Part 4: Developing Mutual Legal Assistance between and within the ASEAN and the EU

The following discussion evaluates and analyzes the salient points of the comparison made in the immediately preceding part of the study to highlight certain lessons that could be learned as well as the factors that would be important to take into consideration in suggesting and recommending how mutual legal assistance in criminal matters could be developed (further) within and between the ASEAN and the EU. The present study focuses on the following values: (1) intergovernmental v. supranational nature or formal v. informal, which refers to the nature or institutional design of the two regional organizations subject of the study; (2) principle of non-intervention v. soft imperialism power, which highlights the workings and/or principles and practices of the two regional organizations; and (3) harmonization v. approximation, which refers to the question of standardization of laws among member states or the need to provide baseline rules and regulations to which member states ought to follow and implement to make policies and decisions in the regional level work.

In light of this, these chosen values may not be complete and exact in determining the best route the possible development and/or strengthening of mutual legal assistance in criminal matters between and within the ASEAN and the EU should take but these values provide good starting points.

I. Lessons Learned

A. Intergovernmental v. Supranational; Formal v. Informal

Based on the foregoing discussion, there are certain lessons learned that could be further considered in providing suggestions as to how mutual legal assistance in criminal matters could be improved within and developed between the ASEAN and the EU.

First, one could look into the lessons that could be learned from the evaluation of the regional framework.

The difference in nature of the two regional organizations dictates how decision-making, compliance, and enforcement would proceed. Because

of its intergovernmental nature, and mostly informal manner of decision-making, the ASEAN cannot decide on its own and impose to its member states a decision or agreement it has entered into. Contrariwise, the member states ought to agree or acquiesce to a certain agreement or arrangement before the same can be legally binding on them. This notwithstanding, there is more to being legally binding on the member states. There is no compliance or enforcement mechanism within the framework that would elicit compliance among the member states. At most, one can expect self-regulation among the member states. This is apparent in the ASEAN MLAT. Despite having this treaty, one can find countries such as the Philippines without any domestic legislation on the same. And while it can be commendable that the Philippines is making the system work without specific domestic legislation on the matter, there is no positive reinforcement or nudging from the part of ASEAN to push the Philippines to come up with the required law. In fact, it would be the principles of ASEAN that hinder other member states to require the Philippines (or Cambodia) to legislate because all have a commitment not to intervene in the national affairs of their fellow member states.

Additionally, the mainly informalistic nature of the ASEAN accounts for the lack of preemptive, specific measures as regards cooperative mechanisms. The bulk of the legislative output of ASEAN are declarations or gentlemen's agreements on how to deal with certain issues. Whilst there is commitment on the part of the member states to deal with the problems tackled in their respective jurisdictions, there is the lack of the needed bite for member states to earnestly or promptly act on their commitments. Again, one can cite the Philippines for its lack of legislation. The Philippine situation is made worse by the startling revelation that absent any standardization on international cooperation such as MLA, the domestic framework itself is muddled and lacks harmonization. While statutory construction or judicial interpretation might be useful toolkits to solve the issue – or by the practitioners who would normally fill in the gaps in the law – the fact remains that almost 16 years since the ASEAN MLAT was agreed on, no legislative output has been made domestically by the Philippines. This notwithstanding, the ASEAN or its member states cannot call out the Philippines (and even Cambodia) on this inadequacy due to reasons discussed in the next following section.

The same kind of observation applies to treaties and agreements concluded within the ASEAN framework such as the one on trafficking in persons, or the agreement on information exchange, for example. The Agreement on Information Exchange mandates the sharing of databases

or even the sharing of airline list of passengers, but only "as appropriate", or on a "as needed" basis. Thus, there are no readily available mechanisms or infrastructure ASEAN-wide that one can resort to when the need arises. This encourages consequently flexibility and ad hoc cooperation procedures.

Flexibility and application of ad hoc procedures are not necessarily bad but it is not completely good. While flexibility is beneficial to a certain extent because there is room to improvise and adapt to the situations that arise, and that ASEAN member states are actually doing a great job practice-wise as regards mutual legal assistance, tackling international cooperation in criminal matters, especially in the prevention, investigation, and prosecution of transnational crime and terrorism requires existing efficient and working infrastructures at a minimum. Tools and the needed structure ought to be readily available when needed by authorities.

