Indonesia
Australia	NA	N	Y	Y
Brunei Darussalam	Y	Y	Y	N
Cambodia	Y	Y	Y	N
China	NA	N	Y	Y
Hong Kong-China	NA	N	Y	Y
India	NA	N	Y	Y
Indonesia	Y	Y	Y	--
Japan	NA	N	Y	N
Lao People’s Democratic Republic	Y	Y	Y	N
Malaysia	Y	Y	Y	N
Myanmar	Y	Y	Y	N
Philippines	Y	Y	Y	N
Republic of Korea	NA	N	Y	Y
Singapore	Y	Y	Y	N
Thailand	Y	N	Y	N
United Arab Emirates (UAE)	NA		Y	Y
Vietnam	Y	N	Y	Y

Source: After Nguyen 2012.

Note: This includes countries that have already been involved in MLA with Indonesia.

network includes mechanisms for information sharing and efforts to improve regional collaboration on enforcement, including through MLA (ASEAN-WEN 2013).

In addition, Indonesia also holds a number of bilateral MLA agreements. These provide direct channels for legal assistance with countries outside AMLAT, and potentially provide a stronger basis for collaboration and cover a wider scope of crimes than global conventions such as UNCAC and UNTOC. Indonesia holds bilateral MLA agreements with Australia, China, Hong Kong, India, South Korea, United Arab Emirates (UAE) and Vietnam (Table 1).

Mutual legal assistance in Indonesia

Indonesia is signatory to all of the relevant international MLA agreements (Table 1), and has established domestic legislation necessary to ensure participation in MLA. In 2006, the government and the legislative assembly passed Law No. 1/2006 on Mutual Legal Assistance in Criminal Matters. This provides law enforcement agencies with the authority to pursue MLA requests (e.g. Indonesian National Police, Attorney General’s Office, Corruption Eradication Commission [KPK]). It also articulates the scope for MLA requests, including

- identifying and locating persons;
- obtaining statements;
- providing documents;
- facilitating the appearance of persons to provide information or to assist in investigations;
- delivering letters;

- executing searches and seizures;
- seizing the proceeds of crime;
- recovering monetary fines related to convicted crimes;
- freezing of asset transactions and of assets derived from the commission of an offense that may be recovered, forfeited or confiscated;
- tracing of assets derived from the commission of an offense that may be recovered, forfeited or confiscated.

The law further specifies that enforcement agencies should file formal requests through the Ministry of Law and Human Rights, which serves as Indonesia’s central authority (CA) for MLA (Figure 1). The Ministry is instructed to forward requests, either directly to the CA in a partner country or through diplomatic channels. Similarly, signatories should send MLA requests to the CA, which communicates with the appropriate enforcement agencies for follow-up. Notably, to be used in an Indonesian legal proceeding, MLA requests have to be formalized through the CA in order to establish the legitimacy of any evidence collected overseas⁸.

Since the 2006 MLA Law, Indonesia has been involved in 124 cases of MLA with 34 countries, usually as the cooperating State (Table 2). Notably, Indonesia was engaged in 19 cases as the requesting country. Requests have related to cases on money laundering, fraud, terrorism, corruption, murder, narcotics, bribery, embezzlement and corruption. Requests have involved access to bank records, requests for testimony and help with interrogation.

