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TOPIC 1

SPECIFIC PROBLEMS AND SOLUTIONS THAT ARISE IN CASES INVOLVING INTERNATIONAL MUTUAL LEGAL ASSISTANCE OR EXTRADITION

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I. INTRODUCTION

The topic assigned to our group for discussion and preparation of a report was: “specific problems and solutions that arise in cases involving international mutual legal assistance or extradition with respect to: assurance of reciprocity, dual criminality, and the scope of offences which can be the basis for mutual legal assistance, or the scope of extraditable offences”.

In general, both “mutual legal assistance” and “extradition” are essentially a process of intergovernmental legal cooperation in the investigation, prosecution and punishment of criminal offenders. Accordingly, the basic concepts of mutual legal assistance and extradition are somewhat similar. Nevertheless, the main purpose of mutual legal assistance is different from extradition. Briefly, mutual legal assistance is the cooperation or assistance regarding investigation, prosecution and judicial proceedings in relation to crimes; for example, taking evidence or statements from persons, executing searches and seizures, providing information, evidentiary items, while extradition is a formal process by which a

person is surrendered by one state to another. As Mr. Hans G. Nilsson (UNAFEI Visiting Expert) observed, the primary difference between mutual legal assistance and extradition is extradition involves the “body” of an offender and, consequently, extradition needs more serious consideration and urgent action since the fundamental human rights should be taken care of. As a result, there are some differences at the practical level between these two processes.

Nonetheless, in general, we could say that the objective of assurance of reciprocity, dual criminality and the scope of offences are not fundamentally different in these two forms of cooperation, and most countries use the same concepts in their domestic legislation for both purposes, for example, the rule of dual criminality in Japan (Law for International Assistance in Investigation, Article 2(2) and Law of Extradition, Article 2(5)), in Thailand (The Mutual Assistance in Criminal Matters Act, Section 9(2) and The Extradition Act, Section 12(2)), and in the Republic of Korea (Act on International Judicial Mutual Assistance in Criminal Matters, Article 6(4) and The Extradition Act, Article 6)

In addition, the group conducted a comparative survey on extradition and mutual legal assistance in criminal matters, based on national legal systems represented among the participants of the seminar. The results are included in the Appendix attached to this report.

II. ASSURANCE OF RECIPROcity

A. General Concept

Reciprocity is one of the bases for mutual legal assistance and extradition treaties, whether it is a multilateral or bilateral agreement. Generally, "assurance of reciprocity" means the assurance that a requesting state will comply with the same type of cooperation or request from a requested state in the future.

Moreover, in practical terms, the essential question is whether this concept requires that the process of both the requesting and the requested states be alike or whether the respective states will reciprocally recognize their respective processes. This problem has implications in the area of the dual criminality requirement, extraditable offenses, criminal processes and others. To a large extent, reciprocity in this sense means parallelism or symmetry between the two processes in the requested and requesting states.

For example, some states rely on the nationality doctrine, while others do not. If the requested state can surrender its nationals, it implies in most cases that that state cannot prosecute its national for offences committed abroad. If such a state requires an extradition request from another state which prohibits surrender of its nationals, that state may, relying on reciprocity, deny the request. The requested state that can surrender its nationals may rely on reciprocity to deny

the request on the understanding that since it could not prosecute on such a jurisdictional theory (nationality principle), it cannot grant extradition for prosecution in the requesting state which will be based on the said theory.¹

B. Issues Arising from the General Discussion and Individual Presentation Papers.

Admittedly, the principle of reciprocity creates some degree of uncertainty, especially in practice. Owing to this uncertainty, a better solution would be to ground the cooperation in a multilateral agreement, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 or Draft United Nations Convention against Transnational Organized Crime.

Reciprocity is explicit in a treaty where each party has agreed either to surrender fugitives to the other or to render requested assistance on the understanding that its requests will also be honored in the future. In *ad hoc* arrangements, designed to meet the situation where the fugitive is found in a country with which the requesting state does not have relationships based on a general extradition treaty, a special agreement may be reached whereby the requested state will extract an understanding that in similar circumstances its request for extradition, or legal assistance, for that matter, will be considered.