This notwithstanding, the advancement this requires might be disproportional to the capabilities of the member states themselves. Compared to most members of the European Union, the ASEAN member states are not only few in number but their economic and socio-political capacity is admittedly lesser. This might explain the lack of readily available and running infrastructures within ASEAN. Despite this, the resilience shown by the ASEAN member states throughout the region's historical development is still reflected in their dealings with one another. The lack of formal arrangements does not hinder them from affording the assistance another member state needs. There would be rooms for improvement as regards concretizing and implementing arrangements, agreements, and other commitments, but for now, they are trying their best to do good in their respective endeavors.

Having said this, an effective cooperation mechanism needs to take into account the difference in nature of both regional organizations. The ASEAN does not have the same infrastructure as the EU and issues might arise in facilitating implementation and compliance to any agreement. Therefore, the relevant agencies on the member state level ought to be involved in any cooperation mechanism. These include necessarily the existing central authorities and their attached agencies. In relation to this, capacity building within the ASEAN itself can be explored. The EU and its existing agencies and bodies could help in the manner wherein a two-way learning, information sharing, and capacity-buidling can be fostered. This has already been made possible by the ASEAN and its member states in the past. If one would recall the height of the 2001 terrorist attacks and the joint endeavors entered into by the ASEAN with other countries, as

well as the other times the ASEAN member states joined other states in coordinated efforts, this could very well be entertained especially in view of international cooperation in criminal matters with one another. No less than the EU has been a partner by the ASEAN and its member states in different endeavors. Thus, if truly committed, capacity building in terms of building the needed infrastructure between and within the two regional organizations can be pursued.

Additionally, the ASEAN could explore the possibility of creating its equivalent of the existing EU bodies vis-à-vis cooperation in criminal matters. Still intergovernmental in nature but would serve the same coordination and cooperation functions as its EU counterparts, the ASEAN can explore the establishment of its own ASEAN Judicial Network and ASEAN Agency for Criminal Justice Cooperation, and/or consider taking within its framework the ASEANAPOL and strengthen its capacity to be an effective agency for law enforcement cooperation. No less than the ASEAN Secretariat has recognized the importance within the ASEAN of having both informal and formal channels of cooperation in criminal matters. The ASEAN member states such as the Philippines and Malaysia are also already benefiting from the use of both informal and formal channels of cooperation. Thus, streamlining and improving the network in this regard would be advantageous for all concerned. Furthermore, should this idea be explored, then there would be more or less 1:1 correspondence in networking and communicating with each other towards an efficient and effective cooperation mechanism.

Considering the foregoing insights, the balance between rigidity and flexibility cannot be stressed enough in terms of fostering cooperation in criminal matters between and within the ASEAN and the EU. Ideally, for an effective cooperation mechanism to work between the ASEAN and the EU, both must respect the more informalistic nature of one and the more formalistic nature of the other. The formal arrangement comes into the picture by having a treaty obligation between the two regional organizations (with the caveat that ASEAN member states must agree). A treaty obligation would reinforce more or less compliance by all signatories. As regards the aspect of flexibility, the existence of EU bodies such as the Europol, Eurojust, and EJN together with possible ASEAN counterparts would promote the use of informal channels of cooperation, which is equally important in cooperation in criminal matters. In line with this, any formal cooperation should be compatible with existing other arrangements.

B. Principle of Non-Intervention and the ASEAN Way v. EU Normative Power

As learned from the historical development of both regional frameworks, the history of both had an impact in molding what the respective organizations are today. Due to the experience and learnings of each regional organization and their respective member states, principles, ideals, and norms have been formed in each one.

One could look into the development in ASEAN of its constitutional principles (including legal rationalistic norms), normative principles, and decision-making principles. At the center of these norms and principles are the tenets of non-intervention. Member states are not allowed to interfere in the domestic affairs of their fellow member states. One member state cannot tell another how to run its business on its own backyard. This is notwithstanding "enhanced interaction", wherein a member state can comment on another's national affairs if the same would affect the regional security or stability, because even with the same, commenting or talking to the other member state could be done only outside the ASEAN framework. So technically speaking, the ASEAN would remain a hands off policy as regards how the member states run their respective domestic affairs.

Given that member states cannot interfere in each other's domestic affairs, the same rings all the more true with regard foreign intervention. Learning from the bitter experiences of the past, the ASEAN detests foreign intervention or the alignment of its member states to foreign powers for defense, etc. While some member states have been friendlier to foreign powers, the general consensus or attitude existing in the ASEAN is against any foreign intervention.

In light of this, one cannot help but think of the normative power the EU tries to exercise in its internal and external affairs. It has also been said that the EU does not act so benignly all time. It is also a "soft imperialism power": the emphasis on democratization projects, strategies for "new abroad" are seen as examples of the EU's hegemonic power driven by both normative and strategic interests such as the need for stability. Taking this into consideration, the EU could then have the tendency to impose itself and its ideals and principles to others.