⁸ Law No. 1/2006 on mutual legal assistance, Article 12

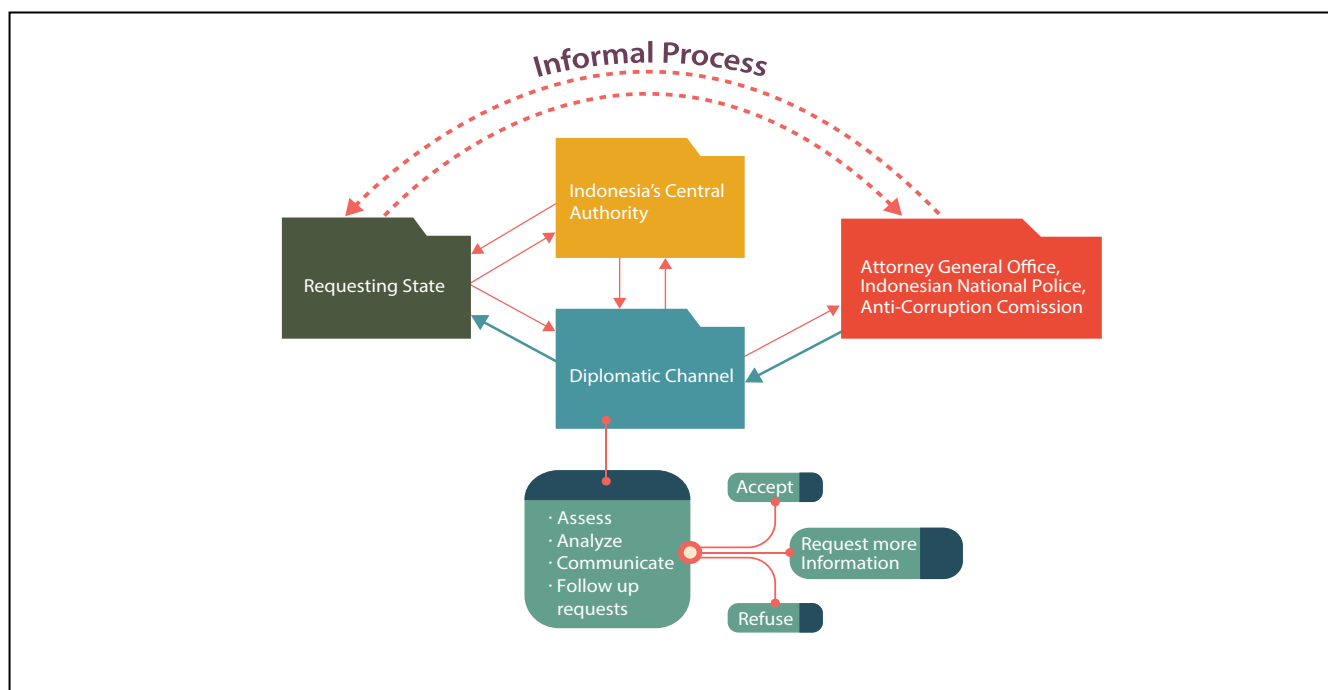


Figure 1. Process of mutual legal assistance in Indonesia

Table 2. Number of known cases of MLA involving Indonesia (2006 – 2012)⁹

Country	Indonesia as requesting state	Indonesia as requested state
Australia	1	9
Belgium	--	4
Brazil	--	1
Bulgaria	--	4
Cambodia	1	1
Cameroon	--	1
Canada	1	--
Czechoslovakia	1	--
China	5	3
Ecuador	--	2
Finland	--	4
France	--	1
Germany	--	11
Greece	--	1
Hong Kong	2	--
India	--	1
Italy	1	--
Japan	2	-
Korea	--	2
Laos	1	--

Country	Indonesia as requesting state	Indonesia as requested state
Lithuania	--	1
Malaysia	6	1
Netherlands	3	7
Norway	--	1
Papua New Guinea	1	--
Portugal	--	1
Russia	--	1
Singapore	13	2
Spain	2	3
Switzerland	1	7
Thailand	1	--
United Kingdom	1	--
United States of America	3	7
Vietnam	1	1
Total	47	77

The CA reports most cases to date have been comparatively informal, based on good bilateral relations and put into operation through diplomatic channels and/or collaboration directly between law enforcement agencies. Collaborations have reportedly often bypassed the CA in order to save time. Importantly, most of Indonesia's MLA requests have reportedly been granted, providing precedents for future collaboration. A small number of requests were, reportedly, pending or returned, due to lack of sufficient data within the original request,

⁹ Interview with Hendra Andy Gurning and Andi Eva Nurliani, International Criminal and Civil Law Section, Ministry of Law and Human Rights, 19 May 2010 and 5 March 2014.

Box 2. Integrated law enforcement approach

Combating forest-related crimes requires a broadened, more integrated approach that draws on diverse tools to 1) increase overall enforcement effectiveness and fairness; 2) create a stronger deterrent effect to reduce crime; and 3) target the high-level financiers and planners of crime — who are often in other jurisdictions. Since 2005, CIFOR has promoted the use of anti-money laundering tools to curtail illegal logging by targeting the proceeds of criminal activities (Setiono and Hussein 2005). In 2007, CIFOR began to conceptualize an expanded integrated law enforcement approach (ILEA). This approach builds on traditional forest sector enforcement (e.g. monitoring, permitting, use of forestry sector laws), and integrates prosecutions based on both forest sector law and ‘cross-over’ crimes such as money laundering and corruption (Santoso et al. 2011; Goncalves et al. 2012). MLA is one key tool within ILEA.

unavailability of the requested data or disclosure of only very general data.

