EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN THAILAND

*Sirisak Tiyapan**

I. INTRODUCTION

Traditional criminal justice usually begins with the tracing of clues and gathering of evidence after the occurrence of a crime, then to arresting of a suspect, putting him under custody, enquiring witnesses and, unless the investigation is conducted by the prosecutor, to refering the case to the prosecutor for screening and institution of prosecution or dropping it and letting the suspect go. In case of prosecution, the prosecutor then resumes his function in the court throughout the whole process. However, when the case become more complex because it touches upon the components of internationalized character or involves the matters of a state's jurisdiction, then the process generally applicable to the domestic criminal has justice may become impossible or even fail on its entirety. This may be perceived, for instance, when a crime has been committed in one country and the criminal has fled away to another country. How do we bring the offender back to stand trial and punishment? Of course, it would be impossible for the country of the crime scene to send its officers to arrest the fugitive directly in the territory of another state because it is against international law. Also, if the investigation or prosecution is carried out in one country but the essential evidence or witnesses exist in another country: How do we obtain such evidence or statements of such witnesses because then again the proceeding country could not send its authorities to conduct an investigation or to collect evidence within the jurisdiction of another country.

The situation illustrated here is not exhaustive. There still exists many aspects and problems the difficulty of which is beyond the capacity of a single state to deal with, especially under the current situation whereby many serious transnational organized crimes such as narcotics trafficking, money laundering, transportation of illicit firearms, sexuality exploitation of women and children, computer fraud, financial crime, terrorism, and so on, have been spread all over the world posing a great danger to every country. The tendency of today's crime is likely to continue and become even more severe in the next millennium. To halt the transnational criminality, states must concretely coordinate with each other in the prevention and suppression of it. Assistance and coordination between states to tackle the crime can take many forms and is collectively known as "international cooperation."

In broad sense, international cooperation encompasses every kind of activity regarding crime and justice, namely; mutual legal assistance, extradition, transfer of proceedings and prisoners, as well as technical cooperation. However, since this paper is intended to be used as the supporting document for the lecture to be given in the 114th UNAFEI International Senior Seminar, "International Cooperation to Combat Transnational Organized Crime - with Special Emphasis on Mutual Legal Assistance and Extradition", it will, therefore, discuss and concentrate

* Expert State Attorney, Legal Counsel Department, Office of the Attorney General, Thailand

substantially only on the issues of mutual legal assistance and extradition as emphasized. In this context, the experience of Thailand in dealing with the cases, laws, regulations, and practice will be taken as the model for comparative study.

II. EXTRADITION IN GENERAL

Of all categories of international cooperation, extradition is the most concrete and direct means to take back the fugitive offender to stand trial and serve sentence in the jurisdiction of the state where he fled away. Extradition of today is still based on different norms and practices, which is reflected by diverse national legislation and treaties concluded between countries. The reasons behind this diversity may be as one scholar[1] point out that "*States still favor bilateral treaties and make extradition a consequence of their political relations. Thus, politically friendly countries reduce what government consider to be barriers to extradition, while the same countries increase these barriers in their relations with less friendly ones*". To take international cooperation among states, which has as its initial objective to cope with crime, as a means for acquiring political interests as such is, of course, against the spirit of crime prevention and suppression. Extradition should be regarded as a tool to prevent the fleeing away of transnational criminals who usually snatch the advantages from the limits of law enforcement, which often end at the border, as well as loopholes arising from the different laws and practices among nations to escape from justice. Difference in norms and practices is unarguably the crucial cause of hindrance and failure of effective extradition. Concern has, therefore, been expressed intensively at international forums as how to harmonize or compromise this kind of differences.

To harmonize diversity, attempts have been made on several occasions either at the global or regional level by international organizations, associations, and NGOs. This can be perceived, for instance, from the works of the United Nations, Association Internationale De Droit Penal, the Asia Crime Prevention Foundation or ACPF, and UNAFEI.

One predominant effort in this regard is the adoption of the United Nations Model Treaty on Extradition in 1990, which has been proposed revising later on by the Intergovernmental Expert Group Meeting on Extradition[2]. This Model treaty has as its main objective the suggestion of a uniform guideline to facilitate treaty conclusions between states. Recently, the issue of extradition has also been discussed comprehensively during the drafting of the International Convention against Transnational Organized Crime. According to the draft convention, significance of extradition in enhancing the effectiveness of criminal justice and law enforcement mechanisms under an international setting to combat transnational organized crime has been recognized, thus, one provision related to extradition will be specifically included.[3]

III. EXTRADITION IN THAILAND

A. Legal Basis

As a civil law country, Thailand promulgated the "Extradition Act B.E. 2472" in 1929. This act is the fundamental

[1] Cherif Bassiouni, Preface of International Review of Penal Law, Vol.62, Nos. 1-2, 1991, p.13

[2] Intergovernmental Group Meeting on Extradition was held at Siracusa, Italy, from 10-13 December 1996

[3] Draft United Nations Convention against Transnational Organized Crime, Article 10, UN documents A/AC. 254/4/Rev.2

legislation for all extradition proceedings so far as it is not inconsistent with the terms of any Treaty, Convention, or Agreement with a foreign state, or any Royal Proclamation issued in connection therewith[4]. Unlike those "Treaty prerequisite countries," Thailand may surrender to a foreign state the person accused or convicted of crimes committed in the jurisdiction of that state even if there exists no treaty, provided that by the laws of Thailand such crimes are punishable with imprisonment of not less than one year[5]. In practice, however, a declaration for the reciprocal assistance as well as certain requirements such as "double criminality", principle of "*ne bis in idem*", and so forth, must also be satisfied before the request for extradition is accorded.

The request for extradition from a foreign state, whether having concluded a treaty with Thailand or not, shall be sent through diplomatic channels, since an exclusive center for extradition like the Central Authority of Mutual assistance in Criminal Matters does not yet exist under Thai laws. Nevertheless, a need to have the Central Authority to expedite and facilitate enforcement of the rapid increasing requests for extradition has been addressed quite often among agencies concerned. So far, this idea has been reflected in new legislation, which is under draft. Presently, extradition is deemed to be commonly handled by various authorities, namely: the Ministry of Foreign Affairs; the Royal Police Organization, the Office of the Attorney General; the Court; and the Correctional Department.

Although there is still no clear-cut indication whether extradition is an administrative or judicial matter, the general consensus among the authorities concerned seems to be implied that it is a direct responsibility of the executive to supervise the extradition process and to look it proceeds on the right direction. Thus, unless the Government decided otherwise, the extradition request will be transmitted to the Ministry of Interior in order that the Public Prosecutor may bring the case before the Court[6].

By virtue of Article 11 of the Extradition Act, the preliminary investigation in the Court must be made in accordance with the Criminal Procedure Code. And this sometime causes problems, in particular with regard to the sufficiency of evidence, because Article 14 of the Act authorizes the Court to discharge the accused if it determines that the evidence is insufficient[7]. The State Attorney[8] who handles extradition proceedings in the Court has to be very careful about the admissibility and sufficiency of evidences adduced since the adequacy of evidence to institute "*prima facie*" for extradition in his opinion might be "inadequate" for some judges who might prefer higher assurance.

