

PRACTICAL ASPECTS OF MUTUAL LEGAL ASSISTANCE IN FINANCIAL INVESTIGATION AND ASSET RECOVERY IN CORRUPTION CASES

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I. INTRODUCTION

Corruption is one of the most serious crimes that affects economic stability, the rule of law and healthy democracy in all jurisdictions. According to the Corruption Perception Index 2018, more than 120 countries failed to reach a 50/100 score-benchmark, revealing ineffective control over corruption.¹ Corruption is found to be one of the five major crimes in Thailand, inter alia, drug offences, tax evasion, unfair securities trading and customs evasion, which all together contribute to 86 per cent of all crime-generated assets.² The reason why corruption persists is based on its economic and monetary incentives. The risk of punishment, in the view of corruptors, outweighs the risk of their opportunity for pecuniary gains. Money is clearly seen as the ultimate goal which incentivizes the criminals as well as the proceeds of crime itself. In most cases, government financial resources are moved, in disguise, mostly from one country and placed into another country which would be layered through more complicated means, and subsequently gathered by innovative integration. Transnational corruption, rather than traditional domestic corruption, is the trend. This transnational corruption calls for effective international legal cooperation to combat such crime. UNCAC and UNTOC are the two prominent international legal instruments that strengthen and promote international legal cooperation. The framework introduces, inter alia, mechanisms to facilitate formal cooperation, mutual legal assistance (MLA) and informal cooperation among relevant agencies.

II. LEGAL BASIS FOR MUTUAL LEGAL ASSISTANCE

In accordance with international norms, seeking and providing mutual legal assistance in criminal matters to and from Thailand is premised on treaty and domestic law. The Act on Mutual Assistance in Criminal Matters 1992 (the MLA Act), Thai domestic MLA law, has been the foundation for mutual legal assistance in Thailand. It permits Thailand to provide assistance to a Requesting State based on an MLA treaty and even in the absence of treaty on mutual assistance in criminal matters, provided that the Requesting State must demonstrate its commitment to provide assistance in a similar manner if Thailand so requests. The Act also sets forth preconditions for granting assistance including dual criminality, grounds for refusal and specific conditions to each type of assistance. The Attorney General or a person designated by him shall be the Central Authority of Thailand for both MLA and extradition requests. With regard to MLA, the Central

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¹ <https://www.transparency.org/cpi2018> (accessed 12 October 2019).

² Anti-money-laundering and counter-terrorist financing measures Thailand Mutual Evaluation Report December 2017, p. 5 and p. 16.

Authority has the power and duty to handle and process both incoming and outgoing requests, transmit them to the competent authority, draft the outgoing request, and to approve and monitor requests.

In 2016, the MLA Act was significantly amended to be in line with international standards by including necessary measures that allow the Central Authority to accord financial investigation requests and the asset recovery process. Four additional competent authorities, namely the Department of Special Investigation (DSI), the National Anti-Corruption Commission (NACC), the Anti-Money-Laundering Office (AMLO) and the Office of Public Sector Anti-Corruption Commission (PACC), are included and vested with power to conduct investigations upon request.³ Prior to this amendment, the execution of an MLA request was required to have been conducted by the Royal Thai Police, the only competent authority.

Moreover, Part 9 of the MLA Act also welcomed the concept of enforcement of value-based confiscation, return of assets and asset sharing. Previously, the asset requested to be confiscated by the Requesting State shall devolve to Thailand, without exception. However, with this amendment, the Court can order the return of forfeited assets as prescribed in a bilateral treaty between Thailand and the other State. In this case, the Central Authority, the Attorney General of Thailand, shall file an application asking the Court to issue an order to submit such asset to the Central Authority to return to the Requesting State.

III. MUTUAL LEGAL ASSISTANCE AND FINANCIAL INVESTIGATION

The reason supporting the assumption of AMLO as the competent authority under the MLA Act is that AMLO plays a prominent role as a specialist financial investigation unit (FIU). The Anti-Money-Laundering Act of B.E. 2542 (1999) established the national financial intelligence unit with the authority to gather financial information and to analyse and disseminate information to relevant legal enforcement officers. With its large information database including suspicious transaction reports (STRs), financial transactions deriving from domestic reporting entities and databases from other agencies, such as land title, vehicles and immigration. In cases where further information is needed, they can request further information from reporting entities for the purpose of investigation of money-laundering and predicate offences, including corruption offences. As a part of the network of international financial intelligence units, the Egmont Group, AMLO can acquire informal financial intelligence through the network as well as from its 54 international partners under their memorandum of understanding. The information obtained can be later distributed to assist domestic money-laundering investigations conducted by other agencies.