Interestingly, the EU has a track record of imposing or attempting to impose this "soft imperialism power" towards the ASEAN and its member states. When the two organizations started their dialogue partnership, the beginning fared well for both organizations but later on the differences be-

tween the two became apparent. After the Cold War and when a new form of partnership took place between the EU and the ASEAN, the EU tried to impose its democratization projects on the ASEAN and the member states. The EU insisted on discussing human rights and democratization with the aid and economic cooperation it has with the ASEAN and its member states. And although one would expect the ASEAN and its member states to waver and submit to the whims of the EU due to the supposedly weaker position it has, the ASEAN and its member states stayed adamant and insisted on the regional order it abides with – dismissing the plot of the EU as undue interference. This notwithstanding, as discussed in the Introduction, the EC/EU did not see anything wrong in what it was doing. It had this self-imposed obligation to promote and protect human rights in accordance with its obligations under the TEU even to the point that it will not hesitate to interfere in the domestic order if the need arises. Due to this clash of values and non-negotiables, the ASEAN and the EU experienced at one point in time an impasse in their relations due to issues relating to the membership of Myanmar in the ASEAN, to which the EU and its member states were against.

If one looks into the historical context from which the ASEAN operates, it must have been obvious to the EU at the very beginning that what it was trying to do would not fare well to the ASEAN and its member states. This is especially the case when it was widely observed that the EU itself was not only failing in its commitments towards the ASEAN in several occasions but also failing in certain issues in its own backyard. Should there be any hint or inkling that the EU is imposing itself and its ideals and principles to the ASEAN and its member states, then the latter would turn its head away from the discussion. Now in the advent of a strategic partnership and recently agreed upon EU-ASEAN Plan of Action that seeks to enhance co-operation in security and criminal matters, the EU should have learned its lesson by now on how to tread carefully in trying to impose its hegemonic or soft imperialism power on the ASEAN and its member states. If the EU hesitates or overlooks the tenets of the principle of non-intervention and the ASEAN Way, then perhaps this strategic partnership would not progress and any planned meaningful and deeper relationship between the two regional organizations would not prosper. Criticism or finding of faults should be avoided. Instead, by focusing on the problems and issues ought to be addressed, solutions are mutually found by both organizations through consensus-building, without necessarily imposing one's will on the other.

C. Harmonization v. Approximation; Minimum Standards

It is settled that there are still differences among the member state frameworks as regards how each implements or interprets a particular substantial or procedural provision vis-à-vis mutual legal assistance in criminal matters. Further, one can internalize that the kind of proceedings each member state espouses have a resonating effect on how a particular provision in the regional instrument is applied domestically. For example, there is the difference of treatment as regards defense rights when one follows adversarial proceedings or inquisitorial proceedings.

Given the differences that exist between member states or contracting states, the process or the overall mechanism is still made to work. The authorities interviewed would give the idea that they are able to cooperate with each other properly most of the time and whatever issues, problems, or discrepancies they have with one another, it is settled most of the time through open channels of communication or preliminary consultation with each other. They do not exist and operate to the exclusion of other authorities in other member states but the networks they build are vital to the success of making the international cooperation work.

In this regard one could learn that despite the differences or lack of harmonization among the member states themselves, the system could work. This resonates with a comment an interviewee made as to harmonization being a pipe dream. Harmonization is then not a necessary step to make cooperation work. Instead, what is needed – as seen in the regional instruments – is a minimum set of principles each member state ought to abide with to build a minimum level of understanding and workable environment among the member states. While some provisions may be too generalized, and must be determined by the respective domestic laws, it could still work if one follows a certain standard.

Furthermore, should the same minimum standards or sets of principles be self-internalized by the respective contracting states, or member states in this matter, then this also provides the motivation to become a good partner in the overall mechanism. This of course contributes to the success of the cooperation mechanism in place.

II. Suggestions for Developing Mutual Legal Assistance: Least Common Denominators

A. Mutual Legal Assistance Within the Regional Frameworks

In line with the idea above-stated, finding the least common denominators would be the best way to approach the development of mutual legal assistance, regardless of the same being between or within the ASEAN and the EU. These least common denominators shall determine the minimum amount of understanding required for the cooperative mechanism to work.

