

SIXTH REGIONAL SEMINAR ON GOOD GOVERNANCE FOR SOUTHEAST ASIAN COUNTRIES

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

Hosted by UNAFEI

With the support of the Ministry of Foreign Affairs of Japan

12-14 December 2012, Tokyo, Japan

UNAFEI

**UNITED NATIONS ASIA AND FAR EAST INSTITUTE
FOR THE PREVENTION OF CRIME
AND THE TREATMENT OF OFFENDERS**



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The views expressed in this publication are those of the respective presenters and authors only, and do not necessarily reflect the views or policies of UNAFEI, the Government of Japan, or other organizations to which those persons belong.

FOREWORD

It is my great pleasure and privilege to present this report of the Sixth Regional Seminar on Good Governance for Southeast Asian Countries, which was held in Tokyo from 12 – 14 December 2012. This was our second time to hold the Good Governance Seminar in Tokyo, and it was our great pleasure to welcome participants to the Japanese capital. We hope that we have repaid the hospitality always extended to us on our previous visits to other countries that have hosted the Seminar.

The main theme of the Seminar was “International Cooperation: Mutual Legal Assistance and Extradition”, and it was attended by five speakers from public and private institutions and sixteen participants, all criminal justice practitioners, from Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Viet Nam. The Seminar was organized by UNAFEI, with the support of the Ministry of Foreign Affairs of Japan.

Corruption destroys nations. It undermines democracy and the rule of law, distorts business activities and competition, and hinders sustainable development and prosperity. It is also a threat to the security of societies as it creates environments in which organized crime, terrorism, and other forms of unlawful activity may prosper. Such enormous negative impacts of corruption and its increasingly transnational aspects led to the adoption of the United Nations Convention against Corruption (UNCAC), the first global, legally binding anti-corruption instrument, by the UN General Assembly on 31 October 2003.


Because corruption has become increasingly transnational, countries increasingly rely on international cooperation to gather evidence and to seek the return of fugitives. The United Nations Convention against Corruption (UNCAC) devotes one full chapter to “International cooperation”, and the United Nations Convention against Transnational Organized Crime (UNTOC) has extensive provisions covering “Extradition” and “Mutual Legal Assistance (MLA)”.

While these provisions set the basic minimum standards for international cooperation, there still remain practical obstacles and challenges such as problems of jurisdiction, differences in criminal law and procedure, lack of international and internal coordination, insufficient knowledge of legal requirements and restrictions, and translation and language problems. Enhancing practical knowledge and mutual understanding and building a relationship of trust and confidence with foreign counterparts can be the key to overcoming these obstacles.

The Sixth Regional Seminar aimed not only to develop contacts between Central Authorities of the participating countries but also to deepen mutual understanding of the current situation and mechanisms for fighting corruption by using formal and informal channels for mutual legal assistance and extradition. Through discussion of the issues, participants exchanged experiences and knowledge of effective strategies, and best practices in the fields of mutual legal assistance and extradition were further improved.

It is my pleasure to publish this Report of the Seminar as part of UNAFEI's mission, entrusted to it by the United Nations, to widely disseminate meaningful information on criminal justice policy.

Finally, I would like to express my sincere appreciation, on behalf of UNAFEI, to the Department of Foreign Affairs of Japan, for its contribution in convening the Sixth Regional Seminar.

A handwritten signature in black ink, reading "Tomoko Akane". The signature is stylized with a large, sweeping initial 'T' and 'A'.

Tomoko AKANE
Director, UNAFEI

November 2013

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INTRODUCTION

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OPENING REMARKS
AT THE SIXTH REGIONAL SEMINAR ON GOOD GOVERNANCE
FOR SOUTHEAST ASIAN COUNTRIES

Tatsuya Sakuma
Director, UNAFEI

Mr. Katsuyuki Nishikawa, Honourable Vice Minister of the Ministry of Justice, Mr. Kunihiro Sakai, Honourable Director General, Research and Training Institute of the Ministry of Justice, honourable guests, distinguished experts and participants, ladies and gentlemen,

It is a great pleasure and privilege for me to announce the opening of the Sixth Regional Seminar on Good Governance for Southeast Asian Countries, which is a commemorative event of UNAFEI's 50th Anniversary. On behalf of UNAFEI, I would like to extend my heartfelt welcome to the honourable guests, the distinguished speakers and participants who have come to join this significant forum.

I would like to take this opportunity to thank the Government of Japan for its continued support as the host country of UNAFEI. I would also like to express my deepest appreciation to the Japanese Ministry of Justice for their assistance in organizing this Seminar.

The topic to be discussed at this seminar is "International Cooperation: Mutual Legal Assistance and Extradition". Corruption disrupts the rule of law. It encourages disregard of human rights, allows criminals to prosper and feeds inequality, injustice and insecurity. In corrupt societies, funds intended for development are often diverted and foreign aid and investment shy away as a result. Thus, this seminar will continue to focus on corruption control as a cornerstone for realizing good governance. In the era of globalization, crimes including corruption are in no way an exception. As the United Nations Convention against Corruption (UNCAC) devotes a full chapter to international cooperation, effective and efficient international cooperation is a prerequisite for successful control of corruption.

However, despite various efforts made until now, we must admit that we are far behind the criminals in this respect. Amidst issues of state sovereignty; disparity of laws, legal systems and languages; low enforcement priority and lack of financial and other resources—we have much to overcome to facilitate international cooperation. I believe this seminar can be a good opportunity for us to identify the issues and the ways to overcome challenges and to build confidence and trust in each other.

I look forward to seeing this Seminar provide a useful forum to exchange expertise and knowledge in our common endeavour against corruption, contributing further to the promotion of good governance in Southeast Asia.

Thank you very much for your attention.

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Kenichi Kiyono
Deputy Director, UNAFEI¹*

It is indeed an honour and a pleasure for me to open the discussion at the sixth Regional Seminar on Good Governance for Southeast Asia and the Pacific, which includes the Joint Ceremony for UNAFEI's 50th and ACPF's² 30th Anniversaries. As the Deputy Director of UNAFEI, I will devote my utmost effort to make the Seminar and the Ceremony successful and productive.

I. UNAFEI'S RECENT ACTIVITIES AGAINST CORRUPTION

It goes without saying that corruption is the main cause of the erosion of good governance and the rule of law. Corruption control is of crucial importance to restore justice and democracy, and to achieve a safe and prosperous society.

With this view, UNAFEI has been conducting the UNCAC³ Training Programme since 1998. We have just concluded the 15th UNCAC Training Programme, which lasted for 5 weeks. Two hundred seventy-eight alumni from 74 countries have completed the UNAFEI UNCAC Training Programme.

In addition, UNAFEI started the Regional Seminar on Good Governance for Southeast Asian Countries in 2007. We have discussed most important issues relating to UNCAC during the three-day Good Governance Seminar each year:

- 1 Corruption Control in the Judiciary and Prosecutorial Authorities (in 2007);
- 2 Corruption Control in Public Procurement (in 2008);
- 3 Measures to Freeze, Confiscate and Recover Proceeds of Corruption, Including Prevention of Money-laundering (in 2009);
- 4 Securing Protection and Cooperation of Witnesses and Whistle-blowers (in 2010);
- 5 Preventing Corruption: Effective Administrative & Criminal Justice Measures (in 2011).

¹ United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, which is an international training and research institute in the field of crime prevention and criminal justice, established in 1962 by an agreement between the United Nations and the Government of Japan. For over 50 years, UNAFEI's major activities have been focusing on providing training programmes for criminal justice practitioners from around the world in a multinational format.

² Asia Crime Prevention Foundation, which is an international NGO in general consultative status with the United Nations Economic and Social Council.

³ United Nations Convention against Corruption.

UNAFEI has also been dealing with corruption-related themes at its conventional five-week training courses, which include:

- 1 Measures to Secure Protection and Cooperation of Witnesses and Whistle-blowers (149th Training Course in 2011);
- 2 Attacking the Proceeds of Crime: Identification, Confiscation, Recovery and Anti-Money Laundering Measures (146th Training Course in 2010);
- 3 Ethics and Codes of Conduct for Judges, Prosecutors and Law Enforcement Officials (143rd Training Course in 2009);
- 4 Effective Legal and Practical Measures for Combating Corruption: A Criminal Justice Response (138th Training Course in 2008).

II. THE IMPORTANCE OF INTERNATIONAL COOPERATION

The main theme of this sixth Good Governance Seminar is “International Cooperation: Mutual Legal Assistance and Extradition”. The global economy and internet society have made corruption crimes more and more sophisticated, cross-border, and difficult to detect and collect evidence. We would not be able to combat corruption without international cooperation of law enforcement officials in each country.

The importance of international cooperation led UNCAC to devote one chapter⁴ to international cooperation, which includes articles on extradition,⁵ the transfer of sentenced persons,⁶ mutual legal assistance (MLA),⁷ the transfer of criminal proceedings,⁸ law enforcement cooperation,⁹ and joint investigations.¹⁰ The United Nations Convention against Transnational Organized Crime (UNTOC) also allocates five articles¹¹ to international cooperation.

These provisions on international cooperation provide the States Parties which require treaties to execute MLA, extradition and other forms of international cooperation with the common platform to execute such cooperation.¹² Furthermore, whenever dual criminality is considered a requirement, it shall be deemed fulfilled — irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party — if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties .¹³

⁴ Chapter 4 of UNCAC.

⁵ Article 44 of UNCAC.

⁶ Article 45 of UNCAC.

⁷ Article 46 of UNCAC.

⁸ Article 47 of UNCAC.

⁹ Article 48 of UNCAC.

¹⁰ Article 49 of UNCAC.

¹¹ Article 16 on extradition, Article 17 on the transfer of sentenced persons, Article 18 on mutual legal assistance, Article 19 on joint investigation, and Article 21 on the transfer of criminal proceedings.

¹² Article 44(5) and Article 55(6) of the UNCAC.

¹³ UNODC (2004), UNITED NATIONS CONVENTION AGAINST CORRUPTION, p. 30.

III. OBSTACLES TO INTERNATIONAL COOPERATION AND MEASURES TO OVERCOME THEM

It is quite obvious that UNCAC and UNTOC require the states not only to acknowledge the importance of international cooperation but also to execute the actual MLA, extradition and other forms of international cooperation efficiently and effectively. That is the reason why we need to identify the main obstacles to the smooth execution of international cooperation and how to overcome them. There are many obstacles; however, I would like to suggest that the following are major ones among them:

- Little knowledge on the legislation, requirements and procedures of MLA, extradition and other forms of international cooperation of the requested country, which causes delay, frustration and even unexecutable requests;
- Little or no acquaintances at the central authority of the requested country, which hinders smooth communication and mutual understanding;
- The translation of the formal request into the official language of the requested country, which not only makes the procedure lengthy and costly but also makes the request difficult to understand or, in some cases, incorrect, as the officials of the requesting country cannot make sure that the request is translated with precision if they do not understand the language of the requested country.

This Good Governance Seminar can provide good solutions to some of these obstacles. This Seminar sees delegations composed of corruption expertise and central authority officials from eight countries, namely, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Thailand and Viet Nam. We also have speakers from Japan, Korea, Singapore, the Basel Institute's ICAR,¹⁴ and Beijing Normal University. The participants and speakers have prepared papers with the latest information on the legislation, requirements and procedures of MLA, extradition and other forms of international cooperation, which will be presented during this Seminar.¹⁵

The delegations will meet each other in this very conference room. In fact, you have already gotten acquainted with each other. You can foster mutual understanding and confidence during this three-day Seminar, after which all of you will be UNAFEI family members! You will be able to consult with each other in very informal ways, which will remove many practical obstacles in executing MLA, extradition and other forms of international cooperation.

Other solutions to smooth execution of international cooperation include:

- Bilateral treaties;
- Multilateral treaties: *inter alia* the so called "ASEAN MLAT"¹⁶ was entered into by the government of Brunei Darussalam, Cambodia, Indonesia, Lao People's

¹⁴ International Centre for Asset Recovery

¹⁵ The presentation papers will be also available on UNAFEI's website. See

<http://www.unafei.or.jp/english/index.htm>.

¹⁶ The official name is the "Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries", which was signed in November 2004 in Kuala Lumpur, Malaysia.

Democratic Republic, Malaysia, Philippines, Singapore and the Socialist Republic of Vietnam;

- Eurojust, which was established in 2002 as an agency of the EU to support and strengthen coordination and cooperation between national authorities in fighting serious cross-border crime that affects the EU, may reveal lessons which we can follow without compromising state sovereignty. Twenty-seven Member States second experienced prosecutors, judges or police officers of equivalent competence to the Eurojust office in The Hague.¹⁷ The outcome of this permanent international cooperation agency is enormous. One thousand four hundred and forty-one cases were dealt with by the coordination meetings of Eurojust, 263 European Arrest Warrants were registered in 2011, which facilitated extradition of offenders, and 31 Joint Investigation Teams were formed with Eurojust's assistance in 2011;¹⁸
- Placing legal attachés at the Embassy to assist and make arrangements for smooth execution of MLA, extradition and other forms of international cooperation;
- Dispatching investigators for the execution of requests, which helps to emphasize the important points of the request for the officials of the requested countries.

The requirement of the use of national languages for formal requests of MLA or extradition often causes various problems. If we allow each other to use English text for formal requests, where appropriate, it can be of great help.

IV. CONCLUSION

There are many practical obstacles to the smooth execution of MLA, extradition and other forms of international cooperation. To identify and overcome them, it would be extremely beneficial for officials in charge of international cooperation from various countries to meet face to face to identify practical obstacles and measures to overcome them. As obstacles may change over time, and we cannot avoid transfers or job rotations, periodical meetings would be ideal, if it is practically possible.

This Seminar sees delegations from eight countries and speakers from five countries or institutes. Furthermore, Mr. Sandeep Chawla, the Deputy Executive Director of the UNODC,¹⁹ Mr. Kim Il-Su, President of the Korean Institute of Criminology, Dr. Kittipong Kittayarak, Permanent Secretary for Justice, Ministry of Justice, Thailand, Mr. Severino H. Gaña, Deputy Prosecutor General, National Prosecution Service, Department of Justice, Republic of Philippines, and Mr. Elias Carranza, Director of ILANUD²⁰ and other distinguished guests will deliver speeches or lectures at the Joint Ceremony for UNAFEI's 50th and ACPF's 30th Anniversaries this afternoon.

¹⁷ Eurojust (2011), Eurojust: The European Union's Judicial Co-operation Unit (http://eurojust.europa.eu/doclibrary/corporate/corporatepublications/Eurojust%20brochure%202011/EUROJUST-2011_EN.pdf).

¹⁸ Eurojust (2012), Eurojust Annual Report 2011 (<http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf>), pp.11, 13 and 23.

¹⁹ United Nations Office on Drugs and Crime.

²⁰ United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders.

I am sure that we will have beneficial and fruitful discussions during this Seminar, which will foster mutual understanding and confidence.

SPEAKERS' PAPERS AND CONTRIBUTIONS

Mr. Masamichi Kamimura
Director, International Affairs Division
Ministry of Justice, Japan

Dr. Kim Young June
Director of Criminal Trial Department
Seoul High Prosecutors' Office, Republic of Korea

Ms. Nor'ashikin Samdin
Deputy Senior State Counsel
Attorney-General's Chambers, Singapore

Mr. Pedro Gomes Pereira
Asset Recovery Specialist
Basel Institute on Governance

Dr. Zhenjie Zhou
Deputy Director of the Institute for Foreign and Comparative Criminal Law,
College for Criminal Law Science, Beijing Normal University

MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Masamichi Kamimura**

I. INTRODUCTION

At the outset, as a member of the Japanese government, I would like to extend a hearty welcome to everyone attending this sixth Regional Seminar on Good Governance. I also would like to extend my congratulations for the 50th anniversary of UNAFEI. I have the greatest respect for UNAFEI's contribution to the promotion and the sound development of criminal justice systems and mutual cooperation in the Asia-Pacific Region. I'm confident that this memorial and commemorative seminar will be fruitful and meaningful to all the participants.

I believe that this Seminar is significant for the reason that Southeast Asian countries have gathered together to have a better understanding of each other within the topic of Mutual Legal Assistance (MLA) and extradition. I, myself, would like to learn more about how the system works in other Asian countries, and I hope I can be of help to others who may be interested in the Japanese system. My presentation today will try to give you an overview of how our MLA and extradition systems work.

II. TREATIES AND MUTUAL LEGAL ASSISTANCE

I would like to start with a question. Can Japan render assistance without an MLA treaty? The answer is "Yes." As long as there is a guarantee of reciprocity, there is no need for a treaty.

A. Channels

If there is a treaty, the request can be sent from a Central Authority. In Japan, the Ministry of Justice and the National Police Agency can both send requests as central authorities, but the Ministry of Justice is the only central authority authorized to receive requests. So, our treaty partner will always send their requests to the Ministry of Justice, but they will receive our requests from either the Ministry of Justice or the National Police Agency. If there is no treaty, the request must come through diplomatic channels. Japan has already concluded bilateral MLA treaties with six countries: the United States (US), the Republic of Korea, China, Hong Kong, the European Union (EU), and Russia.

B. Scope of Assistance

With or without a treaty, Japan can provide assistance using almost the same measures that are allowed in our domestic investigations. Interviewing witnesses, obtaining testimony of witnesses in court, and conducting searches and seizures can all be done for other countries with or without a treaty. However, we cannot execute wiretapping for other countries.

C. Conditions

As for the denial of requests, our domestic laws provide the following. First, we require a

* Director of the International Affairs Division of the Ministry of Justice Criminal Affairs Bureau, specializing in MLA and extradition cases.

guarantee of reciprocity. Next, assistance will not be provided for political offences. Finally, dual criminality is required.

There are special requirements for the examination of witnesses in court and for providing original, tangible evidence. We can only assist if the witness or the original evidence is essential to the investigation in the requesting country. However, if there is an MLA treaty, the requirement of dual criminality and the requirement of essentiality can be exempted.

D. Statistics

In recent years, we have dealt with around 40 to 70 incoming and outgoing cases per year.

III. EXTRADITION

Next, I would like to turn to the issue of extradition. As with MLA, Japan can extradite a fugitive with or without a treaty.

A. Channels

Regardless of the existence of extradition treaties, requests should be sent to Japan through diplomatic channels. Japan has already concluded bilateral extradition treaties with the US and the Republic of Korea.

B. Conditions

As for the required conditions, first we require the guarantee of reciprocity. We cannot extradite the accused for political offences. We also cannot extradite for offences where the maximum term of imprisonment is less than three years under the requesting country's laws, as well as under Japanese law. Dual criminality is also required.

In addition, we need to be shown probable cause that the wanted fugitive has committed the offence. We are often faced with an extradition request which does not contain evidence to support the allegation. Whether or not probable cause exists is the focus when we consider an extradition request. This is because in domestic investigations, probable cause is required to obtain the arrest warrant, and, therefore, Japanese courts strictly examine probable cause in extradition cases as well. Please be advised that should you send an extradition request to Japan, evidence to establish such probable cause is most essential. Lastly, we cannot extradite a Japanese national without an extradition treaty.

C. Statistics

In the past 10 years, we have extradited 12 fugitives to foreign countries; foreign countries have extradited 23 fugitives to Japan.

IV. STRENGTHENING COOPERATION

At this point, I would like to introduce our efforts to strengthen cooperation in MLA and extradition matters.

A. Role of "CA"

CA, in Ministry of Justice terminology, means "central authority." To ensure the effectiveness of MLA and extradition, the role of the central authority is important. My

division serves as a central authority in Japan, and my staff and I make efforts to be a functional central authority.

If the central authority becomes just a mailman or mailbox, the execution of the request will be time consuming, and the result of the request will not satisfy the requesting country. On the other hand, if the central authority has the power and discretion over both incoming and outgoing cases, the assistance can be effective. It is important for the central authority to advise counterpart central authorities on what forms of assistance can and cannot be executed and what should be modified in request documents. Otherwise, the requests will often not be completely executed. Also, it will be very helpful if the central authority can advise its domestic police or prosecutors about how the requests are executed in order to meet the requesting country's demands.

In order for the central authority to fulfill such a role, the central authority should be adequately staffed by trained legal experts. Providing and obtaining effective MLA requires abundant knowledge about the MLA and extradition system as well as domestic criminal procedure and criminal law. The central authority should also be adequately equipped, for example, with secured internet and e-mail systems.

The Japanese central authority has five attorneys: four of them are originally public prosecutors. In addition, Japanese legal attachés in China, England, France, Germany, the Republic of Korea, and the US help us to communicate with such countries' central authorities. Hopefully we are working as effectively as we say we are.

V. OTHER ISSUES

At the Ministry of Justice, we have been strongly recommending to our foreign counterparts to engage in informal consultation before sending a formal request. Even if the request is non-treaty based, we think that the central authorities should communicate directly with each other to discuss and solve problems. The use of diplomatic channels is limited to the sending and receiving of formal requests. Therefore, if you plan to send an MLA or extradition request to Japan, please consult with us at an early stage, and we can advise you accordingly. As I have mentioned, providing good advice is an essential function of a central authority.

The next issue is Japanese translation. In some cases, the Japanese translation of the request is unsophisticated, and, thus, we cannot understand the request well. I understand it is difficult to translate materials into foreign languages, and some people say Japanese is one of the most difficult languages to translate to. So, my proposal is that if your country makes an English version of the request, please send the English version as a supplement to the Japanese translation. While the English version cannot be a substitute for the Japanese translation, Japan can accept an English version as a supplement to the Japanese translation. As far as I've heard, in some countries including Thailand, an English version is prepared before translating into the language of the receiving country.

V. CONCLUSION

More information is available on our website (www.moj.go.jp/english). Also, if you need to consult with us on an individual case, please send us an e-mail at infojp@moj.go.jp.

MLA AND EXTRADITION IN THE REPUBLIC OF KOREA

*Dr. Kim Young June**

I. BASIC MECHANISM, PROCEDURES AND RESPONSIBLE AGENCY

MLA is prescribed in the Act on International Judicial Mutual Assistance in Criminal Matters, and extradition is dealt with according to the Extradition Act. The Central Authority for MLA and extradition in Korea is the Ministry of Justice.

A. MLA

The Central Authority for MLA in Korea is the Ministry of Justice. Korea receives letters requesting MLA through diplomatic channels or by direct mail. Officially, the acceptance of a request for mutual assistance and the sending of materials of mutual assistance to the requesting country shall be made by the Ministry of Foreign Affairs. Provided that there are urgent or special circumstances, the Ministry of Justice may act with the consent of the Minister of Foreign Affairs.

B. Extradition

When the Minister of Foreign Affairs has received a request for the extradition of a criminal from a requesting state, the requesting state shall send the written extradition request and the related data to the Minister of Justice.

II. CONDITIONS AND REQUIREMENTS TO REQUEST MLA AND EXTRADITION TO KOREA

A. Necessity of a Treaty Basis & Reciprocity

Even if an MLA treaty or an extradition treaty has not been concluded, if it is guaranteed that any requesting country would comply with any request of the Republic of Korea with respect to the same or similar matters, the Act on International Judicial Mutual Assistance in Criminal Matters or Extradition Act shall be applicable. In cases where a mutual assistance treaty or extradition treaty includes different provisions from those of the Act, the provisions of the treaty shall prevail over the Act.

B. The Procedure to be Followed by a Requesting State

1. MLA

Any request for mutual assistance shall be made in writing specifying matters falling under the following elements:

- (i) Agency taking charge of the investigation or trial related to the request for mutual assistance;
- (ii) Summary of the case;

* Director of Criminal Trial Department, Seoul High Prosecutors' Office.

- (iii) Object and contents of the request;
- (iv) Other matters necessary for carrying out mutual assistance.

In case of a request for mutual assistance, such as examination of a witness, delivery of objects, testimony in the requesting country, etc., the requesting country shall explain whether it is a request for investigation or trial.

2. Extradition

There is no provision relating to the procedure of requesting in the Extradition Act. But extradition treaties generally prescribe that all requests for extradition shall be submitted in writing through diplomatic channels. All requests shall be supported by:

- (i) Documents, statements, or other types of information which describe the identity, including nationality, and probable location of the person sought;
- (ii) Information describing the facts of the offence and the procedural history of the case;
- (iii) The text of the law describing the essential elements of the offence for which extradition is requested;
- (iv) The text of the law prescribing punishment for the offence;
- (v) A statement of the relevant provisions of its statute of limitations on the prosecution or the execution of punishment of the offence.

C. Dual Criminality and Scope of Offences

Dual Criminality is necessary for both MLA and extradition requests.

1. MLA

Where the crime under mutual assistance does not constitute a crime, or it is a crime against which no public action may be instituted, under the Act of the Republic of Korea, it may not be required to give any mutual assistance.

2. Extradition

Extradition may be requested only in cases where an extraditable crime corresponds to capital punishment or imprisonment or imprisonment without prison labour for life or not less than one year under the Acts of Korea and the requesting state.

D. Limitations of Use (MLA)

Provisions on use limitation exist in most MLA treaties. The requesting state should not use any information or evidence obtained under an MLA treaty in any investigation, prosecution, or proceeding for any purpose other than that described in the request without the prior consent of the requested state.

E. Assurance of Specialty of Extradition

If there is no guarantee from a requesting state that an extradited criminal will not be punished for crimes other than those permitted to be extradited, and he is not extradited to a

third country, the criminal shall not be extradited, except in cases where the criminal falls under any of the following circumstances:

- (i) Where the criminal is punished for a crime which may be deemed guilty in the limit of the criminal facts for which an extradition is admitted, or a crime committed after the criminal is extradited;
- (ii) Where the criminal left the territory of a requesting state after extradition, and he or she voluntarily re-entered the requesting state;
- (iii) Where the criminal fails to leave the territory of a requesting state within 45 days from the time when he or she may freely leave the requesting country; and
- (iv) Where Korea agrees to it.

III. AVAILABLE TYPES OF ASSISTANCE

The scope of MLA is as follows:

- (i) Investigation of the whereabouts of a person or object;
- (ii) Presentation of documents and records;
- (iii) Service of documents;
- (iv) Gathering of evidence, seizure, search and verification;
- (v) Delivery of objects, such as evidence, etc.; and
- (vi) Hearing of statements, and other measures to make any person testify or cooperate with the investigation in the requesting country.

IV. RESTRICTION AND GROUNDS FOR REFUSAL

A. Restriction on MLA

Other than dual criminality, requests are restricted in the following circumstances:

- (i) Where it may be detrimental to the Republic of Korea's sovereignty, national security, public peace and order, or public morals;
- (ii) Where it is deemed that the criminal might be punished, or subject to an unfavourable penal disposition due to race, nationality, sex, religion, social status, or the fact that he or she is a member of a specified social organization, or by the reason that he has a different political view; and
- (iii) Where it is deemed that the crime underlying the mutual assistance request is one of a political nature, or the request for mutual assistance is made for the purpose of an investigation or trial on another crime of a political nature.

B. Grounds for Refusal of Extradition

1. Absolute Cause for Refusal of Extradition

- (i) Where the prescription of indictment or sentence against an extraditable crime is completed under the Act of Korea or the requesting country;
- (ii) Where a trial for an extraditable crime is pending in a court of Korea, or the judgment has become final;
- (iii) Where there is no proper reason to suspect that the criminal committed an extraditable crime, provided that in cases where the accused was convicted in the requesting state for an extraditable crime, this shall not apply; and
- (iv) Where it is deemed that there exist concerns that the criminals might be punished or subject to other unfavourable dispositions for reasons of race, religion, nationality, sex, political belief, or membership in a specific social group.

2. Refusal of Extradition in Crimes of a Political Nature

If an extraditable crime is one having a political nature or related to such a crime, no criminal shall be extradited, provided that if the extraditable crime falls under any of the following subparagraphs, the same shall not apply:

- (i) A crime injuring or threatening the life or body of the chief of the State or Government, or his family;
- (ii) A crime for which Korea exercises a trial right on the criminal or bears an obligation to extradite the criminal under a multilateral treaty; and
- (iii) A crime injuring, threatening, or provoking any danger to lives or bodies of many persons.

If it is deemed that an extradition request is made for the purpose of bringing to trial another crime of a political nature which the criminal committed, or executing a sentence which became final against such a crime, the criminal shall not be extradited.

3. Discretionary Causes for Refusal of Extradition

A criminal may not be extradited in cases falling under any of following subparagraphs:

- (i) If the criminal is a citizen of Korea;
- (ii) If all or part of the extraditable crime has been committed in the territory of Korea;
- (iii) If a trial concerning a non-extraditable crime which was committed by the criminal is pending in a court of Korea, or if the criminal was sentenced to a penalty but execution thereof has not yet been terminated or exempted;
- (iv) If the criminal was brought to trial on an extraditable crime and punished in a third country, or if a judgment that no punishment thereof will be made final;

- (v) If it is deemed inhumane to extradite a criminal in light of the nature of the extraditable crime and the circumstances, etc. faced by the criminal.

V. CONFIDENTIALITY OF THE REQUEST AND THE PROVIDED INFORMATION

The Minister of Justice may upon sending mutual assistance materials request confidentiality to the requesting state. In MLA treaties, there usually are provisions relating to confidentiality. Thus the requested state shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting state.

VI. INTERNAL PROCEDURES FOR REQUESTING TO FOREIGN STATES

A. MLA

In a case where a prosecutor makes a request for mutual assistance as to any investigation of a foreign country, he shall send a written request to the Minister of Justice, and the judicial police officer shall make a request to the prosecutor to send it to the Minister of Justice.

After receiving a written request from the prosecutor, in a case where the Minister of Justice admits that it is necessary, the Minister of Justice shall send it to the Minister of Foreign Affairs.

B. Extradition

When the prosecutor judges that a request for extradition of a criminal to the foreign country is proper, he may suggest a request to the Minister of Justice attaching relating materials.

If the Minister of Justice judges that it is necessary to request extradition, he may request, through the Minister of Foreign Affairs, that the foreign state extradite the criminal.

VII. OTHER METHODS OF LAW ENFORCEMENT COOPERATION

The Korea Supreme Prosecutors' Office concluded 21 Memoranda of Understanding (MOU) on mutual cooperation with various foreign authorities. Through these MOUs, the Korea Prosecution Service has been cooperating with foreign law enforcement directly and quickly, which has turned out to be very successful. The International Cooperation Center was established in the Supreme Prosecutors' Office (SPO), which is in charge of this kind of direct cooperation with foreign authorities.

Nowadays, the SPO is planning to launch the Asset Recovery Inter-Agency Network in Asia and the Pacific (ARIN-AP). An interim secretariat has been established as a central point of contact to receive expressions of interest and to progress the development of the Network (contact: ARIN@spo.go.kr). Direct and speedy inter-agency cooperation in the asset recovery area would be expected with the establishment of ARIN-AP.

INTERNATIONAL COOPERATION: THE EXTRADITION FRAMEWORK IN SINGAPORE – A GENERAL OVERVIEW

*Nor'ashikin Samdin**

I. INTRODUCTION

This paper aims to provide a general overview of the extradition framework in Singapore by addressing the following topics:

- (i) Basic mechanisms, laws and procedures concerning extradition and the agencies responsible for these matters;
- (ii) Legal requirements for making an extradition request to Singapore;
- (iii) Grounds for Refusal;
- (iv) Lessons learnt.

As one of the objectives of this Regional Seminar on Good Governance for Southeast Asian Countries is to provide an opportunity for the participating countries to enhance practical knowledge and mutual understanding of the extradition framework in their respective countries, this paper will focus on extradition requests made by other countries, as Requesting States, to Singapore, as the Requested State.

II. BASIC MECHANISMS, LAWS AND PROCEDURES CONCERNING EXTRADITION AND THE AGENCIES RESPONSIBLE FOR THESE MATTERS

A. The Extradition Act

The principal legislation in Singapore governing the extradition of fugitives to and from foreign countries, including Commonwealth countries, is the Extradition Act, Chapter 103 of the Statutes of the Republic of Singapore (the EA)¹. The EA was enacted on 1st August 1968 and has undergone several amendments since then.

Briefly, the EA provides for 3 different types of frameworks for the extradition of fugitives. The answer to the question of which framework governs a particular request is contingent upon whether the request is made by a foreign state², a declared Commonwealth country³ or by Malaysia⁴. A 'foreign state' as defined in the EA means any foreign State or any of the territories specified in the Third Schedule between which and Singapore an extradition treaty is in force. A 'declared Commonwealth country' as defined in the EA means a country declared to be a Commonwealth country in relation to which Part IV applies.

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¹ A copy of the EA is available on the Attorney-General's Chambers website at http://app.agc.gov.sg/What_We_Do/International_Affairs_Division/Extradition.aspx

² Governed by Part II of the EA.

³ Governed by Part IV of the EA.

⁴ Governed by Part V of the EA.

A list of declared Commonwealth countries can be found in the Extradition (Commonwealth Countries) Declaration which is available on the Singapore Statutes Online at the following URL address: <http://app.agc.gov.sg/>

Under the EA, the extradition of a fugitive who is suspected of being in, or on the way to Singapore is only possible if there is an extradition treaty or arrangement between the Requesting State and Singapore and the requirement of dual criminality is met.

B. The Criminal Procedure Code

In addition to the EA, s 121 of the Criminal Procedure Code Chapter 68 (Revised Edition 2012) of the Statutes of the Republic of Singapore ('the CPC'), provides an alternative legal (reciprocal) basis for the extradition of a person who is accused or convicted of an offence against the laws of Malaysia or Brunei Darussalam and who is suspected of being in, or on his way to Singapore.⁵ Under this reciprocal arrangement, where a warrant for the apprehension of a person has been lawfully issued by the relevant court in Malaysia or Brunei Darussalam, a Magistrate in Singapore may endorse the said warrant which may then be executed by the relevant law enforcement agency e.g the Singapore Police Force ('SPF') as though it were issued by a Magistrate's court in Singapore. This reciprocal arrangement is commonly referred to as the "endorsement or backing of warrants".

As this is a reciprocal arrangement, the domestic criminal procedure laws of Malaysia and Brunei Darussalam accordingly contain corresponding provisions for the endorsement or backing of warrants issued by a Magistrate court in Singapore. I understand that our colleagues from Brunei Darussalam are not here. As such, I shall leave it in the good hands of my Malaysian colleagues to elaborate on the relevant domestic laws in their country on this point during their presentation. I look forward to their discussion on this.

C. The Central Authority

The AGC is designated as Singapore's Central Authority for extradition requests and all matters related thereto. The International Affairs Division of the AGC processes all extradition requests in accordance with the provisions of the EA, CPC and other relevant legislation, as well as any applicable Extradition Treaty ('ET').

D. Other Relevant Ministries and Agencies

Although the AGC is the Central Authority for all extradition requests, other Ministries and government agencies are ordinarily also involved in the extradition process. For instance, if a Requesting State seeks Singapore's assistance in extraditing a fugitive believed to be located in Singapore for having allegedly committed murder in that state, the Police, which is the relevant law enforcement agency tasked with investigating such serious crimes and which may end up executing the request, will be involved in ascertaining whether the fugitive is in fact in Singapore.

In addition, depending on the terms of the relevant extradition treaty, the Ministry of Foreign Affairs ('MFA') may be involved in the extradition process in receiving the formal requisition from the Requesting State in the form of the Third Person Note ('TPN').

⁵ A copy of the CPC is available on the Attorney-General's Chambers website at <http://statutes.agc.gov.sg/aol/home.w3p>

E. The Magistrate

This part of the paper will now focus on extradition requests made to Singapore, as a Requested State, by a foreign state or declared Commonwealth country as the Requesting State. Under the EA, the Magistrate plays a material role in the extradition process. There are two distinct stages during which the Magistrate is authorised to act. The first is the stage before the warrant for the apprehension of the fugitive is issued ('pre-apprehension stage'), and the second is the stage after the warrant for the apprehension of the fugitive is issued ('post-apprehension stage').

During the pre-apprehension stage, the Magistrate can either issue a warrant for the apprehension of the fugitive pursuant to an application made directly to him, or alternatively, pursuant to a notice given by the Minister for Law authorising him to issue a warrant for the apprehension of the fugitive. The litmus test that must be satisfied is that the Magistrate in Singapore must opine that there is such evidence according to Singapore law to justify the apprehension of the fugitive, or to justify the issue of the warrant, as the case may be, if the act or omission constituting the extradition crime had occurred in, or within Singapore's jurisdiction.

During the post-apprehension stage, the Magistrate may remand a person brought before him, either in custody or on bail, for a period, or periods not exceeding 7 days at any one time. The duty of the Magistrate, at this stage in relation to a fugitive who is accused of an extradition crime, is to consider if there is such evidence, according to Singapore law, as would justify the trial of the fugitive if the act or omission constituting that crime had occurred in Singapore, or within the jurisdiction of Singapore. If so, and if after hearing any evidence tendered by the said fugitive, the Magistrate opines that the fugitive is liable to be surrendered to the foreign state or the declared Commonwealth country, as the case may be, he shall commit the fugitive to prison to await the warrant of the Minister for his surrender. Thereafter, he shall immediately furnish a certificate to the Minister, to that effect and such report, if any, relating to the proceedings, as he thinks fit.

The duty of the Magistrate vis-a-vis a fugitive who is alleged to have been convicted of an extradition crime is to assess if there is sufficient evidence to satisfy him that the said fugitive has indeed been convicted of that crime. If he is so satisfied, he shall similarly commit the said fugitive to prison to await the Minister's warrant for his surrender.

In relation to all extradition requests made by any Requesting State pursuant to the EA, where the Magistrate opines that it would be dangerous to the life or prejudicial to the health of the apprehended fugitive to commit him to prison, he may, instead, by warrant, order that the fugitive be held in custody at the place where he is at presently, or at any other place to which he can be removed without danger to his life, or prejudice to his health, until such time as he can be removed without such danger or prejudice, be committed to prison, or he is surrendered.

In relation to a fugitive who has been committed to prison pending the issue of the Minister's warrant for his surrender to a foreign state or declared Commonwealth country (hereafter referred to as 'the prisoner'), or ordered to be held in custody at a specified place other than in prison, the Magistrate shall inform him that he shall not be surrendered until after the expiration of the period of 15 days from the date of the committal or order.

F. Order for the Review of Detention

If the prisoner asserts that his detention is unlawful, he may apply to the High Court for an Order for Review of Detention. Upon the review of the Magistrate's order, the High Court may confirm, or vary the order, or quash the order and substitute a new order in its stead.

G. The Minister for Law

Under the EA, the final decision on whether or not to surrender a fugitive to a foreign state or a declared Commonwealth country, lies solely with the Minister for Law. Vis-a-vis requisitions from foreign states and declared Commonwealth countries requesting the surrender of a fugitive suspected of being in or on his way to Singapore, the Minister for Law plays a key role in the extradition process, both at the pre-apprehension and post-apprehension stages respectively.

Upon receipt of a requisition for the surrender of a fugitive, the Minister may notify the Magistrate accordingly of the receipt of the said requisition and authorise him to issue a warrant for the apprehension of the fugitive, where no such warrant has been issued by the Magistrate. Where the Magistrate has already issued such a warrant without first having been authorised by the Minister, the Minister, if he is of the view that the fugitive is liable to be surrendered to the foreign state or declared Commonwealth country, he may subsequently proceed to notify the Magistrate that a requisition for the surrender of the said fugitive has been made.

Alternatively, if after the Magistrate has issued a warrant for the apprehension of the fugitive without having been authorised by the Minister, the Minister, if he opines that the fugitive is not liable to be surrendered to the foreign state or declared Commonwealth country, he may, by order in writing, direct that the warrant be cancelled and the fugitive, where he is held in custody, shall accordingly be released. Where the fugitive has been admitted to bail, he shall accordingly be discharged from bail.

During the post-apprehension stage, after the expiration of the period of 15 days from the date of committal or order issued by the Magistrate, or if within that period, an application for an order for review is made by the prisoner and the court to which the application is made does not order that the prisoner be released, after the expiration of the period of 15 days from the date of the decision of the court, the Minister may, if he is satisfied that the prisoner is liable to be surrendered to the foreign state or declared Commonwealth country, by warrant, order that the prisoner be delivered into the custody of a person specified in the said warrant and be conveyed by that person to a place in the foreign state or declared Commonwealth country, or within the jurisdiction of, or of part of, the foreign state or declared Commonwealth country and there be surrendered to a person(s) appointed by the said foreign state or declared Commonwealth country to receive him.

III. LEGAL REQUIREMENTS FOR MAKING A FORMAL REQUISITION TO SINGAPORE SEEKING SURRENDER OF FUGITIVES

A. Request for Extradition by a Foreign State or Declared Commonwealth Country

This applies to situations where Singapore, as the Requested State, receives a requisition complete with supporting documents from a foreign state or declared Commonwealth country as the Requesting State. Such requisitions from foreign states or declared Commonwealth countries should contain the following:

- the formal requisition from the Requesting State in the form of a TPN
- authenticated copy of the foreign warrant or overseas warrant for the apprehension of the fugitive issued by a competent authority which is usually a court of law in that Requesting State
- authenticated supporting documents, including a statement of facts, charge sheet, First Information Report ('FIR'), where applicable, the prosecutor's affidavit, copies of legislation, documents confirming the identity of the fugitive and duly sworn/affirmed affidavits of material witnesses⁶
- where the requisition is in relation to a fugitive who is alleged to have been convicted of an extradition crime, the supporting documents should include original or authenticated copies of any judgment or order recording a conviction against the fugitive for the offences, copies of the relevant legislation applicable to the offences, documentary or other evidence or information enabling the identification of the fugitive e.g recent photographs of the fugitive, his fingerprint records, passport details etc.

B. Essential Conditions

The following are the essential conditions that must be satisfied in order to ensure that an extradition request from a foreign state or a declared Commonwealth country is not refused for non-compliance with the provisions of the EA or relevant practical requirements:

- the request must be in respect of an extradition crime as defined in the EA
- the offence must be one that is described in the First Schedule to the EA, or alternatively deemed by other relevant legislation to have been included in the EA
- the offence must satisfy the 'dual criminality' or 'double criminality' rule
- in the case of a declared Commonwealth country, there is an additional requirement that the maximum penalty for that offence is death or imprisonment of not less than 12 months
- the identity of the fugitive must be ascertainable. In this regard, recent photographs of the fugitive and his fingerprint records constitute the best evidence to establish and confirm his identity
- there is sufficient evidence in the depositions in support of each charge in the foreign or overseas warrant.

C. Request for Provisional Arrest

This applies to situations where the request for the apprehension of a fugitive is urgent, for instance, when information is received by the Requesting State that a non-Singapore resident fugitive is transiting through Singapore and will be leaving our territory before the complete set of depositions and documentation in support of a formal requisition can be sent to Singapore. Such requests are sought to prevent the fugitive from evading apprehension due

⁶ s 42 of the EA.

to the delay in preparing the formal requisition for his extradition, together with the complete set of supporting documents.