Although there are doubts as to whether the rule of reciprocity should constitute a legal requirement for extradition, reciprocity continues to play a significant

¹ M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 3rd Edition, 384-385 (1996).

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role in the practice of extradition. It renders extradition possible without excessive formalities in the absence of a treaty. It may also be relied upon to complement a treaty where the offence for which extradition is requested falls outside the scope of the treaty, but is nevertheless permitted by the domestic law of the requested state.

The difference of assurance of reciprocity between mutual legal assistance and extradition depends on the domestic legislature of each state. Consequently, some distinctions have to be drawn. The primary difference between mutual legal assistance and extradition is that extradition involves the “body” and consequently, extradition relates to the issue of human rights. Generally, the assurance of reciprocity in mutual legal assistance and extradition procedures depends on many factors, for example; the domestic legislature of both countries, dual criminality, previous practices, policies and politics. It seems that this requirement is more strictly observed in extradition, while the assurance of reciprocity in mutual legal assistance seems much more flexible. However, no commonly accepted standard of this assurance has developed in this respect. Sufficiency of assurance is examined and evaluated by the requested state according to its own standards on a case-by-case basis. With regard to the practice, the concept of “trust” or “mutual trust” may play the most important role for the cooperation of mutual legal assistance. There are some examples from states’ practice that should be mentioned:

1. The United States may grant mutual legal assistance and cooperation to a requesting state, even though there is no treaty with this country. The requirement of assurance of reciprocity is also flexible, and can be based on the expectation of future cooperation by the requesting state.

In addition to 31 mutual legal assistance treaties (MLATs) in force and 23 MLATs signed in recent years,² the United States has developed a modern mechanism for international law enforcement cooperation, a type of mutual legal assistance. Due to the fact that most international cooperation is conducted through direct contact between police in the countries involved, the “police to police assistance”, or “cop to cop” cooperation has been used on the basis of good will, mutual respect, and shared interest in combating crime.³ A good example is the investigation of the Kenyan and Tanzanian embassy bombings in 1998 when hundreds of FBI agents immediately flew to Africa to begin intensive investigation, alongside the Kenyan and Tanzanian counterparts.⁴

2. The Philippines, without any implementing laws for mutual legal assistance, has enforced MLAT to cooperate with many requesting states. For example, in 1998, Japan requested the Philippines for assistance in a criminal case relating to “Abandonment of Corpse and Violation of the Firearms and Swords Control Law” by confiscating the reward money for this criminal act that was transferred into a bank in the Philippines. In the end, the Philippines’ prosecutor contacted the possessor of that money and turned

² John E. Harris, UNAFEI Visiting Expert, “International Cooperation in Fighting Transnational Organized Crime: Special Emphasis on Mutual Legal Assistance and Extradition,” Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 8.

³ *Id.*, at 6.

⁴ *Id.*, at 5.

over the money to the Japanese Embassy.⁵

3. The Republic of Uzbekistan, meanwhile, applies the provisions of the code of criminal procedure for extradition and mutual legal assistance, without any specific domestic laws. The only multilateral agreement is the 1993 Minsk Convention on the Legal Assistance and Legal Regulations in Civil, Family and Criminal Cases, dealing with the issues of extradition and mutual legal assistance.⁶ Nonetheless, Uzbekistan has cooperated with requesting countries in matters of extradition and mutual legal assistance, based on the principle of reciprocity.

In addition, the Appendix shows that some participants' countries, as the treaty prerequisite countries, grant extradition and/or mutual legal assistance on the basis of reciprocity.

C. Recommendations

1. A clear disadvantage of reciprocity is the geographical limitation of international cooperation. Moreover, reciprocity presumes a certain degree of similarity between the cooperating states. Therefore, a better solution seems to be a multilateral agreement.