Indonesia has limited experience with the use of MLA to pursue environmental crimes. In 2009, the Indonesian National Police filed an MLA request to Hong Kong, seeking information on Adelin Lis after he fled following charges of illegal logging and corruption. However, due to lack of clarity regarding the information needed, Indonesia’s CA never sent the request to the Government of Hong Kong. To date, there have been no formal MLA requests involving forest-related investigations or cases.

MLA within an integrated law enforcement approach

Mutual legal assistance is a key instrument for pursuing an integrated law enforcement approach (ILEA) in the forestry sector (Box 2). Notably, there is scope for using MLA to directly pursue forest-related crimes based on environmental and forestry sector laws, as AMLAT provides channels without limitation to type of crime. These opportunities are highlighted, for example, by ASEAN-WEN efforts. Furthermore, the Group of Technical and Legal Experts for the Convention on Biological Diversity has also recommended MLA to handle breaches of access and benefit-sharing provision, which can extend across jurisdictions (UNEP 2009). However, in many cases, drawing only on sector-specific laws incurs low penalties¹⁰ (Yuntho et al. 2009), and environmental infractions are not necessarily criminalized and/or defined as criminal acts overseas (see Box 3).

Particularly in these cases, MLA can be used to target ‘cross-over crimes’ such as corruption and money laundering. These types of offenses are often associated with environmental crimes, as individuals leverage bribes for illegal resource access and seek to disguise illegally-earned profits via laundering.

Moreover, even where legislation provides limited resources for pursuing environmental crimes, existing MLA agreements mandate Parties to provide assistance during the investigation, prosecutions and judicial proceedings of corruption and money laundering¹¹. This provides unique scope for pursuing the perpetrators of environmental crimes by targeting other crimes that are often conducted in conjunction with them. Importantly, international cooperation through MLA also provides channels for post-conviction recovery of assets from illegal activities and associated corruption and money laundering¹².

Challenges to MLA on forest-related crimes

Despite the potential to improve international cooperation to address forest-related enforcement, there are challenges to mainstreaming MLA across forest governance regimes. Many of these challenges relate to legal/regulatory weaknesses within Indonesia and MLA partner countries, including the following:

1. Provisions on dual criminality¹³ and predicate offenses¹⁴ limit the scope for MLA on forest-related crimes, both within Indonesia and in partner countries. Notably, forest-related crimes in Indonesia do not necessarily represent serious crimes or predicate crimes in cooperating countries (see Box 3).
2. Broad evidence suggests that environmental cooperation among ASEAN countries suffers from a lack of collective investment in shared regional interests, as well as ‘soft’ regulatory approaches to environmental problems that limit enforcement potential (Elliott 2010; Varkkey 2012).
3. There have been few efforts to draw on ‘cross-over crimes’ in handling forest-related crimes, which continue to focus on domestic efforts and have created few opportunities for using MLA tools. While this is partly linked to the overall low intensity and effectiveness of enforcement efforts in Indonesia, it also reflects a lack of specific capacity. A number of key law enforcement agencies lack familiarity with the diversity of legal tools at their disposal. As a result, there is a lack of capacity to draw on ‘cross-over crimes’ and to use and prepare MLA requests effectively. These processes are particularly important, as initial experiences with MLA in Indonesia suggest that timely cooperation depends heavily on the requisitioning Party ensuring that all documents are in order.
4. Many good-governance and environmental activists in Indonesia have had limited appreciation of MLA and its potential for facilitating enforcement, addressing ‘cross-over’ crimes and enabling asset recovery. Yet civil society has a strategic monitoring role to help ensure relevant government agencies take effective measures to enforce environmental laws.

¹¹ For example, Article 46 UNCAC, Article 18 UNTOC, Article 1 AMLAT.

¹² Article 46 and 57 UNCAC; Article 51 Indonesian MLA Law.

¹³ Dual criminality refers to an act that is criminalized and punishable in multiple countries. It is often requisite because suspects can often only be the object of MLA when they are charged with breaking a second country’s law where a similar law exists in the cooperating country.

¹⁴ A predicate offense refers to a crime that is part of a larger, usually more serious crime. In the case of money laundering, the predicate offense refers to the crime that produced the illegal funds.

¹⁰ Article 78 Law No. 41/1999 on Forestry.