A request for provisional arrest should contain the following:

- a TPN from the Requesting State or a note from INTERPOL containing the requisite information and request stating that a formal TPN will follow shortly
- authenticated foreign or overseas warrant
- documentary or other evidence or information confirming the identity of the fugitive, e.g. a recent photograph of the fugitive, his fingerprint records, passport details, etc.
- documents setting out the facts of the case, e.g. sworn deposition, criminal complaint, grand jury indictments. Due to the urgency of the request, duly sworn/affirmed affidavits of material witnesses are understandably not required at this stage

Where the request for provisional arrest is acceded to, the relevant law enforcement agency officer will be instructed to make a Magistrate's complaint and apply for a warrant for the provisional arrest of the fugitive.

D. Contact Details of Central Authority and MFA

Requesting States, viz, foreign states and declared Commonwealth countries, may send their formal requisitions seeking the extradition of a fugitive suspected of being in, or within the jurisdiction of Singapore directly to the AGC as the Central Authority for extradition requests at the following address:

Director-General
International Affairs Division
The Attorney-General's Chambers
1 Coleman Street
#10-00, The Adelphi
Singapore 179803
REPUBLIC OF SINGAPORE

In cases of urgent requests, a copy of the request may also be sent by fax to +65 6338 2979 or by email to AGC_CentralAuthority@agc.gov.sg. However, a hard copy of the request is still required to be sent over. Queries in relation to extradition matters may be sent to the correspondence address and fax number above, or sent by email to AGC_CentralAuthority@agc.gov.sg.

Requesting States which are foreign states or declared Commonwealth countries and whose laws or diplomatic protocol require all formal requisitions seeking the extradition of a fugitive suspected of being in, or within the jurisdiction of Singapore, to be addressed to the Ministry of Foreign Affairs in Singapore (i.e. MFA), may accordingly send their formal requisitions to the MFA at the following address:

Ministry of Foreign Affairs,
Tanglin,
Singapore 248163
REPUBLIC OF SINGAPORE

IV. GROUNDS FOR REFUSAL

A. General Grounds

In accordance with the EA, the Minister shall refuse a requisition from a foreign state or declared Commonwealth country seeking the extradition of a fugitive who is suspected of being in, or within the jurisdiction of Singapore, if he has substantial grounds for believing that:

- the requisition was made for the purpose of prosecuting or punishing the fugitive on account of his race, religion, nationality, or political opinions
- the fugitive may be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reasons of his race, religion, nationality or political opinions
- if the requisition relates to an offence of a political character
- the requisition seeks the continued detention or trial in the requesting state, of a surrendered fugitive for an offence which was allegedly committed before his surrender
- the requisition seeks the continued detention in the requesting state, of a surrendered fugitive for the purpose of his being surrendered to another country for trial or punishment for an offence which was allegedly committed before his surrender to that foreign state
- the requisition is in respect of a person who is held in custody or has been admitted to bail in Singapore in respect of an offence that is alleged to have been committed in Singapore, or is serving a prison sentence for a conviction in Singapore
- the requisition is in respect of a person who has been acquitted or pardoned by a competent tribunal or authority in any country, or has undergone the punishment provided by the law of, or part of, any country, in respect of that offence or of another offence constituted by the same act or omission as that offence (i.e. autrefois acquit or autrefois convict).

B. Specific Grounds

In addition to the general grounds for refusal, the following specific grounds for refusal are applicable to requisitions made by foreign states and/or declared Commonwealth countries:

- in the case of requests from foreign states, any grounds for refusal specified in the applicable treaties
- in the case of requests from declared Commonwealth countries, if the Minister is satisfied that by reason of:

- (a) the trivial nature of the offence that the fugitive is alleged to have committed or has committed;
- (b) the accusation against a fugitive not having been made in good faith or in the interests of justice; or
- (c) the passage of time since the offence is alleged to have been committed or was committed,

and having regard to the circumstances under which the offence is alleged to have been committed or was committed, it would be unjust, oppressive or too severe a punishment to surrender the fugitive, or to surrender him before the expiration of a particular period, the Minister shall not issue a warrant under s 27(2) in respect of the fugitive, or shall not issue such a warrant before the expiration of that period, as the case may be.

V. LESSONS LEARNT

A. Some Practical Tips

- Requesting States, viz, foreign states or declared Commonwealth countries, are advised to establish early contact with the AGC as the Central Authority or alternatively, with Interpol Singapore, and to provide as much advance notification to Singapore of their intention to make a request for provisional arrest or extradition of a fugitive to enable the early identification and resolution of possible legal or practical issues
- The relevant law enforcement agency in the Requesting State is advised to liaise with its counterpart in Singapore to confirm, as far as possible, that the fugitive or person accused or convicted of a crime against its law as the case may be, is, or is suspected of being in, or on his way to Singapore. This will enable both states to have a better idea of how much time they have to apprehend the fugitive or the said person and also, whether to make a request for provisional arrest or a request for extradition proper
- Requesting States are advised to note that the key factor in the evaluation of a request for provisional arrest is whether or not the fugitive is a flight risk. Thus, Requesting States are therefore advised to provide its reasons for believing that the fugitive is a flight risk
- Requesting States which have made a request for provisional arrest are advised to note that once the fugitive has been apprehended, they are required to submit the formal requisition together with the complete set of supporting documents as soon as possible, and in any event, before the expiry of the relevant period stated within the applicable extradition treaty or arrangement
- Requesting States that are planning to issue a media statement regarding their request are advised to consult the AGC and to discuss the possible impact such a statement may have on their request, including any court proceedings relating to the execution of the request, eg. committal proceedings and order for review of the Magistrate's order

- If after consultations with the AGC, the Requesting State wishes to proceed to issue the media statement, it is advised to disclose the proposed media statement to AGC to ascertain if the proposed statement could be drafted in a manner that lessens any possible adverse impact on its request
- Requesting States are advised to identify an expert on the law of their respective states who would be able to testify in the court proceedings in Singapore, if necessary, as to the relevant laws constituting the offences in those states in the event a legal challenge to the extradition request is mounted by the fugitive or his legal counsel

VI. CONCLUSION

As stated at the outset, this paper is intended to provide only a general overview of the extradition framework in Singapore where Singapore is the Requested State, rather than the Requesting State. It is hoped that it has achieved its objective and enabled Requesting States to have a better understanding of the extradition process in Singapore.

MUTUAL LEGAL ASSISTANCE AND ASSET RECOVERY

*Pedro Gomes Pereira**

I. INTRODUCTION

The international community has seen cross-border movement of persons, goods and capital intensify greatly throughout the second half of the 20th century. While this global integration has brought greater wealth, it has also brought with it the growth of, and new trends in, cross-border crime. As a consequence, a new paradigm in criminal law has been emerging in this period, challenging the age-old international legal standards that have defined the modern sovereign State since the 17th century.

The rising international visibility of certain local events alongside the intensification of cross-border movements has allowed this rise of transnational crime¹, in particular of corruption, of money laundering and of transnational organised crime. The traditional interconnection between criminal law and sovereignty has, as a result, rendered the control of transnational crime at a purely local level obsolete. This is due to the fact that sovereignty becomes the main defence mechanism for transnational crime, as the latter normally structures itself through the use of different, and often conflicting, legal systems and traditions.

The response from the international community, in order to bridge this perceived impunity gap, has sought to enhance its cross-border co-ordination with regards to certain criminal offences. This co-ordination is done through hard and soft law instruments at the bilateral, regional and international levels. These instruments allow for a better co-ordination of disparate legal systems in order to avoid the superimposition of jurisdictions and efforts, where possible and applicable.

The focus of these international instruments, when combating corruption and money laundering, is to choke their incentives through the asset recovery process. It is understood that, if the financial incentives — be they the undue advantage offered or accepted, or the profits generated from it — are removed, the occurrence of corruption will be less likely.

The asset recovery process can be understood as a four-phased process², made up of the:

1. *Pre-investigative or intelligence gathering phase*, during which the analyst or the investigator verifies the source of the information which may initiate an investigation and determines its authenticity;

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¹ Maíra Rocha Machado (2004). *Internacionalização do Direito Penal: A Gestão de Problemas Internacionais por meio do Crime e da Pena*. p. 18.

² International Centre for Asset Recovery (ICAR) (2009). *Tracing Stolen Assets: A Practitioner's Handbook*. p. 19.

2. *Investigative phase*, where the proceeds and instrumentalities of crime are identified and located, as well as evidence of the true nature and ownership is collected. This stage covers several areas of investigative work in more formal processes, e.g., through the use of requests for MLA, and financial investigations to obtain and analyse bank records. This phase involves substantiating the veracity of the intelligence and information collected in the previous stage and converting it into admissible evidence. The result of this investigation can therefore be only a temporary measure – e.g., seizure – in order to later secure a confiscation order through the court;
3. *Judicial phase*, where a judgement against the perpetrator is obtained and, where applicable, a decision on the confiscation of the proceeds and instrumentalities of crime is determined;
4. *Realisation phase*, where the property is actually confiscated and realised by the State in accordance with the law, while taking into account international asset sharing obligations, as well as compensation for victims and determination on what to do with the confiscated assets.

One of the tools which is to be used within the asset recovery process – in particular if there are elements of cross-border movements – is known as mutual legal assistance (MLA). Its purpose is to articulate States in order to repress the cross-border criminal activity³. Therefore, MLA can be defined as the manner through which a State renders assistance to another so that the requesting State may comply with its jurisdictional obligations. The need for MLA is mainly due to the fact that the requesting State cannot exercise its jurisdiction in the requested State. As a result, the latter may furnish evidence or take coercive measures on behalf of the former in a way that both complies with its legal requirements and which may be valid in the courts of the requesting State.

MLA is based on the premise that a State will request another, through channels decided upon between them either bilaterally or through the international community, which will then rule on the contents of the request. It is not just a form of communication between States: it transcends to assistance provided by one State to another in order to co-ordinate legal systems with a view to satisfying evidentiary requirements relating to the investigations in the requesting State, or to safeguarding assets which may be at risk of loss or that are the fruits derived from criminal activity, and which are found in the requested State. When viewed this way, it is possible to expand the scope of application of MLA while respecting traditional perceptions of the sovereignty of States.⁴

This paper seeks to briefly put MLA into context in the asset recovery process, on the one hand, while focusing on the international and cross-border efforts to prevent and combat corruption, on the other. This paper will therefore seek to introduce the practitioner to the bases of MLA, its main principles, limits to international co-operation, and also the contents of requests for such assistance. Special focus will be given to the channels of communication, which must remain open and be used regularly and proactively by both the requesting and the requested States. Finally, this paper will also seek to address the issue of validity of the evidence in courts in both the requesting and requested State.

³ GONZÁLES, S. A. ; REMACHA Y TEJADO, J. R, org. (2001). Cooperación Jurídica Internacional. p. 141.

⁴ GONZÁLES, S. A. ; REMACHA Y TEJADO, J. R, org. (2001). Cooperación Jurídica Internacional. p. 70.

II. ASSET RECOVERY AND CORRUPTION

The traditional perception of preventing and combating criminal activity is that there is a need to collect the evidence, identify the perpetrator of the criminal offence under investigation, prosecute him or her and convict or acquit him or her to a punishment that has been pre-determined in law. The identification, seizure and confiscation of the proceeds and the instrumentalities of crime, in this scenario, is secondary: the focus of this action is in order to ensure that there are funds to satisfy the civil obligations which derive from the criminal process, e.g., compensation to victims.

While this approach remains applicable in those cases in which the focus of the criminal action is the unlawful financial gain deriving from the criminal activity, the object is ensuring firstly that these assets are secured, as they are the gains of criminal activity. This is because corruption-related offences⁵, money laundering, fraud and other financial crimes focus on the illicit financial advantage gained by the perpetrator when committing such offences. In these cases, while it is important to seek the conviction and incarceration of the perpetrator, the prime focus is to ensure that they do not enjoy the profits of their crime. Thus, it is fundamental that these criminal assets are identified, seized and confiscated. They are the object of the investigation and prosecution, not its by-product.

The identification of corruption-related proceeds and instrumentalities of crime is done through, and is part of, the asset recovery process, as explained above. This is because, the unlawful assets are laundered⁶ by the perpetrator of the crime. Money laundering is the tool used by the perpetrators of corruption and financial crimes to hide the true nature, origin and ownership of the profits derived from crime⁷. On the other hand, asset recovery is the process through which law enforcement identify and trace those assets, linking them to the perpetrators and their criminal activities, in order to obtain the necessary seizure and confiscation of these unlawful assets.⁸

The identification of the proceeds and instrumentalities of crime, however, is oftentimes complex and time-consuming. As a consequence, the asset recovery process may be constricted by the difficulties in identifying these proceeds and instrumentalities.⁹ An added complexity is the fact that, during the money laundering process, it is common to transit the proceeds and instrumentalities of crime through numerous jurisdictions, in an attempt to mask the true nature, origin and ownership of those unlawful assets.

⁵ The United Nations Convention Against Corruption (UNCAC), the global standard for preventing and fighting corruption, defines the following offences and corruption-related offences: active and passive corruption of national public officials, of foreign public officials and of officials of public international organisations; embezzlement; trading in influence; abuse of functions; illicit enrichment; bribery in the private sector; embezzlement of property in the private sector and money laundering of corruption-related offences. It should be underscored that not all of these offences are mandatory under the UNCAC, as the corruption-related offences are graded as mandatory and non-mandatory by the Convention.

⁶ While the exact definition of money laundering depends of how this criminal offence is defined in the national legislation of each country, it can be generally understood, for the context of this paper — and based on the international standards — as the process of concealing, disguising or hiding the true origin, nature and ownership of property derived from, or involved in criminal activity, such as the corruption-related offences.

⁷ International Centre for Asset Recovery (ICAR) (2011). Development Assistance, Asset Recovery and Money Laundering: Making the Connection. p. 9.

⁸ Ibid. p. 6.

⁹ Ibid. p. 13.

As a result, States will normally require, during the investigation and prosecution of a corruption-related case, to make use of MLA, in order to collect the evidence – to substantiate the criminal activity – and to take coercive measures – such as the preservation of the proceeds and instrumentalities through seizure orders – in another jurisdiction. One of challenges to MLA, however, is its response time, which may be inadequate for seizing and confiscating assets, given the time needed for its execution between the involved countries versus the speed in which international financial transactions occur.¹⁰

III. MUTUAL LEGAL ASSISTANCE AND ASSET RECOVERY

There are several ways through which a State may pursue MLA with another, through: (i) bilateral or multilateral international treaties, (ii) reciprocity undertaking, or (iii) use of the legislation of the requested State.

The international community has established a trend since the adoption of the United Nations Convention against Illicit Traffic in Drugs and Psychotropic Substances, adopted in 1988¹¹ (1988 Vienna Convention), by including specific provisions pertaining to MLA. Since then, these provisions have been enhanced and detailed more thoroughly, as can be seen in the United Nations (UN) Conventions against Transnational Organized Crime (UNTOC), adopted in 2000, and against Corruption (UNCAC), adopted in 2003.

There are also regional MLA conventions within regional bodies, such as the African Union (AU), the Southern Africa Development Community (SADC), the Organisation of American States (OAS) and the Council of Europe (CoE). Furthermore, according to current trends in the field of tackling corruption, there is, at the international legal level, the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Transactions (OECD Anti-Bribery Convention)¹² and on the regional level, the corruption conventions of the OAS, the AU, the SADC and of the CoE.

An international multilateral or bilateral convention may be invoked for the purpose of MLA if both the requesting and requested States have ratified it. In the absence of such ratification by both States, a State may seek to request assistance with the provision of reciprocal treatment in future cases of a similar nature emanating from the requested State. It should be noted, however, that not all legal traditions allow for such a reciprocity undertaking without a legal basis between both countries. Finally, assistance may also be requested on the basis of the internal legislation of the requested State. This is because several jurisdictions already have within their legal framework provisions for MLA, e.g., Switzerland and the United Kingdom.

¹⁰ International Centre for Asset Recovery (ICAR) (2011). Development Assistance, Asset Recovery and Money Laundering: Making the Connection. p. 13.

¹¹ The 1988 Vienna Convention establishes a turning point for the international community as a whole. Prior to this, however, there were some successful experiences seen on the bilateral and regional levels, as is the case of the European Convention on Mutual Assistance in Criminal Matters (adopted by the CoE in 20 April 1959) and its additional Protocol, adopted in 17 March 1978. On the bilateral level, Switzerland and the US signed a bilateral treaty on mutual legal assistance in 1977.

¹² It should be noted that the OECD Anti-Bribery Convention does not contain mechanisms enabling MLA. It has nevertheless been mentioned in this paper as it is an important instrument for the prevention and the combating of corruption.

There are, however, subtle differences between multilateral and bilateral treaties that provide for MLA. Due to the fact that multilateral conventions encompass numerous jurisdictions (e.g., the UNCAC has been ratified by over 150 jurisdictions), the co-ordination between all these States limits itself to establishing important principles and standards concerning specific criminal conduct which the international community wishes to address and combat. The main element of multilateral conventions is not the co-ordination of MLA instruments, but rather the co-ordination of specific offences deemed relevant by the international community. In these cases, more attention is given to the internationalisation of local paradigms,¹³ rather than the procedural provisions enabling the prevention and the combating of such offences.

On the other hand, bilateral treaties on MLA, due to the limited number of parties involved, are able to establish exact procedures and the limits to co-operation that the involved States are willing to provide through such assistance. Bilateral treaties, therefore, do not generally address criminal conduct of the substantive criminal law, but rather leave its application open to any criminal activity (although limited by the principle of speciality, as will be seen below), specifying the rules of procedure to be followed in requests for MLA. Co-ordination between two jurisdictions that have a bilateral MLA treaty in place is more easily attainable, as they seek the co-ordination of jurisdictions and their mechanisms to counter cross-border criminal activity, rather than focusing on the internationalisation of the local paradigms.

It should be noted that the use of the bases for MLA listed above are not mutually exclusive. A request for MLA can be based on one or more conventions, or on a convention and the national legislation of the requested State. This is because the request may address multiple criminal activities of a person or persons, which can easily span numerous multilateral conventions. On the other hand, it may be possible to use a multilateral convention, which addresses specific transnational crimes, and a bilateral treaty, which will specify the appropriate procedures to be followed.

The practitioner should therefore, at an initial stage, analyse the criminal activity found within his or her jurisdiction but which carries effects outside of it, superimposing the said activity with all the international conventions that its country has ratified. Following this step, it should observe whether these conventions have also been ratified by the State in which assistance is to be requested.

1. Mutual Legal Assistance and the Pre-Investigative and Investigative Stages

When an investigation reaches the stage at which an action must be executed within another jurisdiction, the investigator or prosecutor must focus on three initial questions: whom should be contacted in order to request effective assistance, what mechanism should be used, and when should this request be submitted to the requested State? In order to answer these questions, several factors must be taken into account and they have to be considered and analysed on a case-by-case basis.

The investigator should first determine whether the information sought in another jurisdiction could be produced formally or informally. Should the latter scenario be the case, that is, if no evidence is to be presented to a court or coercive measures sought but rather the collection of information to support furthering the investigation, the investigator may wish to

¹³ Boaventura de Sousa Santos (2005). *A Crítica da Razão Indolente: Contra o Desperdício da Experiência*. p. 18.

make use of his or her contacts in order to obtain said information. If no contacts are known, the practitioner should make use of his or her contacts to pursue other contacts within their network. Another avenue to be considered is the use of legal attachés or police liaisons with the Embassy of the requested State. Another mechanism that should be sought in the informal assistance is making use of the numerous groups available for such purposes, such as the Egmont Group of Financial Intelligence Units (FIU) or the Interpol channels.

Should the procedure sought be produced formally, not only must the practitioner make use of the contacts mentioned in the preceding paragraph prior to issuing a request for MLA, but he or she must also contact the central authority of his or her State. The central authority is a body comprised of experts in the field of MLA. Ideally, the central authority is responsible for assisting the law enforcement community and prosecutors in devising their international strategies for an investigation and prosecution, if MLA is required. In order to do so, the central authority must heavily rely on its networking capabilities with central authorities and officials of other jurisdictions, but also have a general understanding of the requirements for MLA and the legal requirements necessary in the requested State in rendering assistance, in order to ensure effectiveness and diligence in the execution of the request. The staff at the central authority should, for this reason, have an adequate understanding not only of the legal and judicial requirements of their country, but also that of the main requested States.

Preliminary contact prior to taking any actions pertaining to MLA is essential in raising the chances of a successful request: in international co-operation, communication is key. Such contact will ensure that the requesting authority attains an understanding of what information must be contained in the request and how the information should be best conveyed within the request to the requested State. Also, such preliminary contact will anticipate the forthcoming request, and allow the requested State to analyse and agree on the terms of the draft request, ensuring its future effectiveness. All these factors become particularly important when the request is either deadline driven which is often the case, or its execution is urgently required.

The timing for issuance of the request is also very important. This is because while the investigation may be confidential in the requested State, procedures in the requesting State may determine that the request must be disclosed to the defence prior to sending the evidence to the requesting State. Communication, once again, is paramount so that both the requested and the requesting States fully understand the outcomes, results and consequences of the assistance rendered. It is only through appropriate communication that the practitioner will learn and understand the legal implications of the request in the requested State. Moreover, understanding these implications will also anticipate legal challenges in the proceeding in the requesting State.

2. Principles Governing Mutual Legal Assistance

There is an array of principles that govern MLA, derived from both international and national law. From a day-to-day practical experience, however, two principles stand out for practitioners who are faced with drafting requests: the principles of dual criminality and speciality.

The principle of speciality prohibits or prevents the requesting State from utilising the results arising from the assistance rendered by the requested State in proceedings other than those specified in the request for MLA. This does not mean, however, that the results from

such a request cannot be utilised in proceedings other than those specified in the request for MLA. Rather, it means that the requesting State must ask in writing for permission from the requested State to utilise the results in other proceedings, and obtain such authorisation prior to disclosing the evidence in other proceedings.

This written request must refer to the new proceedings in which the requesting State wishes to use the evidence, explaining the offences under investigation, the context of the investigation and how the evidence provided would benefit the other proceedings. Should the requested State agree, the evidence may then be lodged in the new proceedings, respecting any conditions that the requested State may wish to impose.

The principle of dual criminality, on the other hand, is capable of easy understanding but often difficult to fully comprehend. Requesting States often see it as the main reason for restricting or denying assistance by requested States. This principle, which can also be found in other forms of international assistance, such as extradition proceedings, conveys the fact that the offence under investigation in the requesting State must correlate to an offence in the requested State. The offence in both the requesting and requested States do not have to be identical – if this were to be required, it would, in fact, greatly diminish the possibility of rendering assistance. Rather, it means that the core elements of the offence in both States must be similar in nature.

While drafting the request for MLA, the practitioner must be aware of the dual criminality principle, and explain how its jurisdiction perceives the offence. The practitioner cannot simply lay down the legal definition of the offence and hope that the requested State will be able to understand it and find a similar offence within its legal system – the practitioner drafting the request must seek to explain how the offence operates within its jurisdiction, and to intertwine it with the subject-matter of the request with the criminal offences found in the requested State. The practitioner must heavily rely on communication with the requested State in order to achieve this, as the understanding of the criminal offences in the requested State will only be forthcoming through this channel.

It should be highlighted that mutual legal assistance is not a transfer of the responsibility to investigate to another country (commonly known as a “fishing expedition”). While the requested State may have the jurisdiction to conduct an investigation, it is the requesting State which has the jurisdiction to investigate and prosecute. It is merely requesting the former to collect evidence or to conduct and act on behalf of the latter, as it does not have jurisdiction to act in the requested State. Thus, the requesting State must conduct its own investigation, especially if it is the only one which has jurisdiction over the matter, and the requests for MLA must be sufficiently clear, detailed and based on preliminary findings from its own investigation. The requesting State’s preliminary investigations must sufficiently provide details about the background for the action which is being requested in the request for MLA.

3. Kinds of Assistance

Treaties on MLA generally provide a list of measures under which assistance may be sought. This list, however, is not exhaustive and States will render assistance insofar as the request does not contradict its own internal constitutional and legal framework. Furthermore, assistance may be rendered at any stage of the criminal proceedings — both pre-trial and trial — and includes acts ranging from the service of process to more complex coercive measures such as obtaining bank statements and seizing proceeds of crime. Other coercive measures

such as seeking to enforce arrest warrants or the extradition of persons are not encompassed by MLA and are done through extradition.

It should be noted that MLA is entrenched within the criminal jurisdiction of a State, which, in turn, is the most visible aspect of its sovereignty, and no other State may seek to apply criminal proceedings directly or enforce criminal orders within another State's jurisdiction without its prior approval. What this means in practical terms is that requests for MLA must contain sufficient information in order for the requested State to understand what is being sought and its connection with the underlying facts, so as to be able to act on behalf of the requesting State within the former's jurisdiction. Failure to provide the minimal amount of information to satisfy the requested State's jurisdiction will more likely than not result in the rejection of the request, as it will be deemed insufficient. Furthermore, the requesting State must also inform the requested State upon application for MLA the reasons for which such coercive measures or production of evidence are necessary for its criminal proceedings.

MLA is not a means to have the requested State carry on an investigation for the requesting State, and thereafter to retransmit the results to the requesting State, so that it may initiate its own investigation or prosecution. This is also known as a fishing expedition, or when the requesting State shifts the burden of the investigation to the requested State. One of the keywords in MLA is co-ordination, and, as such, the requesting State must provide sufficient information, which can only be obtained through investigation, to enable the requested State to render the assistance sought.

When requesting assistance, the practitioner must also be aware of the legal requirements to be met in both the requesting and requested States for the assistance sought, e.g., transmission of affidavits or court orders alongside the request for MLA. While the practitioner of the requesting State is knowledgeable of the standards needed for the production of evidence, one must assume that this is not the case regarding the legal standards of the requested State.

There are many variables to this equation. The type of assistance to be pursued in the requesting State is the first point that the practitioner should analyse. Requests seeking the service of documents or court orders from the requesting State will have simpler standards, whilst taking evidence from a witness or expert may be more complex, as some States deem the production of evidence by witnesses a coercive measure, should the witness not wish to produce it voluntarily and must, therefore, be compelled to produce evidence.

Providing bank records or seizing proceeds of crime, on the other hand, have higher standards. Banking information is, for the most part, legally protected, and a court order has to be obtained prior to its disclosure to both the authorities of the requesting and requested States. Seizing of assets in the requested State on behalf of the requesting State, is the most complex type of assistance to be sought, as is its maintenance for future confiscation and repatriation.

One important point to consider is that requests for MLA are not final. This is to say that requests may be issued at any stage of the criminal proceedings in the requesting State, and that more than one request may be issued for the same proceedings. The practitioner may wish to pursue initially the production of banking information pertaining to an account held by the investigated person. Upon disclosure of the banking information, the investigation

may conclude that other accounts were also used, at which point further requests for disclosure should be made to the requested State. When this investigation has firmly established the link between the investigated person, the facts and the bank accounts, and the monies have been located, a further request for MLA should then be made, seeking to seize the proceeds of crime.

As such, requests for MLA should remain simple, to the extent possible, and should seek precisely what the investigation in the requesting State has already uncovered. One overly long and detailed request, containing multiple requests for assistance are not only cumbersome to execute but also raise the level of complexity, which will invariably result in delay in its execution. Therefore, the practitioner should seek to issue requests with precise objectives: the issuance of a request does not preclude issuance of future requests seeking to amend the previous one or containing a different focus for the assistance sought. This approach, in fact, is generally better accepted and usually has a better chance of success.

Upon establishing the type of assistance to be pursued, the practitioner must then know and understand the standards to be met in the requesting State. This must be done with prior communication with the requested State. Where a more experienced practitioner in MLA may be able to make use of his networking contacts, a new practitioner in the field will have to rely on the central authority of his country.

However, it may not only be the central authority of the requesting State that will have the necessary information. Additionally, other very important sources of information for the practitioner are contacts within the Embassy of the requested State in its own State, such as legal attachés or police liaisons. Many countries nowadays have within their Embassy staff experts from their law enforcement community, and they should be contacted as they are aware of their own law enforcement community and the requirements necessary to obtain the assistance sought in the requested State. Embassy contacts seek to bridge the gap between law enforcement communities of States.

4. Contents of the Request

A request for MLA must be simple and objective, as the requested State must understand the correlation between the criminal activity in the requesting State and what is being requested. The assistance sought should be clearly established and linked to the facts and criminal conduct described in the request.

In order to have a successful request for MLA, it is common to have an investigation that has already been initiated in the requesting State. Its findings will lead the investigator to new leads or hypotheses, which must then be tested in order to confirm if the investigated person(s) is guilty. However, should the information needed to confirm some of these hypotheses be in another jurisdiction, a request for MLA will be necessary.

In order to initiate a request for MLA, the request in the requesting State must be prepared by the relevant authority. It is of little use to have all the information and proceedings done properly if the competent authority does not sign the request, as no court of law in the requesting State will accept the evidence that was, in the final analysis, requested by an incompetent authority. The proper authority will then seek to provide the necessary information emanating from the investigation in the requesting State to the requested State, and be sure that the requirements in both States are met.

The request for MLA must include personal information of the person or persons under investigation, i.e. the full name of the person, date of birth, name of his or her mother and passport number; a summary of the proceedings underway in the requesting State, including the docket number, a brief description of the proceedings, and the stage which the proceedings under the criminal procedures of the requesting State has reached.

A brief description of the facts is to follow the introductory information. Here, the requesting State must provide information of the facts, and how these facts correlate to the investigated person or persons. A correlation between the criminal offence or offences and the facts and persons must also be explained.

Thereafter, a copy of the criminal offences and their sanctions must be made available to the requested State. It is of the utmost importance, however, that these criminal offences are explained. This is necessary as some countries require that requests for MLA meet the dual criminality principle, in which the offence in the requesting State must find correlation with a criminal offence in the requested State.

5. Validity of the Evidence

Preparing a request for MLA is only part of the work which has to be done in MLA. Its preparation must be thorough and complete, as the main goal is to guarantee its effectiveness. Not only must the effectiveness of the request be considered but also the results arising therefrom.

Whilst it is important to meet the requirements of a request for MLA established by the legal framework of the requesting State, in order for it to provide the assistance sought, the actions undertaken by the requested State must also be deemed applicable in the requesting State. Bilateral, regional and international treaties which contain rules for MLA determine that the rules of procedure for the execution of the request shall be those of the requested State.

What if, however, the way in which the evidence is produced by the requested State is considered inadmissible by the requesting State's jurisdiction? It should be highlighted that the general rule mentioned in the preceding paragraph does contain an important exception: the requesting State may ask the requested State, in the former's request for MLA, for it to observe specific procedures applicable in its jurisdiction whilst executing the request. The requested State shall then comply with these rules during the execution of the request, to the extent that they do not conflict with the requested State's internal legal framework or its constitutional requirements.

An important observation thus arises: as uncommon as the procedure may be in the requested State, it shall be observed. Therefore, communication between the requesting and the requested States is of the essence in order to guarantee the success of this procedure, and to understand the extent of application of the requesting State's procedures within the requested State's jurisdiction.

Therefore, if the evidence is produced in a valid manner in the requested State, or if the procedure adopted for the production of the evidence is considered valid by the requested State, it must be considered as valid in the requesting State's jurisdiction.

IV. CONCLUSION

The asset recovery process is a powerful tool for the combating of corruption-related offences. It is also, however, a complex process which requires the investigator and the prosecutor to think outside the box.

An important part of the asset recovery process is mutual legal assistance, as the proceeds and the instrumentalities of crime will normally transit between numerous jurisdictions in an attempt to have hidden – and sometimes even have it as a final destination – by the perpetrator, the true nature, origin and ownership of these proceeds and instrumentalities.

A request for MLA is however a delicate balance between what information is necessary and should be conveyed, and what, in fact, has to be disclosed. This is so because several factors come into play – whereas the requested State needs enough information and understanding of the case in the requesting State in order to render assistance in the assistance sought, an excessive amount of information may create confusion in the requested State, and misunderstanding as to what is the purpose of the request. Moreover, too much information may be made readily available to the defence at a moment when the investigation is still confidential, thus defusing the element of surprise necessary to any investigation. Of fundamental importance to the asset recovery process in general, and mutual legal assistance in particular, are that the channels of communication between the requested and requesting States remain open and are used at all times, even prior to the issuing of the request for MLA itself.

The key to successful MLA is, thus, communication. It is only through clear, concise and constant communication prior to, throughout and after the assistance has been rendered, that the requesting authority will be able to know the intricacies of MLA with the requested State. Moreover, communication brings another important element to MLA: trust. Through communication, one party is able to gradually build the necessary trust that any law enforcement activity requires in order to ensure effectiveness and success.

Although the variables of MLA – difference between legal systems and traditions, the type of assistance required and the subject matter of each investigation all interacting simultaneously – do not allow for one to establish a formula for sure success, it is possible to establish a checklist against which a request should be tested whilst it is in the process of being drafted.

The practitioner should establish what assistance will be sought through the request and what the legal basis will be. Once this is defined, dual criminality issues should be established, if any, and the drafting of the request should be done in a way that it can be comprehended by the requested State's jurisdiction. The request should be proofread in order to ensure that all the necessary information and linkages are contained and, if possible, sent to the requesting authority so that it too may determine that all the information is contained within. Finally, prior to sending the request, it should be checked whether all the appropriate supporting documentation, if any, or, if necessary, accompanies the request.

I. APPENDIX OF ABBREVIATIONS

1988 Vienna Convention	United Nations Convention against Illicit Traffic in Drugs and Psychotropic Substances
AU	African Union
CoE	Council of Europe
FIU	Financial Intelligence Unit
MLA	Mutual Legal Assistance
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development
OECD Anti-Bribery Convention	Convention on Combating Bribery of Foreign Public Officials in International Transactions
SADC	Southern Africa Development Community
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention against Transnational Organized Crime

LEGAL FRAMEWORK AND PRACTICE OF MUTUAL LEGAL ASSISTANCE IN CHINA

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I. INTRODUCTION

After the mid-1990s, along with development of a market economy and an increase in foreign investment, China saw dramatic economic success. Meanwhile, economic prosperity led to more economic disputes, which in turn led to a quick increase in civil and commercial cases, including those involving foreign elements. According to the annual report of the Supreme People's Court (SPC) of the People's Republic of China (PRC) in 2002, people's courts at all levels handled less than 55,000 civil and maritime cases involving foreign elements in the five years from 1996 to 2001,¹ and the annual report in 2008 shows that the five years from 2002 to 2007 saw a considerable increase: the number reached 64,558, nearly a 15% increase.² After 2008, according to annual reports of the SPC, civil and maritime cases involving foreign elements handled by people's courts at all levels continued to increase; the total number was 19,621 in 2009,³ 20,258 in 2010⁴ and about 22,000 in 2011.⁵ In order to handle such cases, mutual legal assistance such as collecting evidence and sending legal documents abroad is naturally necessary.

Besides increases in civil and maritime cases involving foreign elements, China's efforts to crack down on corruption and terrorism in recent years makes mutual legal assistance more and more vital too. For example, according to a research report by a project team of the Chinese Academy of Social Sciences in June 2008, about 16,000 to 18,000 corrupt officials fled from China with more than 80 billion US dollars since the 1990s.⁶ Most of them are now in developed countries such as the US, Canada and EU countries, few of which have signed mutual judicial assistance treaties with China. In order to punish these corrupt officials, China has to request foreign authorities to help in locating and arresting suspects and recovering assets, etc. In sum, mutual legal assistance is unprecedentedly important and necessary to China now.

II. LEGAL FRAMEWORK OF MUTUAL LEGAL ASSISTANCE

China began to legislate on mutual judicial assistance since 1985, when China and

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¹ See Xiao Yang, Report of the Supreme People's Court on the 5th session of 9th National People's Congress (Mar.11, 2002).

² See Xiao Yang, Report of the Supreme People's Court on the 1st session of 11th National People's Congress (Mar.10, 2008).

³ See Wang Shengjun, Report of the Supreme People's Court on the 3rd session of 11th National People's Congress (Mar.11, 2010).

⁴ See Wang Shengjun, Report of the Supreme People's Court on the 4th session of 11th National People's Congress (Mar.10, 2011).

⁵ See Wang Shengjun, Report of the Supreme People's Court on the 5th session of 11th National People's Congress (Mar.11, 2012).

⁶ See Huashang Daily, 16th June, 2011.

France began to negotiate a mutual legal assistance treaty in civil and commercial matters. Since then, China has been actively participating in negotiating, drafting and ratifying international and bilateral documents.

According to the Ministry of Justice (MOJ) of the PRC, since ratification of the first international convention on mutual legal assistance in 1991, the Convention Concerning Sending Abroad Civilian or Commercial Judicial Documents and Un-judicial Documents, China has ratified 28 international and multilateral conventions on mutual legal assistance, including the UN Convention against Corruption and the UN Convention against Transnational Organized Crime. Since signature of the first Treaty on Mutual Judicial Assistance in Civil and Commercial Matters with France in 1987, China signed 107 bilateral mutual legal assistance treaties by the year of 2009.⁷ Meanwhile, China has laid down provisions on mutual legal assistance in general laws such as civil procedure laws and criminal procedure laws, and enacted special laws such as the Extradition Law.

75 of the 107 bilateral treaties that China has signed with foreign states have entered into force. Among them, 19 are in criminal matters, 19 in civil and criminal matters, 11 in civil and commercial matters, and 22 are extradition treaties. The remaining four are convict transfer treaties.⁸ It is worth noting that China has signed bilateral treaties on mutual legal assistance with less than half of the countries and regions in the world, the majority of which are developing countries, such as Central Asian countries. The barriers that China is confronted with mainly are the death penalty, problems in transparency of the justice system and differences in laws.

With the intention to facilitate mutual judicial assistance, China is striving to eliminate these barriers and create favorable conditions. For example, the 8th Amendment to the Criminal Law 1997 abolished the death penalty for 13 offences and in principle exempted the elderly beyond 75 from capital punishment. What is more important is that the Amendment showed the Chinese Legislature's resolution to abolish the death penalty for non-violent crimes and the fact that a majority of the people's representatives agreed on the abolition.⁹ Moreover, China is preparing to ratify the International Convention on Civil and Political Rights (ICCPR),¹⁰ which undoubtedly will make it necessary to amend related laws according to international standards and thereby reduce the gap between Chinese and foreign legislation.

Within the legal framework of mutual legal assistance in China, in addition to the general laws and special laws on mutual legal assistance, regulations and interpretation documents issued by related authorities such as the SPC are also worth mentioning here as they make decisions. For example, as early as in 1982, the SPC issued a notice on how to deal with issues concerning sending judicial documents between China and Japan. Another example would be the interpretation on how to deal with requests of foreign courts for sending judicial documents and submitting requests to foreign courts through the Ministry of Foreign Affairs jointly issued by the SPC, Ministry of Foreign Affairs and MOJ in 1986. Both are actually taking the place of law in guiding mutual judicial assistance in practice.

⁷ The Ministry of Justice of the PRC, Ratification of Treaties and Conventions on Mutual Judicial Assistance in China, at http://www.legalinfo.gov.cn/moj/sfxzws/content/2009-08/26/content_1144120.htm?node=7382.

⁸ Ibid.

⁹ See Guangming Daily, Aug. 26, 2010.

¹⁰ See Nanfang Weekend, Sep. 22, 2005.

In order to offer clear and uniform standards and application guidelines, The MOJ of the PRC had finished the draft of the Law on Mutual Judicial Assistance in Criminal Matters and submitted it to the legislature for review in 2009.¹¹ Meanwhile, Chinese scholars are making contributions too. For example, Professor Huang Feng at the College for Criminal Law Science of Beijing Normal University, a former high level official at the MOJ, published his expert proposal of Law on Mutual Judicial Assistance in Criminal Matters in March 2012.¹² Judging from the present reality, it is very likely that the Law will be adopted in the near future.

Briefly, China now conducts mutual legal assistance through three approaches. The first one is bilateral treaty. It might be the most reliable and fastest approach. However, it takes a long time to negotiate. The second one is multilateral/international conventions, such as the UNCAC and UNTOC. The last one is the foreign approach, which usually takes a long time and has to overcome more barriers, such as the possibility of being subject to the death sentence in criminal cases.

III. PROCEDURE

Procedures of mutual legal assistance in China vary with matters concerned. The most representative one might be the extradition procedure, in which the SPC, Supreme People's Procuratorate (SPP), Ministry of Public Security (MPS) and the State Council are all involved. Therefore, it has become an example often quoted to show how mutual legal assistance in criminal matters is handled in China.

According to the Extradition Law of the PRC enacted in 2000, upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs will examine whether the request and the accompanying documents conform to the extradition law and treaties. Where the Ministry of Foreign Affairs believes that the request conforms, it will transmit the request to the SPC and the SPP.

Where the person sought is detained for extradition before the request is made, the SPC will transmit the request to the Higher People's Court concerned for examination. Where the said person is not detained, the SPC shall, after receiving the request, notify the MPS to search for the person.

The Higher People's Court designated by the SPC will examine whether the request satisfies conditions for extradition and render a decision on it. The SPC will review the decision, and decide whether the extradition shall be granted.

After receiving the decision made by the SPC that no extradition shall be granted, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. Upon receiving the decision made by the SPC that the request meets the conditions for extradition, the Ministry of Foreign Affairs shall submit the decision to the State Council for which to decide whether to grant extradition.

Where the State Council decides not to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. The People's Court shall immediately notify the public security organ to terminate the compulsory measures against

¹¹ See Legal Daily, Mar. 4, 2009.

¹² See Huang Feng (2012) Legislative Proposal of Law on Mutual Judicial Assistance in Criminal Matters and Its Proofs, Beijing: Peking University Press.

the person sought.

As for legal assistance in civil and commercial matters, procedures are relatively easy and fast.

