

MUTUAL LEGAL ASSISTANCE AND EXTRADITION IN THAILAND

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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 speciality 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

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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

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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

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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.

statue 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)