⁵ Severino H. Gana, Jr., UNAFEI Visiting Expert, "Extradition and Legal Assistance: The Philippine Experience," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 15-16.

⁶ Afzal A. Nurmatov, "Main Theme: International Cooperation to Combat Transnational Organized Crime — with Special Emphasis on Mutual Legal Assistance and Extradition," Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 16-17.

2. Besides a multilateral agreement, bilateral treaties among states also should be promoted. In order to achieve smooth, efficient and effective cooperation, the United Nations Model Treaty on Mutual Assistance in Criminal Matters and United Nations Model Treaty on Extradition should be considered. Simultaneously, the United Nations may help the member states to modernize and harmonize their domestic laws by providing necessary information through sending written materials and organizing seminars and conferences.
3. In view of facilitating international cooperation, the treaty prerequisite countries may consider amending their domestic legislation in order to enable mutual legal assistance and extradition with treaty non-prerequisite countries. Moreover, in the fight against serious crime and transnational organized crime, it is essential to relax the interpretation of reciprocity to secure efficient and effective cooperation among states.

III. DUAL CRIMINALITY

A. General Concept

"Dual criminality" refers to the characterization of the offence, and requires that the set of facts on which the legal assistance or extradition request is based, constitute an offence under the laws of both states involved. In other words, dual criminality embodies a reciprocal characterization of those offenses deemed extraditable. Dual criminality is intended to ensure each state that it can rely on corresponding treatment, and that no state shall use its processes to surrender a person for conduct which the requested country does not characterize as criminal.

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There are two different concepts of dual criminality; one is *in concreto* approach in the context of application to extradition and the other is *in abstracto* approach in the context of application to mutual legal assistance, respectively.

B. Issues Arising from the General Discussion and Individual Presentation Paper.

Both the “list of offense system” or “listing system” and “minimum imprisonment system” require dual criminality. As mentioned in Mr. Mikinao Kitada’s paper, the dual criminality requirement comes from the view that it is not appropriate to surrender any fugitive for the offence which is not the crime in the requested country.⁷ Also, in the context of mutual legal assistance, a requested country may not cooperate with the requesting country if that offence is not punishable in that country.

In the listing system, a schedule in which all extraditable offences are listed is usually attached to the treaty. Therefore, if an extradition request is based upon any of the listed offences, the request presumably meets the requirement of dual criminality. On the other hand, in the minimum imprisonment system, a requested country has to examine whether the act described in an extradition request may constitute any crimes under the requested country’s criminal laws.

The differences in legal systems and interpretations of dual criminality give rise to many problems. To solve them within the context of extradition, the United Nations Model Treaty on Extradition, Article 2 Paragraph 2 proposes states to look at the totality of the conduct and to decide whether any combination of those acts and/or omissions would constitute an

offence against a law in force in the requested state. Generally, most states have required *in concreto* approach. Particularly, the resolutions adopted by the 1969 Tenth International Congress of Penal Law recommended that the requested state set aside the requirement of dual criminality *in concreto*, unless special circumstances exist in the requesting state, such as the question of public order. In those cases, the requested state would examine *in abstracto* whether the conduct of the offender constitutes an offence under the state’s law, or if it deems that type of conduct punishable.⁸

Nonetheless, in a case relating to a conspiracy offence in 1989, Tokyo High Court adopted a broad interpretation of the requirement of dual criminality. In this case, the United States requested Japan to extradite a person prosecuted for conspiracy to traffic drugs. The issue of dual criminality arose because Japan’s criminal law had no offence of conspiracy. The Tokyo High Court ruled on the admissibility of extradition of the requested person on the ground of actual action, while holding that, “when we apply the Japanese laws to these facts, it is obvious that Person A is at least an accessory to the crime of heroin importation.”⁹ In other words, the decision mainly focused on the actual action behind the crime, and pointed out that the principle of dual criminality should

⁷ Mikinao Kitada, Director of UNAFEI, “International Cooperation to Combat Transnational Organized Crime, Extradition and Mutual Legal Assistance,” Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 5.