IV. PRACTICE OF MUTUAL LEGAL ASSISTANCE

China has seen a number of well known cases of mutual legal assistance in recent years. For example, LAI Changxing, a notorious smuggling ring kingpin, formed a smuggling ring with bases in Hong Kong and Xiamen since 1991, importing cigarettes, cars and other commodities worth 27.395 billion Yuan (US \$3.69 billion) and evaded duties of nearly 14 billion Yuan from December 1995 to May 1999.¹³ He then fled from China and stayed in Canada for more than 10 years. After long, laborious negotiation, he was transferred to China in July 2011 and sentenced to life imprisonment in May 2012.¹⁴

Another example would be cooperation between China and Thailand. China and Thailand have signed a Bilateral Mutual Judicial Assistance Treaty in Criminal Matters, Extradition Treaty and Convict Transfer Agreement. According to the Ministry of Public Security of the PRC, China has transferred 56 telecom-fraud suspects to Thailand since September 2008 in recent years; the last time was in November 2012, 6 criminal suspects were arrested by the Chinese public security authority and transferred to the Thailand police authority.¹⁵

According to the MOJ, China only dealt with less than 100 cases of mutual legal assistance annually in the 1980s and 1990s. However, the annual number quickly increased to more than 1,500 in the beginning of 21st century. For example, the MOJ handled more than 3,000 cases in 2008. It is especially worth noting that convict transfer cases are on the increase in recent years. The MOJ had received 198 convict transfer requests from both Chinese and foreign authorities by 2012. The MOJ handled 251 cases of mutual judicial assistance in criminal matters, which is a nearly 50% increase compared to previous years, and submitted 8 requests for mutual judicial assistance in criminal matters in 2011.¹⁶

V. CONCLUSION

For China, there are still barriers in the way of extending mutual legal assistance. However, as noted above, China is making efforts to promote mutual legal assistance with foreign countries by adapting domestic laws, ratifying international documents, etc. Meanwhile, international terrorism, environmental crimes and corruption issues make mutual legal assistance vital for all members of this small global village. Therefore, mutual legal assistance will and should be promoted as effectively and as soon as possible.

¹³ See People's Daily (overseas edition), July 26, 2011.

¹⁴ See Procuratorial Daily, May 19, 2012.

¹⁵ See Yangzi Evening, Nov.16, 2012.

¹⁶ See Legal Daily, Feb. 12, 2012.

PARTICIPANTS' INDIVIDUAL PRESENTATION PAPERS

Mr. Ku Khemlin & Mr. Kuy Chhay, Cambodia

Mr. Adnan Pandu Praja, Mr. Abeh Intano & Mr. Chuck Suryosumpeno, Indonesia

Mr. Phongsavanh Phommahaxay & Mr. Somphet Chanthavong, Lao PDR

Ms. Baizura Kamal & Ms. Roziza Sidek, Malaysia

Ms. Htu Htu Ngwe, Myanmar

Mr. Manuel T. Soriano, Jr. & Ms. Mary Grace R. Quintana, The Philippines

Mr. Poonpol Ngearndee, Mr. Kiaitisakdi Putphon, & Ms. Jiraporn Burintaravanich,
Thailand

Ms. Ngo Thi Quynh Anh, Viet Nam

INTERNATIONAL COOPERATION MUTUAL LEGAL ASSISTANCE AND EXTRADITION IN CAMBODIA

*Khemlin Ku**

I. INTRODUCTION

The Ministry of Justice is delegated authority by the Royal Government to perform the mission of guidance and administration of justice in the Kingdom of Cambodia. **To achieve this goal, the MOJ has several functions namely to** assure justice for every one under the laws, to organize and monitor all levels of the administrative processes of tribunals and prosecution institutions, to ensure the functioning of all sectors and levels of tribunals and prosecution institutions, to ensure the functioning of the courts and all prosecutors and to prepare various laws governing, and conduct international relationships associated with, justice and relevant laws.

To fulfill these functions, the Ministry of Justice established the Central Authority in 2011 under the jurisdiction of the General Department of Research and Judicial Development to facilitate mutual legal assistance, the transfer of prisoners, and extradition in criminal, civil, and commercial matters.

II. ROLES OF THE CENTRAL AUTHORITY IN CAMBODIA

The Central Authority's mission, roles, and tasks are as follows:

- Receive, control, and facilitate requests for extradition, prisoner transfers and mutual legal assistance in criminal, civil, and commercial cases.
- Send requests received from the requesting state to the applicable Cambodian agency; and to return completed requests to requesting state;
- Organize information to be sent and monitor all received and sent requests to ensure effective and efficient communication;
- Act as the focal point to facilitate all legal assistance;
- Direct contact or diplomatic channels with national and international agencies to facilitate mutual legal assistance;
- Organize, review and facilitate the translation of requests, case files, evidence, and documents relevant to legal assistance;

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- Manage data of requests on mutual legal assistance and organize legal documents, entering information into our database and submitted online to the Ministry of Justice's website;
- Keep confidential requests for assistance, their contents, and supporting documents contained in the request, as well as the fact of any assistance given and any action taken relative to the request;
- Ensure the information and evidence is protected from losing and using, changing, or revealing without authorization or other improper use;
- Develop an action plan to facilitate spending, study tours, workshops, and meetings at national and international levels;
- Contact donors in order to get support for human resource development;
- Improve cooperation with national and international agencies to facilitate mutual legal assistance.

III. PRINCIPLES GOVERNING RELATIONSHIPS BETWEEN CAMBODIA AND OTHER MEMBERS IN CASE THERE IS NO EXTRADITION OR MLA TREATY

Currently, there is no legal framework governing the issue. But in the future, this issue will be governed by Title IV of the New Code of Criminal Procedure. These provisions apply by default to relations between Cambodia and other countries in the absence of extradition or MLA treaties. Currently, Cambodia has existing bilateral treaties on extradition with Thailand, Lao PDR, China, and South Korea.

In the meantime, the current practice is that:

- *If Cambodia is the requested State:*

The diplomatic procedure precedes judicial procedure. The competent authorities of the requesting State must approach Cambodia by diplomatic channels (Embassy and Ministry of Foreign Affairs (MFA) by written request accompanied by supporting documents. Once the request is received, the MFA will forward this request to the Ministry of Justice (MOJ) which will verify the authenticity of the request. Upon verification, the MOJ may request the Prosecutor General of the Appellate Court to issue an arrest or detention order of the interested person staying in the territory of the Kingdom of Cambodia.

- *If Cambodia is the requesting State:*

The judicial procedure precedes the diplomatic procedure. The concerned court of Cambodia must send a request with supporting documents to the MOJ, which will refer the dossier to the MFA for diplomatic action. Once Cambodia's request is received, the competent authorities of the requested State will verify the authenticity of the request for further action. During implementation of the MLA process, the Cambodian CA has received a request from Vietnam, and is still processing the request. In addition, we have also received requests from South Korea.

IV. THE VALIDATION OF EXTRADITION REQUESTS

All extradition requests shall be submitted to the Royal Government of Cambodia through diplomatic channels. Each request shall contain supporting documents. The supporting documents shall include:

- Documents adequate for identifying the wanted person;
- A report of the acts for which the wanted person is prosecuted;
- The legal provisions applicable to such offence and the possible sentence; and
- A copy of the judgment or sentencing decision, if any.

All documents shall be signed, officially sealed and enveloped. If they are not in the Khmer, French or English languages, the request shall be accompanied by a certified translation of the documents into one of the three languages.

V. CONCLUSION

The procedure for international cooperation in the judicial sector in Cambodia is crucial, using diplomatic channels by forwarding the request to the Ministry of Foreign Affairs and then to the Ministry of Justice, which reviews the request for Cambodia and issues the final decision whether to agree or disagree.

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Kuy Chhay**

I. INTRODUCTION

Cambodia supports anti-corruption measures in every aspect, at all levels and in all areas through education, dissemination, prevention and law enforcement. Fighting corruption, strengthening of public financial management and improving good governance are the key factors to alleviate poverty and promote people's welfare. Through global experiences, monitoring and eliminating corruption are the most difficult, complicated tasks, and are also time consuming, but it remains a high priority of the Royal Government of the fourth legislative mandate. It is generally known that anti-corruption law provides us with legal mechanisms which are necessary for fighting corruption effectively. In light of this, the Royal Government of Cambodia (RGC) has been committed to creating and adopting this law after having consulted enthusiastically with stakeholders and having reviewed existing laws.

The Anti-Corruption Unit has been mandated to pursue three vital roles: 1) Public education and prevention; 2) Law enforcement and suppressing corruption offences and 3) Mass support backed by strategic partnership for cooperation regionally and internationally. With respect to **Extradition** in General Criminal Offences and **Extradition** in Corruption Offences, the **Code of Criminal Procedure** (2007) has been applied.

II. ANTI-CORRUPTION LAW

The Anti-Corruption Law in Cambodia was adopted on 17 April 2010 and regarding the necessity the law was amended and thus, entered into force for full implementation on 2 August 2011. Its purpose is to combat all forms, all natures and all levels of corrupt practices, regardless of political position throughout the Kingdom of Cambodia.

The Anti-Corruption Law provides that it is the court's decision to confiscate corruption proceeds, including property, materials, and instruments derived from corrupt acts, and that the proceeds shall become State property when a person is found guilty of corruption.

Article 26 Special Privileges of Anti-Corruption Unit

Article 27 Privileges of Anti-Corruption Unit related to monitoring

Article 28 Privileges of ACU related to freezing an individual's assets

Article 29 Privileges of ACU in cooperation with public authority

* Assistant to Anti-Corruption Unit, Kingdom of Cambodia.

III. ACTIVITIES OF THE ANTI-CORRUPTION UNIT (ACU)

Development of Legal Framework:

- Prepared the decision made by the Royal Government of Cambodia to allow the ACU to be a mediator and liaison with international public authorities against corruption.
- Prepared sub-decrees on Organization and Functioning of ACU, on Budget Management and Allocation of ACU, on the Logo and Seal of ACU, and on the National Anti-Corruption Day (9 December).
- Prepared Proclamation on Organization and Functioning of the Offices reported to a department of the ACU.

1) Education and Dissemination Activities

- The ACU provided education on and disseminated the Anti-Corruption Law.
- The ACU produced an educational spot on anti-corruption.
- The ACU organized a drawing-completion event, educational proverbs and short stories at the national level.
- The ACU published legal documents and legal instruments regarding anti-corruption.
- The ACU organized a concert to celebrate National Anti-Corruption Day, 9 December. In year 2011, it was the 1st National Anti-Corruption Celebration.

2) Obstruction and Prevention Activities

- The ACU participated in observing the examination of government-official selection at the general Department of Taxation and the Ministry of Public Works and participated in public procurement of timbers.
- The ACU has disseminated legal instruments in effect related to corruption and led and educated the general public about the negative impacts of corruption.
- The ACU has prepared, set up and managed the information system and website of the anti-corruption unit.
- The ACU has encouraged and motivated the general public to provide corruption-related information.

- The ACU prepares and produces spots and videos and make announcement of successful operations.
- The ACU has collaborated with the Ministry of Education, Youth and Sports to incorporate anti-corruption-awareness education into the school curriculum.
- The ACU evaluated and made incentive grading and provided awards for education and corruption prevention work to ministries, institutions and all levels of administrative authorities as well as the public.
- The ACU will prepare exhibits, drawings, documents, and tools used by the Anti-Corruption Unit in fighting corruption for the public to see.
- The ACU has conducted studies identifying the priority areas so as to come up with preventive and obstructive actions to prevent corruption opportunities in ministries, institutions, the private sector and at all levels of local administrative authorities.
- The ACU gave warnings to any suspects who failed to carry out the law and regulations in effect.
- The ACU has recently announced an anti-corruption campaign related to unofficial fees for public services to be carried out at the commune levels all across the country and that the ACU is open and ready to work with civil society. As part of the Unit's recent work, information has been disseminated to all communes (1,633 communes) around Cambodia, assuring local government officials that they face punishment for corruption activities.

3) International Cooperation

- In 2007, the Royal Government of Cambodia (RGC) signed the United Nations Convention against Corruption (UNCAC) and became a member of the South East Asia Parties against Corruption (SEA-PAC).
- The mission of the Anti-Corruption Unit is to lead the activities of fighting against corruption in all forms, sectors and all levels through measures of education, prevention, obstruction and enforcement of the Law on Anti-Corruption with support from the public and international cooperation.
- The ACU closely cooperates with anti-corruption agents around the world, especially with the South East Asia Parties against Corruption (SEA-PAC), in combating corruption through the Mutual Legal Assistance Treaty (MLAT) of the ASEAN in order to develop their own countries.
- In cases where the assets and corruption proceeds are found and kept in foreign states, the competent authority of the Kingdom of Cambodia shall take

measures to claim those assets and proceeds and return them back to Cambodia through the means of international cooperation. The Kingdom of Cambodia shall cooperate with other requesting countries to return the corruption proceeds which are kept in Cambodia. In relation to the mutual legal assistance on corruption offences, the court of the Kingdom of Cambodia may delegate power to a competent court of any foreign state and may also obtain power from a court of any foreign state in order to compile all necessary documents required.

- Regarding regional cooperation, Cambodia is also a Party to the ASEAN Treaty on Mutual Legal Assistance of 29 November 2004, for the purpose to improving the effectiveness of the law enforcement authorities of the Parties in the prevention, obstruction, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters. The Treaty was already ratified on 26 January 2010.

4) Submission of Complaints and Corruption Cases to the Court

- Regarding drug trafficking corruption crime
- Regarding judicial corruption crime

IV. EXTRADITION

A. General Provisions of the Code of Criminal Procedure (CCP)

Article 566: Extradition of Foreign Resident in Cambodia Territory

Article 567: International Conventions and Treaties

Article 568: Definition: Requesting State and Wanted Person

SUB-SECTION 2: CONDITIONS OF EXTRADITION

Article 569: Conditions of Extradition Relative to Act

Article 570: Attempted Offenses and Conspiracy

Article 571: Conditions Relative to Imprisonment Sentence

Article 572: Conditions Relative to Place of Commission of Offense

Article 573: Acts of Political Nature

Article 574: Acts committed in Cambodia and Tried by Final Judgment

Article 575: Extinction of Criminal Actions

Article 576: Multiple Extradition Requests against Same Person

Article 577: Conditions of Extradition Relative to Request

Article 578: Suspension of Extradition

SUB-SECTION 3: EXTRADITION PROCEDURES

Article 579: Validation of Extradition Request

Article 580: Forwarding of Extradition Request

Article 581: Request of Provisional Arrest

Article 582: Special Detention Order against Wanted Persons

Article 583: Presentation of Wanted Person to Royal Prosecutor or General Prosecutor

Article 584: Filing Case with Investigation Chamber
Article 585: Proceedings before Investigation Chamber
Article 586: Decision of Investigation Chamber
Article 587: Application for Release of Wanted Person
Article 588: Agreement to Extradition
Article 589: Effects of Decision of Investigation Chamber

SECTION 2: EXTRADITION REQUESTED BY KINGDOM OF CAMBODIA TO FOREIGN STATE

Article 590: Competence of Investigation Chamber
Article 591: Proceeding before Investigation Chamber
Article 592: No Suspending Effect of Motion to Invalidate Extradition Request
Article 593: Effect of Invalidation of Extradition
Article 594: Consent of State That has Delivered foreign Resident to Cambodia

CHAPTER 3: TRANSIT

Article 595: Transit Request
B. Extradition under the Anti-Corruption Law (ACL)
Article 26: Special Privileges of Anti-corruption Unit

CHAPTER 7: EXTRADITION AND MUTUAL LEGAL ASSISTANCE

Article 50: Extradition Provisions
Article 51: Mutual Legal Assistance
Article 52: Cambodians holding more than one nationality
Article 53: Mutual Legal Assistance Procedure

V. MUTUAL LEGAL ASSISTANCE (MLA)

A. Principles Governing Relationships between Cambodia and Other Members in Cases Where There is No Extradition or MLA Treaty

Currently, there is no legal framework governing the issue. But in the future, this issue will be governed by Title IV of the New Code of Criminal Procedure.¹ These provisions apply by default to relations between Cambodia and other countries in the absence of extradition or MLA treaties. Currently, Cambodia has existing bilateral treaties on extradition with Thailand, Lao PDR, China, and South Korea.

In the meantime, the current practice is that:

- *If Cambodia is the requested State:*

The diplomatic procedure precedes judicial procedure. The competent authorities of the

¹ According to Article 50 (Extradition Provision) of the ACL, Extradition of cases related to Corruption offences, provision of Chapter 2, Content 1, Part/ Section 9 of Penal Code Procedure shall be applicable.

requesting State must approach Cambodia by diplomatic channels (Embassy and Ministry of Foreign Affairs (MFA) by written request accompanied by supporting documents. Once the request is received, the MFA will forward this request to the Ministry of Justice (MOJ) which will verify the authenticity of the request. Upon verification, the MOJ may request the Prosecutor General of the Appellate Court to issue an arrest or detention order of the interested person staying in the territory of the Kingdom of Cambodia.

- *If Cambodia is the requesting State:*

The judicial procedure precedes the diplomatic procedure. The concerned court of Cambodia must send a request with supporting documents to the MOJ, which will refer the dossier to the MFA for diplomatic action. Once Cambodia's request is received, the competent authorities of the requested State will verify the authenticity of the request for further action. During implementation of the MLA process, the Cambodian CA has received a request from Vietnam and is still processing the request. In addition, we have also received requests from South Korea.

B. The Validation of Extradition Requests

All extradition requests shall be submitted to the Royal Government of Cambodia through the diplomatic channels. Each request shall contain supporting documents. The supporting documents shall include:

- Documents adequate for identifying the wanted person;
- A report of the acts for which the wanted person is being prosecuted;
- The legal provisions applicable to such offence and the possible sentence; and
- A copy of the judgment or sentencing decision, if any.

All documents shall be signed, officially sealed and enveloped. If they are not in the Khmer, French or English languages, the request shall be accompanied by a certified translation of the documents into one of the three languages.

VI. CONCLUSION

The procedure for international cooperation in the judicial sector in Cambodia is crucial, using diplomatic channels by forwarding the request, firstly, to the Ministry of Foreign Affairs and International Cooperation, and, secondly, to the Ministry of Justice, and, lastly, to the Royal General-Prosecutor in the Appellate Court.

INTERNATIONAL COOPERATION: *BUILDING TRUST, OVERCOMING DIFFERENCES*

Adnan Pandu Praja^{*}

I. INTRODUCTION

Distinguished Participants of the Sixth Regional Seminar on Good Governance for Southeast Asian Countries. It is our great pleasure to have this opportunity to speak at this seminar on behalf of KPK — the Corruption Eradication Commission of the Republic of Indonesia.

II. CORRUPTION IS A TRANSNATIONAL CRIME

- The main theme of this seminar is “International Cooperation: Mutual Legal Assistance and Extradition,” which is directly related to our daily activities in combating corruption.
- As we all know, corruption is a global, ethical and legal issue. Countries are now facing growing cross-border chains of corrupt activities and the flow of proceeds of corruption between jurisdictions.
- Criminals and the proceeds of crime cross borders easily. Increasingly, there is a need for international cooperation to gather evidence, apprehend fugitives and to recover the proceeds of corruption.
- International cooperation, especially in the areas of mutual legal assistance, extradition and the recovery of proceeds of corruption, is, therefore, becoming more and more important.

III. INTERNATIONAL LEGAL COOPERATION

- Firstly, multilateral and bilateral treaties between countries still represent the most formal vehicles that can be used in international legal cooperation. These treaties should build trust and overcome differences in our legal systems.
- On the other hand, since it was adopted and entered into force, the United Nations Convention Against Corruption (UNCAC) has provided us with the primary international framework for cooperation.
- We are fully aware that many countries have well-established systems for international cooperation and have ratified UNCAC and the OECD Convention on the Bribery of Foreign Public Officials. Many countries have also made major investments in the infrastructure required to detect, investigate and confiscate the proceeds of crime.

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Despite important progress over the last years, international cooperation against corruption is still in an early, but promising, stage of development.

- We also understand that to obtain assistance and cooperation, law enforcement must still rely on the goodwill of foreign states, even in the presence of treaties and agreements. No matter how involved the treaties or agreements between two states are, mutual legal assistance is still a matter of asking another state for help.

IV. DIFFERENT LEGAL SYSTEMS

- One of the most challenging issues in conducting international legal cooperation is the different legal systems between countries.
- We should stress the importance of making the effort to learn about the legal traditions of the requested or requesting state.
- It is important to learn by understanding the legal systems within which the requested and requesting states are working. The domestic legislation of each state is instructive, and early efforts to understand these systems and their methods will pay dividends, not only with the case at hand but also for every case in the future.
- I believe we should speak with the central authorities. They are the national experts in the field of international assistance. By making use of their knowledge, trust and enhanced cooperation will follow.
- However, miscommunication and the problems it creates are founded in misunderstanding. The greater problem often is not the differences in legal systems but misunderstanding about those differences.

V. INFORMAL ARRANGEMENTS

- Based on the KPK's experiences, we learned that in some practical areas, informal agency-to-agency arrangements were considered as important complimentary measures.
- Arrangements were conducted through bilateral agency-to-agency or Interpol cooperation mechanisms, including cooperation between Financial Intelligence Units (FIUs).
- Agency-to-agency cooperation is very beneficial to obtain information from foreign counterparts to collect non-sensitive records or preliminary data.
- It is also useful as a bridging approach in dealing with formal legal cooperation (non-coercive measures).
- In the case of mutual legal assistance, consideration should be given to whether current goals can be achieved through agency-to-agency cooperation or whether the documentation required is in the public domain of the requested state and is therefore something that does not require mutual legal assistance. Normally, the less coercive a request, the more likely it can be achieved without having to resort to a formal request which, no matter how efficient a system is in place, will take more time than an informal

request.

- Knowing when to initiate formal requests is just as important as knowing how to initiate them.

VI. KPK'S EXPERIENCES IN THE AREA OF INTERNATIONAL COOPERATION

- Let me share KPK's experiences in area of international cooperation. KPK via the Indonesia Central Authority has been conducting several MLAs (requesting and requested) with the USA, the UK, Japan, Singapore, Hong Kong, Malaysia, Brunei Darusallam, Australia, and others.
- KPK also has good working relationships with many foreign agencies, such as the FBI (USA), SFO (UK), ICAC (HK), MACC (Malaysia), CPIB (Singapore), etc. We are also actively involved in many anti-corruption forums, such as IAACA, G20 ACWG, APEC ACT, SEA-PAC, World Bank ACHN, etc.
- An example of one of our cases is the repatriation of MN, a high-profile Parliament Member of Indonesia. After about 6 months as a fugitive, he was arrested in Cartagena, Colombia on August 7, 2011. The operation was supported by approximately 15 jurisdictions in the form of formal and informal legal cooperation, including MLA. The operation was supported by INTERPOL as well as authorities and anti-corruption agency networks in Colombia, China, Cambodia, Hong Kong, Laos, Malaysia, Maldives, Singapore, the USA, Vietnam, Venezuela and others
- Another milestone for Indonesia in international cooperation is in the area of UNCAC implementation review. Indonesia completed its UNCAC implementation review on Chapters 3 and 4 in May 2012.

VII. CONCLUSION

1. To move forward in the implementation of international legal cooperation, we would suggest that the following steps be taken: 1. promote UNCAC, particularly the use of provisions related to extradition, MLA and asset recovery; 2. strengthen multilateral/bilateral treaties and agency-to-agency cooperation to gain better understandings; 3. enhance capacity building; 4. improved domestic cooperation (multi-agency teams).
2. To sum up, as crime and criminals continue to have less respect for international boundaries, effective international cooperation becomes more vital. Concurrently, those involved in practice will be required to become familiar with international legal practice, both theoretical and practical. Our criminal justice systems must continue to discover, collate, and absorb the rules, policies and practices of their partners in the international community. Without joint effort, our fight against crime will be less effective. Let us build trust and overcome differences
3. Ladies and gentlemen, thank you for your attention.

INTERNATIONAL COOPERATION IN THE REPUBLIC OF INDONESIA: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Abel Intano**

I. INTRODUCTION

There are around 3 million citizens from the Republic of Indonesia who are living in foreign countries, and around 1 million people from the Republic of Indonesia travel regularly to foreign countries for various business purposes. Also there are around 46,000 foreign citizens living in Indonesia for various business purposes, and there are 750,000 tourists visiting Indonesia (based on 2011 statistics from the Center Statistic Bureau Indonesia). In this condition, the Government of the Republic of Indonesia believes that there is a possible situation related to the criminal aspect which could appear in trans-border activity by the citizens. Offences involving trans-border activity could be ordinary crimes or serious and organized crime.

Efforts to prevent and combat trans-border crime require cooperation and mutual support for the work of law enforcement authorities in all countries and/or jurisdictions; however, each law enforcement authority is limited in that they only work in their own jurisdictions and lack the capability to reach other jurisdictions based on principles of sovereignty.

In support of the law enforcement effort to prevent and combat trans-border offences, the broadest possible measures of cooperation need to be formulated. The government of the Republic of Indonesia supports all mechanisms of cooperation including:

- Informal cooperation between law enforcement agencies;
- Formal cooperation between governments.

All cooperation is designated to support the work of law enforcement throughout their investigation, prosecution, and execution of the judgment for the offence(s) which were conducted by the criminal offenders in foreign jurisdictions. In this regard, Indonesia needs to explore the international best practices in the implementation of formal cooperation through mutual legal assistance in criminal matters and extradition of fugitive offenders.

The government of the Republic Indonesia has enacted national legislation on mutual legal assistance and extradition. For mutual legal assistance, Indonesia has legislation which regulates the principles, guidance, and proceedings in handling mutual legal assistance in

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criminal matters through Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters. For the extradition of fugitive offenders, Indonesia has legislation which regulates the principles, guidance, and proceedings in handling extradition through Indonesian Act Number 1 Year 1979 on Extradition.

In the Republic of Indonesia cooperation is required in the support of the law enforcement work to prevent and combat trans-border crime, which concerns obtaining evidence, proceeds of crime, and also the surrender the fugitive offenders, through mutual legal assistance and extradition, based on the following circumstances:

1. Evidence should be admissible for use by law enforcement and judicial authorities in the Requesting Countries' jurisdictions;
2. If there is a legitimate order from the judicial authority for obtaining evidence which is regulated under criminal procedure legislation;
3. Assurance of the protection of third parties (related to the proceeds of crime);
4. Ensuring due process of law for the surrender of fugitives (Human Rights aspect);
5. If there is consideration for conditions of reciprocity.

The Republic of Indonesia has become a Party to 3 (three) essential Conventions of the United Nations:

1. United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, which was ratified by Indonesia in 1997 by Act Number 7 Year 1997;
2. United Nations Convention against Corruption 2003, ratified by Indonesia in 2006 by Act Number 7 Year 2006;
3. United Nations Convention against Transnational Organized Crime 2000 (UNTOC), ratified by Indonesia in 2009 by Act Number 5 Year 2009.

As a party to these United Nations conventions, Indonesia applies them to combatting criminals, as well as other international principles and national law.

II. MUTUAL LEGAL ASSISTANCE

Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters is specifically for assistance related to criminal investigations, prosecutions and examinations before the court in accordance with domestic laws and regulations of the Requested State. This means that assistance covered in this legislation is only related to assistance in criminal matters and does not include assistance related to civil or commercial matters. Provisions of Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters do not apply to the extradition or surrender of any person, the arrest or detention of any person with a view to the extradition or surrender, the transfer of persons in custody to serve sentences, or the transfer of proceedings in criminal matters. Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters stipulates Mandatory and Discretionary Grounds for Refusal of the Assistance as stated in Articles 6 and 7 of the Mutual Legal

Assistance Act 2006 (Statute of Limitation).

Mandatory grounds for refusal of mutual legal assistance as stipulated in Article 6 Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters are:

1. if the request for Assistance relates to the investigation, prosecution or examination before the court or punishment of a person for the crime that is of a political nature, except a crime or attempted crime against the life or person of a Head of State/a Head of Central Government, or terrorism;
2. if the request for Assistance relates to the investigation, prosecution or examination before the court or punishment of a person for the crime under military law;
3. if the request for Assistance relates to the investigation, prosecution or examination before the court of a person for a crime, the perpetrator of which has been acquitted, awarded clemency, or has completed serving the criminal sanction;
4. if the request for Assistance relates to the investigation, prosecution or examination before the court of a person for a crime which, if committed in Indonesia, cannot be prosecuted;
5. if the request for Assistance is for prosecuting or bringing a person to justice based on a person's race, gender, religion, nationality, or political beliefs;
6. if an approval for providing the Assistance requested will be harmful to the sovereignty, security, interests, or national law;
7. if the foreign state cannot assure that the items requested will not be used for a matter other than the criminal matter in respect to which the request was made;
8. if the foreign state cannot assure that it will return, upon request, any item obtained pursuant to the request.

Discretionary grounds for refusal in mutual legal assistance as regulated in Article 7 Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters are:

1. if the request for Assistance relates to the investigation, prosecution, and examination before the court or punishment of a person for a crime that, if said crime were committed within the territory of the Republic of Indonesia, is not a crime;
2. if the request for Assistance relates to the investigation, prosecution, and examination before the court or punishment of a person for a crime that, if said crime were committed outside the territory of the Republic of Indonesia, is not a crime;
3. if the request for Assistance relates to the investigation, prosecution and examination before the court or punishment of a person for a crime that is subject to capital punishment;
4. if an approval for providing Assistance upon said request will be harmful to the investigation, prosecution or examination before the court in Indonesia, endanger the

safety of the person, or burden the assets of the state.

In support of the work of assistance under Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters and as mandated in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the United Nations Convention against Corruption 2003, and the United Nations Convention against Transnational Organized Crime 2000 (UNTOC), the Republic of Indonesia has designated the Minister of Law and Human Rights of the Republic of Indonesia as the central authority for handling cooperation on mutual legal assistance. For the next stage, the Minister of Law and Human Rights of the Republic of Indonesia as the central authority established the central authority unit under the Ministry of Law and Human Rights, which is the Mutual Legal Assistance Section at the Directorate of International Law and Central Authority, and which handles all technical aspects in the mutual legal assistance role.

The main duties in the Mutual Legal Assistance Section at the Directorate of International Law and Central Authority are:

1. Analyzing the Information and Evidence in the Request Document for satisfaction of the requirements under the Indonesian MLA Act and Indonesian Criminal Procedure Code (before determining whether the request(s) could be granted or not);
2. Immediately consult or communicate with the Requesting Country if there are any additional documents or information needed to execute the request(s);
3. Designate the Competent Case Officer (who the authority in the Requesting Country can contact directly for gathering information on the process);
4. Consultation with Law Enforcement Authorities, which have authority to execute the assistance request;
5. Make sure that the evidence (or others) obtained is admissible under the law of the Requesting Country.
6. Drafting the Request Document(s), if Indonesia becomes a Requesting Country.

The type of assistance that could be given to foreign jurisdictions under Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters are:

1. Identifying and locating persons;
2. Obtaining witness statements (written or other forms thereof);
3. Providing evidentiary documents (written or other forms thereof);
4. Making arrangements for persons to provide statements in the Requested Country or to assist in the investigation;
5. Service of Documents;
6. Providing assistance related to searches by production warrant and also for seizing the

evidence;

7. Forfeiture of the proceeds of crime;
8. Recovery of pecuniary penalties in respect to the crime;
9. The restraining of dealings in property, the freezing of property that may be recovered or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of the crime;
10. Locating property that may be recovered, or may be needed to satisfy pecuniary penalties imposed, in respect to the crime;
11. Other assistance in accordance with the Indonesian criminal procedure code.

Assistance request(s) also provide for using the UN Conventions to which Indonesia (and the Requesting Country) are parties. In this matter the Requesting Country does not necessary need to obtain the specific reciprocity assurance, and the Requesting Country should be a Party to the UN Conventions and should have ratified the conventions without taking Reservations in the chapters or articles on international cooperation (mutual legal assistance).

For assistance related to recovery of assets relating to the proceeds of crime through mutual legal assistance under Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters, there are the following conditions:

1. Assistance requests shall be conviction based. However, at the present Indonesia is in the process of passing legislation which could implement a non-conviction-based-forfeiture regime;
2. Assets should be related to the crimes (including proceeds of crime and/or are instrumentalities of the crimes);
3. The Confiscation Order from the Court in the Requesting Country is needed;
4. Asset Sharing: not regulated in the Indonesian MLA Act 2006, if there are costs, these costs should be further discussed with the Requesting Country during the process (i.e. if the assets needed to be put into special retention entities).

III. EXTRADITION

In support of the work of assistance under Indonesian Act Number 1 Year 2006 on Mutual Legal Assistance in Criminal Matters and as mandated in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the United Nations Convention against Corruption 2003, and the United Nations Convention against Transnational Organized Crime 2000 (UNTOC), the Republic of Indonesia has designated the Minister of Law and Human Rights of the Republic of Indonesia as the Central Authority for handling cooperation on extradition. For the next stage, the Minister of Law and Human Rights of the Republic of Indonesia as the central authority established the central authority unit under the Ministry of Law and Human Rights, which is the Extradition Section at the Directorate of International Law and Central Authority, and which handles all

technical aspects of extradition.

The important principles regarding the implementation of extradition by the government of the Republic of Indonesia are:

1. Extradition of the fugitive where the fugitive offenders are suspected criminal offenders and are needed for prosecution as well as where the fugitive offenders are convicted criminal offenders and are needed for enforcement of imprisonment upon the sentencing by the court;
2. Recognizing the extradition of the fugitive by the bilateral treaty, convention (to which Indonesia and the Requesting Country are parties), and also could be considered in the absence of treaty or conventions (based on the assurances of reciprocity);
3. There are mandatory requirements for submitting the extradition request through diplomatic channels (different from mutual legal assistance that could be using direct channels from central authority to central authority);
4. Indonesia has discretion to extradite its own nationals. Extradition of Indonesian citizens could be granted if in view of the circumstances by the President of the Republic of Indonesia, it would be better if the person concerned be tried at the place of commission of the crime;
5. Mandatory principle on dual criminality of the conduct.

To support the work of cooperation through extradition, as of 2012 Indonesia has bilateral treaties with:

- a. Malaysia (signed 7 January 1974) and has been ratified;
- b. Philippines (signed 10 February 1976) and has been ratified;
- c. Thailand (signed 29 June 1978) and has been ratified;
- d. Australia (signed 22 April 1992) and has been ratified;
- e. Hong Kong (signed 5 May 1997) and has been ratified;
- f. Republic of Korea (signed 28 November 2000) and has been ratified;
- g. Singapore (signed 27 April 2007) and not yet ratified, refer to the parliament schedule;
- h. People's Republic of China (signed 2 July 2009) and not yet ratified, refer to the parliament schedule;
- i. India (signed 25 January 2011) and not yet ratified, refer to the parliament schedule;
- j. United Arab Emirates (scheduled for signing);
- k. Socialist Republic of Viet Nam (scheduled for signing).

There are mandatory principles on the limitation conditions to grant an extradition request under Indonesian Extradition Act Number 1 Year 1979:

1. Respect to political crime [Article 5];
2. There is a final judgement [Article 10];
3. Double Jeopardy [Article 11];
4. Lapse of Time [Article 12];
5. Reason to believe that prosecution or sentence is related to her/his religion, political opinion or nationality, or because of his certain race or group of the people [Article 14];
6. Will be surrendered to a third jurisdiction other than Requesting Countries [Article 16].

However, Indonesian Extradition Act Number 1 Year 1979 stipulates the discretion of refusal based on the following conditions:

1. Extradition for crimes under military criminal law, which are not crimes under ordinary criminal law – Discretion if it is decided otherwise in a treaty [Article 7];
2. Extradition Request to Indonesia for Indonesian Nationality – Discretion if considered that it will be better to prosecute the fugitive in the Requesting Country [Article 7];
3. The criminal conduct has been committed in whole or in part in the territory of the Republic of Indonesia [Article 8];
4. The person sought under criminal proceedings in Indonesia, discretion if the Requesting Country agreed for postponement [Article 9];
5. The criminal law underlying the request is related to the provision of the death penalty, discretion if the Requesting Country could obtain the assurance that death penalty will not be imposed against the person sought [Article 13];
6. Rule of Specialty assurance could not surrender by specific statement from the Requesting Country, discretion if the President of the Republic of Indonesia considers waiving the assurance of specialty from the Requesting Country [Article 15].

Under the extradition principles of Indonesia, for urgent circumstances and when the Requesting Country considers that there is a reason that the fugitive located in Indonesia could be a flight risk, it is possible to implement a Request for Provisional Arrest (PAR) before the Extradition Request is made within the applicable time period (20 days under Indonesia national law, or specific time under the treaty).

The requirements for Provisional Arrest are:

1. Requesting Country could make the Provisional Arrest Request (PAR) in cases of urgency provided that the arrest is not contrary to the law of the Republic of Indonesia (i.e. urgency reason: there are reasonable grounds to believe that if the fugitive is not

immediately arrested, he/she will present a flight risk).

2. PAR is requested when the document of extradition is under preparation in the Requesting Country.
3. PAR is applicable to requests from treaty- and non-treaty-based countries with Indonesia.
4. *Dual criminality* principle is required in the criminal conduct which is made in the document of request for provisional arrest.
5. There is a time limit for the Requesting Country on submission of the document (original) through diplomatic channels (i.e. Indonesia and Australia for 45 days, but from non-treaty-based countries, it is 20 days). If the Requesting Country failed to fulfill the obligations on this matter, the person(s) should be released from custody.
6. PAR requests shall be sent by the competent authorities of the Requesting Country to the competent authorities in Indonesia (Head of Police of the Republic of Indonesia or the Attorney General of the Republic of Indonesia through INTERPOL Indonesia) through the diplomatic channels or also could be sent directly by post or telegraph.
7. Competent authorities in Indonesia will inform competent authorities of the Requesting Country of the decision to arrest the person under PAR.
8. If the extradition document was submitted at the time, the provisional arrest of the person in custody will be continued to the arrest for extradition.
9. Documents for extradition which were made previously by PAR at the first stage should fulfill the requirement (refer to the extradition act or the treaty). It is important for intensive communication and consultation before submission of the extradition request document to make sure the extradition document can be granted.

IV. SOME PROBLEMS CONCERNING MLA AND EXTRADITION

Indonesia has some problems with incoming or outgoing MLA and Extradition.

A. MLA

- **Format of request.** Sometimes requests do not come from the designated Central Authority of the state. We frequently receive letters rogatory, not requests for MLA.
- **Bank secrecy.** Under Law Number 10, 1998, Banks must protect the owner of the account unless the owner is sued as a suspect.
- **Differences of legal systems.** Indonesia sometimes has a problem with different legal systems from other countries. Mainly, how to fulfill the principles of dual criminality. Related to this problem is concerning **Interpretation of legal terminology**. The side effects of different legal systems are problems with investigation and prosecution.

B. EXTRADITION

In extradition, the problems are similar to MLA.

- **Format of Arrest Warrant.** Each country has a different format and different officials who issue (some countries by police, others by the courts)
- **Dual Criminality.**
- **Differences of legal terminology.**

V. SUGGESTIONS

To eliminate problems, we can consider:

- a. The need to expedite and streamline MLA and Extradition and to provide each other easy access to up-to-date information, legislation and forms on MLA and Extradition;
- b. Informal consultation and bilateral meetings between Central Authorities;
- c. Building a regional cooperative network for efficient and effective MLA and Extradition.

VI. CONCLUSION

International legal cooperation among the countries should be promoted. **Indonesia supports** all efforts to combat transnational crime by legal instruments and is a party to some international conventions as well as bilateral treaties. Indonesia also supports **building networks** to combat transnational crime through formal and informal relationships.

ASSET RECOVERY AND MUTUAL LEGAL ASSISTANCE IN INDONESIA: THE PRESENT AND THE FUTURE

*Chuck Suryosumpeno**

I. INTRODUCTION

The criminal offenders have the ability and capacity to commit crimes and place their crime-related assets in any jurisdiction they think fit. They use any loopholes in national law and legislation and exploit the inflexibility and incompatibility of the legal system for their own ends.

The Indonesian Government is fully aware of trans-national crime and therefore takes the view that there is no better solution to combat crime other than to cooperate with other states on the basis of good relations and respect for each others laws and legislation.

The objective of this paper is to provide knowledge regarding the general description on how asset recovery within the frame of MLA works in Indonesia.

II. SEARCH, SEIZURE AND FORFEITURE IN INDONESIA

Indonesia has various investigating authorities. For general crimes, the investigating authorities are divided into two groups. The first is the Indonesian National Police and the second is Civil Servant Investigators (PPNS) such as immigration, customs, tax and forestry. For specific crimes such as corruption cases, the investigators are the Indonesian National Police, the Prosecution Service and Corruption Eradication Commission (KPK). For human rights violations, the investigator is the Prosecution Service.

Despite various investigating authorities, prosecution is the authority of the Prosecution Service. For corruption cases the prosecution authority is executed by two agencies, i.e.: The prosecutors from the Prosecution Service and prosecutors assigned to the Corruption Eradication Commission (KPK).

In general, the criminal procedure for search, seizure and forfeiture is pursuant to Law no 8 of 1981 (KUHAP). When the case is still premature, i.e. in the intelligence data gathering and preliminary investigation stage, it is not yet “pro justitia” (for the sake of justice). At this point the use of force cannot be utilized by the law enforcement.

The persons of interest may provide information or data on a voluntary basis. Therefore the action of search and seizure is not an option. When the case is upgraded into the investigation stage, then investigators are authorized to compel the suspect, witness or any

* Senior Prosecutor, Chief of Asset Recovery Task Force AGO Indonesia, Head of International Division AGO Indonesia, Member of the Indonesian Integrated Team for Tracking and Arresting Corruptors, National Contact Person CARIN for Indonesia.

relevant parties to transfer the legal control over their assets to the investigating authorities since the investigation is now transformed into “pro justitia”

In order to carry out a search, investigators need a warrant and permission from a district court. When a circumstance compels the investigators to act swiftly they may carry out the search and later request approval from the court. The search can be a body search; clothing search; property search. Witnesses have to be present during the search of property and in case of the owner subjects search, the local neighborhood leaders have to be present to witness the search. A copy of the minutes of the search is made available to the owners.

Goods, articles, property or other assets are subject to seizure if they meet criteria sets out by the law. Those criteria are:

- Obtained from a crime or as proceeds of crime.
- Used as a tool of crime or tool to prepare the crime.
- Used to hinder the investigation of a crime.
- Made specifically to commit a crime.
- Other goods, articles, property or assets that have direct connection with the crime.

Assets seized under civil law or bankruptcy cases may be re-seized for the purpose of investigation, prosecution and trial of a criminal case as long as they meet any criteria as mentioned above.

III. MUTUAL LEGAL ASSISTANCE LAW IN INDONESIA

The legal basis for the Indonesian law enforcement to honour requests from foreign states for mutual legal assistance is Law Number 1 of 2006 regarding Mutual Legal Assistance on Criminal Matters. For the ASEAN region, Indonesia is the signatory of the Treaty of Mutual Legal Assistance in Criminal Matters, or better known as AMLAT, was signed in Kuala Lumpur, Malaysia on 29 November 2004. The treaty itself was ratified by the parliament and enforced by Law Number 19 of 2008 regarding the Ratification of the Treaty of Mutual Legal Assistance in Criminal Matters.