Box 3. Defining predicate offenses (based on Walters 2010)

Pursuing MLA generally hinges on establishing that crimes in Indonesia are serious crime and/or predicate offenses in cooperating countries. Corruption is a widely recognized predicate crime, and provides a sound basis for requesting MLA. Crucially, however, forest-related crimes are generally not predicate offenses in key countries, such as Hong Kong and Singapore. One notable exception is the illegal international trade of CITES-listed species, which includes *Gonystylus* spp. (ramin), but excludes many valuable timber species. Nevertheless, the lack of predicate offense represents a major barrier to MLA to pursue overseas money laundering based on income from illegal forest activities. Despite this constraint, Walters (2010) highlights that overseas asset recovery efforts following a conviction generally do not have the same predicate crime restrictions. There is clear need and potential to expand the definition of predicate crimes.

Recommendations

Based on the identified challenges, there are considerable opportunities for strengthening both Indonesia's MLA system and regional cooperation, including the following:

1. Proactive establishment of bilateral MLA agreements could strengthen MLA use, including with countries where the financiers, traders and users of illegally extracted natural resources often reside and bank. Although Indonesia can draw on AMLAT and other international conventions related to environmental protection, anti-corruption and anti-money laundering, bilateral agreements with strategic countries could further facilitate direct cooperation, increasing access to evidence, witness, perpetrators and assets. The Ministry of Foreign Affairs and the Ministry of Law and Human Rights should work together with law enforcement agencies to pursue diplomatic strategies to support enhanced MLA efforts.
2. Given emerging experience with MLA in Indonesia, including the relative informality of most cases to date, a comprehensive assessment should be made of the related institutions and their use and understanding of MLA tools. This would provide a basis to better define the roles, expectations and coordination mechanisms among the central authority (CA) and related enforcement agencies.
3. Indonesia's MLA CA could strengthen its human resources to improve implementation of MLA requests (e.g. language expertise, knowledge of different legal systems). It should also publish technical MLA guidelines online, including in English, so that domestic and overseas counterparts are clear on the scope and process of MLA.
4. Increased use of MLA depends on improving other monitoring and enforcement issues. There is a need to invest

in capacity building of MLA with respect to forestry crime, corruption and money laundering across a broad range of enforcement institutions. In particular, forest sector actors should be well informed about MLA, including how to file requests and how to use it¹⁵.

5. Civil society groups engaged in forest conservation and governance could play a significant role in strengthening transnational cooperation. Civil society coordination meetings, both domestically and across ASEAN, might cooperate to formulate common strategies and responses to transnational forest-related crimes, and to push for overseas cooperation, including overseas asset recovery. This could include cooperation to consolidate and cross-check related data, and capacity building to increase ground-up reporting of suspected environmental crimes¹⁶.
6. Despite challenges to regional cooperation, there is scope to support efforts that help operationalize country commitments to international cooperation, particularly on environmental topics. There are some existing efforts and platforms of importance¹⁷.
7. There is need to engage partner countries, particularly those that serve as regional trade and financing hubs (e.g. Hong Kong, Singapore, Malaysia), to ensure not only that they are positioned to provide MLA, but that they have established the dual criminality and predicate offenses necessary to pursue MLA on forest-related cases. Notably, there is opportunity to monitor the operationalisation of Singapore's Transboundary Haze Pollution Bill, as it considers novel strategies through which to address transnational environmental issues.

Growing regional integration — based around transboundary environmental issues, regional financial and trade flows, and ASEAN integration — necessitates increased cooperation to address forest-related crimes. Despite clear challenges to regional cooperation, MLA represents an important, if underused, tool. Successful use of MLA will depend on capacity building, increasing procedural clarity and legal-regulatory reforms to ensure formal frameworks are in place and better harmonized (e.g. regarding predicate crimes). Moreover, cooperation will rely on good will that prioritizes regional environmental quality and demonstrates willingness to tackle challenging issues.

¹⁵ Including training for public prosecutors, police, judges, staff from the Ministry of Law and Human Rights, the KPK and the Financial Transaction Reports and Analysis Center (PPATK). These efforts should include training and support for instructors at the research and training divisions at each institution.

¹⁶ These types of activities are, for example, an area of focus within the SETAPAK Programmes, supported by The Asia Foundation

¹⁷ For example, efforts such as ASEAN-WEN, ASEANAPOL, INTERPOL's Law Enforcement Assistance for Forests (LEAF) and training by the United Nations Office on Drugs and Crime (UNODC) provide channels for enhancing regional cooperation and capacity to use MLA to strengthen forest-related enforcement.

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