⁸ See *supra* note 1, 390.

⁹ Makoto Tamura, “Two precedents regarding extradition in Japan,” Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 2-4.

be based on the behavior of the alleged offender.

On the other hand, for mutual legal assistance, the interpretation by related authorities seems much broader and relaxed. This may be due to the fact that the nature of this assistance is different from extradition as it may not necessarily infringe upon a person's liberty or freedom. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both states. Nevertheless, when it comes to mutual legal assistance, the trend and practice of many states is to relax this requirement. Some states are now rendering mutual legal assistance even without the requirement of dual criminality.¹⁰ Furthermore, this principle has also been relaxed in some MLATs, for example;¹¹ the MLAT between the United States and Canada, specifying that assistance shall be provided without regard to whether the alleged conduct constitutes an offence in the requested country or not.¹²

The Draft United Nations Convention against Transnational Organized Crime indicates that the delegations proposed that the dual criminality requirement be abolished for mutual legal assistance except for the application of coercive measures.¹³ Article 14, Paragraph 6 is an outcome of the compromise between the proponents and opponents of this requirement.¹⁴ This disparity of views was also reflected among the members of

Group 1. Some of them were of the opinion that the principle of dual criminality is still indispensable in the context of mutual legal assistance and merely a more flexible interpretation or lower standard test may be adequate in this area since this lower standard test could also cover all serious crimes, while the majority preferred the abolishment of the dual criminality requirement.

Furthermore, while interpreting the dual criminality principle, a due consideration should be given to the statute of limitation and lapse of time. The principle of dual criminality also relates to the principle of dual punishability. Therefore, the issue of lapse of time and statute of limitation will have to be taken into account while determining the fulfillment of the condition of dual criminality for extradition or mutual legal assistance.

¹³ "Revised draft United Nations Convention against Transnational Organized Crime" has been prepared by the "Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime," United Nations, General Assembly, and was presented to the Fourth Session, Vienna, 6-17 December 1999. See Draft Article 14

"..."

6. States Parties may not decline to render mutual legal assistance under this article on the ground of absence of dual criminality, unless the assistance required involves the application of coercive measures.

"..."

¹⁴ Information provided by Professor Michael Plachta, UNAFEI Visiting Expert at the 114th International Senior Seminar (Jan. 17 - Feb. 18, 2000). Mr. Plachta served as the leading expert of the Polish Government and a member of the official Polish delegation to the UN *Ad Hoc* Committee for the Elaboration of the Convention against Transnational Organized Crime.

¹⁰ Group 2, Mutual Assistance in Criminal Matters, Annual Report for 1996 and Resource Material Series No. 51, 599 (1997).

¹¹ In addition, the Appendix shows that, among the participants' countries, the Philippines, Pakistan and Sri Lanka have abolished the dual criminality requirement for mutual legal assistance.

¹² *Id.*

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Moreover, both the United Nations Model Treaty on Extradition (Article 3 paragraph (e)) and the European Convention on Extradition (Article 10) affirm that extradition shall not be granted when a person becomes immune from prosecution for lapse of time. However, domestic law varies in this respect. For instance, in most common law states, the system of lapse of time is not adopted.¹⁵ In Japan, the lapse of time is interrupted as soon as the suspect flees the country. In Pakistan, once the case is legally registered, there will be no time limitation for prosecuting the defendant. The law in Thailand does not allow for an interruption of the running statute of limitation.

Another issue emerging from the general discussion is the following question: the statute of limitation of which country should be adopted as controlling the case? The Model Treaty of Extradition, Article 3(e), requires the law of either Party,¹⁶ while the Convention relating to extradition between the Member States of the European Union, Article 8, seems to depend on the law of the requesting state,¹⁷ unless the requested state also has jurisdiction under its own criminal law.