The areas covered by MLA are investigation, prosecution and court hearings in accordance with national laws and regulations. In relation to assets, several types of assistance that can be honoured are: the execution of requests for search and seizure; the recovery of pecuniary penalties related to the crime; the prohibition of asset transactions and the freeze of assets to satisfy the pecuniary penalties; and tracing assets.

Not all requests can be honoured. There are absolute and facultative grounds for refusal. The request is refused if the alleged crime which is the basis of the request is:

- A crime of political nature with the exception of attempted assassination of the head of a state of government;

- A crime that falls under the military laws;
- The offender has been acquitted, granted clemency, or is finishing serving the sentence;
- Non-prosecutable in Indonesia;
- Related to race, gender, religion, nationality or political views of the alleged offender;
- Detrimental to the national laws, sovereignty, security and interest.

The request placed by a requesting state may be refused on the ground that the alleged offence is:

- not a crime if committed in the Indonesian jurisdiction;
- Punishable by capital punishment;
- Detrimental to the Indonesian criminal procedure;
- Endangering the safety of persons if the request is honoured;
- Burdening the state finances if the request is honoured.

There are three optional avenues for a requesting state in making the request, either by the formal fashion or by the informal one. First, the requesting state with MLA agreement with Indonesia may place its request directly through the central authority to the central authority mechanism. The request is addressed to the Indonesian Ministry of Justice and Human Rights as the central authority. The ministry will then refer such a request to the relevant competent authority (the Attorney General or Chief of National Police) for a follow up. In the absence of such agreement, a request can be made through diplomatic channels. The Ministry of Foreign Affairs will refer such request to the Ministry of Justice and Human Rights, which in turn refers it to the competent authority.

Alternatively, a requesting state can make an informal request to the requested state through agency-to-agency channels. For example: Attorney General Office of any ASEAN country may be in direct contact with relevant unit within the Attorney General Office of the Republic of Indonesia to exchange information in regard to the case that MLA is sought. This procedure may speed up the process by avoiding unnecessary delays and unforeseen obstacles.

The request for assistance has to be accompanied by the court order or court permission by the requesting state. If search and seizure of assets are necessitated and a proper warrant has to be attached as well. On the basis of the warrant and other relevant documents from the requesting state the Attorney General or the Chief of the National Police will follow up by issuing the similar warrant in order to execute the request. In the event that the law enforcement must ask swiftly, they may execute a warrant without having to secure the court's permission in the first place. The execution of warrant in this nature is limited to assets that are movable. After the execution the in-charge official must immediately seek approval from the district court within its jurisdiction. At its discretion, the court may or may not approve

the action of the law enforcement official. For immovable assets permission by the district court must be sought before a warrant can be executed.

IV. THE FUTURE

In regard to the asset recovery, the Indonesia Criminal Procedure (KUHP) adopts the principle of *in personam* jurisdiction, meaning that assets can be frozen, seized and forfeited only if such assets can be linked to a crime and the offenders, it is much harder for law enforcement officials to find a link between the assets and the offender. The *in personam* principle cannot satisfactorily address the difficulty of law enforcement. Therefore Indonesia is now preparing a new law (bill) regarding the asset recovery in which the *in rem* principle is adopted and will complement the *in personam* principle in KUHP.

In the last two years (2011–2012) the Attorney General Office of the Republic of Indonesia has established and developed an Asset Recovery Task Force. During the two-year period this task force recovered 1.2 trillion rupiahs from drug and corruption cases. The task force has already been internationally recognized because it is engaged with many international networks such as CARIN (Europol), ARINSA (South Africa), RRAG (South America).

This task force is an embryo of The Indonesian Asset Recovery Office and will become a permanent working unit under the direction of the Attorney General, which has the ability to handle asset recovery. We will take advantage of the existence of this unit to have mutual cooperation in combating trans-border crimes in which assets are involved.

MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Phongsavanh Phommahaxay**

It is my great honour and pleasure to be here today. On behalf of the representatives of the Anti-Corruption Authority of Lao P.D.R, I would like to express my sincere appreciation to the Japanese Government, especially UNAFEI, for giving me an opportunity to take part in this important seminar in Tokyo, Japan, which is a very beautiful and modern city.

Distinguished Guests,

Ladies and Gentlemen,

The topic I am going to present today is: Mutual Legal Assistance and Extradition between Lao PDR and foreign countries.

I. INTRODUCTION

Lao PDR does not have a law on mutual legal assistance so far, but we have bilateral and multilateral agreements with other countries, such as the People's Republic of China, the Socialist Republic of Vietnam, the Democratic People's Republic of Korea and the ASEAN Mutual Legal Assistance Treaty (AMLAT), which was signed in 2004. We are now preparing to draft a law on mutual legal assistance in order to submit it to the national assembly for consideration and approval by the end of this year or in June next year. If this law is approved, it will be an important instrument for Lao PDR in general, particularly for organizations concerned with implementing mutual legal assistance with other countries in the region as well as globally.

The National Assembly has already approved a law on extradition, and the President of the Lao People's Democratic Republic just promulgated a law on extradition on 1 August 2012. This law provides not only principles, rules and remedies for extradition but also a central authority for coordination with other organizations concerned. The Central Authority for extradition is an Office of the Supreme Public Prosecutor, and the other organizations involved are the Ministry of Foreign Affairs, Ministry of Justice, Ministry of Public Security and the Supreme People's Court.

II. MUTUAL LEGAL ASSISTANCE AND PRINCIPLES OF INTERNATIONAL COOPERATION IN CRIMINAL PROCEEDINGS

A. Mutual Legal Assistance

Although the Lao PDR does not have a law on mutual legal assistance, we have bilateral and multilateral agreements with foreign countries and the AMLAT. In addition, we also entered into the United Nations Convention against Corruption (UNCAC), which was signed

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on 9 December 2003 by the Government of the Lao PDR and ratified by the National Assembly on 27 September 2009.

B. Principles of International Cooperation in Criminal Proceedings

International Cooperation in criminal proceedings between the competent authority of the Lao PDR and the competent authorities of foreign countries shall comply with principles of respect for the independence, territorial sovereignty of the states, non-interference in the domestic affairs, equality and mutual benefit, and consistent with the constitution of Lao PDR and the fundamental principles of international law.

In the event that the Lao PDR has not yet signed or has not yet entered into international conventions relating to criminal proceedings, such cooperation shall be carried out on the basis of principles of mutual cooperation, but shall not be in conflict with the laws of the Lao PDR.

1. Treaty between the Lao PDR and the Democratic People's Republic of Korea on Mutual Legal Assistance in Civil and Criminal Matters.

(i) Legal Assistance

Citizens and juridical persons of a Contracting Party shall have the right, in the territory of the other Contracting Party, to legal assistance under the same conditions as applied to citizens and juridical persons of the latter:

Both Contracting Parties shall render legal assistance to each other in civil and criminal matters through the authority concerned that are authorized to handle civil and criminal matters such as courts and public prosecutors' offices.

(ii) Scope of Legal Assistance

Both Contracting Parties shall, in keeping with requirements of each Contracting Party's legislation, render legal assistance in civil and criminal matters as follows:

- performing proceedings such as query of criminals, witnesses, experts or victims;
- providing data and documents of the case;
- executing requests for searches, seizures and collection of evidence;
- recognition and execution of judgments and decisions of the courts;
- Investigating, arresting, detaining and executing.

(iii) Procedure in Legal Assistance

When requesting legal assistance in civil and criminal matters, courts and other competent authorities of both Contracting Parties shall contact each other through their own central authorities.

For the Lao People's Democratic Republic, the central authority shall be the Ministry of Justice, and communications regarding legal assistance of the Central Authority shall use their own mother language and shall be accompanied by an English translation.

(iv) Form and Content of Requests for Legal Assistance

1. Legal assistance shall always be requested in written form in the mother tongue of the requesting authority, and the request shall be followed by translation into the language of the requested country or in English;
2. Written requests for legal assistance shall contain the following:
 - Name of the requesting and the requested organs;
 - Title of the case for assistance and details of the request;
 - Name, birthday, sex, birth place, nationality, occupation, and permanent- or temporary-residence status of the people related to the case;
 - Title and address of juridical persons;
 - Name and address of the assigned person;
 - Title of documents to be delivered;
 - If a criminal case, the record of criminal facts and the relevant provision of the law concerning the legal responsibility.
3. Written requests for legal assistance shall have the signature of the chief person and the official seal of the requesting organs.
4. Written requests for legal assistance shall be submitted together with documents and data necessary to execute each request.

(v) Refusal to Execute Requests

In case the requested Contracting Party refuses to execute the request, it shall inform the other party of the reason and return all documents along with the written request.

The request may be refused under the following circumstances:

1. The execution of the request of the other Contracting Party infringes upon its sovereignty or security, political system, public order or because of some other failure to conform with domestic law;
2. The requested organ of a Contracting Party has no power to execute the request and it cannot transfer the request to any other competent organ.

III. EXTRADITION AND IMPLEMENTATION OF JUDICIAL ASSISTANCE

A. Extradition

Extradition issues arise when a person is accused of a crime, or when a foreign court judgment is entered against a criminal offender in that foreign country, but the accused offender has absconded to the territory of the Lao PDR. These issues also arise when a person is accused of a crime, or when judgment is entered in the Lao PDR, but the accused offender has absconded to the territory of a foreign country. Extradition is transferring an

accused person or offender to the requesting country in order to conduct criminal proceedings or for enforcement of a judgment.

B. Implementation of Judicial Assistance

In the provision of judicial assistance, the competent authority shall conduct criminal proceedings in the Lao PDR and shall comply with the agreements that the Lao PDR has signed with foreign countries or based on international conventions that the Lao PDR is a party to. Provision of judicial assistance may have the objective of extradition; the exchange of prisoners; seizure or sequestration of assets of accused persons or defendants themselves; enforcement of judgments; or cooperation in combating crime across borders.

1. The Treaty on Extradition between the Lao PDR and the People's Republic of China

The treaty between Lao PDR and China is comprised of 21 Articles. Desirous of promoting effective cooperation between the two countries in the suppression of crime on the basis of mutual respect for sovereignty and equality and mutual benefit, each party has undertaken, in accordance with the provisions of this treaty and at the request of the other party, to extradite to each other any person found in its territory and wanted by the other party for the purpose of conducting criminal proceedings against, or executing the sentence imposed on, that person.

(i) Request for Extradition and Documents Required.

- ❖ Requests for extradition shall be made in writing and shall include or be accompanied by the following:
 - a. the name of the requesting authority;
 - b. the name, age, sex, nationality, category and number of identification documents, occupation, characteristics of appearance, domicile and residence of the person sought and other information that may help to identify and search for the person;
 - c. a statement of the case including the time, place, conduct and outcome of the offence;
 - d. the text of the relevant provisions of the laws establishing criminal jurisdiction over the offence, creating the offence and prescribing penalties that can be imposed for the offence; and
 - e. the text of the relevant provisions of the laws concerning any time limit on the prosecution.
- ❖ In addition to the provisions of paragraph 1 above, the following documents are needed:
 - a. the request for extradition, which is aimed at conducting criminal proceedings against the person sought, shall also be accompanied by a copy of the warrant of arrest issued by the competent authority of the requesting party; or
 - b. the request for extradition, which is aimed at executing a sentence imposed on the person sought, shall also be accompanied by a copy of the effective court judgment or verdict and a description of the period of sentence which has already been executed;
 - c. the request for extradition and its supporting documents shall be signed or sealed and shall be accompanied by translation in the language of the requested party and in the English language.

(ii) Execution of Extradition

1. If extradition has been granted by the requested party, the parties shall reach an agreement on the time, place and other relevant matters relating to the execution of the extradition. Meanwhile, the requested party shall inform the requesting

party of the period of time for which the person to be extradited has been detained prior to the surrender;

2. If the requesting party has not taken custody of the person to be extradited within fifteen days after the date agreed on for the execution of the extradition, the requested party shall release that person immediately and may refuse requests by the requesting party for extradition of that person for the same offence, unless otherwise provided in the paragraph below;
3. If one party fails to surrender or take custody of the person to be extradited within the agreed period for reasons beyond its control, the other party shall be notified promptly. The parties shall once again reach an agreement on the relevant matters for execution of extradition.

2. Case Study for Extradition of Chinese Offenders

In 2011, Chinese police sent a request letter to the Lao police through diplomatic channels for detaining and extraditing Chinese offenders who had swindled Chinese citizen's money through electronic equipment and escaped to live in Lao PDR at the time. Upon receipt of the request, we promptly contacted the concerned authorities in China for further information. After getting further information from China, we conducted investigations and searched for the wanted persons. Finally, we arrested 68 offenders (including 29 female offenders). After arresting these persons, we contacted the Chinese Government to schedule a date and time to extradite. The offenders were extradited to China on 30 September 2011. In this extradition, both sides had emphasized further cooperation in criminal matters based on the bilateral agreement on Extradition between Lao PDR and China, which was signed in February 2002.

3. Case Study for Extradition of South Korean Offender

On 14 March 2009, the South Korean Police sent an official letter to the police of Lao PDR through diplomatic channels to detain Mr. Choung Nakguang, a South Korean businessman, in the case of swindling citizen's property. After consideration and according to Articles 117 through 119 on international cooperation of the Criminal Procedure Law of the Lao PDR, the Lao police detained Mr. Choung Nakguang on 15 September 2009. After coordination with South Korean police, the Lao PDR sent this offender to South Korea on 29 March 2010. In this transfer, even though there was no mutual agreement between Laos and South Korea, the two sides signed a memorandum of mutual assistance and cooperation.

IV. CONCLUSION

By recognizing the rights and duties of the countries with which the Lao PDR had signed bilateral and multilateral treaties, the rights and duties under the ASEAN Mutual Legal Assistance Treaty (AMLAT) as well as the International Convention against Corruption (UNCAC), we are now trying to enact a new law on Mutual Legal Assistance in Criminal Matters. We are also working on amending the law on Anti-Corruption and other legislation in order to comply with international obligations and international conventions to which the Lao PDR is a party.

MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Somphet Chanthavong**

I. INTRODUCTION

The extradition law has already been approved and the President of the Lao People's Democratic Republic just promulgated a law on extradition on 1 August 2012. This law provides not only principles, rules and remedies for extradition but also a central authority for coordination and other organizations concerned. This law consists of 8 chapters and 44 Articles. The Central Authority for extradition is the Office of the People's Supreme Prosecutor and other organizations such as: the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Public Security and the Supreme People's Court. In the past we used the criminal procedure law in chapter 11. Otherwise we have used bilateral and multilateral agreements with other countries. At present, however, we have new extradition laws, but the bilateral and multilateral agreements with other countries are still used.

II. INTERNATIONAL COOPERATION IN PROCEEDINGS

A. Principles of International Cooperation in Criminal Proceedings

International cooperation in criminal proceedings between the competent organization conducting criminal proceedings in Lao PDR and competent organs of foreign countries shall comply with principles of respect for the independence and territorial sovereignty of states, non-interference in domestic affairs, equality and mutual benefit, and shall be consistent with the constitution of Lao PDR and the fundamental principles of international law.

B. International Cooperation in Criminal Proceedings

International cooperation in criminal proceedings must be carried out in compliance with agreements that the Lao PDR has signed with foreign countries or international conventions that it has entered into and in accordance to the laws of the Lao PDR.

C. Implementation of Judicial Assistance

In the provision of judicial assistance, the competent organization conducting criminal proceedings in the Lao PDR shall comply with the agreements that the Lao PDR has signed with foreign countries or international conventions that the Lao PDR is a party to and shall comply with the law. Provision of judicial assistance may have the objective of extradition or exchange of prisoners; the seizure or sequestration of assets of the accused person or defendant; enforcement of judgments; or cooperation in combating cross-border crime.

D. Refusal to Provide Judicial Assistance

The competent organization conducting criminal proceedings in the Lao PDR may refuse to provide judicial assistance in the following cases:

* Anti-Corruption Inspection Department, Government Inspection Authority, Lao PDR.

1. The request for judicial assistance is not in conformity with agreements that the Lao PDR has signed with foreign countries, international conventions to which the Lao PDR is a party, or the laws of the Lao PDR.
2. The provision of judicial assistance would affect the sovereignty, security or stability of the nation, or any important interest of the Lao PDR.

II. EXTRADITION BETWEEN LAO PDR AND FOREIGN COUNTRIES

A. Definition of Extradition

Extradition issues arise when a person is accused of a crime, or when a foreign court judgment is entered against a criminal offender in that foreign country, but the accused offender has absconded to the territory of the Lao PDR. These issues also arise when a person is accused of a crime, or when judgment is entered in the Lao PDR, but the accused offender has absconded to the territory a foreign country. Extradition is transferring an accused person or offender to the requesting country in order to conduct criminal proceedings or for enforcement of a judgment.

B. Treaty on Extradition Between The Lao People's Democratic Republic and The Kingdom of Thailand

This Treaty consists of 20 Articles. For example:

ARTICLE 13

Rule of Speciality

1. A person extradited under this Treaty shall not be detained, tried, or punished in the territory of the Requesting Party for any offence other than that for which extradition has been granted, and shall not be extradited by that Party to a third State, unless:
 - (a) That person has left the territory of the Requesting Party after extradition and has voluntarily returned to it;
 - (b) That person has not left the territory of the Requesting Party within thirty days after being free to do so; or
 - (c) The Requested Party has consented to detention, trial or punishment of the person for an offence other than that for which extradition was granted; or to extradition to a third State. For this purpose, the Requested Party may require the submission of any document or statement mentioned in Article 7, including any statement made by the extradited person with respect to the offence concerned.
2. These stipulations shall not apply to offences committed after extradition.

C. Treaty on Extradition Between The Lao People's Democratic Republic and The Kingdom of Cambodia

This Treaty consists of 24 Articles. For example:

ARTICLE 2

Extraditable Offences

1. For the purposes of this Treaty, extraditable offences are offences which are punishable under the laws of the Contracting Parties by the penalty of imprisonment or other form of detention for a period of more than one year or by any heavier penalty.
2. Where the request for extradition relates to a person sentenced by the Requesting Party for any extraditable offence, extradition shall be granted only if a period of at least six months in this sentence remains to be served.
3. For the purposes of this article, in determining whether an offence is an offence against the laws of both Parties, it shall not matter whether the laws of the Contracting Parties place the conduct constituting the offence within the same category of offence or denominate the offence by the same terminology.
4. When extradition has been granted with respect to an extraditable offence, it may also be granted in respect of any other offence specified in the extradition request that meets all other requirements for extradition except for periods of penalty or detention orders set forth in paragraphs 1 and 2 of this article.

ARTICLE 3

Grounds for Mandatory Refusal

Extradition shall not be granted under this Treaty in any of the following circumstances:

1. The Requested Party considers the offence for which the request for extradition is made by the Requesting Party as a political offence. Reference to a political offence shall not include the taking or attempted taking of the life or an attack on the person of a Head of State or a Head of Government or member of his or her family.
2. The Requested Party has well-founded reasons to suppose that the request for extradition made by the Requesting Party aims to institute criminal proceedings against or execute punishment upon the person sought on account of race, religion, nationality or political opinion of that person, or that the position of the person sought in judicial proceedings will be prejudiced for any of the reasons mentioned above.

3. The offence for which the request for extradition is made is exclusively an offence under military law of the Requesting party.
4. The prosecution or the execution of punishment for the offence for which extradition has been sought has become barred by reason prescribed under the law of either Contracting Party including a law relating to lapse of time.
5. The Requested Party has passed judgment upon the person sought in respect of the same offence, before the request for extradition is made.
6. If the judgment of the Requesting Party has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence.

D. Treaty on Extradition Between The Lao People's Democratic Republic and The People's Republic of China

This Treaty consists of 21 Articles. For example:

ARTICLE 15

Surrender of Property

1. If the requesting Party so requests, the Requested Party shall, to the extent permitted by its national law, seize the proceeds and instrumentality of the offence and other property which may serve as evidence found in its territory, and shall surrender the property to the Requesting Party when extradition is granted.
2. When the extradition is granted, the property mentioned in paragraph 1 of this article may nevertheless be surrendered even if the extradition cannot be executed owing to the death, disappearance or escape of the person sought.
3. The Requested Party may, for conducting any other pending criminal proceedings, postpone the surrender of above-mentioned property until the conclusion of such proceedings, or temporarily surrender the property on condition that it is to be returned by the Requesting Party.
4. The surrender of such property should not prejudice any legitimate rights of the Requested Party or any third party to the property. Where these rights exist, the Requesting Party shall, at the request of the Requested Party, return the surrendered property without change to the Requested Party as soon as possible after the conclusion of the proceedings.

III. DEFINITION OF THE EXTRADITION AND A CASE STUDY OF EXTRADITION

A. Definition of Extradition

Extradition issues arise when a person is accused of a crime, or when a foreign court judgment is entered against a criminal offender in that foreign country, but the accused offender has absconded to the territory of the Lao PDR. These issues also arise when a person is accused of a crime, or when judgment is entered in the Lao PDR, but the accused offender has absconded to the territory of a foreign country. Extradition is transferring an accused person or offender to the requesting country in order to conduct criminal proceedings or for enforcement of a judgment.

B. A Case study of Extradition in the Case of Chinese Offenders

In 2011, Chinese police sent a request letter to the Lao police through diplomatic channels for detaining and extraditing Chinese offenders who had swindled Chinese citizen's money through electronic equipment and escaped to live in Lao PDR at the time. Upon receipt of the request, we promptly contacted the concerned authorities in China for further information. After getting further information from China, we conducted investigations and searched for the wanted persons. Finally, we arrested 68 offenders (including 29 female offenders). After arresting these persons, we contacted the Chinese Government to schedule a date and time to extradite. The offenders were extradited to China on 30 September 2011. In this extradition, both sides had emphasized further cooperation in criminal matters based on the bilateral agreement on Extradition between Lao PDR and China, which was signed in February 2002.

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Baizura Kamal**

I. INTRODUCTION

The challenge for prosecutors and law enforcement authorities in every nation in combating crime is the issue of sovereignty, frontiers (borders) and differences in legal systems between States. Criminals depend heavily upon the barriers of sovereignty and evidence to shield themselves of their crimes from detection. Organizations which orchestrate transnational crime and which then disperse and conceal the proceeds of their illicit activities the world over have no regard for national borders. They are positioned to take advantage of the differences between legal systems, the clash of bureaucracies, the protection of sovereignty, and, at many times, the complete incapacity of nations to work together to overcome their differences.

This is where international cooperation plays an important part in crime detection, crime prevention and prosecution. International cooperation in criminal matters such as mutual assistance and extradition are instruments which can be used to overcome the barriers of sovereignty and allow the international community to "fight back" despite existing differences. Both extradition and mutual legal assistance are about countries building bridges to overcome the differences in their legal systems and assisting each other in law enforcement matters.

A. Legal Framework

Criminal offenders are mobile and often seek to evade detection, arrest and punishment by operating across international borders. They avoid being caught by taking advantage of those borders and playing on the frequent reluctance of the law enforcement authorities to engage in complicated and expensive transnational investigations and prosecution.

B. Mutual Assistance in Criminal Matters (MLA)

MLA is the formal process by which one State requests another State to exercise its coercive powers or to take steps to obtain evidence that must be admissible in a criminal trial. MLA is commonly resorted to in situations when compulsive measures or legal sanctions are required to obtain evidence in a foreign States' jurisdiction. An example of compulsive measures would be the issue of subpoenas to witnesses to record statements before a judicial authority and production orders to financial institutions or companies. Thus it operates under different and much stricter rules than those that apply to the informal channels.

The MLA legal framework allows for the collection of evidence in a useable and admissible form by taking into account issues of voluntariness, authorization, oath, affirmation, certification and authenticity. The powers of the authorities in each country vary

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and it will be necessary to establish what can and cannot be obtained through discussions with the relevant authorities.

Before we can fully appreciate the issues and plan of action to fully encourage the utilization of the tools under international cooperation, i.e. MLA and extradition, a brief look at its legal framework is necessary.

1. MLA Legislation

Malaysia already has in place the mechanism for international cooperation such as the Mutual Assistance in Criminal Matters Act 2002 [*Act 621*] (“MACMA”) which came into force on 1 May 2003. MACMA is an Act which makes provisions for mutual assistance in criminal matters to be rendered and sought between Malaysia and other countries and for matters connected therewith. The Mutual Assistance in Criminal Matters Regulations 2003 also has been enacted and came into effect on 15 June 2003 to complement the implementation of MACMA.

MACMA provides for MLA pursuant to a Mutual Legal Assistance Treaty (MLAT)¹ or where a request is made by a State that does not have an MLAT with Malaysia (non-treaty partner), the Minister charged with the responsibility for legal affairs, may, where the requirements of MACMA have been fulfilled and on the recommendation of the Attorney General, issue a special direction to enable the request to be executed in accordance with the provisions of MACMA.²

(i) *Central Authority*

The Central Authority for MLA is the Attorney General of Malaysia who is empowered to make and receive requests to and from the foreign States.³ These requests shall be made and sent through diplomatic channels.⁴

(ii) *Scope of Offences and Dual Criminality Principle*

In considering a request from a foreign State for rendering assistance under the MLA regime, the requirements of *dual criminality* and *threshold* are pertinent in granting assistance to a foreign country. Dual criminality is a mandatory requirement in order for Malaysia to provide assistance to foreign States. This is to ensure that the offence provided for in the request has a relevant corresponding provision under the Malaysia law. The Attorney General (AG) shall refuse any request from any foreign State if the act or omission, had it occurred in Malaysia, would not have constituted an offence against the laws of Malaysia.⁵

It is mandatory that the issue of threshold is satisfied where the request for assistance can only be made if it relates to “criminal matters”⁶ and in respect of a serious offence⁷ or a foreign serious offence.⁸

¹ Section 17(1) of MACMA.

² Section 18 of MACMA.

³ Sections 7 and 19 of MACMA.

⁴ Sections 7(2) and 19(2) of MACMA.

⁵ Section 20(1)(f) of MACMA.

⁶ Section 2 of MACMA defines the term “criminal matter” as being in respect of a serious offence or a serious foreign serious offence as (a) a criminal investigation, (b) criminal proceedings or (c) an ancillary criminal matter.

⁷ “Serious offence” is defined in Section 2 of MACMA as (a) an offence as defined under the Anti-Money Laundering Act 2001 [*Act 613*], (b) an offence against the laws of Malaysia where the maximum penalty of the

However, in view of the current developments relating to MLA and desiring to improve the effectiveness of the law enforcement authorities of the countries in the investigation of crime and in proceedings pertaining to criminal matters through cooperation and MLA, Malaysia is in the midst of reviewing the current MLA law and the Model Treaty in order to keep abreast of the common practices by other foreign States.

(iii) Undertaking of Reciprocity and Specialty

Once the issue of dual criminality has been satisfied, the Requesting State is also required to provide undertakings of reciprocity⁹ and specialty.¹⁰ The Attorney General will refuse any request from any foreign State if that State fails to give an undertaking that it will subject to its laws, comply with a future request by Malaysia to that State for assistance in criminal matters if that State is not the party to the treaty with the Government of Malaysia. This is to ensure that the Requesting State will oblige (reciprocate) a future request based on a similar offence from Malaysia so as to avoid a one-sided affair.

There is a need for the undertaking of specialty to be made to avoid the assistance requested being used for a matter other than the criminal matter in respect of which the request was made. This is to ensure that the information obtained from Malaysia can only be used for the requested purpose due to the confidentiality element contained in the request.

(iv) Types of Assistance Available under MACMA¹¹

Under MACMA, the Attorney General may make arrangements for the provision of the following assistance¹²:

- (a) providing and obtaining of evidence and things¹³;
- (b) the making of arrangements for persons to give evidence, or to assist in criminal investigations¹⁴;
- (c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence¹⁵;
- (d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence¹⁶;
- (e) the execution of requests for search and seizure¹⁷;

offence is death and the minimum term of imprisonment is not less than one year and (c) any attempt, abetment or conspiracy to commit any of the offences referred to in (b).

⁸ Section 2 of MACMA defines foreign serious offence as an offence against the law of a prescribed foreign State stated in a certificate purporting to be issued by or on behalf of the government of that prescribed foreign State and that consists of or includes activity which, if it had occurred in Malaysia, would have constituted a serious offence.

⁹ Section 20(3)(d) of MACMA.

¹⁰ Section 20(1)(j) of MACMA.

¹¹ The list of assistance is non-exhaustive.

¹² Section 3 of MACMA.

¹³ Section 22 of MACMA.

¹⁴ Section 27 of MACMA.

¹⁵ Section 31- 34 of MACMA.

¹⁶ Section 31 of MACMA and Reg. 23-26 of MACMR.

¹⁷ Section 35-36 of MACMA.

- (f) the location and identification of witnesses and suspects¹⁸;
- (g) the service of process¹⁹;
- (h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;
- (i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence; and
- (j) the examination of things and premises.

(v) *Grounds of Refusal – Mandatory*

A request for assistance will be refused as required by Malaysian law²⁰, if the Attorney General is of the opinion that:

- (a) Treaty/Agreement noncompliance – there is a failure to comply with the terms of any treaty or other agreement between Malaysia and that prescribed foreign State in respect of that request;
- (b) Political Offence – the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;
- (c) Military offence – the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would have constituted a military offence under the laws of Malaysia which is not also an offence under the ordinary criminal law of Malaysia;
- (d) Ulterior purpose – there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions;
- (e) Double jeopardy – the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person has been convicted, acquitted or pardoned by a competent court or other authority in that prescribed foreign State or has undergone the punishment provided by the law of that prescribed foreign State, in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;
- (f) Dual criminality – the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would not have constituted an offence against the laws of Malaysia;
- (g) Insufficient gravity – the facts constituting the offence to which the request relates does not indicate an offence of sufficient gravity;

¹⁸ Section 39 of MACMA.

¹⁹ Section 40 of MACMA.

²⁰ Section 20(1) of MACMA.

- (h) Insufficient importance – the thing requested of insufficient importance to the investigation or could reasonably be obtained by other means;
- (i) Impairment of sovereignty etc. – the provision of the assistance would affect the sovereignty, security, public order or other essential public interest of Malaysia;
- (j) Specialty – the appropriate authority fails to undertake that the thing requested will not be used for a matter other than the criminal matter in respect of which the request was made;
- (k) Return of thing obtained – in the case of a request for assistance under sections 22, 23, 24, 25 and 26 or sections 35, 36, 37 and 38 of the MACMA, the appropriate authority fails to undertake to return to the Attorney General, upon his request, anything obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;
- (l) Criminal matter prejudiced – the provision of the assistance could prejudice a criminal matter in Malaysia; or
- (m) Contrary to law – the provision of the assistance would require steps to be taken that would be contrary to any written law.

The Attorney General may exercise his discretionary powers²¹ to refuse a request on the following grounds –

- (a) pursuant to the terms of any treaty or other agreement between Malaysia and that prescribed foreign State;
- (b) if in the opinion of the Attorney General, the provision of the assistance would, or would be likely, to prejudice the safety of any person, whether the person is within or outside Malaysia;
- (c) if in the opinion of the Attorney General, the provision of the assistance would impose an excessive burden on the resources of Malaysia; or
- (d) if that foreign State is not a prescribed foreign State and the appropriate authority of that foreign State fails to give an undertaking to the Attorney General that the foreign State will, subject to its laws, comply with a future request by Malaysia to that foreign State for assistance in a criminal matter.

(vi) Confidentiality of Request and the Provided Information

A request to Malaysia may state that confidentiality of the request (both as to its content and the fact that it has been made) is required. It would be helpful if the reasons for requiring confidentiality are given in the request. Requests for confidentiality will normally be entertained.

²¹ Section 20(3) of MACMA.

(vii) The Internal Procedure for Requesting MLA to Foreign States

The Attorney General's Chambers provides a form in which a request from a foreign country is to be made²², a copy of which is annexed herewith as APPENDIX 1.

2. Agreements/Treaties

In addition to MACMA, Malaysia also has entered into international (bilateral and multilateral) treaties or other agreements on mutual assistance in criminal matters which impose a legal obligation upon Malaysia within its legal framework to obtain and render mutual assistance in criminal matters to the treaty partners.

The most common formal procedure used by States to request or provide legal assistance in criminal matters is through a formal bilateral MLAT. Malaysia had entered into a multilateral mutual legal assistance in criminal matters treaty²³ and five (5) bilateral MLATs which form the legal basis to request and render MLA assistance.²⁴

The ASEAN MLAT is intended to facilitate the implementation of ASEAN Member Countries' obligations under MLA regimes that have been established through international instruments such as the United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC). ASEAN Member Countries have developed a strong legal framework that regulates the provision of MLA through the ASEAN MLAT and this reflects the common desire and commitment among the ASEAN Member States in improving the effectiveness of the law enforcement authorities of the Parties in the prevention, investigation and prosecution of offences through cooperation and MLA.

These MLATs seek to improve the effectiveness of rendering of assistance where it regularizes and facilitates its procedures. It creates unambiguous and binding obligations and makes the MLA process reliable and effective as the provisions are tailored to the respective needs of the negotiating States and can be customized to suit their respective needs. The negotiation process also provided an opportunity to negotiating Parties to get acquainted with the legislation of the other Parties.

C. Extradition

Extradition, unlike MLA, is the oldest component of international cooperation and is very much familiar to the prosecutors and law enforcement authorities in Malaysia. However, in comparison with our foreign counterparts, outgoing extradition requests from Malaysia are still relatively low.

In simple terms extradition could be termed as the process by which a fugitive criminal is returned from the country where he is found to the country where he is accused of or has been

²² Form AGC2- Model Form for Request to Malaysia.

²³ Treaty on Mutual Legal Assistance in Criminal Matters (among like-minded ASEAN Member Countries).

²⁴ Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters; Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters; Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Assistance in Criminal Matters; Treaty between the Government of Malaysia and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters and Treaty between the Government of Malaysia and the Government of the Republic of India on Mutual Assistance in Criminal Matters.

convicted of an offence. It is an arrangement designed to prevent criminals from escaping from justice by crossing frontiers.

Extradition in Malaysia is usually employed when prosecutors intend to prosecute accused person/persons who are no longer within the jurisdiction of the country. Malaysia needs to ensure that criminals cannot evade justice simply by crossing borders. This requires a responsive, streamlined extradition system that effectively combats domestic and transnational crime, including terrorism, with appropriate safeguards.

1. Extradition Legislation

Extradition matters in Malaysia are governed by the Extradition Act 1992 [Act 479] (“EA”). Malaysia’s extradition relationships with other countries exist to enable Malaysia to ensure the effective administration of criminal justice in this country. Malaysia’s extradition relationships also enable us to cooperate with partner countries to fight crime and prevent Malaysia from becoming a refuge and safe haven for persons accused of serious crimes in other countries.

(i) *Central Authority*

The Minister of Home Affairs is the central authority in extradition matters.²⁵ In practice, the Attorney General’s Chambers examines and advises the Minister on whether a request complies with the Extradition Act. Malaysian extradition requests will be prepared by the Attorney-General’s Chambers with approval of the Minister for Home Affairs.

(ii) *Scope of Offences and Dual Criminality Principle*

Fugitive criminals can only be extradited for “extradition offences.”²⁶ Dual criminality is also a mandatory requirement for extradition where a person may be extradited only for conduct/acts which are criminal in both the requested and requesting jurisdictions. Two aspects of dual criminality are threshold where the request can only be entertained if the foreign offence underlying the request is punishable for not less than one (1) year imprisonment or with death. This is to determine that the offence is serious and not a trivial/petty offence. It does not mean the offence in the requesting state must have exactly the same description or terminology as a similar offence in Malaysia. The focus is on the act or omission underlying the request. Malaysia will do its best to fit the conduct into an offence under Malaysian law to accommodate the request.

(iii) *Undertaking of Reciprocity and Specialty*

The widely accepted principle for extradition is the *principle of reciprocity* where the requesting State gives assurances to the requested State that it will reciprocate or comply in a similar type of offence in future. Under the current Extradition Act, there is no provision on reciprocity. However, in practice, when Malaysia receives an extradition request from any country, among the mandatory requirements that need to be fulfilled by a Requesting State is the undertaking of reciprocity.

Specialty means a person shall be tried or punished, after extradition, only for the criminal conducts/acts for which his surrender has been made, unless the requested state, after surrender, gives consent to further trial or punishment.

²⁵ Section 5 of EA.

²⁶ Section 32 of EA.

(iv) The Internal Procedure for Requesting Extradition to Malaysia

The handling of an extradition matter commences upon receipt of either of the following requests:

- (a) a request for a provisional warrant of arrest²⁷ pending a full extradition request; or
- (b) a full request for extradition.

The provisional warrant of arrest is used in cases of urgency. For treaty partners, requests for provisional warrants of arrest are usually made by the foreign state to the designated Central Authority as provided for in the treaty and the supporting documents or the particulars to be included in the request for provisional warrant will normally be identified in the said treaty itself. The Model Form is annexed herewith as APPENDIX 2.²⁸

For non-treaty countries, information contained in an international notice issued by the International Criminal Police Organization (INTERPOL) in respect of a fugitive criminal may be considered by the Magistrate in deciding whether a provisional warrant should be issued for the apprehension of a fugitive criminal and the Attorney General's Chambers (AGC) is to advise the Ministry of Home Affairs to issue a Special Direction to give effect to the request²⁹.

If the above matters are satisfied, the Royal Malaysia Police (RMP) will be notified of the request and the RMP's assistance will be sought to locate the fugitive criminal. Upon agreement by the Attorney General or issuance of a Special Direction by the Minister and upon confirmation on the location of the fugitive criminal, notice of application is to be filed. Upon execution by the RMP, to produce the fugitive criminal before the Magistrate Court and to apply for an order to remand the fugitive criminal to custody for such reasonable period of time with reference to the circumstances of the case, as he may fix, and for this purpose the Magistrate shall take into account any period in the relevant extradition treaty relating to the permissible period of remand upon provisional arrest of a fugitive criminal and to request a mention date on the last day of the remand period.

Upon receipt of the full request, the fugitive criminal is produced before the Magistrate Court, and a request is made for the case to be transferred to the Sessions Court. A request for extradition shall be made in writing and shall be sent through diplomatic channels. However, in urgent circumstances, an advance copy is sometimes transmitted to the AGC to enable initial work to be carried out. The advance copy is only to facilitate the work in the interest of expediting the request. It is not to be treated as an official request.

For non-treaty partners, undertakings of reciprocity are required. If the particulars and information received are insufficient, a request for better and further particulars and information from the requesting authority will be made. Unless expressly provided otherwise in an extradition treaty, a request for provisional arrest should be made by the diplomatic representative of the foreign State in Malaysia to the Minister of Home Affairs. The channel of transmission should be through the Malaysian Ministry of Foreign Affairs ("MoFA"). To

²⁷ Section 13(1)(b) of EA.

²⁸ Model Form AGC-EX1-A.

²⁹ Section 3 of EA.

expedite consideration of the request, an advance copy should also be sent, simultaneously, directly to the International Affairs Division (“IAD”), Attorney General’s Chambers.

A full request requires requisition papers to be submitted through diplomatic channels and the Requesting country shall furnish a warrant of apprehension of the fugitive criminal issued by that country, particulars of him and the facts upon which, and the law under which, he is accused or was convicted as well as evidence sufficient to justify the issue of the warrant of apprehension under section 13 of the Extradition Act. The Attorney General’s Chambers provides a form³⁰ in which a request by a foreign country is made to Malaysia and is annexed herewith as APPENDIX 3.

- Extradition Proceedings –
 - Jurisdiction – The power and jurisdiction to hear extradition matters falls under the purview of the Sessions Court.³¹
 - Procedures – there are three different procedures envisaged under the Extradition Act—
 - (i) a full enquiry³² where a prima facie standard of proof is required;
 - (ii) a full enquiry³³ where the Minister has issued a written direction under section 4 of the Extradition Act to dispense with the prima facie standard of proof;
 - (iii) a simplified procedure where the fugitive criminal informs the court that he consents to a waiver of committal proceedings.³⁴ The Sessions Court is required to follow the procedures provided in order to ascertain that the said waiver is given voluntarily and to advise the fugitive criminal on the effect of such consent. Upon such advice, if the fugitive criminal still consents to the waiver, the Sessions Court shall commit the fugitive criminal to prison to await the issuance of the warrant of surrender from the Minister.
- Extradition Hearing –
 - (i) The hearing of the extradition case is based on the affidavits and evidence filed by the parties. The Sessions Court is empowered to receive any other evidence to show that the fugitive criminal should not be returned.³⁵
 - (ii) Writ of Habeas Corpus – Upon issuance of the committal order by the Sessions Court, the fugitive criminal may apply to the High Court for a writ of habeas corpus.³⁶ The said application will be heard by a High Court Judge. Upon the decision made by the High Court Judge, the aggrieved party (Appellant) may file an appeal against the said decision to the Federal Court. Upon receiving the records of appeal from the High Court, the Appellant is required to file a petition of appeal setting out the grounds of appeal to the Federal Court. Upon the final determination by the Federal Court—

³⁰ Model Form AGC-EX1-B.

³¹ Section 18 of EA.

³² Section 19 of EA.

³³ Section 20 of EA.

³⁴ Section 22 of EA.

³⁵ Section 19(2) of EA.

³⁶ Section 36 of EA.

- if the fugitive criminal is discharged, he will be released from detention under the Act; or
- if the fugitive criminal is committed, he will be further detained pending the issuance of order of surrender by the Minister.

(iii) Application for Review³⁷ - If the Sessions Court discharged the fugitive criminal upon hearing under section 19 or 20 of the Extradition Act, the Public Prosecutor, upon the said decision, gives to the Sessions Court a notice of his intention to review the said decision at the High Court. The said Notice shall operate as a stay of the said order of discharge. Upon such notice, the Sessions Court may grant bail to the fugitive criminal pending the determination of the review by the High Court. Upon receiving instruction to proceed from the Requesting Party, AGC is required to file the application to review at the High Court within 10 days from the order of discharge. The said review is limited to questions of law only. The decision of the High Court shall be final and conclusive.

- Surrender – Upon final determination of the committal order, AGC will inform the Requesting Party of the decision and will request particulars of the officer(s) in charge to receive the fugitive criminal. Upon receiving the said particulars, AGC will advise the Minister to issue the surrender order under section 21(2) or section 22(3) of Act 479 to authorize the surrender of the fugitive criminal to the said authorized officer(s) of the Requesting Party. Upon receiving the said order of surrender from the Minister, AGC will consult with the RMP and the Requesting Party on the appropriate time/place of surrender. Upon agreement, RMP will assist the Requesting Party in the process of surrender. The process of surrender is to take place within 3 months or the period prescribed by the treaty after the date of committal order or after the final determination of the Court's decision. The Minister may, upon an application by the fugitive criminal or on his behalf, order such fugitive criminal to be discharged unless sufficient cause is shown to the contrary.