The National Anti-Corruption Commission (NACC) is the key agency for preventing and combating corruption, especially cases involving high-ranking officials. Through their investigation process, the NACC can order any public official, individual or public organization to give a statement, documents or other evidence. Despite the fact that the NACC is not a financial intelligence unit, they are equipped with the authority and budget to hire advisors or experts to conduct financial investigation and asset tracing in foreign jurisdictions. The NACC can also obtain and provide informal cooperation in corruption cases, including information if

³ The Act of Mutual Legal Assistance in Criminal Matters B.E. 2535 and its amendment, Section 12.

they deem it appropriate through other anti-corruption counterparts.⁴

When foreign countries request evidence or financial information, if the request meets the conditions set forth in the MLA Act, the Central Authority shall transmit the request to the competent authority for execution. Nevertheless, financial intelligence exchange via informal cooperation is applied by practitioners to accelerate the process prior to the submission of a formal MLA request. Once a request is made and transmitted, the execution of such request can be done very quickly. Such good practice, nevertheless, requires a level of mutual understanding, trust and communication among domestic and international counterparts. However, in some jurisdictions, obtaining financial information is more difficult as it requires coercive measures. Therefore, the only means to obtaining financial information must be made through an MLA request to the Central Authority. Therefore, it is important for the requesting agency to understand the different legal culture and standards in order to employ effective approaches.

IV. MUTUAL ASSISTANCE, ASSET CONFISCATION AND ASSET RECOVERY

During the investigation, proceeds of corruption or targeted assets must be secured to ensure the success of asset confiscation and return at a later stage. Measures to secure the assets may differ depending on the law of such jurisdiction. In Thailand, if there are reasonable grounds to believe that any asset connected with the commission of a money-laundering offence includes a corruption offence,⁵ AMLO shall have the power to order a provisional seizure or attachment of such asset for the duration of not more than ninety days. In the case where there is convincing evidence that an asset is connected with the commission of an offence, the Secretary-General shall refer the case to the public prosecutor for consideration and filing a petition in court for an order that such asset be vested in the State without delay.⁶ The NACC is also vested with the power to temporarily seize or confiscate an asset connected with the offence, and with respect to unusual wealth, such order can be limited within 1 year from the dated of seizure or freezing or until the case is final.

According to Thai law, as a general rule, forfeiture of property related to a criminal case is considered as a form of criminal punishment.⁷ Therefore, the traditional means is to apply criminal forfeiture to recover the proceeds of the corruption crime. However, it should be noted that in most corruption cases, the corruptors are very powerful, which might affect the possibility of effective criminal investigation or prosecution or there might be cases where evidence gathered is insufficient to conduct criminal prosecution. In this regard, non-conviction-based asset forfeiture is considered by practitioners to be a more preferable mechanism,⁸ or at least an alternative mechanism to criminal forfeiture.

Thailand incorporates non-conviction-based approaches to forfeiture of proceeds of crime in many laws, including the Anti-Money-Laundering Act B.E. 2542 (1999) and the Act on the

⁴ The Organic Act on Counter Corruption B.E. 2561 Section 34 and 142.

⁵ The Anti-Money Laundering Act B.E. 2542 (1999) Section 3(5).

⁶ Ibid., Sections 48 and 49.

⁷ Thai Penal Code, Section 18.

⁸ Theodore et al. (2009) *Stolen Asset Recovery A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, p 13.

Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534. In corruption cases, Thailand's non-conviction-based approach can be found under the Organic Act on the Prevention and Suppression of Corruption B.E. 2561 (2018). However, it merely applies to the offence of "unusual wealth". Unusual wealth under the Act is defined as having an unusually large quantity of assets, having an unusual increase of assets, having an unusual decrease of liabilities or having illegitimate acquisition of assets as a consequence of the performance of duties or the exercise of power in office or in the course of duty. Under such legislation, the standard of proof required to forfeit proceeds of crime is the preponderance of the evidence. The accused must prove to the court that the property does not result from the unusual wealth,⁹ otherwise the asset shall devolve upon the State. As it requires a different legal basis from its related criminal offence, non-conviction-based measures can be proceeded with independently, and with shifting the burden of proof to the accused culprit, assets can be recovered from NCB measures and the result of the case are totally separate from the criminal case.