C. Recommendations

1. In order to enhance international cooperation, in cases of extradition, it is recommended to interpret the principle of dual criminality in a flexible manner. In other words, the relevant authority in the requested state should be required to look at the

totality of the conduct, focusing on the criminality of the conduct whatever its label. The requirement should be satisfied even if the offence is categorized differently in the two states or if some components of the conduct forming the extradition offence or mutual legal assistance are not entirely the same.

2. Countries should consider granting legal assistance without requiring that the alleged conduct constitute an offence in the requested country, unless the assistance requested involves the application of coercive measures, for instance search and seizure.
3. To solve practical problems created by the dual criminality requirement, the harmonization of domestic criminal law is recommended. This could be achieved through elaborating and ratifying an international instrument. An example can be found in the Draft United Nations Convention against Transnational Organized Crime whose Article 4 criminalises laundering offences. By ratifying this Convention, State Parties will adopt an identical definition of this offence and its constituent elements.

¹⁵ Group 1, Mutual Assistance in Criminal Matters, Annual Report for 1996 and Resource Material Series No. 51, 573 (1997).

¹⁶ Article 3(e) "If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty:"

¹⁷ Article 8 Paragraph 1 "1. Extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested Member State."

IV. THE SCOPE OF OFFENCES WHICH CAN BE THE BASIS FOR MUTUAL LEGAL ASSISTANCE, OR THE SCOPE OF EXTRADITABLE OFFENCES

A. General Concept

In general, the offence for which extradition is requested must be either enumerated among the list of extraditable offences or established according to the minimum imprisonment rule. In the absence of a treaty, the extradition may be based on the principle of reciprocity and the offence must be mutually recognized as extraditable. This requirement is in addition to that of the dual criminality requirement.

The listing system or enumerative system, by which the offences are named and defined, creates undue limitation to the scope of application of extradition, and makes this system inflexible. On the other hand, the minimum imprisonment system or eliminative system, which is indicative rather than limitative, specifies extraditable offences which under the laws of both states are punishable by an agreed degree of severity, usually a minimum of imprisonment.¹⁸ This system, although more preferable, also has some disadvantages.

B. Issues Arising from the General Discussion and Individual Presentation Paper¹⁹

The United Nations Model treaty on Extradition has adopted the minimum imprisonment approach in Article 2 paragraph 1, which reads as follows; “for the purpose of the present Treaty, extraditable offences that are punishable under the laws of both Parties by

imprisonment or other deprivation of liberty for a maximum period of at least one/two year(s), or by a more severe penalty....” However, many countries use both approaches in their treaty practice.

The listing approach will offer the list of specific offences and also excludes the unnecessary offences. Therefore, the Parties could focus on the specific scope of offences as they agree, for example specific offences of transnational organized crime or other kinds of serious crimes. This listing approach also decreases some practical problems - for example, in some countries, the penalty for shoplifting may be imprisonment less than 6 months, while the maximum penalty for this offence in Thailand is a deprivation of liberty for 3 years. So, in this sense, the minimum imprisonment approach might also cause some problems. The main problem of the listing approach arises from the fact that the list can omit certain offences, and the subsequent inclusion by supplementary treaty may prove too cumbersome. With regard to some offences their definition may vary, for example, cheat or fraud. This may give rise to divergent interpretation in different countries. Another problem is that the list might not cover newly emerging and future crimes. To lessen the difficulties mentioned above, a proposed technique of defining extraditable offences in treaties presupposes listing non-extraditable offences and designating extraditable offences by type and category.

On the other hand, the minimum imprisonment approach will decrease the potential for a dispute relating to dual criminality. Also, this approach eliminates the problem of listing offences. Moreover, it could also cover any new crimes, for example computer crimes, white-collar

¹⁸ See *supra* note 1, 396.

¹⁹ The approach of each participant's country is shown in Appendix A.