Being in use for more than seven decades, the Extradition Act B.E. 2472 is no longer able to cope with modern concepts and the progress of contemporary extradition. In particular, it is incapable to

[4] Article 3 of the Extradition Act B.E. 2472

[5] Article 4 of the Extradition Act B.E. 2472

[6] Article 8 of the Extradition Act B.E. 2472

[7] Article 14 of the Extradition Act B.E. 2472 provides that "*if the Court is of opinion that the evidence is insufficient it shall order the accused to be discharged at the end of forty-eight hours after such order has been read, unless within this period the Public Prosecutor notifies his intention to appeal. The appeal must be flied within fifteen days and the Court shall order the accused to be detained pending the hearing of such appeal*".

[8] The term "Public Prosecutor" has been replaced by the term "State Attorney" since the public Prosecution Department" has been changed to be the Office of the Attorney General in 1991.

answer several questions arising from the dissenting interpretation among authorities concerned. Accordingly, the Cabinet has on 1 April 1997, passed a resolution setting up a Special Committee to review and revise laws related to extradition including the Extradition Act B.E. 2472. This ad hoc committee is chaired by the Attorney General and consists of the representatives from various agencies concerned. It is expected that with the overhaul of extradition legislation, Thailand would be able to bring more advantageous and preferable system in this regard to combat transnational organized crime in this new era.

B. Extraditable Offence

If the term "extraditable Offences" is broadly interpreted as to cover all offences the extradition of which is not refused because of its nature, or excluded by the limit of the list of offences as prescribed in the treaties concluded between some states, then the extraditable offence should not include those offences which are against the principles of "double criminality", "*ne bis in idem*", "political offences", as well as any offences beyond the scope of the list.

In Thailand, the Extradition Act B.E. 2472 does not directly specify the definition of extraditable offences, while many treaties concluded between Thailand and foreign states do. Article 4 of the Extradition Act, which is applicable on the non-treaty basis, can be implied that the "extraditable offences" according to Thai laws are such offences punishable with imprisonment of not less than one year. Notwithstanding the provision of extradition laws, treaties between Thailand and some foreign states before 1983 were concluded upon the "list-of-offences" approach[9]. The tendency to shift from the "list-of-offences" approach was heralded for the first time in the treaty signed with the United States of America in 1983 where the minimum "one-year" imprisonment basis was clearly spelled out as the sole element to determine the extraditability of the offences. The "minimum penalty" principle as such has been used as the model for negotiation of later treaties between Thailand and foreign states on several occasions.[10] In draftng of the new Act on Extradition, currently under consideration of the Drafting Committee, a one-year minimum imprisonment is also adopted as the basis for determining of "extraditable Offences." It is quite clear, therefore that at present Thailand tends to follow the principle of "minimum penalty" rather than the "list of offences" approach. This perhaps because the latter is viewed as less flexible to cope with the dynamic emergence of modern and complex of nature crime of today.

Not only the range of penalty of the offence 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 penalty is less than six months even if other elements to fulfill extraditability of the requested offence have been met. This extended "minimum penalty" principle is upheld in the treaty between Thailand and the United States, and followed by the treaty between Thailand and the People's Republic of China. In addition, extraditable offences have been interpreted by the same treaty as to cover the preparing, attempting to commit, aiding or abetting, assisting,

[9] The 1911 Extradition Treaty between Thailand and the U.K., the 1937 Extradition Treaty between Thailand and Belgium, the 1976 Extradition Treaty between Thailand and Indonesia, the 1981 Extradition Treaty between Thailand and the Philippines.

[10] For example in the conclusion of treaty between Thailand and the People's Republic of China.

counseling or procuring the commission of, or being as accessory before or after the fact to, an offence which is punishable under the laws of both Contracting Parties by imprisonment or other forms of detention for a period more than one year or by any greater punishment.

Apart from the time clause, Thailand has also adopted, as the determining basis of the extraditable offences, the actual conduct of the alleged offender rather than the categorization or the naming of such conduct.[11]

C. Reciprocity

The principle of reciprocity in extradition requires that the requested state would, vice versa, have the opportunity of calling for extradition for the same crime, wherein the requesting state would have to grant it.[12] Reciprocity is usually taken as a prerequisite claimed by the requested state before an extradition is accommodated in the case where no treaty with the requesting state existed. However, it is not considered as absolute essential even with the requested state adhering to the "treaty non-prerequisite" principle. This is perhaps, as one scholar pointed out, because "*This prerequisite (reciprocity) would be missing, if the crime underlying the request for extradition were unknown to the requested state or if it were not punishable according to its laws due to the criminal law defining this offence more narrowly*"[13]. It is definitely clear, therefore, that merely reciprocity alone could not institute a mandatory condition for the requested state to accommodate a request for extradition from the requesting state.

Generally speaking, reciprocity may be considered as the complementary part of the common perception among jurists in that extradition is a matter of choice of the state to grant to each other an accord of assistance rather than a mandatory obligation unless they have some treaties between them. The requested state chooses to extradite a fugitive to the requesting state, upon commitment of reciprocity, because it trusts in the standard of justice of the requesting state and, of course, expects to receive a similar trust from the requesting state in return. Therefore, reciprocity is a matter of reciprocal trust and commitment for that. In this sense, reciprocity may have some binding effect upon the requesting state after an accord for extradition has been granted because of reciprocity commitment. However, to create reciprocity is purely a matter of state's option. A requested state may refuse acceptance of reciprocity offered by a requesting state on whatever grounds including the difference between legal systems as occurred between the Common Law and the Civil Law countries.

Thailand has no difficulty in giving or receiving reciprocal trust in justice system of other countries. In addition, no treaty is required as a prerequisite for extradition even with the requesting state of different legal system. Article 4 of the Extradition Act B.E. 2472 specifies that "*The Royal Siamese (Thai) Government may at its discretion surrender to foreign States which no extradition treaties exist persons accused or convicted of crimes committed within the jurisdiction of such States, provided that by the laws of Siam (Thailand) such crimes are punishable with imprisonment not less than one year.*"

[11] Article 2 of theTreaty between Thailand and the United States.

[12] See "THE RULE OF SPECIALITY IN EXTRADITION LAW" by Theo VOGLER, International Review of Penal Law, Vol. 62, Nos. 1-2, 1991, p.234

[13] Cf. Schulz, Das schweiserische Auslieferungsrecht, 1953, p.313, as cited by Theo VOGLER, Id.

In practice, reciprocity is required in accompanied with other requisites such as "extraditability", "double criminality", and "non-political" nature of the offence. Requests for extradition from requesting states, which have no treaty with Thailand must clearly express a commitment to grant extradition of fugitives required by Thailand in similar manner when requested. So far Thailand has extradited to numerous countries the fugitive offenders, even no treaty concluded with Thailand.

D. Representative Clause

"Representative Clause" is understood to be the countervail against the refusal for extradition in order to narrow as much as possible the avenue for the fugitive offender to escape from justice and responsibility of his crime. The principle of *aut dedere aut judicare*[14] (either extradite or prosecute) which is stemmed from the old injunction *aut dedere aut punire*[15] (either extradite or punish) seems to be a decisive explanation for the "Representative Clause".