2. Extradition Agreements

Malaysia's extradition relationships with other countries exist to enable Malaysia to ensure the effective administration of criminal justice in this country. Malaysia's extradition relationships also enable us to cooperate with partner countries to fight crime and prevent Malaysia from becoming a refuge and safe haven for persons accused of serious crimes in other countries.

Extradition is not available at the request of members of the public. Malaysia's treaty partners have obligations to consider Malaysia's requests, and the process will be dealt with in accordance with the provisions of the treaty. In the absence of a treaty, it is a matter for the domestic law in the foreign country to determine whether the country can agree to Malaysia's extradition request, and for requests from the Requesting State (non-treaty based), the extradition process will be dealt with under the Extradition Act 1992.

Like the MLA regime, the EA provides the legal basis for extradition to and from Malaysia. It contemplates two bases for extradition (a) a treaty-based scheme³⁸ and (b) a non-treaty-based scheme. Presently, Malaysia has concluded bilateral treaties on extradition with six (6) countries which have come into force such as the Extradition Treaty between Great

³⁷ Section 47 of EA.

³⁸ Section 3 of EA.

Britain and Siam,³⁹ the Treaty between the Government of the Republic of Indonesia and the Government of Malaysia Relating to Extradition, the Extradition Treaty between the Government of Malaysia and the Government of the United States of America; the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders; the Treaty between the Government of Malaysia and the Government of Australia on Extradition; and the Extradition Treaty between the Government of Malaysia and the Government of the Republic of India.

II. INFORMAL CHANNELS

As a matter of goodwill and international comity, law enforcement authorities around the world may assist each other in the investigation and prosecution of crimes through informal mutual assistance. MACMA allows assistance upon an informal request or other arrangement⁴⁰.

At the preliminary stage of an investigation, coercive powers are not yet needed, and some form of “informal assistance” may suffice to provide information helpful to the investigation. This term is generally used for assistance through channels outside of the formal MLA regime, often through direct communications between counterparts such as financial intelligence units (“FIU’s”) or police sharing intelligence or data which is legally available to that agency through domestic databases. The informal channels have been effective law enforcement tools used among member countries for the expedient sharing of information and use of multiple tools available for each jurisdiction to trace, freeze or seize, and confiscate the assets of international criminal organizations.

The law enforcement authorities of Malaysia such as the Malaysian Anti-Corruption Commission may request their overseas counterparts to provide information or intelligence and conversely may, at their discretion, provide assistance to their respective foreign counterparts. This system of cooperation among law enforcement agencies has the advantage of speed, efficiency and effectiveness. However, assistance can only be offered to the extent that it does not conflict with any laws of Malaysia, and no compulsory measures may be employed in offering assistance. Hence such assistance often neglects the issue of admissibility of evidence.

III. OBSTACLES TO EFFECTIVE MLA AND RECOMMENDATIONS

Malaysia has received from various countries a total of 162 MLA requests from 2007 till present. Malaysia has had many experiences in dealings with the requests received both from treaty partners and non-treaty partners. Malaysia has also made about 30 MLA requests to several countries. From our experience, some of the challenges, or rather barriers, to effective MLA that need to be ironed out and possible recommendations in enhancing cooperation are as follows –

³⁹ The Minister pursuant to section 2(1) of Act 479 issued an order on 10 July 1992 directing for the provision of Act 479 to be applied to the Treaty (Extradition (Thailand) Order 1992) and the order was published in the Gazette as P.U. (A) 269. The order came into force on 21 February 1992. Malaysia and Thailand note that the Extradition Treaty between Great Britain and Siam which is applicable to Malaysia by virtue of the Extradition (Thailand) Order 1992 [P.U. (A) 169/1992], which was signed on 4 March 1911, does not address current extradition development. Hence, both countries are currently in the process of negotiating a new extradition treaty to be entered into by both countries.

⁴⁰ Section 4 of MACMA.

- *Establishment of effective Central Authorities* – failure to identify or designate a responsible central authority to facilitate the implementation of MLA is likely to seriously impede the effectiveness of the process. Central authorities should be single entities to make it easier for other States to contact the appropriate authority for all kinds of mutual legal assistance matters.

It is critical for the central authorities to be staffed with officers who are legally trained, have developed institutional expertise and continuity in the area of mutual legal assistance for the speedy execution of the requests received from other Parties and in planning and drawing up requests as they must be accurate, up to date and widely available to those who frame or transmit mutual legal assistance requests.

- *Increasing availability and use of practical guides regarding national mutual legal assistance legal framework and practices (domestic manuals; guides for foreign authorities)* – States should adopt mechanisms to allow for the dissemination of information, regarding the law, practice and procedures for mutual legal assistance and on making requests to other States, to domestic authorities. One possible approach is to develop a procedural manual or guide for distribution to relevant law enforcement, prosecutorial, and judicial authorities to facilitate effective cooperation.

Guidelines on domestic law and procedures relating to mutual legal assistance to foreign authorities⁴¹ should be made available to foreign authorities through a variety of methods, such as, for example, publication on a website and direct transmission to law enforcement partners in other States to inform foreign authorities on the requirements that must be met to obtain assistance.

- *Reducing delay* – significant delay in the execution of a request is partly caused by delays in consideration of the request by the receiving central authority and transmission of the request to the appropriate executing authority. States should take appropriate action to ensure that requests are examined and prioritized by central authorities promptly upon receipt and are transmitted to executing authorities without delay. States should consider placing time limits upon the processing of requests by central authorities. States are encouraged to afford foreign requests the same priority as similar domestic investigations or proceedings. States should also ensure that executing agencies do not unreasonably delay the processing of requests.
- *Reviewing of treaties and legislation* – States should regularly review their treaties and laws when necessary to ensure that they keep abreast of useful developments in international mutual legal assistance practice to enable speedy assistance, for example, doing away with the dual criminality, specialty and diplomatic channels requirements.
- *Increasing training of personnel involved in the mutual legal assistance process* – lectures and presentations by central authorities as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial authorities; special workshops or seminars on a domestic, regional or multi-jurisdictional basis; introducing programmes on mutual legal assistance as part of the curriculum for law schools or continuing legal education programmes; and exchanges of personnel between central authorities of various jurisdictions;

⁴¹ AGC has published Guidelines entitled, “Obtaining Assistance From Malaysia in Criminal Case”.

- *Reducing complexity of mutual legal assistance through reform of extradition processes* – traditionally, some States did not extradite their nationals to the State in which a crime took place. At times, such States would instead seek to prosecute their nationals themselves in lieu of extradition, resulting in lengthy and complex requests for mutual legal assistance in order to obtain the necessary evidence from the country in which the crime took place. Recent increases in the number of States that either will extradite their nationals or temporarily extradite them provided that any sentence can be served in the State of their nationals, reduce the need for mutual legal assistance that would otherwise be required. States that do not extradite nationals should consider whether this approach can be reduced or eliminated. If this is not possible, the States concerned should seek to coordinate efficiently with a view to an effective domestic prosecution in lieu of extradition.
- *Ensuring confidentiality in appropriate cases* – some States are not in a position to maintain confidentiality of requests, and that the contents of requests were disclosed to the subjects of the foreign investigation/proceedings, thereby potentially prejudicing the investigation/proceedings. It was noted that confidentiality of requests was often a critical factor in the execution of requests. It was recommended that, where it is specifically requested, Requested States take appropriate measures to ensure the confidentiality of requests is maintained, and that in circumstances where it is not possible to maintain confidentiality under the law of the Requested State, the Requested State notify the Requesting State at the earliest possible opportunity, and in any case prior to the execution of the request, in order that it may decide whether it wishes to continue with the request in the absence of confidentiality.
- *Execution of requests in accordance with procedures specified by the Requesting State* – It is important to comply with formal evidentiary/admissibility requirements stipulated by the Requesting State to ensure the request achieves its purpose; failure to comply with such requirements would render it impossible to use the evidence in the proceedings in the Requesting State. This causes delay, where the requested material has to be returned to the Requested State for certification/authentication in accordance with the request. The Requested State should make every effort to achieve compliance with specified procedures and formalities to the extent that such procedures/formalities are not contrary to the domestic law of the Requested State. States are also encouraged to consider if domestic laws relating to the reception of evidence can be made more flexible to overcome problems with the use of evidence gathered in a foreign State.

VI. CONCLUSION

Effective implementation of MLA requires well trained staff in the applicable laws, principles, and practices as failure to meet the standards of requested states can greatly compromise the successful outcome of MLA requests. International corruption case proceedings take place in a complex environment where different national legal systems, including different institutions and models of investigation and prosecution provide obstacles to effective legal cooperation across borders.

The absence of uniform procedures for granting MLA results in lengthy and cumbersome procedures with no guarantee of timely and successful provision of the requested assistance. There have been some cases where pieces of evidence were finally provided long after the trial had been completed. In addition to different and sometimes incompatible transnational and national systems for police co-operation, investigation and prosecution, MLA faces

challenges of organization, efficiency and effectiveness in many developing countries. Last but not least, the outcome of MLA greatly depends on political factors affecting the decisions of the requested State, including issues of national interest and security.

APPENDIX I

Version 1.3 – November 2010

FORM AGC 2 [Section 19]

MODEL FORM FOR REQUEST TO MALAYSIA

To:

The Attorney General of Malaysia
Level 8 Attorney General's Chambers Malaysia
No. 45 Persiaran Perdana
62100 PUTRAJAYA
MALAYSIA.

(Attention: Head of the International Affairs Division)

From:

[name appropriate authority/Central Authority of requesting State]¹

Through diplomatic channels

REQUEST FOR MUTUAL ASSISTANCE IN A CRIMINAL MATTER

RE: *(insert particulars)*

INTRODUCTION

EITHER:

1. I/The office of *(name of designated authority under an operative bilateral agreement with Malaysia for mutual assistance in criminal matters)*, being the Central Authority designated by Article *(number of the relevant Article)* of the Treaty between the Government of Malaysia and the Government of *(name of requesting foreign State)* on Mutual Assistance in Criminal Matters (after this referred to as "the Treaty") to make requests for mutual assistance in criminal matters on behalf of *(name of requesting foreign State)*, and being empowered by *(state relevant provisions of empowering legislation of requesting foreign State)*

¹ Please insert the name of the Central Authority if the request is made pursuant to an operative bilateral agreement with Malaysia, which requires requests to be made by a designated Central Authority. In other cases, please insert the name of the appropriate authority.

to make requests for mutual assistance in criminal matters, present this request to the Central Authority of Malaysia.²

OR:

1. I/The office of (*describe appropriate authority, either person or office*), being an appropriate authority by virtue of (*state relevant provisions of empowering legislation of requesting foreign State*) to make requests for mutual assistance in criminal matters on behalf of (*name of requesting foreign State*), present this request to the Attorney General of Malaysia.³

AUTHORITY FOR REQUEST

EITHER:

2. This request is made under the Treaty.⁴

OR:

2. (*Name of requesting foreign State*) makes this request for assistance to be extended under the Mutual Assistance in Criminal Matters Act 2002 [*Act 621*] of Malaysia.⁵ The request is made in respect of a criminal matter within the meaning of subsection 2(1) of the Mutual Assistance in Criminal Matters Act 2002.

NATURE OF REQUEST

- 3.1 This request relates to a (*criminal matter*)⁶ concerning (*describe subject of criminal matter*).
- 3.2 The personal details of the subject of the request are as follows:

Name/Description:
Date of birth:
Age:
Occupation:
Nationality:
Passport No.

² This version may be used by a foreign State having an operative bilateral agreement for mutual assistance in criminal matters with Malaysia.

³ This version may be used by a foreign State without any operative bilateral agreement for mutual assistance in criminal matters with Malaysia.

⁴ This version may be used by a foreign State having an operative bilateral agreement for mutual assistance in criminal matters with Malaysia.

⁵ This version may be used by a foreign State without any operative bilateral agreement for mutual assistance in criminal matters with Malaysia.

⁶ State whether it is an investigation, prosecution or an ancillary criminal matter relating to the restraining of dealing with property or the enforcement or satisfaction of a foreign forfeiture order.

Address/Location:

3.3 The details of the property to be traced/restrained/forfeited are as follows⁷:

Description:

Location:

Other relevant details:

3.4 The reasons for suspecting that the person/property is in Malaysia are as follows⁸:

3.5 The authority having the conduct of the criminal matter is *(describe authority in the requesting foreign State concerned with the criminal matter)*.

STATEMENT OF FACTS

4. *(Describe the material facts of the criminal matter including, in particular, those facts necessary to establish circumstances connected to evidence sought in Malaysia and the relevance of Malaysian evidence to the criminal matter in the requesting foreign State.)*

CRIMINAL OFFENCES/APPLICABLE LEGISLATION/PENALTIES

EITHER:

5.1 *(Name of suspects/defendants)* are *(suspected of having/alleged to have)* committed/have been charged with the commission of the following offences, namely -

- *(describe offences and provisions of the legislation contravened)*

The maximum penalties for the above offences, which are the subject of this *(investigation/prosecution)* are:

- *(specify maximum penalty for each offence and applicable law)*⁹.

OR:

5.1 A foreign forfeiture order *(has been/may be)* made in proceedings in *(name of requesting foreign State)*. *(State basis for any statement that a foreign forfeiture order may be made.)*

⁷Applicable where request relates to restraint of property or enforcement of a forfeiture order.

⁸Applicable where request relates to restraint of property or enforcement of a forfeiture order.

⁹Applicable where request relates to an investigation or prosecution.

The foreign forfeiture order is connected with (*state the relevant offences*) in (*name of requesting foreign State*) the maximum penalties for which are (*specify maximum penalty for the offence and applicable law*)¹⁰.

- 5.2 A copy/extract of the relevant legislation is attached and marked as “Attachment A” to this request.

PURPOSE OF THE REQUEST

6. By this request it is intended to (*state purpose: e.g. secure admissible evidence for the purpose of the criminal proceedings against the defendants, enforce the abovementioned foreign forfeiture order, etc.*)

MANDATORY UNDERTAKINGS

- 7.1 It is confirmed that this request:

- (a) does not relate to the investigation, prosecution or punishment of a person for a criminal offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;
- (b) does not relate to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would have constituted a military offence under the laws of Malaysia which is not also an offence under the ordinary criminal law of Malaysia;
- (c) is not made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of that person’s race, religion, sex, ethnic origin, nationality or political opinions;
- (d) does not relate to the investigation, prosecution or punishment of a person for an offence in a case where the person -
 - (i) has been convicted, acquitted or pardoned by a competent court or other authority of the (*name of the requesting foreign State*); or
 - (ii) has undergone the punishment provided by the law of (*name of the requesting foreign State*),

in respect of that offence or of another offence constituted by the same act or omission as that offence;

¹⁰ Applicable where request relates to restraint of property or enforcement of a foreign forfeiture order.

- (e) does not relate to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would not have constituted an offence against the laws of Malaysia;

[(f) does not have as its primary purpose the assessment or collection of tax.]¹¹

7.2. The (*appropriate authority of the requesting foreign State*) further undertakes -

- (a) that the thing requested for will not be used for a matter other than the criminal matter in respect of which the request was made¹²;
- (b) that in the case of a request for assistance under sections 22, 23, 24, 25 and 26 or sections 35, 36, 37 and 38 of the Mutual Assistance in Criminal Matters Act 2002, to return to the Attorney General of Malaysia, upon his request, any thing obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made¹³;
- (c) that (*name of person*) who attends in (*name of requesting foreign State*) shall not -
 - (i) be detained, prosecuted or punished for any offence against the law of (*name of requesting foreign State*) that is alleged to have been committed, or that was committed, before the his/her departure from Malaysia;
 - (ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before his/her departure from Malaysia; or
 - (iii) be required to give evidence or assistance in relation to any criminal matter in (*name of requesting foreign State*) other than the criminal matter to which the request relates, unless he/she has left (*name of requesting foreign State*) or he/she has had the opportunity of leaving (*name of requesting foreign State*) and has remained in (*name of requesting foreign State*) otherwise than for the purpose of giving evidence or assistance in relation to the criminal matter to which the request relates¹⁴;
- (d) that any evidence given by (*name of person*) in the criminal proceedings to which the request relates, if any, will be inadmissible or otherwise

¹¹ Necessary only if the criminal matter is an investigation concerning offences relating to taxation and a bilateral agreement with Malaysia is in operation.

¹² Not applicable if the Attorney General consents pursuant to subsection 20(2) of the Mutual Assistance in Criminal Matters Act 2002.

¹³ Not applicable if the Attorney General consents to waive this requirement.

¹⁴ Applicable if request relates to attendance of person in requesting foreign State.

disqualified from use in the prosecution of *(name of person)* for an offence against the law of *(name of requesting foreign State)*, other than for the offence of perjury or contempt of court in relation to the giving of that evidence¹⁵;

- (e) that *(name of person)* will be returned to Malaysia in accordance with arrangements agreed to by the Attorney General of Malaysia¹⁶; and
- (f) *(such other matters as the Attorney General of Malaysia considers appropriate)*.

DESCRIPTION OF ASSISTANCE REQUESTED

8. The Attorney General of Malaysia is requested to take such steps as are necessary to give effect to the following:

- (a) examination on oath or affirmation of a witness before a Sessions Court Judge;

(e.g.) Mr. X
ABC Co., Ltd.
(address)

to be orally examined on oath or affirmation on the following matters:

- *(specify clearly the relevant issues/areas relating to the subject-matter of the criminal proceedings/investigation on which evidence of the witness is sought and/or provide a list of the relevant questions)*

Note:

This statement is to be obtained in the form of an affidavit in accordance with Form 1 attached to this request.

- (b) production of things (documents, books, etc.) before a court [and obtaining of oral evidence of the witness producing such material for the purpose of identifying and proving the material produced]¹⁷;

(e.g.) Director
ABC Co., Ltd.

¹⁵ Applicable if request relates to attendance of person in requesting foreign State.

¹⁶ Applicable if request relates to attendance of person in requesting foreign State.

¹⁷ Include this part if it is deemed necessary for the purposes of admissibility of the documents in evidence.

(address)

to be required to produce (*describe the form of evidence e.g. "certified copies"*) of the following documents for the period (*state relevant time frame*):

- (*specify documents or classes thereof*).

The above witness to be orally examined on oath or affirmation on the following matters for the purpose of identifying and proving the documents produced:

- (*state relevant particulars*).

(e.g.)

- to provide confirmation as to his position in a company/office and that he is responsible for keeping/maintaining/holding the records in relation to the subject-matter of the investigation
- that he is authorised by the relevant law of the requested foreign State to make the affidavit
- to confirm that he has access to the records kept in relation to the subject-matter of the investigation in the normal course of his duties
- to confirm the authenticity of the copies of the documents supplied
- to confirm that the documents were created in the ordinary course of business

Note:

This statement is to be obtained in the form of an attestation in accordance with Form 2 attached to this request.

- (c) search of person or premises for things;

(e.g.) The premises of ABC Co., Ltd.
(address)

to be searched under a search warrant for the seizure of the following from the company:

- *(provide details of the things sought to be searched for and seized).*
- *(support any request for originals of items seized with reasons).*

(d) production of material (documents, books, etc.) through production orders;

(e.g.) Manager
ABC Bank Ltd.
(address)

to be required to produce copies of the following documents under a production order:

- *(describe particulars of material required to be produced and where located).*
- *(state grounds for believing that the material sought is likely to be of substantial value to the criminal matter in the requesting foreign State).*
- *(support any request for the production of originals of documents with reasons).*

(e) arrangement of travel of person/prisoner from Malaysia to assist in a criminal matter;

(e.g.) Arrangements to be made for Mr. X
(address)

to travel to *(name of requesting foreign State)* to give assistance in a *(criminal matter)*¹⁸ by rendering the following assistance:

- *(specify the assistance sought).*
- *(provide the undertakings required by the law of Malaysia).*
- *(provide details of the allowances to which the person will be entitled, and of the arrangements for security and accommodation for the person, while the person is in the requesting foreign State pursuant to the request).*

(f) enforcement of a foreign forfeiture order/request to assist in the restraining of dealing in property;

¹⁸ State whether it is an investigation or criminal proceedings of an offence in the requesting foreign State or an ancillary criminal matter.

- *(state particulars of the foreign forfeiture order to be enforced, or the property to be restrained and present state of related proceedings).*
- (g) assistance in locating/identifying and locating a person who is suspected to be involved in/to have benefited from the commission of a foreign serious offence;
 - (e.g.) Arrangements to be made to locate/identify and locate Mr. X who is believed to be in Malaysia with the last known address at *(address)*.
 - *(state particulars of person concerned).*
- (h) assistance in tracing property suspected to be connected to a foreign serious offence;
 - (e.g.) Arrangements to be made to trace *(description of property)* believed to be in Malaysia.
 - *(state particulars of property concerned).*
- (i) service of process.
 - (e.g.) Mr. X
(address)

to be served with the following documents:

 - *(describe documents to be served).*
 - *(specify manner of service and period within which documents to be served).*
 - *(specify required proof of service).*

EXECUTION OF REQUEST

(A) CONFIDENTIALITY

- [9.1 It is requested that the fact that this request has been made and the execution of the request be kept entirely confidential except to the extent necessary to execute the request as *(state reasons e.g. the likelihood of interference with witnesses and /or destruction of evidence, etc.)*]¹⁹

¹⁹ Necessary if confidentiality is requested.

- [9.2 It is also requested that the evidence of the witness be taken *in camera* as there exist reasonable grounds for believing that it is in the interests of the witness to give evidence *in camera* because (*state reasons*) and the criminal matter would be substantially prejudiced if the examination was conducted in open court because (*state reasons*).]²⁰

(B) PARTICULAR PROCEDURES TO BE FOLLOWED

10. It is requested that the following procedures be observed in the execution of the request:

- (*state details of manner and form in which evidence is to be taken and transmitted to requesting foreign State, if relevant.*)

(e.g.)

In relation to the evidence obtained on examination on oath/affirmation of a witness, please provide the statement in admissible form. To be admissible, the statement must be made in the form of an affidavit except when recorded in writing by a judicial authority. If documents and records are referred to or are otherwise enclosed, the documents and records must be accompanied by an attestation of authenticity. Copies of the prescribed form for the affidavit and attestation of authenticity are attached to this request and marked as Attachment B and Attachment C respectively.

- (*state any special requirements as to certification/authentication of documents.*)

(e.g.)

In relation to evidence to be provided by affidavit-

- (a) the affidavit should be made before a judicial officer or other officer who is authorised to administer oaths or affirmations in Malaysia. When the affidavit has been sworn or affirmed, the affidavit should be sealed with an official or public seal of Malaysia to ensure compliance with (*relevant provision of applicable law of requesting foreign State*), a copy of which is attached to this request and marked as Attachment D;
- (b) if the affidavit runs for more than one page, each page other than the last should be initialed both by the person who makes the affidavit and by the person before whom the affidavit is made; and
- (c) each page of each attachment should be initialed both by the person who makes the affidavit and by the person before whom the affidavit is made.

²⁰ Applicable if the request relates to the taking of evidence before a court for the purposes of an investigation in the requesting foreign State.

- *(state if attendance by representative of appropriate authority at examination of witnesses/execution of request is required and, if so, the title of the office held by the proposed representative.)*

(e.g.)

Permission is requested for an officer of *(name of appropriate authority in requesting State)* to travel to Malaysia to assist in the execution of this request.

(C) PERIOD OF EXECUTION²¹

11. It is requested that the request be executed urgently/within *(state period giving reasons i.e. specify likely trial or hearing dates or any other dates/reasons relevant to the execution of the request).*

²¹ Section 23 of the Mutual Assistance in Criminal Matters Act 2002 prescribes a period of 7 days for the production of documents and things under a court order. Where large quantities of documents are involved, a longer period may be required.

(D) TRANSMISSION OF REQUESTED MATERIAL

12.1 Any documents, statements, information or things obtained in response to this request should be sent to *(name of appropriate authority in requesting foreign State)* at the following address:

- *(state address of appropriate authority in requesting foreign State).*
- *(state telephone, facsimile, electronic mail address).*

12.2 The *(appropriate authority in requesting foreign State)* will forward the material to *(name of requesting authority in requesting foreign State)*, being the relevant requesting authority in this matter.

(E) DETAILS OF ALLOWANCES, ARRANGEMENTS FOR SECURITY AND ACCOMMODATION²²

13.1 The allowances to which *(name of person)* will be entitled are as follows:

(State details of allowances)

13.2 The arrangements for the security of *(name of person)* are as follows:

(State details of security arrangements)

13.3 The arrangements for the accommodation of *(name of person)* are as follows:

(State details of accommodation arrangements)

LIAISON

14.1 The case officer of *(name of appropriate authority in requesting foreign State)* is:

(name of officer of appropriate authority in requesting foreign State, telephone and facsimile numbers and e-mail address)

14.2 The following Malaysian officers of *(name of appropriate authority in Malaysia)* has knowledge of this matter:

(name of officer of appropriate authority in Malaysia, telephone and facsimile numbers and e-mail addresses).

²² If the request involves a person travelling from the requested foreign State to Malaysia.

- 14.3 If permission is given for an officer of *(name of appropriate authority in requesting foreign State)* to travel to Malaysia, the officer is likely to be *((name of officer of appropriate authority in requesting foreign State))*.

SUPPLEMENTARY REQUEST

15. The *(name of appropriate authority in requesting foreign State)* may wish to make supplementary requests for assistance in this matter if necessary.

RECIPROCITY UNDERTAKING²³

16. The Government of *(name of requesting foreign State)* assures the Government of Malaysia that it would, subject to its laws, comply with a request by the Government of Malaysia to *(name of requested foreign State)* for assistance of this kind in respect of an equivalent offence.

EITHER:

17. I, _____, the *(name of appropriate authority of requesting foreign State)*, pursuant to *(relevant provision in applicable law of requesting foreign State)* and at the instance of *(name of appropriate authority in requesting foreign State)*, being satisfied that there are reasonable grounds for believing that there is evidence in Malaysia that would be relevant to an investigation/criminal proceedings in the *(name of requesting foreign State)*, make this request to the Attorney General of Malaysia for assistance in relation to this criminal matter.

OR:

17. I, *(name of person)*, an officer of the *(name of appropriate authority in requesting foreign State)*, acting in reliance on the authority of the *(name of appropriate authority in requesting foreign State)* in the exercise of the executive powers under *(relevant provision of applicable law of requesting foreign State)* to make requests to foreign States for assistance in criminal matters, and at the instance of *(name of relevant authority in requesting foreign State)*, make this request to the Attorney General of Malaysia for assistance in relation to this criminal matter.

²³ Applicable if the request is made by a foreign State without any operative bilateral agreement with Malaysia. The undertaking should be given by the appropriate authority that is authorised to give such undertaking on behalf of the requesting foreign State.

Signed by

Name: _____

Office: _____

Date: _____

APPENDIX II

FORM AGC – EX 1- A

MODEL FORM FOR EXTRADITION REQUEST TO MALAYSIA FROM TREATY PARTNER

To:

The Minister of Internal Security
Ministry of Internal Security
Level 11, Block D1 & D2
Federal Government Administrative Centre
62512 PUTRAJAYA
(Attn: Head of the Security and Public Order Division)

OR

[Name Central Authority for Malaysia designated by bilateral agreement].¹

From:

[name appropriates Central Authority designated in bilateral extradition agreement with Malaysia]

[Through diplomatic channels]

¹ Central Authority designated by treaty –

- Provisional arrest request:
 - Thailand – Ministry of Internal Security (diplomatic channel)
 - Indonesia – Inspector General of Police (diplomatic channel/direct/Interpol)
 - USA – Attorney General’s Chambers (diplomatic channel)
 - HK – Attorney General’s Chambers (direct)
 - General – Ministry of Internal Security (diplomatic channel)
- Extradition requests –
 - Thailand – Ministry of Internal Security (diplomatic channel)
 - Indonesia – Minister responsible for the administration of justice (diplomatic channel)
 - USA – Ministry of Internal Security (diplomatic channel)
 - HK – Attorney General’s Chambers – (direct)
 - General – Ministry of Internal Security (diplomatic channel)

INTRODUCTION

1. I/The office of *(name of designated authority under an operative bilateral agreement with Malaysia for extradition)*, being the Central Authority designated by Article *(number of the relevant Article)* of the Treaty between the Government of Malaysia and the Government of *(name of requesting foreign State)* on extradition (after this referred to as “the Treaty”) to make requests for extradition on behalf of *(name of requesting foreign State)*, and being empowered by *(state relevant provisions of empowering legislation of requesting foreign State)* to make requests for extradition, present this request to the Central Authority of Malaysia.¹²

AUTHORITY FOR REQUEST

2. This request is made under the Treaty.

NATURE OF REQUEST

3.1 This request for provisional arrest/extradition *(name of fugitive offender)* who is a fugitive criminal /offender * from justice / convicted person * whose surrender is being sought by *(name competent authority of requesting foreign State)* of *(name requesting foreign State)*. The subject is a person who is believed to be presently in Malaysia at *(provide particulars of address/location of subject as available)*.

3.2 The personal details of the subject are as follows:

Name/ Description:
(including aliases)

Date of Birth:

Age :

Occupation :

Nationality:

National Identity Card No:

Passport No:

Address/Location:

.....

.....

Other relevant details:
(e.g. height/eye color/particulars of Interpol Red Notice)³

* *Delete which ever is not applicable*

² Insert if diplomatic channels required by bilateral agreement with Malaysia.

³ Attach copies of relevant documents, e.g. passport, photograph, set of fingerprints, Interpol Red Notice.

3.3 The reasons for suspecting that the person is in Malaysia are as follows:

(provide particulars)

3.4 The authority having conduct of this matter is (describe authority in the requesting foreign State concerned)

Intention to request the surrender of the person⁴

4. The Government of (*name of requesting State*) intends to request the surrender of (*the subject*) in accordance with (*number of relevant Article*) of the Treaty and shall submit the required documents in support of a formal request for his surrender within (*specify period provided in Treaty*) / within the period required by the Malaysian authority pursuant to this request.

5. A statement of the existence of a warrant of arrest.⁵

5.1 On (*specify date*), a (*specify competent authority e.g. Judge/Magistrate/Judicial Authority*) in and for (*name of requesting foreign State*) issued a warrant for the arrest of the subject. The warrant specified that (*the subject*) is wanted for a charge of (*provide particulars of offence and provisions of relevant applicable law*).

5.2 The warrant of arrest remains in full force and effect. A copy of the warrant of arrest is at **Annex “_”** and the proposed charges at **Annex “_”**.

Description of the offences and a statement of sentence.

6.1 The subject is wanted for (*provide details of offences and provisions of relevant applicable of law*).

6.2 A person, who commits the offence of (*provide details of offences and provisions of relevant applicable of law*) is liable on conviction to (*specify maximum applicable penalty*).

6.3 There is a/is no * time limitation for the prosecution of the said offence.

6.4 The particulars of the offence are set out in **Annex “_”**.

6.5 A copy/ extract of the relevant legislation is at **Annex “_”**

⁴ Applicable if initial request is for provisional arrest.

⁵ Applicable if initial request is for provisional arrest.

The facts of the case

7. Provide brief summary of the facts of the case.

** Delete which ever is not applicable*

SUPPORTING DOCUMENTS

8. The supporting documents for this request for provisional arrest/ extradition* comprise –
- (a) *(specify supporting documents prescribed in bilateral extradition agreement with Malaysia).*
 - (b) *(specify any additional document available)*

E.g.

The supporting documents comprise a true copy of the relevant warrant of arrest for the subject and original affirmations/affidavits of witnesses made in the *(name of competent authority)* in the requesting foreign State and duly authenticated by *(name of authorized officer)* in the *(Central Authority)* of the requesting foreign State, a competent authority of the requesting foreign State.

DECLARATIONS.

9. For the purpose of *(relevant Article of the Treaty)*, I declare that – *(insert declaration required by bilateral agreement with Malaysia.)*

E.g.

I declare that:

- (1) each of the offences in respect of which the surrender of the subject is requested is not an offence of a political character;
- (2) the surrender of the subject is not for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;

- (3) the subject will not, if surrendered, be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

For the purpose of *(relevant Article)* of the Treaty I declare that, if the subject is surrendered to *(name of requesting foreign State)* by Malaysia, he will not, unless he has first had the opportunity to leave *(name of requesting foreign State)* and has not do so within *(specify period provided by bilateral agreement with Malaysia if any)* of having been free to do so or he has volunteered by returning to *(name of requesting foreign State)* be proceeded against, sentenced or kept in custody for any offence committed prior to his surrender to *(name of requesting foreign State)* other than:

- (1) the offence or offences in respect of which his surrender is ordered; or
- (2) any lesser offence, however describe, disclosed by the facts in respect of which his surrender was ordered provided that such an offence is an offence for which the subject can be surrendered under Treaty.
- (3) any other offence being an offence for which surrender may be ordered under the agreement and in respect of which the Government of Malaysia consents.

For the purpose of *(relevant Article of the Treaty is surrendered)* to *(name of requesting foreign State)*, he will not be surrendered to any other jurisdiction for any offence committed before his surrender unless the Government of Malaysia consents to such surrender or he has first had an opportunity to leave *(name of requesting foreign State)* and has not done so within *(specify period provided in bilateral Agreement with Malaysia)* and having been free to do so, or he has volunteered by returning to *(name for requesting foreign State)* having first left.

10. I, , the *(name of appropriate authority of Requesting foreign State)*, pursuant to *(relevant provision in applicable law of requesting foreign State)* and the instance of *(name of appropriate authority in requesting foreign State)*, being satisfied that there are reasonable grounds for believing that the subject is in Malaysia make this request to *(name of requested State)* for the provisional arrest/extradition of the subject.

Urgency

(Please specify the reason/s for urgency if any)

11. Liaison

11.1. The case officer of *(name of appropriate authority in requesting foreign State)* is:

(name of officer of appropriate authority in requesting foreign State, telephone, and facsimile numbers and e-mail address)

11.2 The following Malaysian officer of *(name of appropriate authority in Malaysia)* has knowledge of this matter:

(name of officer of appropriate authority in Malaysia, telephone, and facsimile numbers and e-mail address)

Signed by:

Name :

Office :

Date :

c.c. NCB/Interpol/Royal Malaysian Police

OR

IN WITNESS WHEREOF is set the official seal of *(state name of the office making request)* of *(name of requesting foreign State)* and my signature.

This day of 2005.

(Seal)

.....
(Name)
(Office)

APPENDIX III

FORM AGC – EX 1- B

MODEL FORM FOR EXTRADITION TO MALAYSIA

To:

The Minister of Home Affairs
Ministry of Home Affairs
Level 11, Block D1 & D2
Federal Government Administrative Centre
62512 PUTRAJAYA

OR

[Name Central Authority for Malaysia designated by bilateral agreement].¹

From:

[name appropriate Central Authority designated in bilateral extradition agreement with Malaysia]

[Through diplomatic channels]

INTRODUCTION

1. I/The office of *(name of designated authority under an operative bilateral agreement with Malaysia for extradition)*, being the Central Authority designated by Article *(number of the relevant Article)* of the Treaty between the Government of Malaysia and the Government of *(name of requesting foreign State)* on extradition (after this referred to as “the Treaty”) to make requests for extradition on behalf of *(name of requesting foreign State)*, and being empowered by *(state relevant provisions of empowering legislation of requesting foreign State)* to make requests for extradition, present this request to the Central Authority of Malaysia.

¹ Central Authority designated by treaty –

- Extradition requests –
 - Thailand – Ministry of Home Affairs (diplomatic channel)
 - Indonesia – Minister of Justice (diplomatic channel)
 - USA – United States Department of Justice (diplomatic channel)
 - HK – Attorney General’s Chambers – (direct)
 - Australia - Attorney General’s Chambers (diplomatic channel)
 - India – Ministry of External Affairs (diplomatic channel)
 - General – Ministry of Home Affairs (diplomatic channel)

AUTHORITY FOR REQUEST

2. This request is made under the Treaty.

NATURE OF REQUEST

- 3.1 This request for extradition of (*name of fugitive offender*) who is a fugitive criminal / offender * from justice / convicted person * whose surrender is being sought by (*name competent authority of requesting foreign State*) of (*name requesting foreign State*). The fugitive criminal / offender * is a person who is believed to be presently in Malaysia at (*provide particulars of address/location of subject as available*).
- 3.2 The personal details of the fugitive criminal / offender * are as follows:

Name/ Description:
(*including aliases*)

Date of Birth:

Age :

Occupation :

Nationality:

National Identity Card No:

Passport No:

Address/Location:
.....
.....

Other relevant details:
(e.g. height/eye color/particulars of Interpol Red Notice)³

* *Delete which ever is not applicable*

- 3.3 The reasons for suspecting that the person is in Malaysia are as follows:

(provide particulars)

- 3.4 The authority having conduct of this matter is (*describe authority in the requesting foreign State concerned*)

³ Attach copies of relevant documents, e.g. passport, photograph, set of fingerprints, Interpol Red Notice.

REQUEST FOR THE EXTRADITION OF THE FUGITIVE CRIMINAL / OFFENDER*

4. The Government of *(name of requesting State)* now makes a request for the extradition of *(name of fugitive criminal / offender *)*, in accordance with Article *(number of the relevant Article)* of the Treaty and submits herewith the required documents in support of a formal request for his surrender.

A STATEMENT OF THE EXISTENCE OF A WARRANT OF ARREST

- 5.1 On *(specify date)*, a *(specify competent authority e.g. Judge/Magistrate/Judicial Authority)* in and for *(name of requesting foreign State)* issued a warrant for the arrest of the fugitive criminal / offender *. The warrant specified that *(fugitive criminal / offender*)* is wanted for a charge of *(provide particulars of offence and provisions of relevant applicable law)*.
- 5.2 The warrant of arrest remains in full force and effect. A copy of the warrant of arrest is at **Annex “_”** and the proposed charges at **Annex “_”**.

DESCRIPTION OF THE OFFENCES AND A STATEMENT OF SENTENCE

- 6.1 The fugitive criminal / offender * is wanted for *(provide details of offences and provisions of relevant applicable of law)*.
- 6.2 A person, who commits the offence of *(provide details of offences and provisions of relevant applicable of law)* is liable on conviction to *(specify maximum applicable penalty)*.
- 6.3 There is a/is no * time limitation for the prosecution of the said offence.
- 6.4 The particulars of the offence are set out in **Annex “_”**.
- 6.5 A copy/ extract of the relevant legislation is at **Annex “_”**

** Delete which ever is not applicable*

THE FACTS OF THE CASE

7. (Provide brief summary of the facts of the case)

SUPPORTING DOCUMENTS

8. The supporting documents for this request for extradition comprise –

- (a) *(specify supporting documents prescribed in bilateral extradition agreement with Malaysia).*
- (b) *(specify any additional document available)*

E.g.

The supporting documents comprise a true copy of the relevant warrant of arrest for the subject and original affirmations/affidavits of witnesses made in the *(name of competent authority)* in the requesting foreign State and duly authenticated by *(name of authorized officer)* in the *(Central Authority)* of the requesting foreign State, a competent authority of the requesting foreign State.

DECLARATIONS

9. For the purpose of *(relevant Article of the Treaty)*, I declare that – *(insert declaration required by bilateral agreement with Malaysia.)*

E.g.

I declare that:

- (1) each of the offences in respect of which the surrender of the fugitive criminal / offender * is requested is not an offence of a political character;
- (2) the surrender of the fugitive criminal / offender * is not for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;
- (3) the fugitive criminal / offender * will not, if surrendered, be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.
- (4) the prosecution of which his return is sought is not barred by time according to the law of *(name of requesting foreign state)*;
- (5) each of the offences in respect of which the surrender of the subject is requested is not an offence under military law.

For the purpose of *(relevant Article)* of the Treaty I declare that, if the fugitive criminal / offender * is surrendered to *(name of requesting foreign State)* by Malaysia, he will not, unless he has first had the opportunity to leave *(name of requesting foreign State)* and has not do so within *(specify period provided by bilateral agreement with Malaysia if any)* of having been free

to do so or he has volunteered by returning to *(name of requesting foreign State)* be proceeded against, sentenced or kept in custody for any offence committed prior to his surrender to *(name of requesting foreign State)* other than:

- (1) the offence or offences in respect of which his surrender is ordered; or
- (2) any lesser offence, however describe, disclosed by the facts in respect of which his surrender was ordered provided that such an offence is an offence for which the subject can be surrendered under Treaty.
- (3) any other offence being an offence for which surrender may be ordered under the agreement and in respect of which the Government of Malaysia consents.

For the purpose of *(relevant Article of the Treaty is surrendered)* to *(name of requesting foreign State)*, he will not be surrendered to any other jurisdiction for any offence committed before his surrender unless the Government of Malaysia consents to such surrender or he has first had an opportunity to leave *(name of requesting foreign State)* and has not done so within *(specify period provided in bilateral Agreement with Malaysia)* and having been free to do so, or he has volunteered by returning to *(name for requesting foreign State)* having first left.

10. I, , the *(name of appropriate authority of Requesting foreign State)*, pursuant to *(relevant provision in applicable law of requesting foreign State)* and the instance of *(name of appropriate authority in requesting foreign State)*, being satisfied that there are reasonable grounds for believing that the subject is in Malaysia make this request to *(name of requested State)* for the extradition of the fugitive criminal / offender *.

URGENCY

(Please specify the reason/s for urgency if any)

LIAISON

- 11.1. The case officer of *(name of appropriate authority in requesting foreign State)* is:

(name of officer of appropriate authority in requesting foreign State, telephone, and facsimile numbers and e-mail address)

- 11.2 The following Malaysian officer of *(name of appropriate authority in Malaysia)* has knowledge of this matter:

(name of officer of appropriate authority in Malaysia, telephone, and facsimile numbers and e-mail address)

Signed by:

Name :

Office :

Date :

OR

IN WITNESS WHEREOF is set the official seal of (*state name of the office making request*) of (*name of requesting foreign State*) and my signature.

This day of..... 20 .

(Seal)

.....
(Name)
(Office)

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Roziza Sidek**

I. INTRODUCTION

Since the inception of the anti-corruption laws in Malaysia, vis-à-vis the Prevention of Corruption Act 1961 and the creation of the Anti-Corruption Agency, Malaysia has witnessed rapid economic development and its establishment as a major financial hub in the region. With this development, the crime of corruption has also grown in substance and complexity. We have also realized that corruption forms an integral part of other organized and serious fraud crimes.