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crimes. The biggest disadvantage of this approach is the disparity in penalties among states and legal systems. The different cultural attitudes may also cause problems for minor crimes. For example, even within the European Community, there are different approaches to certain offences: “Simple examples are the permissive attitude towards cannabis use in the Netherlands, the greater tolerance to certain forms of pornography in Germany, the very tough stand taken by Greek courts against hooliganism”.²⁰ Nonetheless, the minimum imprisonment approach is considered a modern concept. This formula has been adopted in the United Nations Model Treaty of Extradition, the European Convention on Extradition and many other treaties. Therefore, a consensus on the minimum imprisonment approach for extraditable offences is to be recommended. In addition, the United Nations Model Treaty on Extradition, Article 2 Paragraph 2, also has attempted to minimize the problem by providing some standards to determine the offence punishable under the laws of both Parties.

For mutual legal assistance, it is advisable and recommended that its scope be expanded as much as possible.²¹ This idea has been reflected in Article 1 of the United Nations Model on mutual assistance in criminal matters: “The Parties shall, in accordance with the present Treaty, afford to each other the widest possible measures of mutual assistance in investigations or court proceedings.” Similarly, the European Convention on Mutual Assistance in Criminal Matters, Article 1, states that the

Contracting Parties undertake to afford each the widest measure of mutual assistance.

C. Recommendations

1. For the purpose of extradition, the minimum imprisonment system should be adopted by all states to make the scope of extraditable offences broader and more dynamic.
2. It is recommended that the scope of offences for which mutual legal assistance can be granted be as wide as possible. However, a more restrictive approach should be adopted with regard to coercive measures.

²⁰ Geoff Gilbert, *Aspects of Extradition* 9 (1991), in Jumpol Pinyosinwat, “The Extradition Act in Thailand and the New Draft Extradition Bill” Paper presented to the 114th International Senior Seminar (Jan.17-Feb.18, 2000), 13.

²¹ The Appendix shows that there is no limitation for the scope of offence under the domestic legislature of Japan and Korea, in the matter of mutual legal assistance.

APPENDIX

SURVEY ON MUTUAL ASSISTANCE AND EXTRADITION IN CRIMINAL MATTERS

	BANGLADESH	BRAZIL	CHINA	FIJI	INDIA	INDONESIA	JORDAN	LITHUANIA	MALAYSIA	NEPAL
Law system	Common	Civil	Original	Common	Common	Civil	Civil	Civil	Common	Mixed
Treaty	Yes	No	No	Yes	No	Yes	Yes	Yes	Yes	Yes
Prerequisite	M.L.A.	No	No	Yes	No	Yes	Yes	Yes	Yes	Yes
Domestic Law	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes
		No	No	Yes	Yes	No	No	No	Yes	Yes
Assurance of Reciprocity*1	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
		Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes
Double Criminality Requirement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
		Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Scope of offence	Minimum	Minimum	Minimum*2	Minimum	Listing	Listing	Minimum	Minimum*2	Minimum	Minimum
					Listing	Listing*2	Minimum*2	Minimum*2		Minimum

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Law system	NIGERIA	PAKISTAN	PERU	PHILIPPINES	REPUBLIC OF KOREA	SRI LANKA	THAILAND	UGANDA	UZBEKISTAN	JAPAN
Treaty Prerequisite	Extradition	Yes	Yes	Yes	No	Yes	No	Yes	No	No
	M.L.A.	Yes	Yes	No	No	No	No	Yes	No	No
Domestic Law	Extradition	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
	M.L.A.	No	Yes	No	Yes	No	Yes	No	No	Yes
Assurance of Reciprocity* 1	Extradition		Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
	M.L.A.		Yes	No	Yes	No	Yes	Yes	Yes	Yes
Double Criminality Requirement	Extradition	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	M.L.A.	Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes
Scope of offence	Extradition	Listing	Minimum	Both	Minimum	Listing	Both	Listing	Minimum*2	Minimum
	M.L.A.	Minimum	Listing	Minimum*2	All		Minimum		Minimum*2	All

(Note) M.L.A: Mutual legal assistance

Minimum: Minimum imprisonment system

Listing: Listing system

*1 Question is "Does your country grant extradition or mutual legal assistance based on the assurance of reciprocity?"

*2 Be provided by the convention or treaty.