Although the representative clause is construed as a right kit to counter the refusal of extradition and should be encouraged in all likelihood, there are still some questions regarding the extent of its scope, manner, and appropriateness of various aspects concerned. Although the United Nations Model Treaty on Extradition seems to be silent in this matter, many endeavors at the international level have been made for many occasions.

One example in this context is the text of the "Representative Clause" proposed to be considered in the Asia Crime Prevention Foundation Group Meeting on "Extradition and Mutual Assistance in Criminal Matters" held in Kuala Lumpur, Malaysia, from 27-31 May 1997. The text reads:

> *"If the requested country refuses an extradition request from a requesting country because of lack of a treaty, the requested country shall establish jurisdiction over the case requested and refer to the authorized criminal justice agency (based on a request from the requesting country) subject to compliance with other requirements.*"

In some countries like Thailand, the refusal of extradition due to the lack of a treaty may not occur or is very rare, the suggestion to establish jurisdiction over the case underlying extradition request as well as to refer the case to the authorized criminal justice agency is somehow a problematic issue. Establishment of jurisdiction over the alleged conduct may be possible only if such a conduct contains in its some elements of international crime whereby every state is capable and willing to take action, otherwise it might be determined by the standard of "double criminality" principle. The lack of such characteristic will render the establishment of jurisdiction over the requested offence difficult if not entirely impossible.

Another example is the extradition clause in the Draft Convention against Transnational Organized Crime[16] recently proposed under the framework of the United Nations, which is currently under review of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. The text

[14] This is the terms proposed by Cherif Bassiouni as cited by Edward M. Wise in "EXTRADITION: THE HYPOTHESIS OF A *CIVITAS MAXIMA* AND THE MAXIM AUT DEDERE AUT JUDICARE", International Review of Penal law, vol.62.Nos.1-2, 1991, p.119

[15] This is the terms used by H. Grotius as cited Id., p. 119

is partly read as follows:

> "*The State Party in the territory of which the offender or the alleged offender is found shall, in cases where this Convention applies, if it does not extradite that person [for the purpose of prosecution], be obliged, upon request of the State Party seeking extradition, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, [subject to the condition of double criminality,] through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State*"

The text proposed by the Draft Convention against Transnational Organized Crime has been developed a bit clearer than that of the former example since it expressly imposes the burden to prosecute upon the requested state if it refuses to extradite the offender.

In Thailand the principle of "*aut dedere aut judicare*" has not been included in the Act on Extradition B.E. 2472, nor any treaty. However, the issue has been discussed considerably during the drafting process of the new Extradition Act, which resulted in the acceptance of the Drafting Committee to include the principle of "*aut dedere aut judicare*" in the new Act.

E. Political Offence

Political Offence as the exception for extradition is said having been built on a triple rationale, namely:

1. The political argument: which means that states should remain neutral toward political conflicts in other states, and, therefore, should not lose neutrality by surrendering a fugitive to his political opponents;
2. The moral argument: which is based on the presumption that resistance to oppression of political persecution is legitimate and therefore the political crime is justified;
3. The humanitarian argument: which means that a political offender should not be extradited to a state in which he risks an unfair trial.

The pragmatic problems usually occur due to the lack of neither universal definition of political offence nor the standard norm of application. Each country has to develop its own legal and political criteria on the subject, thus, very varied from the others. Furthermore, the complication seems to be on the increase when the exception related to political offence is enlarged to cover the ordinary crime allegedly committed by political motivation. However, the most disputable issue seems to fall within the question whether it is appropriate, and if so, how to narrow the scope of political and politically motivated offence in certain types of crime which cause massive injury to lives or safety of the innocent individual or the public, such as hijacking, hostage taking, terrorism, etc..

This question seems to be reflected clearly by the diverse concept between those who favor the political offence exception and those who do not; or as one expert[17] called it the split between the "prosecution" and the "defense."

For those who support the restriction of political offence exception, such conduct is viewed as the crime per se, and since it against public safety, no room should be accorded to allow the offenders escape from

[16] Article 10 clause 9(a), General Assembly document A/AC. 254/4/Rev.2

trial and being punished in the requesting state. In this regard, to list out certain acts and exclude them from the scope of political offence, which is known as "*per se* limitation" or the "negative definition", is extremely called for in international pattern to suppress crime.

In contrast, the argument raised by those who still firmly adhere to the tradition political offence is substantially relied on the humanitarian guarantee. For them, the extradition should be refused in all likelihood that a requested person will be subjected to a biased trial or imminent danger against his fundamental rights. Thus, to list out offences under the "*per se* limitation" approach seems to be too risky and unnecessary since the discretion whether to extradite a fugitive or not can be followed the normative limitations.

Position of Thailand in this regard seems to be on the compromise. While the Extradition Act B.E. 2472, as well as the treaties concluded between Thailand and the United Kingdom, and Thailand and Belgium keep silent on the "negative definition" of the political offence, the more recent treaties between Thailand and some countries such as the United States, Indonesia, the Philippines, and the People's Republic of China, explicitly excluded "a murder or willful crime against the life or physical integrity of a head of State or one of the Connecting Parties or of a member of that person family, including attempts to commit such offence" from the scope of political offence exception.

The adoption of the "negative definition" or "*per se* limitation" approach in Thailand through the conclusion of treaties as such is still very restricted and considered as an extraordinary exception under the current practice. This is enlightened, for instance, by the refusal to accept a very broad list of offences proposed by the delegation of India to be excluded from the course of political offence during the negotiation of Extradition Treaty between Thailand and India sometime ago. The reasons to refuse, according to the Thai delegation, were that: "most of the offences listed could be considered as normal offences, which fell under the general rule of extraditable offence and since there is still no universally accepted norm to determine such offences as political in nature or connected with politically motivated crime." In addition, another ground for Thailand to hesitate to adopt too wide range of the "negative definition" perhaps stemmed from the long implicit tradition to treat extradition as the administrative matter whereby the Government as the executive body has direct responsibility to supervise a policy towards a requesting foreign state, especially where the flexibility of Government's discretion might be lessened by the prior establishment of crime list.

However, since there is an international concern about the increasing refusal of extradition upon the excuse of political offence in some categories of criminality, in particular those transnational organized offences, which are very dangerous and capable of causing huge damage to lives and properties of innocent victims all over the world, the tendency to adopt "negative definition" of the political offence is becoming more and more recognized. To respond to the internationally accepted necessity in this regard, the Drafting Committee of the new Act on Extradition, therefore, unanimously agree to include in the new Act a provision recognizing certain conducts as the exception of political offence, namely:

[17] Steven LUBET, "THE POLITICAL OFFENCE EXCEPTION", International Review of Penal Law Vol.64Nos. 1-21911,p.108

(i) a murder or willful crime against the life or physical integrity of a Head of State or one of the Connecting parties or of a member of that person family;
(ii) offences under the treaty whereby Thailand is a party:
(iii) offences related to illicit trafficking of narcotics;
(iv) attempts, or coordinate with the offender to commit all said offences mentioned above

F. Extradition of Nationals

Reasons for states to refuse extradition of their nationals may be as one scholar pointed out long time ago that:[18]

(i) *the fugitive ought not be withdrawn from his national judges;*
(ii) *the state owes its subjects the protection of its laws;*
(iii) *it is impossible to have complete confidence in the justice meted out by a foreign state, especially with regard to a foreigner; and*
(iv) *it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses.*

To adhere too strictly to the non-extradition of nationals may impede the spirit of extradition with aimed at the attempt to narrow loopholes snatched by the fugitive offender to escape from justice, particularly if the refusal to extradite is not in line with the rule of "*aut dedere aut judicare.*" And even if the principle of "*aut dedere aut judicare*" is applied to counter the refusal of extradition, questions still arise especially with regard to the promptness and sufficiency of evidences of the crime scene as well as enthusiasm of the requested state to prosecute.