Anent the development within the ASEAN and the EU, this has been more or less settled and the mechanism has been working with seldom problems. As regards the ASEAN, one can see the learnings of the ASEAN Way finding its way to formal channels of cooperation because despite the formalistic requirements, which could often be dismissed as too stringent, the ASEAN member states are still able to find ways to resolve problems and issues that could be encountered vis-à-vis mutual legal assistance. There is focus on the interests of the entire community. They are able to make things work without necessarily imposing one's will to another. If one also takes into consideration the trainings, meetings, etc. they conduct regularly among themselves in tackling best practices, etc., in international cooperation, then the existence of consensus and openness to one another helps in making the cooperation mechanism efficient.

At this juncture, one could contemplate on whether the imposition of time limits, the use of a pro forma MLA request, and the use of direct contacts prove useful within the ASEAN framework. Among these three features learned from the EU framework, it would be the use of time limits that could be adopted, albeit might not make any significant change to the speed the ASEAN member states work with.

The use of a prescribed form might prove itself counter-intuitive to the flexibility the ASEAN member states generally exercise among themselves as regards mutual legal assistance. It might rather be limiting and constraining rather than allowing member states to send requests freely in whatever format they think is best. This has been seen admittedly as a flaw of the pro forma EIO with the EU member states. What could have been achieved through a simple letter with an attached warrant is not anymore allowed in the EIO context. Rather, authorities would need to fill up several pages of forms.

Further, a prescribed form could prohibit the use of draft copies or advance copies being sent by authorities to one another should they need clarifications on how the MLA request should be drafted, or during urgent matters, when the MLA is needed as fast as possible to be made. Having the prescribed form then would run counter to the manner or culture ASEAN member states have developed amongst each other vis-à-vis MLA.

Additionally, the use of direct contacts in lieu of central authorities for the issuing and executing authorities might also not be advisable, even if the same has proven useful and effective for EU member states. One ought to remember that direct contacts in the EU work generally because of the existing working infrastructures and networks it has such as the EJN and Eurojust. These networks are well established and contact points are readily known and available.

While the ASEAN member states' authorities would have their own established contact points, the ASEAN is bereft of any comparable formal network or infrastructure like that in the EU. Unless the ASEAN endeavors to establish similar bodies, problems may be encountered in searching for particular executing authorities in any particular matter requiring mutual legal assistance.

Furthermore, the central authorities have traditionally worked best in the sending and receiving of MLA requests. They have developed the needed expertise to handle situations relating to mutual legal assistance. Likewise, the model of having central authorities as shown by Malaysia and the Philippines, and in the EU, by the UK, proves more effective given the difference in structures these countries have, the use of adversarial proceedings, and the functions their respective courts perform. Therefore, the use of central authorities or the retention of horizontal cooperation might work best.

With respect to the use of time limits, it may theoretically improve the efficiency of the ASEAN member states as well as provide good rules of thumb for member states to abide with, but one must not forget that the imposition of time limits is underscored by the principle of mutual recognition based on mutual trust more or less. There are determined time limits due to the notion in the EU that no further step is needed to recognize the EIO being issued. For purposes of emphasis, the principle of mutual recognition does not exist in the ASEAN nor is there a similar provision of similar import. Thus, the additional steps of inquiring into the request, etc. theoretically still exists within the ASEAN context.

In addition to this, the ASEAN member states are in general effective already in effectuating MLA requests. Should one believe the statements

of the Malaysian and Philippine authorities, ASEAN member states do not encounter much problems in dealing with each other and in fastly providing the needed mutual legal assistance. If there is any delay encountered, most of the time this is not attributable to the concerned authorities themselves but could be attributed to delays caused by court processes, which these authorities can only influence to a certain extent.

Based on the foregoing, the time limits could be put into place but could end up as having no significant positive change nor practical value anymore. At most, it can serve the function of positive reinforcement for authorities to act promptly, efficiently, and effectively.

Similar to the ASEAN, the EU is generally effective in its cooperation mechanism, and in this case, the EIO. At the outset, there is the principle of sincere cooperation and the enforcement mechanism that enjoins member states to be compliant in their duties and responsibilities. Further, there is adherence to and internalization by member states of the principle of mutual recognition and the application of this principle makes it easier for an EIO to be recognized or executed. Together with this, there is a common acceptance of European values and/or human rights obligations that needs to be realized, which put the member states already on the same page. Moreover, open communication exists among the different authorities. The existence of the Eurojust, EJN, and other channels of communication and cooperation, as well as the principle of availability of information, help also in making the cooperation mechanism work between EU member states. Further, there are the structural changes in the EIO which member states applied to their domestic jurisdictions. These include time limits, the prescribed form that theoretically should ease the issuance and execution of an EIO, use of direct contacts, among other things.