Many corrupt activities have transformed into cross-border crimes. Criminals are also able to escape justice by speedily moving around to different places, taking advantage of the convenience of rapid modern-day travel. In the face of this challenge of hi-tech and internationalized corrupt activities, how to tackle cross-border corruption has become an important issue among law enforcement agencies worldwide.

The Malaysian Anti-Corruption Commission (MACC) has moved with the times and paid serious attention to the need for international cooperation in fighting corruption and organized crime. Our strategy in this respect focuses on three areas: Mutual Legal Assistance, Informal Assistance and Enforcement Officers' Training.

II. INTERNATIONAL COOPERATION

A. Enforcement Officers' Training

In order to strengthen investigation strategies among anti-corruption agencies in the Asia-Pacific Region, MACC, through its training academy, has organized regional anti-corruption training programmes at the Malaysian Anti Corruption Academy (MACA). At these training programmes, anti-corruption professionals from the region exchange information and ideas about the fight against corruption, evaluate existing strategies and develop new approaches towards detecting and fighting corruption.

B. Informal Assistance

Informal assistance remains an invaluable tool in international cooperation in the fight against corruption. Less formalized, its strength lies in networking and information exchange among enforcement officers. To that end, MACC has relied on informal assistance provided to us by KPK (Indonesia), CPIB (Singapore) and ICAC (Hong Kong) in its detection and investigation of certain individuals. With their timely assistance, we have subsequently embarked on and completed our investigation of these individuals.

* Deputy Public Prosecutor, Malaysian Anti Corruption Commission.

MACC believes that as long as care is taken to gather information lawfully, with due regard to its future use as evidence, and as long as the authorities in both jurisdictions are informed, informal cooperation along these lines can be followed-up through formal channels by ensuring that requests are well documented. Platforms of this nature should serve as an ideal set up for us to not only socialize but to network and exchange information on matters that would eventually assist in the detection, investigation and prosecution of corruptors and their ill-gotten proceeds.

It must be borne in mind that the effectiveness of informal and to a lesser extent formal cooperation largely depends on trust which, in turn, develops through familiarity, working relationships and mutual respect for the informal rules of cooperation, such as confidentiality and reciprocity.

C. Mutual Legal Assistance

Quite a number of cases investigated these days by MACC involve a cross-border element: either where the suspects had absconded or they had transferred their ill-gotten gains to places outside the territory or where the act of corruption is a collaboration of different nationals from different regions.

Ever since we have witnessed the increase of cross-border corruption, we have naturally relied on assistance and information from Interpol and other overseas law enforcement agencies in providing vital information about fugitive offenders, asset tracing information in relation to corrupt public officials and individuals, and in detecting joint collaboration from different nationals in acts of corruption or conspiracies to commit acts of corruption on Malaysian soil.

This assistance that we have received was as a result of formalized mutual-assistance treaties entered into by the Government of Malaysia with other governments and through informal assistance with anti-corruption agencies worldwide.

1. The Mechanism in which Mutual Legal Assistance and Extradition Can Be Rendered

In the area of formalized assistance, The Mutual Assistance in Criminal Matters Act 2002 [Act 621] of Malaysia provides the backdrop for mutual assistance in criminal matters. Since the coming into effect of this Act, Malaysia has embarked on Mutual Legal Assistance Treaties with various countries to enhance their mutual legal assistance. Substantive and procedural requirements for extradition are set forth in the Extradition Act 1992 (Act 479).

2. Agencies and Organizations Responsible For These Matters

The Central Authority responsible for matters pertaining to MLA requests is the Attorney General's Chambers of Malaysia whereas MACC is the specialized organization in Malaysia to combat corruption. Thus, for the purpose of rendering MLA requests, or handling such requests, MACC liaises closely with the International Affairs Division (IAD) of the Attorney General's Chambers.

The work process for MLA in MACC can be summarized as follows.

- (i) For outgoing requests, the requesting officer submits requests for foreign assistance to the special unit at MACC known as the "Management Foreign Mutual Assistance in Criminal

Matters (MACMA) Branch". The authorized officer from the MACMA Branch studies the request and then drafts the MLA. The draft MLA will then be forwarded to the Central Authority for its perusal and discussion. After that, MACC then waits for the response from the Central Authority on the outcome of the request. Once the outcome has been received, the MACMA Branch prepares the full report on the result of the request and sends the report to the requesting officer (usually the investigating officer).

However, there still remain challenges for outgoing requests. These challenges sometimes impede investigation or subsequent prosecution of corrupt practices. Among the challenges faced are delay or failure to respond to queries by MACC and delay in execution of requests by law enforcement agencies, banks, etc. – for example, compliance with production orders.

(ii) For incoming requests, once the MACMA Branch receives the official request from the Central Authority, the MACMA Branch executes the assistance and submits the result of the request to the Central Authority.

For the extradition process, once the MACMA Branch receives the application for extradition, the authorized officer will discuss the matter with the Central Authority in order to obtain its consent. If consent is given, the MACMA Branch will then handle the matter either by transporting the suspect to/from Malaysia.

III. THE MACC EXPERIENCE TO SPEED UP THE PROCESS

There is a broad consensus among the law enforcement authorities that proactive use of informal channels and alternative mechanisms for cooperation can complement, and often substitute for, formal MLA procedures, particularly during the early stages of investigations. Many of the requests by MACC for assistance on routine, non-coercive measures are dealt with through informal channels, such as gathering information from public records, contacting potential witnesses to determine availability and taking voluntary statements. Mutual legal assistance would then be used primarily for measures that would require the direct participation of law enforcement authorities during the investigation (such as the interviewing of involuntary witnesses, interviewing suspects under caution, obtaining bank and financial information, and search and seizure requests), and preventive and ultimately coercive measures.

IV. SUCCESS STORY

By virtue of the bilateral agreement entered into between MACC and the Anti Corruption Bureau (ACB) in Brunei Darussalam, both agencies have agreed to mutually assist each other in respect of operational matters, by forming an "Operational Working Group". This working group committee has garnered a lot of success in combating corruption between the two countries in respect of investigation, as well as intelligence work, since its establishment in 2003.

For instance, MACC has made a request to obtain several copies of documents from the Brunei Customs Department and to record a statement from a Brunei Customs Department Officer which was linked to the investigation conducted by MACC. Through this committee, MACC has received responses from the ACB, Brunei Darussalam in less than two weeks, and this enabled the case to be concluded on schedule.

V. MEASURES TO ENHANCE INTERNATIONAL COORDINATION

1. The United Nations Convention Against Corruption (UNCAC)

Article 46(1) of UNCAC calls on States Parties “to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.” The convention promotes and facilitates this cooperation by strengthening key elements of the existing international arrangements. Furthermore, there should be strong incentives for countries to collaborate, since all countries are both requesting and requested parties. However, implementation is still lagging, and there remains room for improvement in the provision of mutual legal assistance in support of asset recovery. Malaysia, has not only ratified the Convention but is currently reviewing the implementation of Chapters III and IV of the Convention.

2. The International Association of Anti Corruption Authorities (IAACA)

MACC’s commitment towards international assistance also lies in the role it has placed in the founding of the International Association of Anti Corruption Authorities (IAACA), where one of its objectives is to push forward international cooperation against corruption. The IAACA has successfully organized a series of events in an effort to push forward international cooperation against corruption.

3. The South East Asia Parties against Corruption (SEA-PAC)

Law enforcement cooperation which includes the exchange of information and coordination of certain investigations is pursued through the membership and participation of MACC in the South East Asia Parties against Corruption (SEA-PAC). MACC works closely with its counterparts: for instance, MACC has conducted joint investigations with the ACB, Brunei Darussalam.

VI. CONCLUSION

The presence of, and the participation in, this seminar is testament that the international community has realized that international cooperation is a strategy in any country’s effort in fighting corruption. It is not a luxury anymore but an integral part in the exploration of new strategies and collaboration in the fight against ever-increasing cross-border corruption. It is hoped that these concerted efforts can be further consolidated and enhanced.

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION IN MYANMAR

*Htu Htu Ngwe**

I. INTRODUCTION

Myanmar acceded to the Convention against Transnational Organized Crime on 31 March 2004. In this Convention, Mutual Legal Assistance (MLA) and Extradition are important provisions for the state parties. To be in line with and to implement the provision of MLA, Myanmar enacted ‘The Mutual Assistance in Criminal Matters Law’ on 28 April 2004 and promulgated the Mutual Assistance in Criminal Matters Rules on 14 October 2004.

Section 5 of said law provided that the Government shall form the Central Authority for rendering assistance among States in criminal matters, comprising the following persons;

- (a) Minister, Ministry of Home Affairs, Chairman
- (b) Deputy Minister, Ministry of Home Affairs, Vice Chairman
- (c) Deputy Minister, Ministry of Foreign Affairs, Member
- (d) Deputy Minister, Ministry of Finance and Revenue, Member
- (e) Deputy Minister, Ministry of Immigration and Population, Member
- (f) Deputy Chief Justice, Member
- (g) Deputy Attorney General, Member
- (h) A Representative from the Ministry of Defense, Member
- (i) Director General, General Administration Department, Member
- (j) Director General, Myanmar Police Force, Secretary
- (k) Chief of Police, General Staff Myanmar Police Force, Joint Secretary

The functions and duties of the Central Authority are mentioned in Section 6 as follows:

- (a) Granting or refusing to provide assistance after scrutiny of the request;
- (b) Giving opinions to the Government with respect to entering into agreements between States on mutual assistance in criminal matters;

* Director, Union Attorney General’s Office, Myanmar.

- (c) Laying down necessary training programmes for personnel from relevant departments and organizations for enhancement of skill and technology in implementation of this law;
- (d) Liaising and coordinating, as may be necessary, if requested issue is also involved with another State;
- (e) Coordinating with the relevant government departments, organizations and persons in respect of the requested issue;
- (f) Informing the relevant government department and organization to carry out matters related to the request and handing over the performances of the relevant government department and organization to the Requesting State;
- (g) Requesting and obtaining assistance from a foreign State in criminal matters.

Therefore, the Central Authority is the main responsible agency and organization for MLA Matters.

1. The conditions and requirements to request MLA in Myanmar regarding with necessity of a treaty basis, the procedure to be followed by a requesting state, assurance of reciprocity, and dual criminality are mentioned in the relevant provisions.

Section 2 of the Law mentioned that this law shall apply to providing assistance in criminal proceedings with States parties to an international convention or regional agreement to which the Union of Myanmar is a State party or with the State that has entered into bilateral agreement or with the State that will provide reciprocal assistance though not a State party to the international convention or regional agreement or bilateral agreement with respect to investigation, prosecution and judicial proceedings in criminal matters.

Concerning the necessity of a treaty basis, the States parties to an international convention or regional agreement or bilateral agreement to which Myanmar is a State party shall be provided MLA.

If the State is not a party to the above-mentioned agreements, MLA will be provided upon the assurance of reciprocity.

Regarding dual criminality, Section 3(a) provides that Offence means the offence, punishable with imprisonment for a term of one year and above under any existing law. The imprisonment for a term of one year and above under the law of any requesting foreign State;

2. The scope of offences for which MLA can be granted has no classification of offences. But the request may be refused under Section 18 of the law. The severity of offences is punishable with imprisonment for a term of one year and above under any existing law.

3. Available types of assistance are provided in Section 11. Any foreign State may, in making a request under Section 10, with respect to investigation, prosecution and judicial proceedings in criminal matters, include and request the following matters:

- (a) Taking evidence or a statement from any person;

- (b) Rendering service so that judicial documents shall have effect;
- (c) Examining objects and sites;
- (d) Identifying or tracing money or property to be used for evidentiary purposes relevant to the offence;
- (e) Executing searches, seizures, control, issuing restraining orders and confiscation of exhibits;
- (f) Obtaining information, documents to be used for evidentiary purposes, records and expert opinions;
- (g) Providing originals or certified copies of relevant documents and records to be used for evidentiary purposes;
- (h) Exposing the residential address of an offender, location of the exhibit and other necessary information;
- (i) Other matters in respect of which the Central Authority has agreed to give assistance.

4. Grounds for refusal of MLA are provided in Section 18. The Central Authority shall not refuse the request of any foreign State on the ground that it is a bank or on the ground of financial-institution secrecy. Provided that if it is found on scrutiny that it infringes one of the following facts, the request may be refused in whole or in part:

- (a) Not being in conformity with the stipulations of this Law;
- (b) Encroaching on the sovereignty of the State, its security prevalence of law and order or public interests;
- (c) There being cause to believe that the race, sex, religion, nationality, ethnic origin, political opinion or personal stand of any individual is encroached;
- (d) There being a prohibition of conducting investigation, prosecution and judicial proceedings of an offence similar to the offence requested, under the existing law of the Union of Myanmar;
- (e) Being an offence of military nature actionable under the Defence Services Act, 1959;
- (f) The subject matter relating to the request being contrary to the laws of Myanmar;
- (g) Being a request incidental to matters reserved in an international convention to which the Union of Myanmar is a State Party.

5. Confidentiality of the request and provided information regarding Section 22 of the Law, the Central Authority shall:

- (a) if there are matters that are to be kept confidential among the information and evidence to be sent by one's own State with respect to matters that are given assistance by the Union of Myanmar, inform the Requesting State to keep the same confidential;
 - (b) if there is no intention of handing over documents, records or property in their entirety to the Requesting State, mention to return the same without delay to the Union of Myanmar after completing performance of the request.
6. The internal procedure for requesting MLA is concerned with Section 10 of the Law, and any foreign State requesting assistance of Myanmar in criminal matters shall:
- (a) if it is the State Party to the international convention or regional agreement to which the Union of Myanmar is a State Party or the State which has bilateral agreement with the Union of Myanmar, request assistance directly from the Central Authority;
 - (b) if it is the State Party to the international convention or regional agreement to which the Union of Myanmar is not a State Party or the State that has not entered into bilateral agreement with the Union of Myanmar, request assistance from the Central Authority through diplomatic channels.

In the Mutual Assistance in Criminal Matters Rules, the request form was mentioned and is called Form-1. (This form is mentioned in Annex-1)

7. Other informal methods of law enforcement cooperation are provided in Section 13 of the Law. The requesting State may, in urgent circumstances, make a request orally by telephone, facsimile, electronic mail or other electronic means including computer networks. In making such requests, the original letter of request shall be sent to the Central Authority without delay.

8. Regarding Mutual Legal Assistance, Myanmar is a State Party to the Convention Against Transnational Organized Crime and the Treaty on Mutual Legal Assistance in Criminal Matters (MLAT). Myanmar has only concluded a bilateral agreement with India on this matter. In most of the ASEAN countries, the focal points of MLA are Offices of the Attorney General, but in Myanmar, the Central Authority was established and led by the Minister of Home Affairs. Most of the MLA requests were carried out in informal ways between Myanmar and China, Myanmar and Thailand.

9. Regarding extradition, Myanmar enacted the Extradition Act in 1903 which still exists but does not apply in practice. It is not in line with the current situation, and we are trying to promulgate a new law for extradition. At present, Myanmar has not concluded any bilateral agreement between other States. Therefore, we have no presentation on extradition.

II. CONCLUSION

In conclusion, as a member of the United Nations, ASEAN and other international and regional organizations, Myanmar is actively taking part in Mutual Legal Assistance with other countries, especially with neighboring countries.

INTERNATIONAL COOPERATION: EXTRADITION AND MUTUAL LEGAL ASSISTANCE

*Manuel T. Soriano, Jr.**

I. INTRODUCTION

Our Constitution declares that the Philippines adheres to the policy of cooperation with all nations.¹ This cooperation necessarily includes assistance in other countries' fights against corruption, subject to Philippine domestic laws, treaty obligations and generally accepted principles of international law. Like most countries, the Philippines abhors corruption because of its devastating effect on the social and economic development of nations and their people. As stressed in the *Rationale* of this seminar, "Corruption destroys nations. It undermines democracy and the rule of law, distorts business activities and competition, and hinders sustainable development and prosperity. It is also a threat to the security of societies as it creates environments in which organized crime, terrorism, and other forms of unlawful activity may prosper." The Philippines is committed to do its part in the fight against this common enemy of nations, and has entered into several extradition and mutual legal assistance treaties for that purpose. This paper will tackle the Philippine mechanism and procedures concerning extradition and mutual legal assistance. It is hoped that this simple presentation will give my fellow participants an opportunity to compare their systems and practices with ours in the Philippines.

To be sure, participation in international seminars, such as this, helps us keep abreast of developments in the international arena and provides us with the essential opportunity to learn from our peers and share good practices. I thus look forward to the presentations of my fellow participants in order to have an opportunity to gain broader understanding of their respective systems on extradition and mutual legal assistance which I can bring to my country.

II. LEGAL AND INSTITUTIONAL FRAMEWORK FOR EXTRADITION AND MUTUAL LEGAL ASSISTANCE

A. Agencies Involved

Before introducing mechanism and procedures relative to extradition and mutual legal assistance, it may be worth mentioning and describing certain government agencies in the Philippines which have roles in the matters under consideration. These agencies are the Office of the Ombudsman, the Department of Justice, the Department of Foreign Affairs, and the Anti-Money Laundering Council.

1. Office of the Ombudsman

The Office of the Ombudsman is an independent constitutional body mandated to fight and prevent corruption. It is headed by an Ombudsman who has, among others, the power to investigate and prosecute, on his/her own or on complaint by any person, any act or omission

* Acting Director, Prosecution Bureau III, Office of the Special Prosecutor, Office of the Ombudsman, Philippines.

¹ Article II, Section 2.

of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient.² The Office of the Ombudsman may request assistance and information from any government agency in the Philippines.

According to the Philippine Notification relative to the ratification of the United Nations Convention against Corruption (UNCAC), the Office of the Ombudsman, in the absence of a bilateral treaty, serves as the Central Authority for mutual legal assistance. Should there be a bilateral treaty between a state party to the UNCAC and the Philippines, it is the Department of Justice that functions as the Central Authority which shall have the power to receive requests for execution or transmittal to competent authorities.

2. Department of Justice

The Department of Justice (DOJ) investigates and prosecutes criminal offenders through the National Bureau of Investigation³ and the National Prosecution Service, respectively.⁴ The Department serves as the Philippine Central Authority for extradition and mutual legal assistance on criminal matters and represents treaty partners before Philippine courts.⁵

3. Department of Foreign Affairs

The Department of Foreign Affairs is the prime agency of government responsible for the pursuit and implementation of the Philippine foreign policy. It pursues bilateral, regional and multilateral relations with other states or governments to advance the interests of the Philippines and the Filipinos.

4. Anti-Money Laundering Council

The Anti-Money Laundering Council is the Philippines' Financial Intelligence Unit. Among its functions are to: (i) institute civil forfeiture proceedings through the Office of the Solicitor General; (ii) cause the filing of complaints with the Department of Justice or the Ombudsman for the prosecution of money laundering offenses; and (iii) investigate money laundering activities and other violations of the Anti-Money Laundering Act.⁶

B. The Philippine Extradition Law⁷

1. Concept of Extradition

Extradition is defined in the law as “the removal of an accused from the Philippines with the object of placing him at the disposal of foreign countries to enable the requesting state or government to hold him in connection with any criminal investigation directed against him or the execution of a penalty imposed on him under the penal or criminal law of the requesting state or government.”⁸ It has been characterized as the right of a foreign power, created by treaty, to demand the surrender of one accused or convicted of a crime within its territorial jurisdiction, and the correlative duty of the other state to surrender him to the demanding state. It is not a criminal proceeding. Even if the potential extraditee is a criminal, an extradition proceeding is not by its nature criminal, for it is not punishment for a crime, even though such punishment may follow extradition. It is *sui generis*, tracing its existence wholly to

²Republic Act No. 6770 (The Ombudsman Act of 1989).

³ <http://www.doj.gov.ph/vision-mission-and-mandate.html>.

⁴ <http://www.doj.gov.ph/vision-mission-and-mandate.html>.

⁵ Id.

⁶ <http://www.amlc.gov.ph/amlc.html>.

⁷ Presidential Decree No. 1069, entitled “Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country.”

⁸ Sec. 2(a), PD 1069.

treaty obligations between different nations. It is not a trial to determine the guilt or innocence of the potential extraditee. Nor is it a full-blown civil action, but one that is merely administrative in character. Its object is to prevent the escape of a person accused or convicted of a crime and to secure his return to the state from which he fled, for the purpose of trial or punishment.⁹

2. Basis and Purpose

Extradition may be granted only pursuant to a treaty or convention.¹⁰ In the Philippines, for a treaty to be valid and effective, the same must be concurred in, or ratified by, at least 2/3 of all the members of the Senate,¹¹ that is, at least 16 out of 24 Senators.¹² At present, the Philippines has extradition treaties with 13 countries, namely, Indonesia,¹³ Thailand,¹⁴ Australia,¹⁵ Canada,¹⁶ Switzerland,¹⁷ South Korea,¹⁸ Micronesia,¹⁹ the United States of America,²⁰ Hong Kong,²¹ Spain, India, China, and the United Kingdom.²²

Extradition may be requested for the following purposes: (i) criminal investigation instituted by authorities of the requesting state or government charging the accused with an offense punishable under the laws both of the requesting state and the Republic of the Philippines by imprisonment or other form of deprivation of liberty for a period stipulated in the relevant extradition treaty or convention; or (ii) execution of the prison sentence imposed by a court of the requesting state, with such duration as that stipulated in the relevant extradition treaty or convention, to be served within the territorial jurisdiction of the requesting state.²³

The general conditions for extradition are set forth in the Extradition Law, while the specific minimum requirements as well as the mandatory and discretionary grounds for refusing a request for extradition are provided for in existing treaties.²⁴

Under existing treaties, extradition of a Filipino national is one of the discretionary grounds for refusing a request for extradition, with the exception of the treaties of the Philippines with India, the United Kingdom and the United States of America, which contain

⁹*Govt. of Hong Kong, represented by the Phil. Dept. of Justice vs. Hon. Felixberto Olalia Jr., et al., G.R. No. 153675, April 9, 2007, jurisprudence cited in the case omitted here.*

¹⁰ Sec. 3, PD 1069.

¹¹The Philippine Congress, which is the Legislative Department of the government, is composed of two (2) chambers, the Lower House (House of Representatives) and the Upper House (Senate).

¹²Sec. 21, Art. VII, Philippine Constitution.

¹³ Date of Entry into Force: October 25, 1976.

¹⁴ Date of Entry into Force: December 7, 1984.

¹⁵ Date of Entry into Force: January 18, 1991.

¹⁶ Date of Entry into Force: November 12, 1990.

¹⁷ Date of Entry into Force: February 23, 1997.

¹⁸ Date of Entry into Force: November 30, 1996.

¹⁹Based on the records of the Department of Foreign Affairs of the Philippines, the treaty between the Philippines and Micronesia has not entered into force. No file found (Note Verbale on notification of completion of the requirements) on its entry into force.

²⁰ Date of Entry into Force: November 22, 1996.

²¹ Date of Entry into Force: June 20, 1997.

²²Philippine treaties with Spain, India and the United Kingdom are pending before the Philippine Senate Committee on Foreign Relations for concurrence.

²³Sec. 3 (a) (b), PD 1069.

²⁴Atty. Rafael G. Hipolito, UNCAC Review Focal Point, Office of the Ombudsman, "Inventory of Philippine Compliance with the United Nations Convention Against Corruption (UNCAC), Chapter IV-International Cooperation, page 5.

an explicit provision that extradition shall not be refused on the ground that the person sought is a citizen of the requested state. To date, the Philippines has not refused a request for extradition on the sole ground that the person sought to be extradited is its own national.²⁵

Moreover, the Extradition Law and the existing treaties do not impose as a condition for the extradition of a Filipino national that the service of sentence, in case of conviction, be in the Philippines. There is also no domestic law which would authorize the enforcement in the Philippines of a sentence imposed under the domestic law of a foreign country.²⁶

Extradition may be denied on the ground that the request is likely for the purpose of prosecuting and punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, or political opinions or that compliance with the request would cause prejudice to the person's position for any one of these reasons. This mandatory ground for denying a request for extradition is present in all Philippine bilateral extradition treaties, except with India, Indonesia, Thailand and the United States of America.²⁷

With regard to UNCAC, the Philippine Notification states that, in view of the requirement of dual criminality under the Philippine Extradition Law, UNCAC cannot be considered as a legal basis for extradition. However, subject to compliance with domestic legal processes, the Philippines is considering the amendment of its declaration, so that it can use the Convention as a basis for extradition provided that the dual criminality requirement is satisfied.²⁸

3. Requesting Officer; Requirements

Request for extradition may be made by any foreign state or government with which the Philippines has an extradition treaty or convention in force. Such request may be made by the diplomat of the foreign state, addressed to the Secretary of Foreign Affairs of the Philippines. The request shall be accompanied by: (i) the original or an authentic copy of either- (a) the decision or sentence imposed upon the accused by the court of the requesting state, or (b) the criminal charge and the warrant of arrest issued by the authority of the requesting state or government having jurisdiction of the matter or some other instruments having the equivalent legal force; (ii) a recital of the acts for which extradition is requested, with the fullest particulars as to the name and identity of the accused, his whereabouts in the Philippines, if known, the acts or omissions complained of, and the time and place of the commission of these acts; (iii) the text of the applicable law or statement of the contents of said law, and the designation or description of the offense of the law, sufficient for the evaluation of the request; and (iv) such other documents or information in support of the request.²⁹

4. Provisional Arrest; Right to Bail

In case of urgency, the requesting state may, pursuant to the treaty or convention in force, request the provisional arrest of the accused pending receipt of the request for extradition. A request for provisional arrest shall be sent to the Director of the National Bureau of Investigation (NBI) of the Philippines, either through the Diplomatic Channels or direct by post or telegraph. The Director of the NBI or any official acting on the Director's behalf shall, upon receipt of the request, immediately secure a warrant for the provisional arrest of the

²⁵ Id. at page 7.

²⁶ Id. at page 8.

²⁷ Id. at page 9.

²⁸ Id. at page 4.

²⁹ Sec. 4, PD 1069.

accused from the judge of the Regional Trial Court of the province or city having jurisdiction. The NBI Director through the Secretary of Foreign Affairs shall inform the requesting state of the result of its request. If within 20 days after the provisional arrest the Secretary of Foreign Affairs has not received the request for extradition and the required documents, the accused shall be released from custody. Release from provisional arrest shall not prevent re-arrest and extradition of the accused if a request for extradition is received subsequently in accordance with a treaty or convention in force.³⁰

Can a prospective extraditee post bail for his/her provisional liberty upon arrest? In a 2002 case, the Philippine Supreme Court held that, “The constitutional provision on bail does not apply to extradition proceedings, as it is available only in criminal proceedings.”³¹ However, in 2007, the Philippine Supreme Court held that, “Clearly, the right of a prospective extraditee to apply for bail in this jurisdiction must be viewed in the light of the various treaty obligations of the Philippines concerning respect for the promotion and protection of human rights. Under these treaties, the presumption lies in favor of human liberty. Thus, the Philippines should see to it that the right to liberty of every individual is not impaired.”³² The Supreme Court added that, “Obviously, an extradition proceeding, while ostensibly administrative, bears all earmarks of a criminal process. A potential extraditee may be subjected to arrest, to a prolonged restraint of liberty, and forced to transfer to the demanding state following the proceedings.”³³

5. Duty of Secretary of Foreign Affairs; Concurrent Request for Extradition

Unless it appears to the Secretary of Foreign Affairs that the request fails to meet the requirements of the Philippine law and the relevant treaty convention, the Secretary shall forward the request together with the related documents to the Secretary of Justice, who shall immediately designate and authorize an attorney in the Justice Department to take charge of the case. The attorney so designated shall file a written petition, including all related documents, with the proper Regional Trial Court of the province or city having jurisdiction of the place, with a prayer that the court take the request under consideration. The filing of the petition and the service of the summons to the accused shall be free from payment of docket and sheriff’s fees. The court where the petition is filed shall continue to have exclusive jurisdiction to hear and decide the case, regardless of the subsequent whereabouts of the accused, or the change or changes of residence.³⁴

In case extradition of the same person has been requested by two or more states, the Secretary of Foreign Affairs, after consultation with the Secretary of Justice, shall decide which of the several requests shall be first considered, and copies of the former’s decision thereon shall be promptly forwarded to the attorney having charge of the case, if there be one, through the Department of Justice.³⁵

6. Issuance of Summons; Temporary Arrest; Hearing; Service of Notices

Immediately upon receipt of the petition, the judge shall, as soon as practicable, summon the accused to appear and answer the petition on the day and hour fixed in the order. The

³⁰ Id. at Sec. 20.

³¹ *Government of the United States of America vs. Hon. Guillermo Puruganan, et al.*, G.R. No. 148571, September 24, 2002.

³² Id.

³³ *Govt. of Hong Kong, represented by the Phil. Dept. of Justice vs. Hon. Felixberto Olalia Jr., et al.*, *supra*.

³⁴ Sec. 5, PD 1069.

³⁵ Id. at Sec. 15.

judge may issue a warrant for the immediate arrest of the accused which may be served anywhere within the Philippines if it appears to the judge that the immediate arrest and temporary detention of the accused will best serve the ends of justice. Upon receipt of the answer to the petition, or should the accused after having received the summons fail to answer within the time fixed, the judge shall hear the case or set another date for the hearing. The order and notice as well as a copy of the warrant of arrest, if issued, shall be promptly served each upon the accused and the attorney having charge of the case.³⁶

7. Appointment of *Counsel de Officio*; Hearing in Public; Exception; Legal Representation

If on the date set for the hearing the accused does not have legal counsel, the judge shall appoint any law practitioner residing within the court's territorial jurisdiction as *counsel de officio* to assist the accused in the hearing.³⁷ The hearing shall be public unless the accused requests, with the approval of the court, that it be conducted in chambers. The attorney having charge of the case may upon request represent the requesting state throughout the proceedings. The requesting state may, however, retain private counsel to represent it for particular extradition cases. Should the accused fail to appear on the date set for hearing, or if the accused is not under detention, the court shall forthwith issue a warrant of arrest which may be served upon the accused anywhere in the Philippines.³⁸

8. Nature and Conduct of Proceedings; Decision and Service Thereof.

In the hearing, the provisions of the Rules of Court, insofar as practicable and not inconsistent with the summary nature of the proceeding, shall apply to extradition cases, and the hearing shall be conducted in such a manner to arrive at a fair and speedy disposition of the case. Sworn statements offered in evidence at the hearing of any extradition case shall be received and admitted in evidence if properly and legally authenticated by the principal diplomatic or consular officer of the Philippines residing in the requesting state.³⁹

Upon conclusion of the hearing, the court shall render a decision granting extradition, and shall give his reason therefor upon showing of the existence of a prima facie case. Otherwise, it shall dismiss the petition.⁴⁰ The decision of the court shall be promptly served on the accused if present at the hearing, and the clerk of court shall immediately forward two copies thereof to the Secretary of Foreign Affairs through the Department of Justice.⁴¹

9. Appeals by Accused; Stay of Execution

The accused may, within 10 days from receipt of the decision of the court granting the extradition, appeal to the Court of Appeals of the Philippines, whose decision in extradition cases shall be final and immediately executory. The appeal shall stay the execution of the decision.⁴² The provision of the Philippine Rules of Court governing appeals in criminal cases in the Court of Appeals shall apply.⁴³ The accused and the Secretary of Foreign Affairs, through the Department of Justice, shall each be promptly served with copies of the decision of the Court of Appeals.⁴⁴

³⁶ Id. at Sec. 6.

³⁷ Id. at Sec. 7.

³⁸ Id. at Sec. 8.

³⁹ Id. at Sec. 9.

⁴⁰ Id. at Sec. 10.

⁴¹ Id. at Sec. 11.

⁴² Id. at Sec. 12.

⁴³ Id. at Sec. 13.

⁴⁴ Id. at Sec. 14.

10. Surrender of Accused; Seizure and Turn Over of the Accused's Properties

After the decision of the court in the extradition has become final and executory, the accused shall be placed at the disposal of the authorities of the requesting state, at a time and place to be determined by the Secretary of Foreign Affairs, after consultation with the foreign diplomat of the requesting state.⁴⁵ If the extradition is granted, articles found in the possession of the accused who has been arrested may be seized upon order of the court at the instance of the requesting state, and such articles shall be delivered to the foreign diplomat of the requesting state who shall issue the corresponding receipt.⁴⁶

11. Costs and Expenses; By Whom Paid

Except when the relevant extradition treaty provides otherwise, all costs and expenses incurred in any extradition proceeding and in apprehending, securing and transmitting an accused shall be paid by the requesting state. The Secretary of Justice shall certify to the Secretary of Foreign Affairs the amount to be paid by the requesting state on account of expenses and cost, and the Secretary of the Foreign Affairs shall cause the amount to be collected and transmitted to the Secretary of Justice for deposit in the National Treasury.⁴⁷

C. Mutual Legal Assistance

1. No Domestic Legislation

The Philippines does not have a domestic law on mutual legal assistance. However, the absence of domestic legislation concerning mutual legal assistance does not prohibit the Philippine government from requesting or granting legal assistance to a foreign country. The Philippines can request or provide legal assistance in criminal matters to other states using as bases, among others, the provisions of existing bilateral and regional mutual legal assistance treaties (MLATs), as well as “mini-MLAs” contained in the various United Nations Conventions to which the Philippines is a state party, such as the United Nations Convention against Corruption (UNCAC). Mutual legal assistance may also be provided pursuant to R.A. 9160, the Philippine Anti-Money Laundering Act of 2001 (AMLA), as amended by R.A. 9194.⁴⁸ Moreover, non-treaty-based requests for legal assistance may also be made on the basis of reciprocity.

2. Philippine MLATs With Other Countries

To date, the Philippines has 8 MLATs. These are with Australia,⁴⁹ China,⁵⁰ Hong Kong,⁵¹ South Korea,⁵² Spain,⁵³ Switzerland,⁵⁴ the United Kingdom⁵⁵ and the United States of America.⁵⁶ The more recent MLATs in the list are with China and the United Kingdom, which were concurred in by the Philippine Senate in May 2012. The Philippines is also a state party to the “Treaty on Mutual Legal Assistance in Criminal Matters,” or the so-called “ASEAN MLAT” entered into by the governments of Brunei Darussalam, Cambodia,

⁴⁵ Id. at Sec. 16.

⁴⁶ Id. at Sec. 17.

⁴⁷ Id. at Sec. 18.

⁴⁸ Inventory of Philippine Compliance with the United Nations Convention Against Corruption (UNCAC), Chapter IV-International Cooperation, *supra*, page 11.

⁴⁹ Date of Entry into Force: December 19, 1993.

⁵⁰ Date of Entry into Force: October 19, 2012.

⁵¹ Date of Entry into Force: March 24, 2004.

⁵² Date of Entry into Force: November 17, 2008.

⁵³ Date of Entry into Force: December 18, 2008.

⁵⁴ Date of Entry into Force: December 1, 2005.

⁵⁵ Date of Entry into Force: June 1, 2012.

⁵⁶ Date of Entry into Force: November 22, 1996.

Indonesia, Lao People's Democratic Republic, Malaysia, Philippines, Singapore, and the Socialist Republic of Vietnam.

The MLATs entered into by the Philippines contain a lot of common provisions, among them are assistance in: (i) gathering of evidence; (ii) taking the testimonies or statements of persons; (iii) execution of requests for searches and seizures; (iv) facilitating the personal appearance of witnesses; (v) transferring of persons in custody for testimony or other purposes; (vi) obtaining and production of judicial and official records; (vii) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities, including assisting in proceedings related to forfeiture of assets, restitution and collection of fines; and (viii) providing and exchanging information on law, documents and records.⁵⁷

3. Grounds for Denial of Requests for Mutual Legal Assistance

The grounds for the denial of a request for assistance may be mandatory or discretionary. The mandatory grounds include those that involve: (i) political offenses; (ii) offenses under military law; (iii) double jeopardy; (iv) offenses barred by prescription; or (v) requests made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, sex, religion, nationality, or political belief.⁵⁸

In the ASEAN MLAT, it was stated that the following shall not be considered as political offenses: (i) an offense against the life or person of a Head of State or a member of his/her immediate family; (ii) an offense against the life or person of a Head of a central Government, or of a minister of a central Government; (iii) an offense within the scope of any international convention to which both the Requesting and Requested states or governments are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of commission of that offense; and any attempt, abetment or conspiracy to commit any of the offences referred to above.⁵⁹

The discretionary grounds to deny a request for legal assistance include those: (i) where the requesting party has, in respect of that request, failed to comply with any material terms of the treaty or other relevant arrangements; (ii) the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the requested party; or (iii) the provision of the assistance would impose an excessive burden on the resources of the requested party.⁶⁰

Noteworthy, the Philippine MLATs with China, Republic of Korea, Switzerland, Spain and the United States provide as a discretionary ground for refusing a request for assistance the fact that the execution of the request is likely to prejudice its sovereignty, security, public order, or other essential interests. On the other hand, the Philippine MLATs with Australia

⁵⁷ Simeon Marcelo, Former Ombudsman of the Philippines, "Denying Safe Havens through Regional and Worldwide Judicial Cooperation: The Philippine Perspective," Issue Paper (Workshop F), presented to the 5th Anti-Corruption Conference, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (September 28-30, 2005).

⁵⁸ In the Philippines and the United States of America MLAT, it was stipulated that the Requested State may deny assistance if the request relates to a political offense; an offense under military law which would not be an offense under ordinary criminal law; or if the execution of the request would prejudice its security or similar essential interests, or made not in conformity with the Treaty. (Article 3 [1] of the Treaty).

⁵⁹ Article 3(3), ASEAN MLAT.

⁶⁰ Id., Article 3(2).

and Hong Kong provide such as a mandatory ground for refusal.⁶¹

4. Dual Criminality

Dual criminality relates to acts that are criminal in both the requesting and requested states. Generally, the requirement of dual criminality is discretionary upon the requested state. However, the Philippines has bilateral agreements wherein it is expressly stated that assistance will be provided without regard to whether the alleged conduct constitutes an offense under the laws of the requested party. As a rule, the Philippines does not decline requests for mutual assistance, be they treaty or non-treaty based, on the ground of absence of dual criminality. Likewise, dual criminality is not a requirement for providing assistance to a foreign state under Section 13 of the AMLA.⁶²

5. Central Authority

As previously stated, the Department of Justice serves as the Central Authority for treaty-based requests for legal assistance. It acts on both incoming and outgoing MLA requests. The Department of Justice, through its Office of the State Counsel, conducts the evaluation. If the Justice Department finds that the execution of the request belongs to another government agency, said Department transmits the request to the agency competent to execute the same. If the request involves production of bank records, the request will be referred to the Anti-Money Laundering Council.

In the absence of a treaty, the Office of the Ombudsman, through its Office of the Legal Affairs, serves as the Central Authority for mutual legal assistance. So far, the Office of the Ombudsman has received only one request, and it is pending.

6. Confidentiality

The Justice Department exerts its best efforts to keep MLA requests confidential, including its contents and any action taken thereon. In case the confidentiality is breached, the Department of Justice, or the Office of the Ombudsman in proper cases, will immediately inform the requesting party of such breach to determine if it still wants to pursue the request. However, where the request would involve filing an application in court for its execution, the request and the information provided therein would be considered as public record once the application is filed in court.

7. Limitation of Use

The information or evidence obtained may only be used in the criminal proceeding referred to in the request for assistance. If the requesting state wishes to use the information or evidence in a proceeding not mentioned in the request, it must first secure the consent of the requested state. MLATs are intended solely for mutual assistance between the parties to the treaty. The provisions of an MLAT will not give rise to any right on the part of any private person to obtain, suppress or exclude any evidence or impede the execution of the request.

⁶¹ Inventory of Philippine Compliance with the United Nations Convention Against Corruption (UNCAC), Chapter IV-International Cooperation, *supra.*, page 23.

⁶²Id. at page 16.

III. CASE STUDIES

A. Turn-over of US\$132,000, Representing Proceeds of the Forfeiture Sale of Property Registered in the Name of a Former Military Comptroller's Wife

In 2005, the Office of the Ombudsman filed a forfeiture case before the Sandiganbayan⁶³ against former military Comptroller and General Jacinto Ligot for amassing wealth grossly disproportionate to his lawful income. Further investigation, in close cooperation with US authorities, resulted in the identification of real property located in Buena Park, California, registered in the name of the General's wife. The property was promptly subjected to forfeiture proceedings and auctioned off for the amount of US\$132,000.

In 2009, a request for the return of the proceeds of the forfeiture sale was made by the Office of the Ombudsman, through the Department of Justice, under the auspices of the US-Philippines Mutual Legal Assistance Treaty. In 2011, the US Government, through Ambassador Harry K. Thomas, Jr. turned over to Secretary of Justice Leila M. de Lima a cheque, in the amount of US\$132,000, representing the proceeds of the forfeiture sale. Ambassador Thomas declared that it was the "first-ever return of funds in an asset-forfeiture case," demonstrating the benefits of the Mutual Legal Assistance Treaty between the two nations.

B. Return of US\$100, 000 Seized from a Military Comptroller's Sons

In December 2003, the sons of retired Armed Forces of the Philippines Comptroller and General Carlos Garcia attempted to bring into the United States of America the undeclared amount of US\$100,000 (cash) but were caught by San Francisco airport authorities and charged with conspiracy to commit bulk cash smuggling. The sons pleaded guilty and the money was forfeited to the US Government.

In the Philippines, an investigation led to the filing of a Plunder charge and a forfeiture case against General Garcia and his family. In 2010, the Office of the Ombudsman formally informed the US authorities that the seized US\$100,000 was part of the ill-gotten wealth of General Garcia and requested its return, under the auspices of the US-Philippines Mutual Legal Assistance Treaty. In January 2012, the US Government, through Ambassador Harry K. Thomas, Jr., turned over to Ombudsman Conchita Carpio Morales a cheque, in the amount of US\$ 100,000, representing the money seized from the General's sons.

C. Extradition of Charlie Atong Ang, Co-accused in a Plunder Case Against a Former Philippine President

Charlie Atong Ang, then consultant of the Philippine Amusement and Gaming Corporation, fled to the United States when then Philippine President Joseph Estrada was ousted. Mr. Ang's extradition was sought for prosecution of the crime of Plunder, in violation of Republic Act No. 7080, specifically for conspiring with the President in the conversion of P130 million worth of tobacco excise tax for the latter's personal use and in receiving proceeds from the illegal numbers game *jueteng*. Finding that the evidence established probable cause that Mr. Ang committed Plunder, the US District Court of the District of Nevada granted the request for extradition.

⁶³ Special Anti-Graft Court in the Philippines which has jurisdiction over offenses committed by high-ranking public officers of the Philippines, as well as low-ranking employees and private persons who may have conspired with the high-ranking public officers.