Lack of promptness and sufficiency of evidences may be compensated by the channel of Mutual Legal Assistance between the requesting and the requested state. Yet, lack of enthusiasm due to non-ostensive interests to deal with crime taking place in the jurisdiction of another sovereignty is somewhat could not be prevented to become the cause of worry of the requesting state, no matter how high degree the requesting state trusts in the system of the requested state. Nevertheless, even more worry in this regard may be the lack of jurisdiction of the requested states to try the alleged offender.

Although a suggestion has been made for the states that refuse to extradite their nationals to establish jurisdiction over the alleged cases, it is not easy to do so in every case. Most countries have already established their criminal jurisdiction according to their own ways of thinking, thus, might feel it extremely difficult to embrace a new alleged conduct that may not be a crime at all in their views.

In Thailand, the position towards the non-extradition of nationals seems to be not so obvious as that of some countries. The Extradition Act B.E. 2472 specifies no clear-cut rule on the issue. Article 16 of the Act provides that "*In all cases in which the Court is of opinion that the accused is a Siamese subject...reference must be made to the Ministry of Justice before making an order for the release of the accused.*" Some authorities have interpreted this provision that the "Thai nationality" is a mandatory factor to refuse extradition, and the Court, after having referred the case to the

[18] Lord Cockburn in R.v. Wilson, 3 Q.B.D.42, 44(1877) AS CITED BY Sharon A. WIIAMS in "NATIONALITY, DOUBLE JEOPARDY, PRESCRIPTION , AND THE DEATH SENTENCE AS BASES FOR REFUSING EXTRADITION", in International Review of Penal Law, Vol. 62, Nos. 1-2, 1911, p. 260-261

Ministry of Justice, shall release the accused. However, other authorities have a dissenting view that "Thai nationality" alone is not a mandatory factor to refuse extradition, thus, the Court has no power to release the person required on its own motion. This provision, according to the dissenting view, requires the Court to refer the case to the Ministry of Justice which is an executive agency because the actual authority to determine whether to extradite a Thai national or not is the executive not the judiciary. The provision is, therefore, considered as to forbid rather than allow the Court to automatically release the fugitive.

In the context of the treaty, apart from the 1973 Extradition Treaty between Thailand and Belgium where extradition of national of the requested state is explicitly forbidden, all other treaties between Thailand and foreign countries do not close the door for extradition of nationals of the Contracting Parties.

In 1995, Thailand extradited a Thai politician, who allegedly committed a crime of narcotics trafficking, to stand trial in the United States for the first time in history. This deal was made upon the 1983 Extradition Treaty between Thailand and the United States. Although Article 8 of the treaty provides that neither Contracting Party shall be bounded to extradite its own nationals, other paragraphs are widely open for each country to extradite its own nationals if it thinks appropriate to do so. In this case a strong opposition of the defendant upon the basis of nationality led to a hot controversy and debate among the authorities concerned as to whether it is possible and appropriate to extradite a Thai citizen to stand trial under the foreign laws and jurisdiction. However, since it was impossible for Thailand to establish a retroactive jurisdiction over the person requested for the crime allegedly committed long before the entering into force of specific legislation concerned, extradition was, therefore, considered as the best resolution to maintain the spirit of international cooperation and crime suppression.

The most recent tendency of Thailand in this regard may be perceived from the provision related to extradition of Thai nationals, proposed to be included in the new Extradition Act pending drafting. According to the proposed text, the request for extradition of a Thai national to foreign country will be refused unless (1) the treaty already concluded between Thailand and the requesting country provides otherwise, (2) the fugitive give his consent to be extradited, or (3) the Cabinet has a resolution approving extradition.

G. Capital Punishment

The call for abolition of capital punishment or death penalty in various regions[19] is a contemporary phenomenon. Strong push to abolish such kind of conviction usually be correlated to the claiming of human rights protection, and in turn reflected by the refusal to extradite fugitive offenders to a requesting state where they might be punished by death. The requesting states that still apply capital punishment often face with refusal, or required by the requested states that

[19] The first binding international instrument against capital punishment is the "Sixth Additional Protocol to the European Convention on Human rights." Another convention on the abolition of death penalty was an additional protocol to the American Convention on Human rights. In 1988 the General Assembly of the United Nations adopted the text of a Second Optional Protocol to the International Covenant on Civil and Political Rights which aimed at the abolition of the death penalty. See "Extradition involving the possibility of the death penalty" by Matthias WENTZEL in International Review of Penal Laws, Vol. 62, Nos. 1-2, 1991, p.336

have already abolished such penalty to give an assurance not to impose death penalty upon the extradited person or at least not to carry it out.

Refusal of extradition request upon the citation of capital punishment or requirement of an assurance not to impose or carry out death penalty as such has been strongly protested by those countries that still retain capital punishment in their systems. For them, such practice not only hampers the smooth flow of extradition between states and thereby diminishes the spirit of international cooperation to suppress crime, but may also be considered as the effort to interfere with the judicial discretion of the requesting state and thereby equal to the stepping over the borderline of justice sovereignty of another state. According to the countries where capital punishment still exists, there is still no uniform rule on the issue of capital punishment; therefore, every country is free to establish national norm and standard conforming to particular historical background and tradition most suitable to the justice system of its own. No state should be allowed to encroach upon the border between nations.

Countries which strongly support the abolition of death penalty and usually refuse to extradite a fugitive to the requested states that still apply capital punishment, are mostly the European countries. According to them, the protection of fugitive offenders from facing justice in a requesting state for a crime related to death penalty by refusing to extradite is corresponding to human rights protection, which must be maintained and universally regarded as the absolute essential. However, this perception has been severely criticized by many other countries, as one scholar indicated that: "*From the contemporary European perspective, the choice may seem clear: the right of an individual to be extradited from Europe must satisfy the minimum standards of the European Human Rights Convention, an international instrument embodying international standards. However, Europe is not the globe, and a European consensus concerning the rights of an accused is not a global consensus.*"[20]

From the point of view of those countries which still retain capital punishment, it might be necessary to have such penalty to punish the most wicked criminal who has committed the most severe crime whereby other effort to correct or rehabilitate him is in despair. However, to establish death penalty and to carry it out are different matters. Let us take Thailand for example, according to the Thai Penal Code, the most severe penalty is death.[21] In practice, the law has given to the Court a very wide range of discretion to reduce penalty when the accused pledges guilty, or if he/she deserves penalty mitigation due to certain circumstances prescribed by the laws. Thus, the death penalty may be minimized to life imprisonment, or less severe conviction. If the offender is a juvenile, the Court has to automatically reduce penalty for him/her, and, therefore, will never be punished with death. In summary, it is possible to say that although Thailand still upholds the death penalty, the possibility to apply it is rather difficult.