Stating it simply, the EU was able to form a sophisticated form of MLA among its member states. As to whether there is added value should the learnings from the ASEAN be applied, it would be the flexibility and openness the ASEAN member states have in relating to one another. While the EIO prescribed form has its advantages of being easily understandable, it could be more or less restricting and limiting as to how an EIO can be issued to another executing authority. Hurdles could be met when one is confronted with exigent or urgent circumstances that handling a pro forma EIO might be counter-productive and not time-efficient. While practitioners make adjustments in practice in addressing these kinds of issues, it would have been practicable and efficacious if urgent situations are contemplated within the EIO context that excuses the use of, or the

delay in transmitting, the pro forma EIO. This would then foster flexibility and likewise account for urgent matters that need to be met by authorities.

As regards the other learnings from the ASEAN framework, it would not make sense for the EU member states to fall back to the traditional MLA framework especially given the higher caliber the EIO framework now has. It offers more protection for human rights by, for example, integrating defense rights more into the instrument; lessens the grounds to refuse recognition or execution; establishes direct contacts between authorities; integrates the principle of mutual recognition; and provides time limits to encourage faster executions of EIOs, among other things. Further, there are principles that apply equally to the member states that makes the provisions of the EIO meaningful. Given these innovations that so far work for the EU member states, it defies common sense and logic to abandon the same to go back to the traditional notions of mutual legal assistance.

Having mentioned the foregoing, and identifying how the regional and their member state frameworks work respectively, it would be prudent to identify the least common denominators as well as the non-negotiables of each one to identify the building blocks that could constitute an interregional framework.

B. Groundwork for the Cooperation Mechanism between the ASEAN and the EU

At the outset, both regional organizations should be on equal footing with each other. No regional organization should act with ascendancy over the other. Any observed soft hegemonic power or imperialism from the EU should be toned down in negotiating and acceding to any interregional mutual legal assistance treaty. Any interregional mutual legal assistance treaty or development of a cooperation mechanism is not hinged on human rights conditions, which the EU places normally on development aids, the ENP, and other external actions it undertakes. Any treaty would be pure and simple about interregional mutual legal assistance and/or international cooperation in criminal matters with no strings attached. In other words, any interregional mutual legal assistance treaty should not be a "carrot" on a stick for democratization and human rights concerns. This would in fact be in line with the tenets of reciprocity and would adhere to the principle of non-intervention of the ASEAN.

Second, in line with the least common denominators suggestion, there should be consideration of the willingness of the respective member states to enter into such an arrangement. The ASEAN could then opt for the ASEAN Way among themselves and/or the "ASEAN minus X" rule, that would allow those member states ready, willing, and able to enter already into the arrangement or agreement while those which need time are given the time and space they need. On the other hand, the EU can act with exclusive competence to enter into any agreement with the ASEAN and its member states. Alternatively, resort to "enhanced cooperation" can be explored albeit the concept is originally limited to agreements between EU member states.

C. Suggestions for Substantive Provisions

A discussion of the least common denominators or non-negotiables with respect to substantive provisions of a mutual legal assistance agreement is imperative.

First, said interregional mutual legal assistance between the ASEAN and the EU should remain – or start – with being request-based, rather than demand-based or order-based as one sees in the EIO. The principle of mutual recognition based on mutual trust is mutually exclusive to the EU and its member states. The same principle or something of similar import does not exist in the ASEAN and its member states. Following the tenets of traditional mutual legal assistance, the nomenclature therefore ought to be followed are requests. Besides, the ASEAN and its member states might not appreciate it should its possible EU member state partners impose upon them through "orders". This is notwithstanding the fact that in practice, the change in nomenclature did not mean an automatic, no-questions-asked kind of implementation. However, one could still entertain said possibility should such kind of "order-based" mechanism be applicable both ways and that all ASEAN member states agree to the idea.

Second, it is proper that whatever interregional mutual legal assistance shall be developed, it shall be applicable to all criminal matters. This would be the minimum or otherwise standard requirement in traditional mutual legal assistance. If further explanation or clarification is required, then the DEIO example could be followed. An enumeration of certain matters wherein the MLA shall be applicable could be provided.

In relation to this, clarificatory provisions might be in order as regards the applicability to natural and legal persons as provided by the EU exam-

ple. There might be issues arising out of corporate criminal liability in ASEAN and EU member states alike. Thus, a clarification might help in defining and delineating the applicability of assistance.