In the case of Mr. Supoj Saplom, the former permanent secretary of the Transport Ministry holding the position between 2009-2011, the Court of Appeal made a decision to order confiscation of assets of Mr. Saplom worth 64 million baht or to make payment in lieu thereof. Such assets included cash, bank deposits, gold, six parcels of land, houses, condominiums and luxury vehicles. The investigation began in 2012 after burglars broke into Saplom's house in Bangkok on a night in November 2012 during a severe flood in Thailand. The Burglars were later arrested with 18-million-baht cash and 10 bath weight gold. They also revealed that millions of baht in cash were inside the house. The NACC later inspected Mr. Saplom's house and conducted an investigation. It appeared that Mr. Saplom could not explain the source of such assets. The NACC finalized the case file and submitted it to the Office of the Attorney General. The public prosecutor filed a petition to the Civil Court to devolve such assets to the State as unusual wealth and due to his failure to declare assets under the Organic Act on Counter Corruption B.E. 2542 (1999). With regard to the criminal case, in 2018, the Supreme Court's Criminal Division sentenced Mr. Saplom to 10 months' imprisonment for political officeholders deliberately avoiding declaration of assets under Section 119 of the same Act.

In Juthamas's Case, the former Governor of the Tourism Authority of Thailand was charged with demanding bribes from American investors in exchange for a contract to manage an international film festival. During the criminal proceedings, the NACC asked the Central Authority to make mutual assistance requests to freeze the accounts of Juthamas's daughter, the co-defendant, which were opened abroad. The civil forfeiture was based on an unusual wealth allegation. That case is being conducted in parallel and is still pending.

However, in international corruption cases, such seizure or freezing of assets in Thailand for the purpose of confiscation and asset recovery must be made through mutual assistance requests. As mentioned earlier, the MLA act was amended allowing assets to be returned. The Requesting State can send a request for seizure/freezing of property during its investigation or prosecution with its seizure/freezing order issued by its authority, or the court judgment, although it is not yet final. The public prosecutor shall later file the case of such request to the Court to issue a seizure or freezing order. Thailand can also accord the request to confiscate the asset if the case in the

⁹ Anti-Money Laundering Act B.E. 2542, Section 51.

Requesting State is final.

Since its amendment, nevertheless, the application of these provisions has not yet been tested before the Court. It should also be noted that the MLA itself does not stipulate whether the order or judgment must be criminal forfeiture or non-conviction-based asset forfeiture. As Thailand is party to the UNCAC and UNTOC and with its utmost efforts to combat corruption and transnational organized crime, the application of the MLA Act is to provide the widest measures to enable effective asset recovery, or at least to become aware of the issues with possible solutions based on the context of their own legal culture.¹⁰ This pro-cooperation concept is, however, being tested in the case requested by Thailand in a drug-trafficking and money-laundering case. The Civil Court ordered the forfeiture of proceeds of drug trafficking that were transferred abroad. The Central Authority of the Requested State in which the three accounts were found agreed to return the frozen accounts.

V. CONCLUSION

Investigation, prosecution and asset recovery of proceeds of corruption are very challenging, especially in cases of transnational corruption. Thailand has developed its domestic legal framework to establish agencies specialized in financial and corruption investigation to combat corruption crime. Civil forfeiture is also put in place to ensure proceeds of crime are recovered. Furthermore, the international asset recovery regime and asset sharing are now incorporated into the MLA Act. Such measures can only fully be implemented through international cooperation. Differences in approaches in financial investigation, asset confiscation and asset recovery will remain with respect to legal systems and legal cultures in each jurisdiction. Nevertheless, direct communication between agencies, Central Authorities, efforts to informal consultation and the mindset to accord the widest assistance will narrow such gaps and move towards the common goal to combat and break the corruption chain.

¹⁰ UNCAC, Article 51.