With regard to the extradition request where the death penalty is concerned, it seems that Thailand is still reluctant to follow the standard suggested by those states which against the said penalty, although their requirement has begun to be increasingly accepted at some degree for the sake of compromise. Most treaties

[20] Daniel H. DERBY in "COMPARATIVE EXTRADITION STUDY SYSTEMS", International Review of Penal Law, Vol.62. Nos. 1-2, 1991, p. 59

[21] Article 18 of the Thai Penal Code.

concluded by Thailand do not explicitly forbid extradition in the case where capital punishment is concerned, and some treaties even implicitly allow it. For example, the Extradition Treaty between Thailand and Belgium clearly prescribes, in Section 2, the extraditable offences which include in sub-section (11) the offence of threat to cause bodily or property harm where such offence is inflicted with death penalty or imprisonment, while the treaty between Thailand and the Philippines, Article 2, defines the extraditable offence as the offences listed out in the treaty where such offences may be imposed by death, imprisonment, or deprivation of liberty at least one year.

A compromise to remove the stagnancy of extradition involving capital punishment has been firstly accepted by Thailand in 1983 in the provision of Extradition Treaty signed with the United States. According to Article 6 of the Treaty, when the offence for which extradition is sought is punishable by death under the laws of the Requesting State and is not punishable by death under the laws of the Requested State, the competent authority of the Requested State may refuse extradition unless:

(a) the offence is murder as defined under the laws of the Requested State; or
(b) the competent authority of the Requesting State provides assurance that it will recommend to the pardoning authority of the Requesting State that the death penalty be commuted if it is imposed.

To exempt murder from the ambit of refusal in this regard may be deemed as a new approach which could be applied also for the compromise between the countries which still uphold capital punishment and the countries which do not, in the sense that either side recognized the importance of conception regarding death penalty of the other and try to seek a tolerable solution mutually accepted. Likewise, the countries holding capital punishment could not insist the countries having no capital punishment to extradite a fugitive to face death penalty except in certain offences extremely crucial for the requesting states. On the other hand, the countries having no capital punishment have to retreat one step from the confrontation line by granting extradition only for such offences. The requesting and the requested states may consult each other what offences should be listed as extremely crucial.

To give assurance as to recommend to the pardoning authorities to commute death penalty is another approach to resolve problem. The assurance like this is somehow more lenient than the commitment not to impose death penalty or not to carry it out, because the only commitment binding the requesting states is to make a recommendation to the pardoning authorities not to guarantee the result of which. This kind of resolution seems to suit Thailand or those countries having similar administration because the pardoning authorities is the King, who is the most respectful person and sole authority to grant pardon at his own will, and nobody even the Government could interfere with His Majesty's discretion. In practice, the Minister of Interior will be the authority to make a recommendation to the King, but the final decision is rested with the King.

The most recent trend of Thailand is still unclear. Although, during the drafting of a new Act on extradition, a suggestion has been made as to include in the new Act a provision to automatically commute the death penalty imposed by the Court to life imprisonment in corresponding to the commitment of Thailand, as the requesting

state, not to carry out death penalty if so required by the requested states who do not impose death penalty on the underlying conduct requested by Thailand, this suggestion could not obtain unanimous agreement and still under hot debate.

H. *Prima Facie* Requirement

Although the common view of states seems to emphasis on the speedy and convenient extradition as the ideal means of international cooperation to return the fugitive offenders back to face justice in their own land, it is regrettable that extradition still falls under some technical barriers. The "*prima facie*" requirement or whatever conditions requiring the requesting state to comply with before the extradition is accommodated, are undoubtedly construed as technical barriers.

In most of the common law countries, the "*prima facie*" requirement is usually interpreted relatively wide as to embody both the sufficiency and admissibility of the evidences in extradition proceeding. And this is somewhat astonishing to most civil law countries. According to civil law concept extradition wherever proceeded should not be confused with the actual case proceedings which requires the extreme strictness of proof. The sole purpose of extradition proceedings is whether or not the alleged fugitive should be surrendered to the requesting state, thus, very far from whether he is guilty or not. The requested state should limit its content to a warrant of arrest issued by the competent authorities of the requesting state, or an authenticated copy of the judgment of the court and other supporting document as enough to establish the committal for trial of the person needed and to extradite him/her.

In Thailand, the standard of requirement to establish suitability to extradite is more flexible than that of the common law countries. According to Article 7 of the Extradition Act B.E. 2472, the request for extradition must be accompanied by a duly authenticated copy of the judgment of the Court which tried him, or a warrant of arrest issued by the Competent Authorities of the requesting state, or a duly authenticated copy thereof, and by such evidence as would justify the commitment for trial of the accused, if the crime has been committed in Thailand.

In this regard, various treaties concluded between Thailand and foreign states contain similar provisions.[22]

I. Simplified Procedure

Simplified procedure, the surrender of person requested with the least or without formal proceedings of extradition in the normal course, is a practice adopted in various regions.[23] This approach is also supported by the United Nations through the adoption of the United Nations Model Treaty on Extradition.[24] Generally speaking, rendition of a fugitive without meeting the stringent requirements of formalities under extradition can take many forms such as deportation, expulsion, exclusion, or even abduction. However,

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[22] For example, Article 9(3) of the 1983 Treaty between Thailand and the United States provides that "A request for extradition relating to a person who is sought for prosecution also shall be accompanied by:

(a) A copy of the warrant of arrest issued by a judge or other competent authorities of the Requesting State;

(b) Such evidence as, according to the laws of the Requested State, would justify that person's arrest and committal for trial, including evidence establishing that the person sought is the person to whom the warrant of arrest refers"

[23] For example, in Europe, U.S.A. , and Thailand.

[24] General Assembly's Resolution 45/116 of 14 December 1990.

such measures are considered as purely administrative and beyond the scope of extradition. The simplified procedure in this regard is emphasized on an extradition in some extra form. The main objective of simplified procedure is aimed at the shortening of process to expedite and grant as much as possible the convenience in the surrender of the required fugitive, thus, to cut down unnecessary formalities, as well as to waive or mitigate in some degree the test of eligibility of the case. The question may arise here as; To what formalities or requisites or tests should be waived or mitigated and to what extent? Since the simplified procedure, like the full process extradition itself, still relies on the different norms and practices of a particular countries or groups of countries without a uniform rules, the answer of the said question may be varied from jurisdiction to jurisdiction according to national value and philosophy. Treaties concluded between states as well as the United Nations Model Treaty on Extradition[25] explicitly indicates the consent of the person to be extradited as the key element for the "simplified procedure" but rarely mentions details of other conditions. This perhaps was because the simplified procedure was viewed as the practical matter requiring negotiation and mutual consent between the requesting and the requested states, thus, left out the details for sake of flexibility. For, instance, Article 15 of the Extradition Treaty between Thailand and the United States regarding "Simplified Procedure" provides that "*if the person sought irrevocably agrees in writing to extradition after personally being advised by the competent authority of his right to formal extradition proceedings and the protection afforded by them, the Requested State may grant extradition without formal extradition proceedings.*" This provision does not prescribe clearly as to what are those formalities which will be waived and what could not, but leaves it to the discretion and consultation between the concerned authorities of both Contracting Parties on case by case basis. In practice, the "formal proceedings" under this article has been interpreted as to cover all stages of criminal procedure including the judicial trial, if the extradition is proceeded on the full and formal basis. Thus, during the trial of the court, if the alleged accused agrees to be extradited, the State Attorney will apply for the cessation of the court proceeding, and refer the case back to the Ministry of Interior for the arrangement of rendition as soon as possible.