Third, it is advisable that any mutual legal assistance to be developed between the ASEAN and the EU contemplates all kinds of assistance. This would make the agreement more flexible to changing times as well as technological advancements. In this respect, the catch-all provision provided in the ASEAN MLAT may be included as a safety net provision. The EU could likewise consider including in the scope those measures not originally included in the DEIO such as joint investigation teams, cross-border surveillance, etc., to avoid future possible conundrums on whether a particular investigative measure is included or not. Also, while mutual legal assistance would normally contemplate a judicial to judicial kind of cooperation, there might be instances wherein there are investigative measures that do not have the same kind of correspondence but are likewise included in a MLA request. In such cases, it is suggested that the MLA request is construed in favor of approval rather than denial of the request. In other words, contracting parties should act towards effectuating a request rather than denying it.

Fourth, there are the different principles, conditions, and exceptions. As regards the sufficiency of information requirement, since both the EU and the ASEAN have the same direct proportionality between the information to be provided and the intrusiveness of the investigative measure, this should then be maintained. Thus, the more information shall be required, the more intrusive the measure involved is. In relation to this, since both the ASEAN and the EU would need to provide the widest possible measure of assistance, the lack of provided information should not be a ground to refuse recognition or execution.

With respect to the dual criminality requirement, the exclusion of the 32 offenses from the applicability of the requirement could be attempted. However, if one looks into the origins of why these 32 offenses have been excluded in the first place, it might be hard to convince the ASEAN member states to agree. Alternatively, the ASEAN and the EU could agree on a particular list – not necessarily encompassing the full list of 32 offenses, but doing it in a step-by-step basis. But then again, the dual criminality requirement is losing significance in practice so the interregional MLA between the ASEAN and the EU might be the needed jump board to exclude the requirement altogether.

With regard the double jeopardy requirement, there ought to be a proper definition that embodies the transnational nature both the ASEAN and

the EU aim for but still fall short in their respective applicable provisions. This is suggested considering the lack of transnational definition in the ASEAN (very restricted application) and its member states, as well as the issues found still in the EU context. By establishing a proper delineation and definition at the outset, problems would be avoided in the future. In light of this, it would be ideal to consider a double jeopardy or *ne bis in idem* provision that embodies a true transnational nature or puts it into fruition: a provision that does not only consider either the requested state, the requesting state (i.e. Malaysian law), or both, but instead considers likewise third states where a conviction, acquittal, pardon, or service of sentence has already occurred vis-à-vis the facts constituting the offense included in the request. In relation to this, a request shall be denied if the person subject of the request has been convicted, acquitted, or pardoned in a state other than the requesting state for the same facts constituting the offense; and in case of conviction, the sentence has already been enforced, is being enforced, or by reason of the law of the sanctioning state can no longer be enforced. This reflects more or less the ASEAN MLAT provision (as it already tackles service or execution of sentence) but expands it beyond the requesting and requested state.

Significantly, this proposed provision is progressive in nature. It captures transnationality as how it should be: it would not only take note of judgments elsewhere in determining one's sentence but would free one altogether from the risk of being placed in jeopardy one way or another. It would mitigate, if not remove, any risk that has been increased by virtue of EU member states needing to frame their transnational criminal law in favor of the Union to punish violations of EU law to the greatest possible extent, which,as mentioned earlier in this study, consequently carries with it issues on fair trial, due process of law, and the idea of personal legal certainty. In the context of the EU, there is the high risk of being placed in a situation of unforeseeability because even if they have been tried already in one country, their legal situation can still be altered in the other. This is arguably counter-intuitive to the intent of having an area of justice and home affairs. The same can be gainsaid about the ASEAN member states. They have agreed on an ASEAN Security Community and are moving toward the same direction of penalizing the same criminal offenses, especially terrorism and transnational crimes (and even started to formalize international agreements among themselves regarding criminal matters such as these), which are often the subject matter of MLA requests. It also offers the opportunity to operationalize the prohibition found in

the ASEAN Human Rights Declaration without waiting for developments to occur at a member state level.

It is understandable however if the suggested provision would not be fully acceptable as a mandatory ground for refusal, especially if it involves a third state, which is not a contracting party to the interregional treaty. One can follow the route done in the German framework wherein the ground for refusal, irrespective of fellow EU member state or third state, is optional in nature. The existence of double jeopardy does not equate to automatic refusal of a MLA request. Instead, authorities are given the needed space for discerning whether to proceed or not in granting a request. Indeed, scenarios could occur wherein the issue being determined in the requesting state is about the existence of double jeopardy itself and the requested information and evidence is integral to its determination. Further, this puts into consideration the possibility that the criminal matter has been committed wholly or partially in the territory of the requested state. Therefore, there might be an interest for it to pursue its own criminal proceeding.