IV. CONCLUSION

Extradition and mutual legal assistance may no longer be in their infancy stages in the Philippines. However, more work should be done. There is no domestic legislation on mutual legal assistance, hence, legislation in that regard should be enacted. Likewise, trainings on extradition and mutual legal assistance for authorities responsible for extradition and mutual assistance may be needed. Further, more treaties on extradition and mutual legal assistance with other willing states should be entered into by the Philippines. To be sure, the more treaties of that kind, the fewer places where corrupt people and other criminals can hide, perpetrate their nefarious activities and evade investigation, prosecution and service of sentences.

INTERNATIONAL COOPERATION: MUTUAL LEGAL ASSISTANCE AND EXTRADITION

*Mary Grace R. Quintana**

I. INTRODUCTION

“With the advent of easier and faster means of international travel, the flight of affluent criminals from one country to another for the purposes of committing crime and evading prosecution has become more frequent. Accordingly, governments are adjusting their methods of dealing with criminals and crime that transcend international boundaries.”¹

“More and more, crimes are becoming the concern of one world. Laws involving crimes and crime prevention are undergoing universalization. One manifest purpose of this trend towards globalization is to deny easy refuge to a criminal whose activities threaten the peace and progress of civilized countries. It is to the great interest of the Philippines to be part of this irreversible movement in the light of its vulnerability to crimes, especially transnational crimes.”²

II. LEGAL FRAMEWORK

A. Mutual Legal Assistance (MLA)

The Philippines does not have domestic legislation on mutual legal assistance (MLA). The absence of a domestic law on mutual legal assistance, however, does not mean that we cannot seek or obtain assistance from and to a foreign government. We do so on the basis of our existing bilateral Mutual Legal Assistance Treaties in Criminal Matters, commonly known as MLATs, or on the basis of reciprocity.

In case of a request for assistance that is made on the basis of reciprocity, an undertaking has to be made by the requesting State that it will provide the same type of cooperation to the requested State. The extent of assistance that the Philippines can seek or grant will, therefore, depend on the nature of assistance being requested. A request for assistance requiring compulsory processes or court intervention for its execution may not be made on the basis of reciprocity; requests of this nature can only be made on the basis of a treaty.

The Philippines is party to eight (8) bilateral MLATs with the following countries: Australia, China, Hong Kong, Korea, Spain, Switzerland, the United States of America (USA) and the United Kingdom (UK). It is also a party to the ASEAN MLAT.

Aside from the bilateral agreements earlier mentioned, the Philippines is also a Party to multilateral treaties which contain provisions on extradition and mutual legal assistance. These include the UN Convention Against Corruption (UNCAC), the UN Convention Against Transnational Organized Crime (UNTOC), the UN International Convention for the

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¹ *Government of the United States of America v. Purganan*, 389 SCRA 623, 652.

² *Secretary of Justice v. Lantion*, 343 SCRA 377, 393.

Suppression of the Financing of Terrorism, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and others.

B. Extradition

Presidential Decree No. (P.D.) 1069, “*Prescribing the Procedure for the Extradition of Persons Who Have Committed Crimes in a Foreign Country*,” was issued by then President Ferdinand E. Marcos on January 13, 1977. At present, the Philippines has thirteen (13) extradition treaties with the following countries: Indonesia (1976); Thailand (1981); Australia (1988); Canada (1989); Micronesia (1990); Korea (1993); the USA (1994); the Hong Kong Special Administrative Region (1995); China (2001); Spain (2004); India (2004); the UK (2009). PD No. 1069 expressly states that extradition may be granted only pursuant to a treaty or convention.³

III. PHILIPPINE CENTRAL AUTHORITY

The designated Central Authority for the Republic of the Philippines in MLA and Extradition is the Department of Justice (DOJ). Unless the treaty itself expressly states that the request be transmitted through diplomatic channels, all requests for extradition and mutual legal assistance may be directly transmitted to the DOJ.

The Office of the Chief State Counsel (OCSC), which assists the Secretary of Justice in the performance of his/her duties as the Attorney General of the Philippines, performs the role of the DOJ as Central Authority in the processing and/or implementation of requests for extradition and mutual legal assistance. The OCSC also represents our treaty partners before the courts in extradition proceedings and requests for mutual legal assistance in criminal matters.

IV. LEGAL PRECONDITIONS

A. Dual Criminality

For MLAs, the requirement of dual criminality is generally discretionary upon the requested State. However, we have bilateral agreements wherein it is expressly stated that assistance will be provided without regard to whether the alleged conduct constitutes an offense in the requested state. Under our MLATs with Australia, China, Hong Kong, and Korea, a request for legal assistance may be refused if the request relates to acts or omissions which would not constitute an offense under the laws of the Requested State. A similar provision is found in the ASEAN MLAT except that the Requested Party may provide assistance even in the absence of dual criminality if permitted by its domestic laws.

For extradition to be granted, dual or double criminality is required. In determining whether an offense is an offense punishable under the laws of both parties, it shall not matter whether the laws of both States place the act or omission within the same category of offense or denominate the offense by the same terminology (China).

B. Use Limitation/Rules of Specialty

The use of the limitation principle is standard in all of our MLATs. Under this principle, the information or evidence obtained may only be used in the criminal proceeding referred to in the request for assistance. If the Requesting State wishes to use the information or evidence

³ Sec. 3.

in a proceeding not mentioned in the request, it must first secure the consent of the Requested State.

In our MLAT with Switzerland, prior consent is not necessary if (a) the facts which are the basis of the request constitute another offense for which mutual legal assistance would be granted; or (b) the foreign criminal proceedings are directed against other persons having participated in committing the offense.

The rule of specialty, while not provided in our Extradition Law, is found in all our bilateral treaties. Under this principle, an extraditee will only be tried or punished by the Requesting State for offenses in respect of which extradition has been granted unless the Requested State consents thereto. Before giving its consent, the Requested State may require the submission of documents/statements under the Treaty. Our treaties expressly excluded application of this rule (a) for conduct committed by an extraditee after his/her extradition; and (b) for lesser offenses, provided such lesser offense is an extraditable offense. In our bilateral extradition treaties with UK and USA, the rule of specialty is extended to the extradition of a person to a third State.

C. Evidentiary Test

In requests for mutual legal assistance, the laws of the Requested State shall be observed in their implementation or execution. This requirement is essential to prevent “fishing expeditions.” However, like dual criminality, evidentiary requirements are more relaxed for MLA rather than for extradition, particularly for less intrusive measures such as the production of documents or taking of statements of witnesses.

For extradition cases, the evidence submitted to the requested State should at least meet the standard of probable cause. However, some jurisdictions, while agreeing on this standard, may, under their respective domestic laws, differ in meeting this standard.

Under PD No. 1069, the Department of Justice, as petitioner, must establish a *prima facie* case. While the other treaties are silent as to the standard of evidence to be used in extradition proceedings, our extradition treaties with Canada, Hong Kong, India, and the US expressly provide that the conduct of extradition proceedings shall be in accordance with the laws of the Requested State.

V. SCOPE OF OFFENSES

Affording the widest range of assistance possible under our MLATs, and subject to each parties’ domestic laws, mutual legal assistance is rendered in the investigation and prosecution of offenses or to proceedings relating to criminal matters. Criminal matters include matters connected with offenses against a law related to taxation, customs duties, foreign exchange control or other revenue matters. Still other treaties include criminal matters relating to forfeiture or confiscation of property in respect of an offense, imposition or recovery of a pecuniary penalty and/or the freezing of assets that may be forfeited, confiscated or used to satisfy a pecuniary penalty imposed in respect of an offense.

P.D. 1069 provides that the person who is the subject of the request for extradition be charged with an “offense punishable under the laws of both the requesting state or government and the Republic of the Philippines by imprisonment or other form of deprivation of liberty for a period stipulated in the relevant extradition treaty or convention.”

(Section 3) Except for our bilateral treaties with Hong Kong, Indonesia and Thailand, which follow the list-approach, our treaties require that the offense must be penalized by imprisonment for a period of at least one year, or by a more severe penalty. This may include the attempt, conspiracy to commit, aid, abet, counsel, cause or procure the commission of or being an accessory before or after the fact to, an offense to which the extradition relates (US, Thailand).

VI. GROUNDS FOR REFUSAL

All extradition treaties and MLATs specify the grounds on which cooperation may be denied. The ground for denying an extradition request or a request for mutual legal assistance may be a mandatory or discretionary ground.

Mandatory grounds of refusal include requests that involve (a) political offenses; (b) offenses under military law; (c) double jeopardy; (d) prosecution is already barred by prescription; or (e) requests made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, sex, religion, nationality, or political belief.

In MLATs, discretionary grounds include requests where the Requesting Party cannot comply with the conditions imposed by the Requested State relating to the confidentiality or limitations as to the use of the evidence. A request for assistance may also be refused if its implementation would prejudice an investigation or proceeding in the Requesting State, or endanger the safety of any person or impose an excessive burden on the resources of the Requested State or prejudice national interest.

Discretionary grounds for refusal of extradition include requests when the person sought to be extradited is a national of the Requested State or if the extradition would be unjust or incompatible with humanitarian considerations, taking into account the nature of the offense, the interests of the Requested State, and the age or health of the person sought. The extradition treaties with the United States and India contain a provision to the effect that extradition shall not be refused on the ground that the person sought is a citizen of the Requested State.

VII. INTERNAL PROCEDURE

A. Transmission

Extradition requests are generally transmitted through diplomatic channels. Requests for mutual legal assistance, on the other hand, are generally transmitted directly between the Central Authorities of the two States.

B. Evaluation

In *Sec. of Justice vs. Lantion*⁴, the Supreme Court held that the executive authority given the task of evaluating the sufficiency of the request and the supporting documents is the Department of Foreign Affairs (DFA).

The DFA must also see to it that the accompanying request had been certified by the principal diplomatic or consular officer of the Requested State resident in the Requesting

⁴ 322 SCRA 160 (Jan. 18, 2000).

State. It shall also determine if the request is politically motivated, or if the offense is a military offense which is not punishable under non-military penal legislation.

Should the DFA find that the request complies with the requirements of the law and applicable treaty, the request and supporting documents are forwarded to the DOJ. The Secretary of Justice shall then designate a panel of State Counsels to handle the extradition case. The designated State Counsels shall then file a written petition with the proper regional trial court (RTC).

There are, however, instances when the person sought may waive the extradition proceedings either before or after the filing of the petition for extradition. This process is called simplified extradition. In such a case, the person will be returned to the requesting State as expeditiously as possible without further proceedings.

In case of requests for MLA, the DFA will only have the opportunity to evaluate the request if the same is made on the basis of reciprocity. For MLA requests made on the basis of a treaty, the DOJ conducts the evaluation. If the execution of the request belongs to another agency, the DOJ will transmit the request to the agency competent to execute the same. For example, if the request involves production of bank records and the offense involved is money laundering, the same will be referred to the Anti-Money Laundering Council (AMLC). Where the request for mutual legal assistance involves a corruption case, it shall be forwarded to the Office of the Ombudsman for implementation.

C. Extradition Hearing

PD No. 1069 does not specifically indicate whether the extradition proceeding is criminal, civil or a special proceeding. Par. 1 of Sec. 9 thereof provides, however, that in the hearing of the extradition petition, the provisions of the Rules of Court, insofar as practicable and not inconsistent with the summary nature of the proceedings, shall apply (Section 9, Paragraph 1). Thus, the extradition court shall, immediately upon receipt of the petition for extradition and as soon as practicable, summon the accused to appear and answer the petition.

If in the court's opinion, the immediate arrest and temporary detention of the person sought will best serve the ends of justice, the extradition court may issue a warrant of arrest. It has been our practice to request the arrest of the person sought upon the filing of the petition for extradition.

Upon conclusion of the hearing, the court shall render a decision granting the extradition and giving the reasons therefore upon a showing of the existence of a prima facie case, or dismiss the petition.⁵ Said decision is appealable to the Court of Appeals (CA), whose decision shall be final and immediately executory.⁶ The provisions of the Rules of Court governing appeals in criminal cases in the CA shall apply in the aforementioned appeal, except for the required 15-day period to a file brief.⁷

The person sought to be extradited may also be provisionally arrested pending receipt of the formal request for extradition as long as it can be proven that there is urgency in the provisional arrest such as when the subject person is a flight risk.

⁵ Sec. 10, PD No. 1069.

⁶ *Ibid.* at Sec. 12.

⁷ *Ibid.* at Sec. 13.

In this case, the DOJ, upon evaluation of the request for provisional arrest, indorses the request to the INTERPOL Division of the National Bureau of Investigation, which shall then file the application for provisional arrest with the RTC. Upon receipt and evaluation of the formal request for extradition, the State Counsels assigned to the case shall thereafter file the corresponding petition for extradition before the RTC.

Application with the RTC for the implementation of MLA requests will only be filed if the request involves coercive measures such as search and seizure, freezing, confiscation or forfeiture of assets, or where the witness refuses to have his or her statement taken, etc.

D. Surrender of Fugitive/Implementation of MLA Request

After the decision of the extradition court granting the petition for extradition has become final and executory, the person sought will be placed at the disposal of the authorities of the Requesting State, at a time and place to be determined by the Secretary of Foreign Affairs, after consultation with the foreign diplomat of the Requesting State. Where the Philippines is the Requesting State, at least two (2) INTERPOL agents of the NBI will escort the fugitive back to the country. Where the Philippines is the Requested State, the extraditee is normally turned over to the authorities of the Requesting State, the US Marshalls in case the Requesting State is the US, at the NAIA. Documents or evidence produced pursuant to an MLAT request are transmitted through the fastest possible means.

VIII. CHALLENGES

Extradition and mutual legal assistance, while already customarily used in international law, are fairly new concepts in our jurisdiction. Expectedly, difficulties and challenges abound in its implementation. Listed below are some of the common problems we encounter.

1. No organic law on MLA/outdated law on extradition.

While we have dutifully complied with our obligations under our MLATs, our ability to provide the widest range of assistance to non-treaty partners is considerably hampered. Without a domestic law on mutual legal assistance, we cannot grant requests for assistance that require coercive measures for its execution, i.e. executing searches and seizures or effecting service of judicial documents.

Our Extradition Law, on the other hand, was enacted thirty-five years ago before criminals intensified their trans-border criminal activities. Understandably, there are already some gaps in the law that have been legally attacked in court – rights afforded to an extraditee, admissibility of evidence presented, among others – all of which has contributed to delays in the proceeding. While we have, so far, successfully defended such issues, it has lengthened the process contrary to the summary nature of an extradition hearing.

2. Lack of familiarity/awareness among law enforcers and prosecutors

3. Difficulty in gaining direct access to contact/focal points.

4. Differences on the evidentiary requirement rules.

IX. MEASURES TO ADDRESS THE GAPS

As the primary implementing agency, the DOJ has taken steps to address the difficulties in implementing or executing requests for mutual legal assistance or extradition. Among them –

1. Drafting of/amendments to domestic legislation.
2. Conducting trainings among stakeholders, i.e. law enforcers and prosecutors, to familiarize them with the use of MLATs and Extradition as a tool in investigation, evidence gathering, and case build-up.
3. Regular dialogue/meetings with Central Authorities to thresh out common issues faced and to facilitate coordination.

X. CONCLUSION

“Indeed, in this era of globalization, easier and faster international travel, and an expanding ring of international crimes and criminals, we cannot afford to be an isolationist state. We need to cooperate with other states in order to improve our chances of suppressing crime in our country.”⁸

⁸ *Government of the United States of America v. Purganan, supra.* p. 653.

MUTUAL LEGAL ASSISTANCE AND EXTRADITION IN THAILAND

*Poonpol Ngearndee**

I. INTRODUCTION

Corruption, one of the serious crimes, has a wide range of devastating effects on the development of a country. Once the proceeds of corruption have been transferred abroad, the limitations on state sovereignty to investigate and prosecute become obstacles to practitioners. Acknowledging the serious problem of grand corruption and the need for improved mechanisms to combat its devastating effects, most countries have developed arrays of tools that can be used to facilitate cooperation across borders in criminal matters.

The case becomes more complex because it touches upon the components of international character or involves the matters of a state's jurisdiction. When a crime has been committed in one country and the criminal has fled away to another country, there are numerous practical and political factors that can impede cooperation. Also, if the investigation or prosecution is carried out in one country but the essential evidence or witnesses exist in another country, how we can obtain such evidence or statements of such witnesses is the question that needs to be answered. There still exist many problems, the difficulties of which are beyond the capacity of a single state to deal with, especially under the current situation. Every state must internationally cooperate with each other in the prevention and suppression. Assistance and coordination between states to combat the crime can take many forms and is collectively known as "international cooperation."

II. MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

A. Background and Evolution

Unlike that of European countries, mutual legal assistance in Thailand does not stem from extradition treaties. Before the promulgation of the Act on Mutual Assistance in Criminal Matters B.E.2535 in 1992, there was no direct legislation to govern on this matter. Any request of this kind was conducted in accordance with the "General principle of international law" as clearly spelled out in Article 34 of the Civil Procedure Code, which is also applicable in criminal cases by virtue of Article 15 of the Criminal Procedure Code. Article 34 of the Civil Procedure Code provided that:

Where any proceeding is to be carried out wholly or in part through the medium of or by request to the authorities in any foreign country, the Court shall, in the absence of any international agreement or provision of law governing the matter, comply with the general principle of International Law.

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“General principle of international laws” in this regard includes comity, reciprocity, and “rules of due process”, as are generally recognized between and among the sovereign states. When assistance regarding criminal matters is requested, the request thereof shall be sent through diplomatic channels and then referred to the Ministry of Foreign Affairs to provide its opinion, which was a very time-consuming process.

Mutual legal assistance in its modern sense, which encompasses all criminal matters, began after the coming into force of the Act of Mutual Assistance in Criminal Matters B.E. 2535, as well as the conclusion of many treaties regarding this matter.

B. Legal Basics

Thailand adopted the Act on Mutual Assistance in Criminal Matters B.E. 2535 in 1992. This Act is the main legislation to be applied to all processes of providing and seeking assistance upon receiving requests from foreign states or Thai agencies; however, if it is inconsistent with the terms or provisions used by the treaties concluded between Thailand and such foreign countries, the treaty shall prevail. Assistance in Thailand may be granted even if no treaty exists between Thailand and the requesting state, provided that such state commits to assist Thailand in a reciprocal manner when requested.

1. Agencies and Organizations Responsible for these Matters

In ordinary dealing, the request for assistance shall be submitted through diplomatic channels. However, if a mutual assistance treaty between Thailand and the requesting state is in force, commitments of reciprocity and submission through diplomatic channels will be waived. The request for assistance in such a case as well as other communications shall be made directly to the Attorney General, who is the Central Authority of mutual legal assistance as prescribed by the law.

2. Conditions and Requirements to Request MLA

(i) Forms of Assistance

In Thailand, forms of assistance are basically understood to include certain forms of the processes of criminal case handling, as well as other indefinite conduct under the scope of the stipulated indefinite description. According to section 4 of the Act on Mutual Assistance in Criminal Matters B.E. 2535, “assistance” means assistance regarding investigation, inquiry, prosecution, forfeiture of property, and other proceedings relating to criminal matters. Categorization of the forms of assistance can be further enlightened by the provision of Section 12 of the same Act to cover the following:

- (a) Taking statements of persons, providing documents, articles and evidence out of Court, serving documents, searches, seizure of documents or articles, locating persons
- (b) Taking the testimony of persons and witnesses or adducing documents and evidence in court, and requesting forfeiture or seizure of property
- (c) Transferring persons in custody for testimonial purposes
- (d) Initiating criminal proceedings

It is quite clear from the above provision that the terms “other proceeding”, stipulated in Section 4, is capable to accompany other forms of assistance in the treaties with other countries.

(ii) Authorities and Officials

In Thailand, according to the Act on Mutual Assistance in Criminal Matters B.E. 2535 as well as treaties concluded with various countries, the “Central Authority” is the “Attorney General or, the person designated by him.” The Central Authority is the official who takes the most predominant role in requesting assistance. Apart from the general function as the coordinator to receive the request for assistance from the requesting state and transmitting it to the Competent Authorities concerned, as well as to receive the request seeking assistance presented by the agency of Thai Government and deliver it to the Requested State, another equal or more significant task entrusted to the Central Authority is to determine the legality and eligibility of all requests and processes. In this context the Central Authority is also authorized to interpret the rule or announcement for the implementation of the whole process.

Determination of the Central Authority in all matters regarding the grading and seeking of assistance will be final except in two situations: firstly, if it is overruled by the Prime Minister, and secondly, if a request relates to the issues of national sovereignty or security, crucial public interest, international relations, political offences or military offences, and where the Advisory Board has a dissenting view and the Prime Minister agrees with such dissenting view.

(iii) Competent Authority

The Competent Authority includes those officials who actually carry out the function conforming to the request for assistance as notified by the Central Authority.

In Thailand, the Competent Authority includes the following:

(1) The Police Commission General: to deal with the request for initiating criminal proceedings and taking statements of persons, providing documents, articles, and evidence out of Court, serving documents, searches, seizures, and locating persons.

(2) The State Attorney Director General for Litigation to deal with the request for initiating of criminal proceedings and taking the testimony of persons and witnesses, adducing documents and evidence, as well as requesting for forfeiture or seizure of property in the Court.

(3) The Director General of the Correctional Department to deal with the request for transferring persons in custody for testimonial persons.

(iv) Double Criminality

The principle of double criminality requires that the conduct underlying the assistance requested must also be a criminal offence punishable under the law of the requested state, otherwise such request must be refused. This position in Thailand seems to be a compromise between the concept of protecting the innocent’s rights and liberty by the principle of double criminality on one hand, and the spirit of cooperation between and among states to support and control crime on the other hand.

While the Act on MLA places the principle of “Double Criminality as a prerequisite for granting assistance, there are many treaties concluded with foreign states such as the United States, Canada, the United Kingdom, of which the principle of double criminality is not required.” On the contrary, all said treaties impose obligations on each Contracting Party to provide assistance to the other Contracting Party even if the underlying conduct so requested does not constitute a criminal offence in the requested state.

(v) Refusal of Requests

In Thailand the grounds for refusal are stipulated both in the Act on MLA as well as various treaties concluded with foreign states. The Act on MLA article 9 stipulated that assistance to a foreign state shall be subject to the following conditions:

(1) Assistance may be provided even if no mutual assistance treaty exists between Thailand and the Requesting State, provided that such state commits to assist Thailand in a similar manner when requested;

(2) The act on which the request is based must be an offence punishable under Thai laws unless Thailand and the Requesting State have a mutual assistance treaty between them, and the treaty specifies otherwise, provided, however, that assistance must be conformed to the provisions of this Act;

(3) A request may be refused if it affects national sovereignty or security, or other crucial public interest of Thailand, or is related to a political offence;

(4) Assistance shall not be related to a military offence.

As regards mutual legal assistance treaties, the clause related to the refusal of a request is usually prescribed similarly, for example.

“The Requested State may refuse to execute a request to the extent that” (a) the request would prejudice the sovereignty, security, or other essential public interest to the Requested State: or (b) the request is related to a political offense.

C. Conclusion

The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) of Thailand is the law providing assistance and seeking assistance regarding investigation, inquiry, prosecution, and forfeiture of assets if property and other proceedings relate to criminal matters to/from a foreign state. The Attorney General or the person designated by him is the Central Authority of Thailand. One main function of the Central Authority is to consider and determine whether to provide assistance to a requesting state; and whether to seek assistance from a foreign government.

Assistance to a foreign state shall be subject to the following conditions:

(i) Assistance may be provided even if no mutual assistance treaty exists between Thailand and the requesting state, provided that such state commits to assist Thailand in a similar manner when requested;

(ii) The Act which is the cause of a request must be an offense punishable under Thai laws except when Thailand and the requesting state have a mutual assistance treaty that specifies otherwise;

(iii) A request may be refused if it affects national sovereignty or security, or other crucial public interest of Thailand, or relates to a political offense;

(iv) Assistance shall not be related to a military offense.

States having mutual assistance treaties with Thailand shall submit their request for assistance directly to the Central Authority. States not having such treaties shall submit their requests through diplomatic channels.

III. EXTRADITION

A. Background and Evolution

As a civil law country, Thailand promulgated the Extradition Act B.E. 2551 in 2008, which was adapted from the Extradition Act B.E. 2472 (1929). This Act is the fundamental legislation for all extradition proceedings so far as it is consistent with the terms of any Treaty, Convention or any Royal Proclamation issued in connection therewith. Thailand may surrender to a foreign state the person accused or convicted of crime committed in the jurisdiction of that state even if no treaty exists, provided that by the laws of Thailand such crimes are punishable with imprisonment of no less than one year. In practice, however, a declaration for reciprocal assistance, as well as certain requirements such as “double criminality”, the principle of double jeopardy (*ne bis in idem*), must also be satisfied before the request for extradition is accorded.

The request for extradition from a foreign state which does not have a treaty with Thailand shall be sent through diplomatic channels, but the treaties usually contain provisions on the procedure of cooperation, that a request may be sent directly through the Central Authority, who is an exclusive center for extradition in the same way as the Central Authority on mutual assistance in criminal matters. In Thailand, the Attorney General is the Central Authority to expedite and facilitate enforcement of the incoming and outgoing requests for extradition.

B. Legal Basics

By virtue of Section 18 of the Extradition Act, the preliminary investigation in court must be made in accordance with the Criminal Procedure Code. In Thailand, there is an option of provisional arrest that may involve a simplified request (basic facts, identifying information) that can be completed and processed quickly. This provision is stipulated in Section 14:

When there is an urgent necessity, the Requesting State may make a request for provisional arrest and detention of the person sought. Such a request of the Requesting State having an extradition treaty with Thailand shall be transmitted to the Central Authority. Where the Requesting State has no extradition treaty with Thailand, it shall be transmitted through the diplomatic channels.

C. Conditions and Requirements to Request Extradition

1. Extradition Offence

In Thailand, the Extradition Act B.E. 2551 does not directly specify the definition of extraditable offences, while many treaties concluded between Thailand and foreign states do so. According to Section 7 of the Extradition Act, which is applicable on a non-treaty basis, it can be implied that the “extradition offences” according to Thai laws are such offences punishable by death or with imprisonment of not less than one year: notwithstanding the provision of extradition laws, treaties between Thailand and some foreign states were concluded upon the list of offences.

Not only the range of penalties of the offences that has to be taken into account, but also the remaining period for its enforcement. Extradition will not be granted if the remaining period for serving the penalty is less than six months, even if other elements to fulfill extradition have been met.

2. Reciprocity

The principle of reciprocity in extradition requires that the requested state, vice versa, have the opportunity to request extradition for the same crime wherein the requesting state would have to grant it. Reciprocity is considered to be a prerequisite claimed by the requested state before extradition is accommodated in the case where no treaty with the requesting states existed.

3. Political Offences

For political Offences, as the exception for extradition, it has traditionally been accepted that states are entitled to decline to extradite a person on the basis that the request relates to a “political offence”. However this is not absolute, as this exception can be exempted when a request involves violent crimes which are very dangerous and capable of carrying out serious damage to lives and properties of innocent victims such as genocide, crimes against humanity and war crimes.

In Thailand, the exception of political offences is stipulated in Section 9 but the exception of political offences does not include the following crimes:

(i) murder or willful crimes against the life or physical integrity of a Head of State or one of the related parties or of a member of that family.

(ii) Offences under the treaty whereby Thailand is a party

(iii) attempts, or coordination with the offender, to commit all said offences mentioned above.

4. Military Offences

It is a recognized principle of Thai law that extradition is not available for military crimes which are not otherwise subject to criminal sanction. However, where the offence in question is an offence under military law and is also an extraditable offence under the non-military, civilian laws, then extradition should not be refused.

5. Extradition of Nationals

Thailand will not extradite Thai nationals. Refusal of an extradition request on these grounds is provided for both in the Extradition Act and often in treaties

6. Capital Punishment

Extradition may be refused where the offence for which extradition is being sought carries the death penalty. Requested countries' refusal of extradition requests based on capital punishment, and their demands for assurances that the death penalty will not be imposed, have been strongly protested by those countries that still retain capital punishment in their systems. In Thailand, national laws give authority to the executive branch to make the necessary assurances that the death penalty will not be imposed or carried out in cases where it otherwise is possible that the death penalty may be imposed (Extradition Act B.E.2551 (2008) section 29).

7. Evidentiary Tests

The Extradition Act requires that the Requesting State provide sufficient evidence of the alleged crime in support of its request for cooperation. Section 19 of the Act stipulated that the court shall order detention of the person sought for extradition when a prima facie case has been established, indicating that such offence has been committed inside Thailand.

8. Dual Criminality

In Thailand, the Extradition Act requires that the conduct constituting the extradition offence be recognized as a criminal offence in both Thailand and the requesting state. This is referred to the dual criminality principle which is now generally accepted that when the laws of both states "appear to be directed to the same basic evil," this is sufficient to establish dual criminality. But there are many treaties between Thailand and other countries that do not require dual criminality.

9. Double Jeopardy

The principle of double jeopardy is part of the Extradition Act, Section 10, which provides as follows: "The person sought for extradition shall not be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the laws by the Thai Court or the Requesting State Court."

10. Speciality

The rule of speciality provides that the Requesting State must specify the offence or offences for which it seeks the person's return and that upon the subject's return, the Requesting State shall only try that person for the offence covered in the request. The following principle is in the Extradition Act, Section 11: "This rule of specialty will not be barred if the requested state consents or the subsequent prosecution of a person who voluntarily remains in Thailand more than 45 days after completion of the extradition process or return to the Thailand."

C. Conclusion

The Extradition Act B.E. 2551 is the law providing for extradition. This includes, inter alia, the nature and extent of the preparation required to understand the legal and procedural framework, communication, and whether to seek a full order or provisional arrest of the person.

(i) The Preparation of Requests

The extradition request must include the name of the person wanted for extradition, along with a clear description of the conduct that constitutes the relevant offences and information about relevant law in the Requesting State. This information provided will assist

the Requested State and the criminal justice agencies involved in the case in making their decisions.

(ii) Provide Sufficient Evidence

Thailand requires evidence to meet certain standards of proof, either to establish a prima facie case or that an appropriate level of information has been included in the extradition request.

(iii) Legal Basis for Requests

Extradition requests should clearly state the legal basis that the Requesting State is seeking to rely upon, such as an applicable treaty.

(iv) Assurances

It is good practice to anticipate and provide any assurances that may be necessary in the extradition request, for example that the person will not be sentenced to life imprisonment or the death penalty.

(v) Language Requirement

The Extradition Act specifies that the request shall be made in Thai. Requesting States should consider having not only the request itself translated in advance, but also any relevant laws or other materials the Central Authority may need to consider, as part of deciding whether to agree to extradite.

(vi) Transmitting Extradition Requests

In cases where there are treaties with Thailand, the requests for extradition are usually transmitted through the Central Authority; where no treaty exists, requests shall be transmitted through diplomatic channels.

(vii) The Extradition Process

The Requesting State ought to make sure that any documents that are being provided as evidence will comply with the formal requirements. When the extradition process is brought before the court to determine if the conditions are met, then the person will be held in custody or on bail to await surrender. The decision of the judge may be subject to appeal by the person sought or the Public Prosecutor.

The extradition process can be simplified if the person, for whom extradition is sought, waives his or her right to have an extradition hearing or consents to their surrender and return to the Requesting State.

APPENDIX 1

Treaties on Mutual Legal Assistance in Criminal Matters

Countries with which Thailand has Treaties on Mutual Legal Assistance in Criminal Matters, and the days when the treaties entered into force.

Countries	Signatory Date	Place of Signature	Date of Entry into force
1. U.S.A.	19 March 1986	Bangkok	10 June 1993
2. U.K.	12 September 1994	Bangkok	10 September 1997
3. Canada	3 October 1994	Ottawa	3 October 1994
4. France	11 September 1997	Paris	1 June 2000
5. Norway	20 May 1999	Bergen	22 September 2000
6. China	21 June 2003	Chiengmai	20 February 2005
7. South Korea	25 August 2003	Seoul	6 April 2005
8. India	8 February 2004	Phuket	7 June 2003
9. Poland	26 February 2004	Bangkok	4 October 2009
10. Sri Lanka	30 July 2004	Bangkok	-
11. Peru	3 October 2005	Lima	3 October 2005
12. Belgium	12 November 2005	Bangkok	23 July 2010
13. Australia	27 July 2006	Kuala Lumpur	18 June 2009
14. Ukraine	-	-	-

APPENDIX 2

Extradition Treaties

Countries with which Thailand has Treaties on Extradition, and the days when the treaties entered into force.

Countries	Signatory Date	Place of Signature	Date of Entry into Force
1. U.K.	4 March 1911	Bangkok	19 August 1912
2. Belgium	14 January 1936	Bangkok	14 January 1937
3. Indonesia	29 June 1976	Bangkok	18 June 1980
4. Philippines	16 March 1981	Manila	7 December 1984
5. U.S.A.	14 December 1983	Washington D.C.	17 May 1991
6. China	26 August 1993	Beijing	7 March 1999
7. Cambodia	6 May 1998	Bangkok	15 March 2001
8. Bangladesh	9 July 1998	Dhaka	1 March 2001
9. Laos	5 March 1999	Bangkok	18 March 2001
10. South Korea	26 April 1999	Seoul	31 March 2001
11. Hong Kong	-	-	-
12. Australia	-	-	-

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS AND COOPERATION IN THE FIGHT AGAINST CORRUPTION IN THAILAND

Kiaitisakdi Putphan^{*}

I. INTRODUCTION

Corruption in itself is probably the most difficult crime to investigate and prosecute due to its clandestine nature. The offenders can be even more professional than the investigators, and they are cautious to cover up any trail of their crimes by taking advantage of sophisticated technology and cross-jurisdictional loopholes. The situation is especially frustrating when tackling bribery offences as the lack of eyewitness and apparent crime scene evidence poses daunting challenges for the investigators. Complicating matters further, enhanced methods of travel and communication make it even easier for criminals to shield themselves from justice by simply crossing national boundaries. For them, boundaries do not constitute obstacles; on the contrary, these transnational elements render the detection and prosecution of corruption offences more difficult and allow criminals to conceal the evidence and profits of their crimes. Mutual Legal Assistance (MLA) is thus an important mechanism through which states may help each other in the fight against international criminality in the areas such as locating witnesses and suspects, tracing money trails, requesting cross-jurisdictional searches and extradition, as well as conducting joint investigations.

Significant efforts by international organizations such as the United Nations Office on Drugs and Crime (UNODC) have highlighted their continued commitment to root out corruption and bribery by the means of international cooperation and asset recovery. For example, Chapter IV on International Cooperation of the United Nations Convention Against Corruption (UNCAC) explicitly encourages States Parties to cooperate in criminal matters and to consider assisting each other in investigations of, and proceedings in, civil and administrative matters relating to corruption, especially by mutual legal assistance.

Mutual Legal Assistance (MLA) is a formal process to obtain and provide assistance in gathering evidence for use in criminal cases, to transfer criminal proceedings to another state or to execute foreign criminal sentences. In some instances, MLA can also be used to recover proceeds of corruption.¹ In addition, the informal cooperation directly from agency to agency is another type of cooperation that could bring an achievement of assistance and cooperation. Both MLA and informal cooperation are indispensable means of international cooperation in fighting corruption.

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¹ Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

II. FORMAL CHANNELS OF INTERNATIONAL COOPERATION IN FIGHTING CORRUPTION THROUGH MUTUAL LEGAL ASSISTANCE

Traditionally, there are two channels through which jurisdictions seek out international cooperation in criminal matters. In other words, when an anti-corruption agency is in need of assistance from a foreign jurisdiction, it will use one or more of the following legal bases when sending its MLA requests to a foreign jurisdiction:

1. Treaty-Based Cooperation

- Multilateral conventions, treaties, or agreements include the UN Convention against Corruption, the OCED Anti-bribery Convention and the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters
- Bilateral Mutual Legal Assistance Treaties or “MLATs”. Bilateral agreements give countries greater flexibility over the preferred scope and degree of cooperation compared to multilateral conventions.

2. Non-Treaty-Based Cooperation

- A jurisdiction can seek assistance from a foreign jurisdiction through provisions in the requested jurisdiction’s relevant domestic legislation on Mutual Legal Assistance. For example, Thailand may grant assistance to a foreign jurisdiction even when no treaties, multilateral or bilateral, exist between Thailand and the requesting jurisdiction, provided that the latter commits to assist Thailand in a similar manner when requested, also known as the reciprocal principle.²

III. INFORMAL CHANNELS OF COOPERATION THROUGH ANTI-CORRUPTION AGENCIES: BACKGROUND OF THE NATIONAL ANTI CORRUPTION COMMISSION (NACC)

The Thai political system includes three separate branches, namely the Executive branch headed by the Prime Minister and the Cabinet; the Legislative Branch comprising the lower and upper houses; and lastly the Judiciary Branch made up of courts of different levels. The fourth branch is an independent organ established by the Constitution to check and balance the government branches. These bodies include the National Anti Corruption Commission (NACC), the Auditor-General, the Ombudsman etc. To ensure their independence, these agencies are not under the executive branch’s supervision and control.

The NACC is a law enforcement body charged with responsibilities of preventing and suppressing public sector misconduct and corruption. It has broad duties and authorities, which include inquiring into public sector corruption, examining the assets and liabilities of politicians and high-level officials, inquiring into politicians and public officials suspected of having accumulated unusual wealth (or illicit enrichment), as well as implementing preventive anti-corruption measures in all social sectors. In addition, the NACC has the power to investigate an individual or the private sector for corruption in cases where such

² This principle is clearly specified in Section 9 or otherwise known as the “reciprocal clause” of Thailand’s Act on Mutual Assistance in Criminal Matters.

individuals or the private sector is involved in corrupt offences conducted by public officials.³

A. NACC: International Cooperation

With regard to international cooperation, the NACC is by law the designated authority in handling all international anti-corruption matters related to Thailand as stipulated in section 19 (14) of the Organic Act on Anti Corruption (No.2) B.E. 2554 (2011). Additionally, in March of 2011, Thailand became a State Party to the United Nations Convention against Corruption. The NACC also maintains observer status at the meetings of the OECD Anti-Bribery Working Group. At the regional level, the NACC is an active member in several forums including the ADB/OECD Anti-Corruption Initiative in Asia and the Pacific and so on. The NACC is also very keen on establishing direct agency-to-agency cooperation with international organizations and foreign law enforcement agencies. This strategy has tremendously helped the NACC in overseas corruption investigations, which will be described in the latter part of this paper.

B. The Thailand Anti-Corruption Agreements Coordination Center (TACC)

The Thailand Anti-Corruption Agreements Coordination Center (TACC) was established following Thailand's ratification of UNCAC to comply with section 19 (14) of the Organic Act on Anti Corruption (No.2) B.E. 2554 (2011). The center serves as a national focal unit for inter-agency coordination of anti-corruption efforts in Thailand, particularly those pertaining to corruption suppression/investigation and fulfillment of obligations under UNCAC. The TACC also handles cross-border corruption cases involving Thai officials or politicians. Even before our ratification of UNCAC in March this year, the NACC was already handling several high-profile international corruption cases and has worked closely with law enforcement agencies in Asia, the US and Europe. Since the numbers of transnational corruption cases are expected to increase significantly in the near future, the TACC is preparing itself by strategically entering into cooperative agreements with potential foreign counterparts. For instance, the TACC has entered into agreements, or Memoranda of Understanding, and has already been working with anti-corruption agencies in the Czech Republic, Morocco and other prospective agencies on an ad hoc, informal basis for corruption investigation and intelligence exchange.

The NACC, by the TACC, has been very active in establishing bilateral cooperative agreements/MoUs with overseas counterparts. This move is in fact in part of the fulfillment of Article 48 of the United Nations Convention Against Corruption, which strongly encourages direct agency-to-agency cooperation against corruption. These bilateral agreements enable the NACC and other anti-corruption agencies to address transnational corruption on a real-time basis and with maximum efficiency and effectiveness.

C. Limitations of Formal Channels of Cooperation

The formal channels of cooperation are not without the limitations and challenges. The examples are as follows:

- Negotiating a multilateral convention is often a complicated and time-consuming task
- Respecting the uniqueness of legal and political systems of individual jurisdictions.

³ 2007 Constitution of Thailand and the Organic Act on Counter Corruption B.E. 2542 (1999), as amended by No.3 B.E. 2554 (2011).

- States Parties to international conventions, such as UNCAC, have different levels of readiness and capacity in implementing obligations of the convention
- Bilateral MLAT requires both the requesting and requested jurisdictions to strictly observe the legal restrictions and procedures imposed on them.
- The lengthy procedures involved in executing a request can make the process ineffective in urgent cases.

The transmission process involved in the execution of a request of assistance by Diplomatic Channels takes much time due to the fact that the request has to be transmitted through several agencies. For the request from Thailand, in cases in which the NACC would like to seek assistance from anti-corruption counterparts in foreign countries, the NACC has to contact the Attorney General, which is the Central Authority in Thailand; the request will then be forwarded from the Central Authority to the Thai Ministry of Foreign Affairs for further transmission to its destination. When the request has been successfully executed, the counterpart agency will then reverse that same process to get the requested information back to us. The requests made through diplomatic channels usually take up nothing less than six months to a year to execute.

And in the cases in which Thailand already has a Mutual Legal Assistance Treaty, or MLAT, with its foreign counterpart, transmission can be made through the central authorities of each country without having to go through the ministries of foreign affairs. This reduces the time needed to about 3 months or longer, but the legal formalities involved in MLAT requests could still be time-consuming and less effective in urgent cases such as requests to freeze illegal proceeds in a bank account.

D. Informal Channels of Assistance

Considering the various limitations and challenges through formal procedures above, formal means of cooperation alone are not always sufficient to carry out effective international cooperation. As such, jurisdictions which are in the process of amending their domestic legal framework should take advantage of informal channels of assistance. Jurisdictions that already have an adequate legal framework in place can also benefit from the effective use of informal channels of assistance, which should be regarded as a practical means to not only supplement, but also to be taken together with the formal channels of assistance.

The difference between formal and informal assistance principally focuses on the speed with which cooperation may be provided and the purpose for which what is obtained is to be used. Because informal assistance often involves direct agency-to-agency communication, legal formalities and procedures can be greatly reduced so long as the execution of such requests does not contravene the national law of the requested jurisdiction. Now, this allows requests of assistance to be executed in an expeditious manner. However, the information obtained through the informal channels can, in most instances, only be used as operational intelligence.

E. Types of Informal Assistance

It is important for law enforcement agencies to recognize that not all types of assistance need to be requested through the formal channels. The first step to facilitating effective informal assistance is to classify the types of assistance according to the level of coerciveness or level of force to be used in executing a request. To give an example, it would be less coercive, or practically non-coercive, if the request pertains to getting information from public records compared to a request that involves a search and seizure that requires a court order.