Simplified procedure for the informal extradition like this one certainly encourages the expedition and convenience of extradition between states and should be welcomed. Nevertheless, to achieve the true spirit of extradition through simplified procedure, and in order to save time, the requested state might be required to waive some scope of verification once used to be extremely essential procedure for extradition such as the consideration of the "rule of speciality," or the "extraditability" of the offence, as well as the protection of fugitive's fundamental rights through judicial review, etc.. In addition, technical requirement for the formality of the request for extradition and supporting documents should be made more lenient by the requested state. And this may be the problem deserves addressing and discussion to seek a common resolution for the more effective extradition.

[25] Article 6 of the United Nations Model Treaty on Extradition provides that "The Requested State may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

IV. MUTUAL LEGAL ASSISTANCE IN THAILAND

A. Background and Evolution

Unlike that of European countries, mutual legal assistance in Thailand does not stem from extradition treaty. Before the promulgation of the "*Act on Mutual Assistance in Criminal Matters B.E. 2535*", in 1992, although there were many extradition treaties concluded between Thailand and various foreign states such as the United Kingdom, Belgium, Malaysia, Indonesia, and the Philippines, non of them mentioned about "*other judicial assistance*," or "*mutual legal assistance*" as known today. In addition, there was also no direct legislation on this matter. The request of this kind, if any, was conducted in accordance with the "*General principle of international law*" as clearly spelled out in Ariticle34 of the Civil Procedure Code, which is also applicable in criminal case by virtue of Article 15 of Criminal Procedure Code. Article 34 of the Civil Procedure Code provides 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.*"

"*General principle of international law*" in this regard includes comity, reciprocity, and "rules of due process" as generally recognized between and among the sovereign states. When assistance regarding the whole trial or part of it was required, the request thereof shall be sent through diplomatic channel, which was a very time consuming process. First of all, the Court in Thailand had to submit its request to the Ministry of Justice; the Ministry of Justice would then refer such request to the Ministry of Foreign Affairs. The next step began by the Ministry of Foreign Affairs of Thailand sent the said request of Thai Court to the Ministry of Foreign Affairs of the requested states through the Thai Embassy attached to that country. Upon receipt of the request, the Ministry of Foreign Affairs of the requested state would refer the matter to the Court of that country. After the request was fulfilled or refused by the foreign Court, the matter would then sent back by the same process.

Since the process for request and receipt of legal assistance as such was too complicated and delay, other efforts for the more convenience and expedition were incessantly developed. In 1951,Thailand became the member of the "International Police Organization", or which is more often referred to as "INTERPOL", for the purpose of information exchange and cooperation with other members in the prevention and suppression of crime. In 1978, Thailand concluded an agreement on judicial cooperation in civil matter with Indonesia in order to establish a direct contact between the Courts of two countries. Similar agreement was concluded later on with France in 1983.

Nevertheless, cooperation under the scheme of INTERPOL is limited only among the polices with the rigid purpose only for information and technical exchange not law enforcement, while judicial cooperation agreement is limited only for civil matters. The actual mutual legal assistance according to the general sense of today, which encompasses all criminal matters, was begun after the coming into force of the *Act on Mutual Assistance in Criminal Matters B.E. 2535*, as well as the conclusion of many treaties regarding this matter.

B. Legal Basis

Upon the realization of necessity to cooperate with other countries to cope with the rising trend of transnational crime and criminal organizations, 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 the request from foreign states or Thai agencies, in so far as it is not inconsistent with the terms or provisions used by the treaties concluded between Thailand and such foreign countries. In the case of contradiction, the treaty will prevail. This may be perceived, for instance, from the provision of Section 9 (2) of the Act, which provides that:

> "*Section 9: The providing of assistance to a foreign state shall be subject to the following conditions:*
>
> (1) Assistance may be provided even there exists no mutual assistance treaty between Thailand and the Requesting State provided that such state commits to assist Thailand under the similar manner when requested
> (2) The Act which is the cause of a request must be an offence punishable *under Thai laws unless when Thailand and The Requesting State have a mutual assistance treaty between them and the treaty otherwise specifies....*"

Apart from the *Act on Mutual Assistance in Criminal Matters, B.E.2535*, the *Criminal Procedure Code* and the Constitution also play crucial role in the actual performance because various activities so requested such as the inquiry and producing of evidence, search and seizure of articles, as well as the initiating of proceedings must be carried out conforming to the *Criminal Procedure Code* and could not in one way or another contrary to the Constitution, which is the supreme law of the country to guarantee fundamental rights of the people.

Unlike that of treaty prerequisite states, assistance in Thailand may be granted even there exists no treaty between Thailand and the requesting state provided that such state commits to assist Thailand under the similar manner when requested. This principle is clearly specified in Section 9 of the Act, and known as the "reciprocal clause." In ordinary dealing, the request for assistance shall be submitted through diplomatic channel.[26] However, if the mutual assistance treaty between Thailand and the requesting state is in application, commitment for reciprocity and connection through diplomatic channel 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.[27]

Normally, the process of requesting and granting of the assistance will follow the Act except where there is a treaty and the treaty provides otherwise, then the treaty will prevail. However, this does not mean that the treaty is automatically applied since the legislation in Thailand follows the "Dual System", which means no treaty or agreement concluded with foreign countries by the Government is self-executing but needed to be legitimized or adopted by the National Assembly before coming effective. To this extent, a supporting act for each particular extradition treaty or agreement must be enacted to support its legality. So far Thailand has already concluded mutual

[26] Section 10 of the Act on Mutual Assistance in Criminal Matters B.E. 2535.

[27] Section 6 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 provides that "*The Central Authority shall be the Attorney General or the person designated by him*"

legal assistance treaties with the United States, United Kingdom, Canada, Norway, and recently with France.

C. Objective

Perhaps the most distinct indication of the objective for the establishment of mutual legal assistance in Thailand is perceived from the explanation of the necessity to promulgate the *Act on Mutual Assistance in Criminal Matters, B.E. 2535* during the introduction of its draft to the National Assembly in 1992. The text of such explanation reads: "*The reason to enact this Act (Act on Mutual Assistance in Criminal Matters B.E. 2535) is because the crime of today has been committed under the network of criminal organizations in many countries whereby criminal justice of each country alone could not efficiently prevent and suppress. Prevention and suppression of the said crime has to rely to international cooperation. To uphold such cooperation, it is necessary and appropriate to enact this Act.*" This explanation was further enlightened later on in the preface of "Laws Related to the Execution of Work under the *Act on Mutual Assistance in Criminal Matters, B.E.2535*"[28] to the effect that certain categories of criminality have been mentioned as transnational crime, namely: economic or white collar crime, computer crime, crime committed in the industrial world, environmental crime, as well as drug trafficking and narcotics crime.