With regard reciprocity and speciality requirements, this should be maintained in any interregional mutual legal assistance agreement between the ASEAN and the EU. These are cornerstones of mutual legal assistance and other international cooperation mechanisms. Further, a look into the law in practice and how the regional instruments are applied domestically show the importance of these values. Thus, it is suggested that these should be considered to be included. This necessarily includes the provision requiring the return of documents or evidence once the proceedings for which it was requested has ceased. In addition to this, data protection considerations should be taken into account. As mentioned above, the EU has a data protection framework that equally applies to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. While there is no ASEAN framework on data protection standards especially in criminal and security matters, any interregional treaty ought to consider the conditions needed to be satisfied in transfers of personal information and data to and from EU member states. In respect thereto, an additional provision or annexed schedule can be provided tackling data protection issues and further down the road, data protection agreements or arrangements can be explored by both regional organizations.

In respect of special offenses or national interests, the political and military offenses exception found in the ASEAN MLAT may be retained. However, it is suggested that these exceptions be treated as discretionary grounds for refusal rather than mandatory. This would accommodate the non-existence of these grounds for refusal in the EU instruments. Further, it should be within the discretion of the contracting parties on whether to proceed in the execution of a MLA request should this exist or not.

In relation to this, one could converge the other grounds to refuse execution based on national interests found in both the ASEAN MLAT and the EIO. These include, but is not limited to those that might affect sovereignty, public order, or other essential public interest; territoriality; privilege; pending criminal investigation; etc.

The last substantive provision in consideration are regarding human rights. As regards grounds to refuse a request, one could take into account for example existing provisions that enforce the prohibition against non-discrimination, prohibition against *ex post facto* laws, or denials grounded on consent of the individual concerned. One could also integrate the ground for refusal found in the DEIO regarding the human rights obligations of the EU member states under Article 6 TEU, which embodies the provisions in the Charter of Fundamental Rights, European Convention of Human Rights, etc. This is a non-negotiable for EU member states, especially those which relate to conditions of detention, rights to fair trial, and prohibition of death penalty and the imposition of torture, and cruel, degrading and inhumane punishment. Interestingly, rights of similar import can already be found in the ASEAN Human Rights Declaration but are not operationalized as a basis to refuse a MLA request in the ASEAN MLAT due to non-intervention considerations. If one would then integrate a similar provision found in the DEIO regarding "the human rights obligations of the EU member states under Article 6 TEU," this would provide ASEAN member states a basis in treaty to deny requests if the same is incompatible with their own human rights obligations, especially those which have extraterritorial application. There would be no need to find a loophole any further in invoking "state interest" as a ground for refusal.

Anent the issue of conditions of detention that relate to the prohibition against torture or other cruel, inhumane, degrading punishment or treatment, the standards of ASEAN member states would need to be assessed as there might be stark differences to what the EU member states espouse. Standards or doctrines found in ECHR or CJEU jurisprudence may be incompatible with the ASEAN member states' situation. Mutual legal assistance could include requests for the transfer of persons in custody

to give information or evidence. Thus, tackling conditions of detention is imperative. What could be done to address this concern initially is for EU member states to get commitments from ASEAN member states should there be issues relating to conditions of detention.

On this note, it becomes interesting to resolve the issue of the imposition of the death penalty, torture, and/or cruel, inhumane, and degrading punishment at this juncture. These human rights obligations have extraterritorial application and therefore, as mentioned above, are indeed non-negotiables. Provided that some ASEAN member states still impose the death penalty and other forms of corporal punishment such as whipping in Malaysia, a ground to refuse could be included in the interregional treaty tackling the same. Alternatively, the same kind of commitment can be taken from those concerned.

D. Suggestions for Procedural Provisions

The substantive provisions constituting any possible mutual legal assistance treaty between the ASEAN and the EU aside, there are also some suggestions that could be made in relation to the procedural ones.

First, it might be prudent to retain central authorities for the time being. While direct contacts would have its advantages, one of the reasons it works for the EU member states, as already mentioned before, are established networks and contacts among them. There is also the Eurojust and the EJN that helps in facilitating these contacts and channels of communication. The same formalized network does not exist unfortunately in the ASEAN infrastructure. So unless the ASEAN develops similar counterpart agencies within its framework such as an ASEAN Criminal Justice Network or similarly structured coordinating bodies, authorities might be constrained in not knowing who to contact or to whom a request should be sent to. So while direct contacts may speed up the process, it might not work between the ASEAN and the EU. At least with the central authorities, they would traditionally have the expertise needed to address the requests. Point persons are also easier identifiable. Moreover, should trainings and consultations be required, one would be apprised already of whom to contact and the point persons would be easily identifiable. This of course is without prejudice to exploring again the idea of direct contacts when the needed corresponding infrastructures are present between and within the ASEAN and the EU.