Informal assistance should be sought at the initial stages of investigation when the primary goal is to obtain intelligence and information, after which the requesting agency can decide whether to proceed with formal assistance. Informal assistance should, at a minimum, include non-coercive investigative actions such as:

- Sharing with each other, spontaneously or upon request, information of relevance for preliminary fact inquiry, detection, substantiation and prevention of corruption
- Providing of public records, such as land registry documents, company documents, information about directors and shareholders
- Identifying or locating a suspect, fugitive or material witness believed to be in the jurisdiction of the Requested Party
- Taking statements of voluntary witnesses
- Conducting surveillance activities

IV. CASE STUDIES: THE EFFECTIVENESS OF INFORMAL ASSISTANCE IN INTERNATIONAL COOPERATION ON ANTI-CORRUPTION

A. Thailand – United States (Greens’ case)

The case involves a Hollywood couple bribing a Thai senior tourism official to unfairly obtain concession rights to organize an international film festival in Bangkok. Through the information provided to the NACC by the United States FBI and Department of Justice, the NACC was able to initiate its own formal inquiry of the Thai public official. In Thailand’s subsequent MLA request to the US Department of Justice, the constant communication we had maintained with our counterpart before, during and after the submission our MLA request, helped expedite its execution.

B. Thailand – Korea

The NACC sought the assistance of the Supreme Prosecutor’s Office of the Republic of Korea in locating the whereabouts of a Thai national wanted in connection with a corruption case in Thailand. Although the NACC had gathered from intelligence operations that the suspect had escaped to South Korea, it was not certain the suspect was still in South Korea. After close consultation with the South Korean prosecutors the NACC decided to first seek informal assistance to verify the whereabouts of the suspect. Because it was a request for informal assistance, the counterpart was able to execute the NACC’s request promptly with minimum legal formalities.

V. CONCLUSION

As mentioned before, the corrupt perpetrators can be even more professional than the investigators, and they are not subject to any limitations in their cross-border operations. Thus, it is important that countries should put their efforts towards attempting to increase cooperation and coordination in order to fight corruption more effectively. There is also a need for collective action internationally and domestically with greater cooperation for both formal and informal channels. Three recommendations to achieve this goal are as follows:

Firstly, countries whose legal frameworks are inadequate in providing international cooperation in anti-corruption should make the amendment of their legal framework a top priority.

Secondly, the responsible official should explore and exhaust informal channels of assistance before resorting to formal MLA. In addition, we have to keep in mind that the formal and informal channels of assistance are not exclusive. They can be used to support each other and to create synergy to enable more effective and efficient international cooperation

And lastly, countries should strive to develop cooperation mechanisms that would help build and strengthen trust among international and domestic anti-corruption stakeholders because trust, above all, is the most important factor in successful international cooperation. This will not only enhance smooth cooperation but will also improve the standard of criminal justice and the efficiency in law enforcement in the respective countries.

MUTUAL LEGAL ASSISTANCE IN THAILAND

*Jiraporn Burintaravanich**

I. INTRODUCTION

The globalization and high technology of worldwide communication creates a number of new opportunities for complicated and cross-border crimes. A single country is not able to fight against corruption, terrorism, transnational crimes, cybercrimes or white collar offences alone, so it is necessary to obtain extensive cooperation from many countries worldwide (international cooperation) to prevent the fugitives from escaping the realm of justice, to retrieve evidence, such as bank statements and business records, and to keep pace with the changing circumstances of our country.

Cooperation measures or assistance to other countries are investigations, inquiries, prosecutions and judicial proceedings (in civil, criminal or administrative cases), including extradition as well as an exchange of the information of crimes, e.g. evidence, bank data, business records etc. Informal cooperation or initial enquiry is conducted by the police through the International Criminal Police Organization (ICPO or Interpol).¹

Mutual Legal Assistance is the assistance on a formal legal basis, basically in the gathering and transmission of evidence by the authority of one country to an authority in another in response to the request for assistance.

Mutual Legal Assistance in Thailand in this paper will be divided into three parts: firstly, Mutual Assistance in Criminal Matters; secondly, Extradition; and thirdly, International Cooperation by the National Anti-Corruption Commission (NACC).

II. MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A. Responsible Agencies and Organizations

1. Public Sector, i.e. the Foreign Ministry, the Interior Ministry, the Justice Ministry and Royal Thai Police.
2. Independent Agencies, i.e. the Office of the Attorney General and courts of justice.

B. Providing and Seeking Assistance

1. Treaty Basis

Thailand has currently concluded Mutual Assistance in Criminal Matters treaties with 14 countries.² The countries concluding Mutual Assistance in Criminal Matters Treaties with

* Legal Officer, Bureau of Legal Affairs, Office of National Anti-Corruption Commission (ONACC).

¹ Mostly for gathering and exchanging information on crimes.

² The United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Norway, Canada, French Republic, the People's Republic of China, the Republic of Korea (South Korea), the Republic of India, the Republic of Poland, the Republic of Sri Lanka, the Republic of Peru, the Kingdom of Belgium, the Commonwealth of Australia, Ukraine.

Thailand have to send the request to the Central Authority.³ On the other hand, the countries which do not have Mutual Assistance in Criminal Matters Treaties with Thailand can send the request through the normal diplomatic channels (or by letters rogatory) as the condition that the non-treaty requesting country commits to assist Thailand in a similar manner when requested (reciprocity).

2. Procedures

(i) Requesting

(a) Rendering assistance to a foreign state (incoming request)

The Requesting State has to send the request to the Thai authority (treaty based: directly to Central Authority/non-treaty based: through diplomatic channels) with the requirements, e.g. name of the authority of the Requesting State, matters, details or information, relevant laws and purposes and necessities; furthermore, in case of forfeiture or seizure of property, this requires final court judgment or court order and description of the property and its location.

(b) Seeking assistance from a foreign state (outgoing request)

Thai agencies and organizations have to send the matter to the Central Authority with the requirements, e.g. name of the agency, matters, details or information, relevant laws, purposes and necessities for seeking assistance.

(ii) Consideration

After the Central Authority has already considered and determined the request about the complement,⁴ it will send the matter to the Board for an opinion. If the opinions of the Central Authority and the Board dissent, the Central Authority has to send the case to the Prime Minister for ruling.

3. The Offences

(i) Classification of Offences Must be Punishable under Thai Law

(ii) Severity of Offences

The other offences are provided by the Mutual assistance treaty between the Requesting state and Thailand.

(iii) Grounds for Refusal

Thailand can refuse or be refused a request for assistance on the following grounds:

- (a) National sovereignty or security.
- (b) Crucial public interests of Thailand.
- (c) Related to a political offence.
- (d) Related to a military offence.

C. Available Types of Assistance

Thailand will provide for a full range of assistance to foreign States by:

³ The Attorney General or the person designated by him.

⁴ The request conforms to the forms, regulations, means and conditions defined by the Central Authority. Furthermore, the request has followed the process correctly as well as accompanied by all appropriate supporting documents.

1. Inquiry and producing evidence
2. Providing documents and information in the possession of Government Agencies
3. Serving documents
4. Search and seizure
5. Transferring persons in custody for testimonial purpose
6. Locating persons
7. Initiating criminal proceedings upon request
8. Forfeiture or seizure of properties

II. EXTRADITION

A. Responsible Agencies and Organizations

1. Public Sector, e.g. the Foreign Ministry, the Interior Ministry, the Justice Ministry and Royal Thai Police.
2. Independent Agencies, e.g. the Office of the Attorney General and courts of justice.

B. Conditions and Requirements of Request

1. Treaty Basis

Thailand has currently concluded extradition treaties with 14 countries⁵; countries concluding extradition treaties with Thailand have to send the request to the Central Authority.⁶ Nevertheless, countries which do not have an extradition treaty with Thailand are not banned from requesting in the latter extradition process. They can send the request through normal diplomatic channels on the condition that the non-treaty requesting country commits to extradite in a similar manner when requested (reciprocity).

2. Procedure

(i) Requesting

(a) Rendering Extradition to a Foreign State (Incoming Requests)

The requesting state has to send the request to the Thai authority (treaty based: directly to Central Authority/non-treaty based: through diplomatic channels) with the required details as specified in the Regulation.

(b) Seeking Extradition from a Foreign State (Outgoing Requests)

The public prosecutors or Thai agencies and organizations can send the matter to the Central Authority with the required details as specified in the Regulation.

⁵ The Commonwealth of Australia, the People's Republic of Bangladesh, the Kingdom of Belgium, the Kingdom of Cambodia, Canada, the People's Republic of China, the Republic of Fiji, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Korea (South Korea), the United Kingdom and the United States of America.

⁶ The Attorney General or the person designated by him.

(ii) Consideration

When the request is submitted through the diplomatic channels, the Ministry of Foreign Affairs has to consider and render an opinion that the request may or may not affect international relations. This opinion is forwarded to the Cabinet for consideration; if the Cabinet concurs with the opinion of the Ministry of Foreign Affairs, the Ministry of Foreign Affairs shall accordingly submit the matter to the Central Authority.

After the Central Authority received the completed request from the State that has an extradition treaty with Thailand or the Ministry of Foreign Affairs (non-extradition treaty with Thailand and request through diplomatic channels), the Central Authority will notify the Public Prosecutor to petition the Court for issuing the arrest warrant.

3. The Offences

(i) Classification of Offences

The offences must be the same category of offences, or the offences are denominated by the same terminology, in the Requesting State and Thailand (dual criminality). These offences must be punishable by death, imprisonment, deprivation of liberty, or other form of detention for a period from one year upward.

(ii) Severity of Offences

The other offences with punishment by imprisonment or by deprivation of liberty and other forms less than one year may be requested for extradition, if related to the offence for which the extradition has been granted whether the request has been made at the same time with the initial request or afterward.

(iii) Grounds for Refusal

Thailand can refuse or be refused the extradition request on the following grounds:

- (a) The request for extradition is contrary to the laws of Thailand or the request is not processed in accordance with the procedure, is not accompanied with proper documents and evidence or is not executable under certain necessary conditions.
- (b) Political crimes⁷ or military crimes.⁸
- (c) Nationality of the person sought for extradition: if that person is not a Thai national or a Requesting State national.
- (d) Existence of the death penalty: the Thai Government has to give assurances of non-execution on offences punishable with death according to the Thai law but not up to the punishment of death according to the law of the Requested State.
- (e) The person sought for extradition was tried and acquitted after a final decision by the Thai Court or the Requesting State Court to served, pardon or amnesty is granted, the

⁷ The offence of political character does not include the following:

(1) Murdering, inflicting bodily injury or depriving liberty of the King, Queen or Heir Apparent;
(2) Murdering, inflicting bodily injury or depriving liberty of Head of the State, government leader or immediate family members of such person;

(3) Committing an offence not regarded as a political offence for the purpose of extradition according to the treaty to which Thailand is a party.

⁸ Military offence means specific military criminal offences and not ordinary criminal offences.

statute of limitations has lapsed or there arises any other causes barring the proceedings against such person under the law of the Requesting State (double jeopardy).

C. Available Types of Extradition

Thailand will extradite persons (arrested or witnesses) with relative documents and evidence after the request is submitted and considered by the Cabinet or the Central Authority.

III. INTERNATIONAL COOPERATION BY THE NATIONAL ANTI-CORRUPTION COMMISSION (NACC)

The National Anti-Corruption Commission (NACC) is the Constitutional Independent Organization that responds to prevent and suppress corruption cases that involve State officials.⁹

A. Powers and Duties

1. To inquire into facts and summarize cases along with an opinion in a submission to the Senate for Removal from Office.
2. To inquire into facts and summarize cases along with an opinion to be referred to the Attorney General for the purpose of prosecution before the Supreme Court of Justice's Criminal Division for Persons Holding Political Positions.
3. To inquire into and determine whether Persons Holding Political Positions and state officials have become unusually wealthy and his or her assets shall be forfeited (devolve to the State).
4. To inquire and decide whether a person holding a political position or a State official holding a position starting from a high-level executive or government official holding a position starting from a division director has become unusually wealthy or has committed an offence of corruption, malfeasance in office or malfeasance in judicial office, or a related offence, including to take action against a State official or government official holding a lower-level position who has jointly committed an offence with the person holding such position or with a person holding a political position, or who has committed an offence in such a manner that the NACC considers an action appropriate as provided by the NACC.
5. To verify the accuracy and actual existence of, as well as changes in, assets and liabilities of Persons Holding a Political Position and State officials who submit the

⁹ State official means a person holding a political position, Government official or local official assuming a position or having permanent salaries, official or person performing duties in a State enterprise or a State agency, local administrator and member of a local assembly who is not a person holding a political position, official under the law on local administration and shall include a member of a Board, Commission, Committee or of a sub-committee, employee of a Government agency, State enterprise or State agency and person or group of persons exercising or entrusted to exercise the State's administrative power in the performance of a particular act under the law, whether established under the governmental bureaucratic channel or by a State enterprise or other State undertaking.

account showing particulars of assets and liabilities under Chapter 3, Inspection of Assets and Liabilities.

6. To monitor and administer the morality and ethics of persons holding political positions.
7. To take action relating to foreign affairs and become a center for international cooperation for the benefit of counter corruption so as to be in conformity with the international legal obligations and agreements pertaining to counter corruption.

B. Available Types of Assistance

In case of International Cooperation, the NACC is the national authority for exchange of information about corruption and cooperation with other agencies or entities in both Thailand and other countries. The NACC, by the Thailand Anti-Corruption Agreement and Coordination Center (TACC), handles cross-border corruption cases involving Thai officials or politicians.

The cooperation between NACC and other countries is the informal channel that parallels the formal channels of Mutual Legal Assistance by the Central Authority, and NACC and other countries may or may not have treaties or Memoranda of Understanding. Available types of informal assistance are:

1. Sharing with each other (spontaneously or upon request) information of relevance for preliminary fact inquiry, detection, substantiation and prevention of corruption.
2. Providing public records, such as land registry documents, company documents, information about directors and shareholders.
3. Identifying or locating a suspect, fugitive or material witness believed to be in the jurisdiction of the requested party.
4. Taking witness statements of voluntary witnesses.
5. Conducting surveillance activities.

IV. CONCLUSION

For Thailand, the operation of Mutual Legal Assistance via formal channels (treaty based: directly to Central Authority/non-treaty based: through diplomatic channels) is the general way of assistance in criminal cases as provided by law. In a corruption case, Thailand has the National Anti-Corruption Commission (the Constitutional Independent Organization) to suppress and prevent such cases and cooperate with agencies or authorities of other countries through informal channels.

The informal channels of assistance and cooperation of the Thailand Anti-Corruption Agreement and Coordination Center (TACC) is in line with the operation of the Central Authority in the formal channels, but the pros of informal channels include shorting the time of coordination, which means the request can pass through the agencies or authorities of the other countries immediately (furthermore, the agencies or authorities can send the evidence, such as public records or information identifying the domicile of the accused person etc.).

Thus, Mutual Legal Assistance (Mutual Assistance in Criminal Matters and Extradition) in a variety of channels, via formal channels (treaty based: directly to Central Authority/non-treaty based: through diplomatic channels) and via informal channels (through the National Anti-Corruption Commission, especially the Thailand Anti-Corruption Agreement and Coordination Center), is an efficient way to cooperate with Thailand and other countries for suppression and prevention of complicated crimes and cross-border crimes, e.g. corruption, terrorism, cybercrimes, white collar offences etc.

After Thailand ratified the United Nations Convention against Corruption B.E. 2546 (2003) and became a State Party since B.E. 2554 (2011), Thailand has an obligation to implement UNCAC 2003 (chapters 3-5) by drafting and amending the three relevant laws, i.e.:

A. The Thai Penal Code

1. Adding the terms of “foreign public officials” and “officials of public international organizations”.
2. Adding the criminalizing of offences towards public officials and the abuse of functions or position relating to foreign public officials or officials of public international organizations.
3. Adding the suspension of statutes of limitations periods in cases in which an offender evaded prosecution overseas or having such statutes of limitation periods restart after being back for prosecution.

B. The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) by adding the principles of tracing, freezing, and confiscating of property transferred overseas

C. The Proceeds of Crime Act by focusing on measures to facilitate asset recovery

Thailand will have measures to handle cross-border crimes or transnational crimes to reach a goal of international cooperation, especially to prevent and suppress corruption when these three important draft Acts are enacted.

In addition, the National Anti-Corruption Commission looks forward to amending the law by adding the Thailand Anti-Corruption Agreement and Coordination Center as the Competent Authority for the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992), and providing the power to the National Anti-Corruption Commission to give Mutual Legal Assistance to other countries via formal and informal channels.

V. RELEVANT LAWS AND REGULATIONS ON MUTUAL LEGAL ASSISTANCE

- A. The Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992)
- B. Regulation of the Central Authority on Providing and Seeking Assistance in Criminal Matters B.E. 2537 (1994)
- C. The Organic Act on Counter Corruption B.E. 2542 (1999)
- D. United Nations Convention against Corruption 2003

E. Constitution of the Kingdom of Thailand B.E. 2550 (2007)

F. Extradition Act B.E. 2551 (2008)

COUNTRY PRESENTATION OF VIET NAM

Thi Quynh Anh Ngo^{*}

Mr. Chairman,

Your Excellencies and distinguished guests,

First of all, I would like to thank the hosts, Japan and UNAFEI, for organizing this important event so that the participating countries can share experiences in mutual legal assistance and extradition. Then, we can strengthen the rule of law and our judicial systems and legal infrastructure in order to successfully cooperate and effectively combat crimes.

In my presentation, I would like to introduce Vietnamese regulations on basic mechanisms and procedures concerning MLA and extradition; agencies responsible for these matters; conditions and requirements to request MLA and extradition; some difficulties coped with during the process of execution and some typical cases; experiences and instances of MLA and extradition; and some recommendations for enhancing the effectiveness of the assistance.

A. Basic Principles Relating to Mutual Legal Assistance and Extradition

The Law on Mutual Legal Assistance of Viet Nam was passed by the National Assembly and entered into force on July 2008. This law provides for principles, competences, and procedures of executing legal assistance in civil and criminal matters, extradition and transfer of sentenced persons between Viet Nam and foreign countries; and responsibilities of state agencies of Viet Nam in mutual legal assistance.

1. Mutual Legal Assistance in Criminal Matters

(i) *Competent Agencies*

According to Article 64 of the Law on Mutual Legal Assistance, the Supreme People's Procuracy (SPP) is the *Central Authority* of MLA activities of Viet Nam. The SPP has responsibility to receive, send, monitor and urge the execution of requests for mutual legal assistance in criminal matters; consider and decide on execution and request the appropriate People's Procuracy or investigation agency to execute requests for mutual legal assistance in criminal matters; and to refuse or postpone the execution of a request for mutual legal assistance within its competence.

The SPP delegates those functions to its Department of International Cooperation and MLA in criminal matters. The contact details are as follows: The Department of International Cooperation and MLA in criminal matters, the SPP of Viet Nam.

Address: 44 Ly Thuong Kiet Street, Ha Noi, Viet Nam
Phone: +84 38255058 – ext 428.

^{*} Head of Division for Mutual Legal Assistance in Criminal Matters, International Cooperation Department, Supreme People's Procuracy of Vietnam.

Email: ttp_mla@vks.gov.vn

Other state agencies involved: Investigation bodies and courts at all levels.

(ii) Scope of Assistance

Under the provisions of this Law (Article 17), forms of mutual legal assistance in criminal matters between Viet Nam and foreign states include: service of documents and other records and documents concerning mutual legal assistance in criminal matters; summoning of witnesses, experts, and persons who have rights and obligations in the case; collection and provision of evidence; criminal prosecution; exchange of information; and other forms of mutual legal assistance in criminal matters.

Within its authority and responsibilities provided by law, the SPP, as the Central Authority, has to directly manage, receive and organize the implementation of those MLA cases.

(iii) Procedures for an In-coming Request

Requests from the competent authorities of foreign countries will be sent to the SPP of Viet Nam directly under regulations of treaties or through diplomatic channels. After receiving an MLA request sent by a foreign competent authority, the SPP records it in the Register of requests for legal assistance in criminal matters, checks its validity and transmits it to the agency conducting the Vietnamese criminal proceedings for execution. If the request is not valid, the SPP returns it to the competent authority of the requesting State and specifies the reasons therefore. The SPP also offers translation services for those documents that have not been translated into Vietnamese.

If a request is under executing authority of the Investigation Police Office or the Security Investigation Agency of the Ministry of Public Security, the SPP will transfer it to the appropriate agency of the Ministry of Public Security to execute. If a request is under the authority of the People's Procuracy at the provincial level, the SPP will transfer it to the provincial People's Procuracy to implement.

A document containing the results of a request's execution is sent back by the agency conducting the Vietnamese criminal proceedings; then, the SPP sends it to the competent authority of the requesting State according to the international treaty to which Vietnam and that foreign state are parties, or through diplomatic channels.

If the request cannot be executed, exceeds the time limit required by the foreign competent authority, or needs additional conditions to execute, the agency conducting the Vietnamese criminal proceedings shall inform in writing the Supreme People's Procuracy of the reasons therefore so that the SPP can notify the competent authority of the requesting State.

(iv) Conditions for Refusal or Postponement of the Execution of a Foreign Request

(a) A foreign request will be refused in one of the following circumstances:

- It is not in conformity with Vietnamese laws or the obligations of Viet Nam under the international treaties to which Viet Nam is a party;

- The execution of the request may jeopardize the sovereignty or national security of Viet Nam;

- The request is for prosecution of a person for criminal conduct of which that person has been convicted, acquitted or granted a general or special reprieve in Viet Nam;

- The request relates to criminal conduct for which the statute of limitations has elapsed according to the Penal Code of Viet Nam;

- The request relates to a violation of law which does not constitute a criminal offence under the Penal Code of Viet Nam.

(b) The execution of a foreign request for legal assistance in criminal matters may be postponed if the execution of that request would create an obstacle to the investigation, prosecution, trial, or the enforcement of a judgment in Viet Nam. After deciding to refuse or postpone the execution of a request, the SPP will inform the requesting State of the reasons therefore and measures to be taken.

2. Extradition

(i) Competent Agencies

The Law on Mutual Legal Assistance of Viet Nam stipulates the responsibility of the Ministry of Public Security as the Central Authority for extradition (Article 65). The Ministry of Public Security must receive, send, consider, and execute foreign requests for extradition. Other state agencies involved are the SPP and the Supreme People's Courts, the provincial People's Procuracies and Courts.

(ii) Extraditable Offences

Extraditable offences are offences punishable, under the criminal laws of both Viet Nam and the requesting state in force at the time of extradition, by imprisonment for a period of at least one year, life imprisonment, or death, or in cases where the offender has been sentenced by the court of the requesting State to imprisonment and the remaining term of imprisonment to be served is at least six months.

However, it will not matter whether the laws of both Viet Nam and the requesting state place the referred conduct within the same category of offence or denominate the offence by the same terminology.

Where the referred offence has been committed outside the territory of the requesting state, extradition may be granted if it is a criminal offence under the Penal Code of Viet Nam.

(iii) Conditions for Refusal of Extradition

(a) Compulsory refusal: Viet Nam will not grant extradition in any of the following circumstances:

- The person whose extradition is requested is a Vietnamese citizen;

- Under the laws of Viet Nam, the person whose extradition is requested cannot be prosecuted or does not have to serve the sentence imposed due to lapse of the statute of limitations, or for other legitimate grounds;

- The person whose extradition is requested for prosecution has been convicted under a final judgment by a Vietnamese court for the conduct to which the request relates or the case has been suspended according to the criminal procedure laws of Viet Nam;

- Where the competent authorities of Viet Nam have reasonable grounds to believe that the request for extradition has been presented with a view to prosecuting or punishing the person sought by reason of race, religion, sex, nationality, social status, or political opinions;

- Where the request for extradition relates to more than one offence and each offence is punishable under the laws of the requesting State but does not meet the demands of extraditable offences under Vietnamese laws.

(b) Optional refusal: The agencies conducting criminal proceedings of Viet Nam may refuse to grant extradition in any of the following circumstances:

- The conduct committed by the person whose extradition is requested does not constitute an offence under the Penal Code of Viet Nam;

- The person whose extradition is requested is being prosecuted in Viet Nam for the offence for which extradition is requested.

(iv) Procedures

After receiving the request for extradition and the accompanying documents sent by a foreign competent authority, the Ministry of Public Security will enter this fact in the extradition register and examine the validity and feasibility of the request. The Ministry of Public Security may request the foreign competent authority to furnish additional information. If that additional information is not received by the Ministry of Public Security within 60 days from the date of sending the request for that information, it will return the dossier of request for extradition to the requesting state and inform that state of the reasons for the return. If the dossier is valid, the Ministry of Public Security will transmit the dossier to the competent People's Court at the provincial level for consideration and decision.

The Provincial People's Court where the person whose extradition is requested is residing, detained or serving the sentence of imprisonment must entertain the request transmitted by the Ministry of Public Security and inform in writing the People's Procuracy at the same level. Within the time limit for considering the request for extradition, the People's Court at the provincial level may request the foreign competent authority for clarification of uncertain points in the request for extradition. The request for extradition and the reply will be transmitted through the Ministry of Public Security of Viet Nam.

Within four months of consideration, the People's Court at the provincial level will issue one of the following decisions: (1) consider the request for extradition if it satisfies all the requirements prescribed; (2) suspend the consideration of the request and return the dossier of request to the Ministry of Public Security if any reason renders the consideration of the request impossible. Then, the People's Court at the provincial level must consider the request for extradition within 30 days of the issuance of the decision to consider the request and transmit a set of the dossier of request to the People's Procuracy at the same level. The request for extradition will be considered at a hearing of a chamber consisting of three judges, one of whom shall chair the hearing, and a representative of the People's Procuracy at the same level. The People's Court at the provincial level will send the decision to the person

whose extradition is requested, to the People's Procuracy at the same level, and to the Ministry of Public Security for exercising their legal rights and duties.

The person whose extradition is requested has the right to appeal; the People's Procuracy at the same level and the Supreme People's Procuracy have the right to protest the decision issued by the People's Court at the provincial level. The Supreme People's Court reviews any decision of the People's Court at the provincial level which is appealed or protested. The appellate court will decide whether to extradite or refuse to extradite the person sought. The Ministry of Public Security will arrange the execution of the decision on extradition and inform in writing the requesting State thereof.

B. Experiences and Instances of MLA and Extradition

In 2011 and the first 6 months of 2012, Viet Nam received 74 MLA requests and 2 extradition requests from other countries, mostly from European countries. Viet Nam also sent 54 MLA requests and 2 extradition requests to foreign countries. The MLA requests sought mainly are for serving of documents, providing of evidence, and criminal prosecution. Actually, the content of MLA requests are more and more complicated and diverse, involving many areas and serious crimes such as murder, drug-related crimes, corruption, fraudulent appropriation of property, money laundering, etc. There is a increasing trend of not only the number but also the character and nature of requests.

During the process of executing MLA and extradition requests, Viet Nam copes with some difficulties such as the time-consuming nature of the process, differences of laws and regulations, taking testimony or statements via video link, attendance of foreign officers, death penalty issues, languages, etc. Specifically, the law on criminal procedure of Viet Nam provides a time limit for each stage of the investigation, prosecution and trial while the MLA requests have no time limits for execution. Some cases took up to a year or longer to resolve; some cases from 2009 are still unresolved. That is the obstacle causing delay to the domestic criminal procedure of the cases having outgoing MLA requests. The death penalty is still applied in the Vietnamese system of punishment. Some MLA requests relating to crimes can be punished with the death penalty, and it is one of the refusal conditions of foreign countries. Besides, Vietnamese laws do not permit the measure of taking testimony or statements via video link and the attendance of foreign officers in the process of resolving domestic criminal cases. However, Viet Nam recently has implemented projects of judicial reform including supplementing and amending laws relating to criminal procedure and international cooperation. Those matters mentioned above have been taken into consideration.

Typical successful case: one of the most successful instances is the assistance between Viet Nam and Japan in 2010 - 2011. That was a case of tax evasion and unfair competition crimes that happened in a Japanese company (short name is PCI) having its head office in Tokyo. This company had some contracts with a Vietnamese company and underground agreements with the Vietnamese director to receive mutual personal benefits. That Vietnamese director also was a defendant of a criminal case for receiving bribes in Viet Nam. In order to get enough evidence to prove the crimes, both competent agencies of Japan and Viet Nam sent requests to each other asking for assistance in providing information and documents in their respective jurisdictions. Because there is no MLA treaty between Japan and Viet Nam, the assistance based on assurance of reciprocity and the MLA requests were sent through diplomatic channels. As a result, the competent authorities of Japan had used evidence from Viet Nam to prosecute and punish Japanese criminals. Respectively, with

thousands of papers as evidence from the Japanese, the Courts in Viet Nam successfully adjudicated the corruption case and sentenced the accused to 20 years' imprisonment.

C. Some Recommendations

To speed up the process, a network of Central Authorities with full details of contact persons should assist the close coordination, information exchange and activities on enhancing legal assistance of countries.

The contents of sending requests should have enough information related to the case and its legal basis, including information on the time limit for domestic procedures to resolve the case.

Organizing more seminars on special subjects and working groups will help participating countries share information, updates on foreign laws in force and learning experiences with others.

Southeast Asian countries must establish a cooperating mechanism to share information and suitable modes of operation to deal with transnational cases where criminal acts take place in both countries or where the person to be extradited is a foreigner who engaged in criminal acts in the territory of other countries.

Thank you for your attention.

CHAIR'S SUMMARY

Chair's Summary
Sixth Regional Seminar on Good Governance
for Southeast Asian Countries
International Cooperation: Mutual Legal Assistance and Extradition
(12-14 December 2012, Tokyo, Japan)

1. The Sixth Regional Seminar on Good Governance for Southeast Asian Countries, hosted by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), was held in the Main Conference Room of the Ministry of Justice of Japan, in Tokyo from 12 to 14 December 2012.

2. Officials and experts from the following countries and organizations attended the seminar:

Cambodia; Indonesia; Lao PDR; Malaysia; Myanmar; Philippines; Thailand; Vietnam; the Seoul High Prosecutors' Office of the Republic of Korea; the Attorney-General's Chambers of Singapore; the Ministry of Justice of Japan; the National Police Agency of Japan; and the Ministry of Foreign Affairs of Japan.

3. Officials and experts from the following organizations also joined the seminar:

The Basel Institute on Governance; Beijing Normal University; ILANUD; and the Korean Institute of Criminology.

4. Mr. Tatsuya Sakuma, Director of UNAFEI, delivered the opening speech, expressing his gratitude to the above countries and organizations for their participation.
5. Mr. Kenichi Kiyono, Deputy Director of UNAFEI, provided an overview on international cooperation, emphasized the importance of international cooperation to combat corruption, and identified common obstacles and measures to overcome them.
6. Speakers from the Ministry of Justice of Japan, the Seoul High Prosecutors' Office of the Republic of Korea and the Attorney-General's Chambers of Singapore gave comprehensive presentations on the frameworks of mutual legal assistance and extradition and discussed practical issues.
7. In the country presentations, the participants outlined their respective countries' basic mechanisms and procedures for mutual legal assistance and extradition, conditions and requirements for rendering assistance, the scope of offences, available types of assistance, grounds for refusal, and their experiences and successful instances of cooperation. Some countries pointed out the practical challenges of requesting and receiving mutual legal assistance and extradition and advocated constructive proposals to solve these issues.
8. The speaker from Beijing Normal University presented the legal framework and practice of mutual legal assistance in China. The speaker from the Basel Institute on

Governance addressed the universal legal framework for mutual legal assistance regarding asset recovery.

9. During discussions, participants and speakers pointed out various obstacles they face regarding international cooperation, such as the lack of knowledge on legislation, requirements and procedures of mutual legal assistance and extradition, the lack of personal and professional interaction between central authorities, problems with the translation of formal requests into the requested country's official language, delay in the execution of requests, and a lack of well-trained personnel involved in international cooperation.
10. During the Meeting, the participants shared the following views and ideas to overcome challenges:
 - The importance of establishing an effective and clear framework of mutual legal assistance and extradition, particularly the identification and designation of responsible and effective central authorities.
 - The benefit of having a forum for the exchange of updates on the formal and informal frameworks of international cooperation and having a mechanism for sharing contact information.
 - The necessity of prompt execution of requests for mutual legal assistance and extradition, and transparency in the process of receiving and executing the requests.
 - The importance of facilitating and utilizing informal channels before the submission of formal requests, enhancing the network between counterparts.
 - The benefit of using English versions of the requests in informal consultation or as formal requests, where appropriate.
 - The importance of building confidence and trust between counterparts at central authorities and related agencies to facilitate international cooperation.
 - The benefit of holding annual conferences of central authorities and other related organizations, such as this Good Governance Seminar, to make the international framework of mutual legal assistance and extradition more effective and to boost mutual understanding and relations of trust.
 - The importance of learning from other countries' experiences and exchanging good practices.
11. The visiting experts and participants expressed their thanks and appreciation to the Japanese Ministry of Justice and UNAFEI for hosting this Sixth Good Governance Seminar for Southeast Asian Countries.

Tokyo, 14 December 2012

Comparative List of Systems of MLA and Extradition in the Participating Countries

MLA	KHM	IDN	JPN	KOR	LAO	MYS	MMR	PHL	SGP	THA	VNM
Domestic Law	Code of Criminal Procedure (CCP)	2006 No. 1 Act on MLA in Criminal Matters	1980 Law on International Assistance in Investigation	Act on International Judicial Mutual Assistance in Criminal Matters	None	2002 Mutual Assistance in Criminal Matters Act	2004 Mutual Assistance in Criminal Matters Law	None	Mutual Assistance in Criminal Matters Act	1992 Act in Mutual Assistance on Criminal Matters	2008 Law on MLA
Treaty required?	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)	No (If no treaties, special direction by the Minister of Legal Affairs with AG's recommendation is required)	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)
Compulsory judicial intervention possible without treaties?	Yes	Yes	Yes	Yes	Yes	Yes if reciprocity is given & dual criminality satisfied	No	No (if execution would require court intervention)	Yes, if reciprocity undertaken provided	Yes	Yes
Can UNCAC be the basis?	Yes	Yes	Not ratified yet	Yes (after ratification in 2008)	Yes	Yes (after ratification)	Not ratified yet	Yes	No	Yes	Yes
Member of ASEAN MLAT?	Yes	Yes	No	No	Yes	Yes (Secretariat)	Yes	Yes	Yes	No	Yes
Requesting (Central) Authority	MOJ (MFA if no treaty)	Minister of Law and Human Rights	MOJ, NPA (MOFA if no treaty)	MOJ (through MOFA)	MOJ	AGC	MOHA and other organizations (MOFA if no treaty)	DOJ, OMB (only for States Parties to UNCAC or in the absence of bilateral treaty with the Philippines)	AGC	OAG (MOFA if no treaty)	SPP (MOFA if no treaty)
Requested (Central) Authority	MOJ (MFA if no treaty)	Minister of Law and Human Rights	MOJ (MOFA if no treaty)	MOJ (through MOFA)	MOJ	AGC	MOHA and other organizations (MOFA if no treaty)	DOJ, OMB (only for States Parties to UNCAC)	AGC	OAG (MOFA if no treaty)	SPP (MOFA if no treaty)
Who is involved in executing the request?	MOJ, Prosecutor General, Anti-Corruption Unit	Police, AG, PP, KPK	MOJ, PPO, NPA, Police	Prosecution Service	MOFA, MOJ, Ministry of Public Security, Supreme People's Court	Police, MACC, Central Bank, Multimedia & Communication, Customs, Immigration etc	Bureau of Special Investigation (BSI), Myanmar Police Force, Ministry of Home Affairs	DOJ, OMB, National Bureau of Investigation (NBI), AMILC (for bank records)?	AGC, Ministry of Law, relevant law enforcement agencies	Police Commissioner General, State Attorney Director for Litigation, Director General of the Correctional Department	Investigation Police Office, Security Investigation Agency of Ministry of Public Security, Court
Dual criminality required?	Yes	Yes	Yes (exceptions by treaties)	Yes (Discretion)	Yes	Yes	Yes	No	Yes	Yes (exceptions by treaties)	Yes
Language (Is English version acceptable?)	English and French are available	English is acceptable	Japanese (cannot be substituted but can be supplemented by English version)	English is acceptable	Lao and English (both)	Yes	Burmese and English (both)	Yes	Must be in English	Yes	SPP translates the request
Non-Conviction-Based Confiscation?	Yes	No	No	No	No	Yes	No	Yes	Yes	No	No

Extradition	KHM	IDN	JPN	KOR	LAO	MYS	MMR	PHL	SGP	THA	VNM
Domestic Law	2007 CCP	1979 No.1 Act on Extradition	1953 Extradition Law	Extradition Act	2012 Law on Extradition	1992 Extradition Act	1903 Extradition Act (not working)	Extradition Law (P.D. 1069)	Extradition Act	2008 Extradition Act	2008 Law on MLA
Treaty required?	No (with reciprocity), Art. 567	No (with reciprocity)	No (with reciprocity)	No (with reciprocity)	Yes	No (Special Direction of Minister of Legal Affairs with AG's recommendation)	n/a	Yes	Yes, unless declared commonwealth countries	No (with reciprocity)	No (with reciprocity)
Can UNCAC be the basis?	Yes	Yes	Not ratified yet	No	Yes	Yes (after ratification)	Not ratified yet	No	No	Yes	No
Requesting (Central) Authority	MOJ	Minister of Law and Human Rights through MOFA	MOFA	MOJ (through MOFA)	People's Supreme Prosecutor	Minister of Home Affairs (AGC examines) through MOFA's diplomatic channels	n/a	DOJ	AGC	OAG (MOFA if no treaty)	Ministry of Public Security
Requested (Central) Authority	MOJ (through MOFA) (Art.579)	Minister of Law and Human Rights through MOFA	MOFA	MOJ (through MOFA)	People's Supreme Prosecutor	Minister of Home Affairs (AGC examines) through MOFA's diplomatic channels	n/a	DOJ	AGC	OAG (MOFA if no treaty)	Ministry of Public Security
Who is involved in executing the request?	MOJ, PG, Investigation Chamber of Phnom Penh Court of Appeal	Police, AG, KPK	MOJ, PPO	Prosecution Service	MOFA, MOJ, Ministry of Public Security, Supreme Court	Royal Malaysia Police, Magistrate Court, Sessions Court	n/a	DOJ, NBI (National Bureau of Investigation), Regional Trial Court	AGC, Ministry of Law, Magistrate	Public Prosecutor, Court	SPP, Supreme People's Court, Provincial People's Procuracies & Courts
Dual criminality required ?	Yes (Art. 569)	Yes	Yes	Yes	Yes	Yes	n/a	Yes	Yes	Yes (exceptions by treaties)	Yes
Extradite own nationals?	No (Art. 566)	Discretion	No (exceptions by treaties)	Discretion	No	Discretion	n/a	Discretion (exceptions by treaties)	Yes	No	No
Provisional arrest possible?	Yes (Art. 581)	Yes	Yes	Yes	Yes	Yes	n/a	Yes	Yes	Yes	Yes

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SEMINAR SCHEDULE

The Sixth Regional Seminar on Good Governance for Southeast Asian Countries

- *International Cooperation: Mutual Legal Assistance and Extradition* -

12-14 December 2012

Main Conference Room, Ministry of Justice, Tokyo

Host :

United Nations Asia and Far East Institute
for the Prevention of Crime and the Treatment of Offenders (UNAFEI)

Tuesday, 11 December

17.00-18.00: Registration

18.00-19.30: Reception hosted by UNAFEI (on the 11th floor of KKR Hotel)

Wednesday, 12 December

8.30 : Assemble at the lobby of KKR Hotel

9.20- 9.25: Welcome and Announcements

9.25- 9.40: Opening Ceremony

Opening Address by Mr. Tatsuya Sakuma, Director, UNAFEI

Address by the Honourable Mr. Katsuyuki Nishikawa, Vice Minister of Justice

Group Photo

9.40- 9.50: Coffee/Tea Break

9.50-10.00: Introductory Remarks by Mr. Kenichi Kiyono, Deputy Director, UNAFEI

10.00-10.30: Presentation by Speaker (Ministry of Justice of Japan)

10.30-11.00: Presentation by Speaker (Attorney-General's Chambers of Singapore)

11.00-11.30: Presentation by Speaker (Korea)

11.45-13.00: Lunch at Hibiya Palace hosted by the Korean Institute of Criminology

13.15-14.15: Observation Tour of Tokyo District Public Prosecutors' Office

14.30-18.00: Joint Ceremony for UNAFEI's 50th and ACPF's 30th Anniversaries

19.00-21.00: Party for UNAFEI's 50th and ACPF's 30th Anniversaries (at KKR Hotel)

Thursday, 13 December

9.00 : Assemble at the lobby of KKR Hotel

9.50-10.20: Country Presentation (Philippines)

10.20-10.50: Country Presentation (Cambodia)

10.50-11.20: Country Presentation (Thailand)

11.20-11.30: Q & A Session

11.30-13.30: Lunch

13.30-14.00: Country Presentation (Lao PDR)

14.00-14.30:	Country Presentation (Myanmar)
14.30-15.00:	Country Presentation (Viet Nam)
15.00-15.10:	Q & A Session
15.10-15.25:	Coffee/Tea Break
15.25-16.05:	Country Presentation (Indonesia)
16.05-16.35:	Country Presentation (Malaysia)
16.35-16.45:	Q&A Session
16.45-17.00:	Coffee/Tea Break
17.00-18.00:	Discussion

Friday, 14 December

8.50	:	Assemble at the lobby of KKR Hotel
9.40-10.00:		Presentation by Speaker (Beijing Normal University)
10.00-10.30:		Presentation by Speaker (Basel Institute on Governance)
10.30-11.00:		Discussion, Statement of Chairman
11.00-11.20:		Coffee/Tea Break
11.20-11.30:		Closing Ceremony
12.00-12.45:		Farewell Lunch

Afternoon: Tokyo Tour; Imperial Palace, Asakusa, and Tokyo Sky Tree

APPENDIX

PHOTOGRAPHS

- *Commemorative Photograph*
 - *Opening Address by Director Sakuma*
 - *Address by Vice Minister of Justice Nishikawa*
 - *Presentation by the Delegation from Myanmar*
 - *Presentation by Speaker Samdin of Singapore*
-

UNAFEI



Commemorative Photograph



Opening Address by Director Sakuma



Address by Vice Minister of Justice Nishikawa



Presentation by the Delegation from Myanmar



Presentation by Speaker Samdin of Singapore