The said indication might be somewhat arousing open-ended discussion, although it might be more or less similar to that of many countries, because the objective or reason to grant assistance to a foreign state is purely a state's option rather than obligation. Besides, the description of the objective of mutual legal assistance like this also seems to be rather abstract, thus, difficult to be given a definite demarcation.

Another way to indicate the objective of mutual legal assistance is by the practical viewpoint. In this regard, the more precise objective of the mutual legal assistance may be identified on one hand as to seek or request assistance from other countries, and on the other hand to grant or render it. This is the most explicit thing provided in all mutual legal assistance legislation and treaties as the main objective. Let us take Thailand for example. *The Act on Mutual Assistance in Criminal Matters, B.E. 2535* embraces in its content both the measures to grant assistance to foreign requesting states and to seek assistance from foreign states,[29] in particular Section 7 of the Act specifies very clear about this twofold function of the Central Authority.

D. Forms of Assistance

Generally speaking, forms of assistance under the framework of mutual legal assistance legislation of various countries as well as those specified in treaties concluded between them are more or less similar, although the terms or wording used may be different. This is not too difficult to understand since the fundamental reason for requesting and rendering of assistance is to facilitate criminal proceedings in the requesting state. In broad sense, proceedings of criminal cases can be interpreted as to cover all steps of the deal such as tracing of clues and evidence, investigation, inquiry of witnesses, prosecution, taking testimony of the witness, etc. Criminal proceedings under any system are similarly relied to these processes. Assistance requested or rendered in order to facilitate criminal proceedings as such is, therefore,

[28] Handbook of the Office of the Attorney General, Thailand, "Rung Silp Printing Co. ,Ltd"., Bangkok, First Edition, September 1995.

[29] Section 9 to Section 14, and Section 36 to Section 41 of the Act.

based on the same set of activities or generally referred to as "forms of assistance."

In Thailand, forms of assistance are basically understood as to include certain forms of the processes of criminal cases handling, as well as other indefinite conducts under the scope of the stipulated open-ended 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 is further enlightened by the provision of Section 12 of the same Act to cover the following:

(i) Taking statement of persons, providing documents, articles, and evidence out of Court, serving documents, searches, seizure of documents or articles, locating persons;
(ii) Taking the testimony of persons and witnesses, adducing document and evidence in the Court, forfeiture or seizure of properties;
(iii) Transferring persons in custody for testimonial purposes;
(iv) Initiating criminal proceedings.

It is quite clear from the above provision that the terms "*other proceedings*" stipulated in Section 4 is possible to be interpreted as to cover forfeiture or seizure of properties, transferring persons in custody for testimonial purposes, as well as initiating of criminal proceedings, however, such interpretation is not exhaustive. For some legal scholar, the said terms is intentionally made relatively flexible and open-ended, so it is capable to encompass other forms of assistance in the future.

E. Authorities and Officials

♦ Central Authority

In the past, mutual legal assistance between countries was a time consuming matters and rather complicated. Seeking for and providing of assistance was conducted only through diplomatic channel or Letters Rogatory because there was no other means for a direct contact. To avoid delay and minimize unnecessary formalities, the concept of having "Central Authority" to be the center for sending and receiving requests as well as taking a direct responsibility of mutual legal assistance matter was, therefore, initially included in most of the treaties concluded by the United States. Advantages of having the "Central Authority" have become more and more recognized in the international level. This is testified, for example, from the United Nations Model Treaty on Mutual Assistance in Criminal Matters, article 3, whereby the designation of an authority or authorities through which requests for the purposes of mutual assistance should be made is suggested.

In Thailand, the "Central Authority," according to the *Act on Mutual Assistance in Criminal Matters, B.E. 2535*, as well as treaties concluded with various countries, is the Attorney General or, the person designated by him.[30]

The Central Authority is the official who take the most predominant role and responsibility in the process of granting and requesting assistance. Apart from general function as the coordinator to receive the request for assistance form the requesting state and transmit it to the Competent Authorities concerned, as well as to receive the request seeking assistance presented by the agency of Thai

[30] Section 6 of the Act on Mutual Assistance in Criminal Matters, B.E. 2535.

Government and deliver it to the Requested State, other 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 he is also authorized to rule down regulations or announcement for the implementation of the whole process.[31]

Determination of the Central Authority in all manners regarding the granting and seeking assistance will be final except in two situations. First, if it is overruled by the Prime Minister, and second, if it is related to the issues of national sovereignty or security, crucial public interests, international relation, political offence, or military offence, and where the Advisory Board, set up under Section 8 of the *Act on Mutual Assistance in Criminal Matters, B.E.2535*, has a dissenting view and the Prime Minister agree with the dissenting view.

♦ **Competent Authorities**

The Competent Authorities are those officials who actually carry out functions conforming to the request for assistance as notified by the Central Authority. Thus, Competent Authorities in general sense are the officials of the requested state having authority and functions related to each particular form of assistance requested such as the investigation authorities, the detective units, the prosecution, etc.

In Thailand, the Competent Authorities are the following:

(1) The Police Commissioner General: to deal with the request for initiating of criminal proceedings and taking statement 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 document and evidence, as well as requesting for forfeiture or seizure of properties in the Court;
(3) The Director General of the Correctional Department: to deal with the request for transferring persons in custody for testimonial purpose.

♦ **Advisory Board**

To assist the Central Authority in dealing with some sensitive issues related to the national sovereignty or security, crucial public interests, international relation, political or military offence, an Advisory Board (the Board) comprising representatives from agencies concerned, namely; the Ministry of Defense; the Ministry of Foreign Affairs; the Ministry of Interior; the Ministry of Justice; the Office of the Attorney General; and other four distinguished peoples is established under Section 8 of the *Act on Mutual Assistance in Criminal Matters, B.E. 2535*.

In case of dissent between the Central Authority and the Board, the matter will be referred to the Prime Minister for his ruling.

F. Double Criminality

Requirement of "double criminality" in mutual legal assistance is one of the debatable issues. The principle of double criminality requires that the conduct underlying the assistance requested must also be a criminal offence punishable under the laws of the requested state, otherwise such request may be refused. Obstacle of this kind, which is also a crucial hindrance to extradition, normally stems from the

[31] Section 7 of the Act on Mutual Assistance in Criminal Matters, B.E. 2535.

divergent philosophy and conception under different legal system, which results eventually in the difference in substantive criminal law. States of different laws usually hesitate to render assistance for the conduct that does not institute a criminal offence in their jurisdiction for fear of unnecessary encroachment upon the fundamental rights and liberty of person, as well as the incapability to claim for the return reciprocity. Difficulty arising from this principle becomes even more severe nowadays when states have to include in their laws some innovative concept to cope with the modern crime. Even now, treaties on mutual assistance between some states, as well as the United Nations Model Treaty on Mutual Assistance in Criminal Matters still uphold the claiming of "double criminality" as justified for the refusal of assistance. However, since verifying of "double criminality" to institute eligibility of the request is a complicated and time consuming matter because each component of the crime and offence under the laws of the requested state must be identified out from the alleged conduct before the compliance with the request is permitted, but fighting against crime could not be waited for too long, alleviation or waiving of the strictness in application of "double criminality" approach has become increasingly called for at present. This is perceived from the recent conclusion of mutual assistance treaties between the United States and some countries including Thailand whereby the obligation to cooperate with the other Contracting Party prevails the requirement of double criminality. Even more striking example, is the motivation under the United Nations framework in the drafting of International Convention against Transnational Organized Crime where the refusal of granting assistance within the ambit of mutual legal assistance upon the assertion of "double criminality" will not be allowed, unless such grant will bring about some coercive measures.