Second, there would be the aspect of the preparation and issuance of a MLA request. At this point, there is no need to impose a prescribed or pro forma MLA request like the EIO. Instead, at a minimum, there ought to be flexibility among the contracting states to the form and format of the MLA request. At most, the interregional treaty could copy the provision in the DEIO that requires parties to acknowledge receipt of the MLA request. This reinforces or promotes good MLA practice among the contracting states and would also give an idea on when to follow up with a requested state regarding a particular request.

In connection to preparations of requests, one ought to consider at whose instance it can be issued. Given the lack of participation of the defense in the ASEAN MLAT and in the domestic legislations of its member states, it might be prudent at the first stages of the interregional treaty to provide that the participation of the defense in the issuance and execution of a MLA request is highly encouraged and shall be determined in the respective domestic laws of the contracting states. By drafting the provision as such vis-à-vis the right to participate by the defense or request the issuance of a MLA request on its behalf, it does not only accommodate the promotion of the right found in the DEIO, but more importantly, it gives ASEAN member states the opportunity to internalize and/or reconsider the participation they give to the defense in the process, as well as reassess that the MLA framework is not limited to being a prosecution tool. In the alternative, should ASEAN member states continue to view MLA as a process exclusively meant for investigators and prosecutors, or the inclusion of defense participation is a way of the EU to impose its ideals to the ASEAN, there would still be no harm in retaining such a provision. Through additional talks, consensus-finding processes, etc., provisions tackling the same could be included in additional protocols to any interregional treaty.

Third, the interregional treaty could combine the provisions of both the ASEAN MLAT and the DEIO on the applicable law vis-à-vis execution of requests: the MLA request could be recognized or executed in accordance with the laws and/or formalities of the requesting state, subject to the domestic laws of the requested state (or unless it violates the fundamental principles or domestic laws of the requested state). Thus, the general rule would be automatically be a *forum regit actum* arrangement and this could overcome the issues relating to human rights as well as evidentiary and admissibility rules, while maintaining respect to the domestic laws and fundamental principles of the requested state. Understandably, if the request does not indicate any procedure or formality to be followed, then

the law of the requested state shall prevail. Additionally, the interregional treaty can include provisions of allowing the presence of authorities from the requesting state during the execution of the investigative measure requested. Furthermore, a requested state can suggest other investigative measures if the investigative measure requested is not available or not allowed for the particular criminal matter in the domestic legal system of the requested state.

In relation to the last mentioned suggestion, one must bear in mind that while suggesting another investigative measure is allowed in the EU framework, there are five (5) instances to which an investigative measure should be available in an EU member state, namely, (1) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing state, in the framework of criminal proceedings or for the purposes of the EIO; (2) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings; (3) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State; (4) any non-coercive investigative measure as defined under the law of the executing State; (5) the identification of persons holding a subscription of a specified phone number or IP address. These five instances can be taken further into consideration on the relevant provision on applicable law on execution.

Fourth, it is likewise important to consider that human rights protection is present in the execution of the investigative measures that are subject of a MLA request between the ASEAN and the EU member states. This is already apparent in the respective regional instruments and domestic instruments tackling mutual legal assistance. While participation of a suspect, accused, or the defense in general would still need to be negotiated, the basic protection of human rights vis-à-vis investigative measures should be a non-negotiable. This includes the integration of procedural rights and the availability of remedies should redress be needed.

Fifth, there is the option to include time limits in the provisions of the possible interregional treaty. This would be like the provisions in the DEIO which are not mandatory but could provide good barometers on speed and efficiency. More or less, there is a commitment from the contracting parties to act fast as they could on MLA requests that would foster strong interregional cooperation in criminal matters.

Sixth, a standard provision could be provided as regards authentication in general. Not only are requests needed to be accomplished or issued in a manner that produces a written record, but all the evidence or information to be obtained via a MLA request does not require further authentication.

Seventh, there could be specific provisions tackling specific investigative measures, akin to the provisions found in all regional and member state instruments tackled so far. This would highlight any specificities needed to be addressed as well as idiosyncrasies that could exist with a particular measure. Bearing this in mind, the contracting parties may also opt to include those that touch on technological advances such as those involving online evidence or cyberdata. What is more imperative is that the instrument, whilst maintaining traditional MLA characteristics, would be able to stand the test of time in relevance and application.