Position of Thailand in this regard seems to be on the compromise between the concept of retaining innocent's rights and liberty on one hand, and spirit of cooperation between and among states to suppress and control crime on the other hand. While the *Act on Mutual Assistance in Criminal Matters, B.E.2535* places the principle of "double criminality" as a prerequisite for granting assistance, treaties concluded with the United States, Canada, United Kingdom do not require it. On the contrary, all said treaties impose obligation on each Contracting Party to provide assistance to the Other Contracting Party even the underlying conducts so requested does not constitute a crime or an offence in the requested state.

G. Refusal of Request

Generally speaking, states are competent to refuse granting assistance requested by other states on whatever reasons since there is no hard and fast rule under international law to force them to render it, unless they are bound by agreements or treaties. The requested state does not have to grant assistance, unless it so should because it thinks appropriate to do so for the reason of comity or reciprocity between countries. Refusal in this context may be made either upon the assertion of technical or non-technical grounds. Technical grounds for the refusal in this regard are those explicitly prescribed as "grounds for refusal" in national legislation, international instruments, or treaties on mutual legal assistance concluded between states. Non-technical grounds in this light are those beyond the scope of what specified by law or treaty, for example, refusal upon the political reasons.

As regards the non compliance with the request, the "Refusal of Assistance" clause as mentioned in the United Nations Model

Treaty on Mutual Legal Assistance, and "Limitations on Compliance" as used by some treaties, denote the same concept to preserve as State's absolute discretion not to grant assistance in some matters or occasions which are sensitive to them.

Apart from certain grounds such as the assistance requested is beyond the scope of treaty or agreement, or contrary to the elements of "double criminality", "*ne bis in idem*", and "conflict of jurisdiction", other grounds often asserted by sovereign states for refusal of giving cooperation are the preservation of national sovereignty, security or crucial public interests, and the avoidance of political offence or military offence.

In Thailand similar grounds for refusal are stipulated both in the *Act on Mutual Assistance in Criminal Matters, B.E. 2535* as well as various treaties concluded with foreign states.

Within the framework of the *Act on Mutual Assistance in Criminal Matters,B.E. 2535*, Section 9 provides that:

"Section 9: The providing of assistance to a foreign state shall be subject to the following conditions:

(1) Assistance may be provided even there exists no mutual assistance treaty between Thailand and the Requesting State provided that such state commits to assist Thailand under the similar manner when requested;
(2) The act which is a cause of the request must be an offence punishable under Thai laws unless when Thailand and the Requesting State have a mutual assistance treaty between them and the treaty otherwise specifies provided, however, that the assistance must be conformed to the provision of this Act;
(3) A request may be refused if it shall affect national sovereignty or security, or other crucial public interests of Thailand, or relate to a political offence;
(4) The provision of assistance shall not be related to a military offence."

As regards mutual legal assistance treaties, the clause related to the refusal of request usually prescribed similarly. For instance, Article 2 of the "Treaty Between Thailand And Canada on Mutual Assistance in Criminal Matters" concluded in 1994, partly provides that:

"The Requested State may refuse to execute a request if it considers that:
(a) the request would prejudice the sovereignty, security or other essential public interest of the Requested State or the safety of any person; or
(b) the request relates to a political offence."

V. ADDITIONAL DATA

APPENDIX I

A. Countries having Extradition Treaties with Thailand up to October 1999.

Number	Countries	Date of Signing
1	The United Kingdom	4 March 1911
2	The United States	14 December 1983
3	Belgium	14 October 1937
4	Indonesia	29 June 1976
5	The Philippines	16 March 1981
6	People's Republic of China	26 August 1993
7	Malaysia	Succession of Thai-United Kingdom Treaty.
8	Fiji	"
9	Canada	"
10	Australia	"

B. Countries having no Extradition Treaty but commit to follow Reciprocal Principle

Number	Countries
1	France
2	Italy
3	Norway
4	German
5	Austria

C. Countries having signed Extradition Treaties but has not yet ratified them.

Number	Countries
1	Cambodia
2	Bangladesh
3	Laos
4	Republic of Korea

Source: Ministry of Foreign Affairs.

APPENDIX II

A. Countries having Mutual Legal Assistance Treaties With Thailand upto October 1999.

Number	Countries	Date of Signing
1	The United States	19 March 1986
2	Canada	3 October 1994
3	The United Kingdom	12 September 1994

B. Country having singed Mutual Assistance Treaties but has not yet ratified it.

- France

C. Country having negotiated Mutual Assistance Treaty. and pending the signing of it.

- Norway

APPENDIX III

A. States requesting Extradition from Thailand.

Requesting States	Number of Cases During 1996-1997	Number of Cases in 1988 Up to October	Total
Australia	1	1	2
Austria	1	-	2
Belgium	1	1	2
Canada	1	-	2
France	-	3	3
German	-	1	1
Malaysia	2	-	2
Norway	-	1	1
United Kingdom	1	1	1
United States	14	4	15

B. States requested by Thailand for Extradition.

Requested States	Number of Cases during 1997-1998	Number of Cases in 1998 Upto October	Total
Australia	-	1	1
Canada	1	-	1
German	-	1	1
Malysia	1	-	1
Italy	-	1	1
People's Republic of China	1	-	1
United Kingdom	1	-	1
United States	-	1	1

APPENDIX IV

A. Countries Requesting Assistance from Thailand during January 1996-October 1999.

Countries	Number of cases requested during 1996-1997	Number of cases requested during January 1998-October 1998	Total
Austria	5	3	8
Belgium	10	3	13
Canada	-	1	1
Denmark	1	2	3
France	2	8	10
Finland	-	2	2
German	9	3	12
India	1	1	2
Iceland	1	-	1
Japan	2	1	1
Laos	1	-	1
Lithuania	-	1	1
Poland	2	6	8
Russia	1	1	2
Sweden	5	-	5
Singapore	-	1	1
South Africa	1	1	1
Switzerland	-	3	3
Taiwan	-	1	1
United Kingdom	5	5	10
United States	8	9	17

B. <u>Foreign countries from which Thailand requested assistance. During January 1996-October 1998.</u>

Countries	Number of Cases requested During 1996-1997	Number of Cases requested In 1998, up to October	Total
Austria	2	-	2
Australia	-	4	4
Canada	1	1	2
France	-	2	2
German	1	1	2
Greece	1	-	1
Japan	1	-	1
People's Republic of China	1	-	1
Pakistan	-	1	1
Singapore	-	4	4
Switzerland	1	-	1
United States	3	1	4