
PARTICIPANTS' PAPERS

EFFECTIVE LEGAL AND PRACTICAL MEASURES AGAINST CORRUPTION

*Sanchai Krungkanjana**

I. INTRODUCTION

Thailand has transformed itself from an agriculture-reliance country to a more industrialized, foreign-investment and tourist-reliance country just in the last few decades. This transformation has brought out the bigger economy and more complex society. As Thailand has adhered to the system of an absolute monarchy for several hundred years, Thai people always respect the bureaucrat as the representative of the king and bow to the superiors or high ranking officers. This conduct has been imbued in the trade and commerce also. The merchants always respect and bow to the bureaucrat as the superior authority to give the permission to do their business. As a pass to begin the business or become a more lucrative one, the merchants always offer some money as a reward in return for such permission or sometimes bribe the bureaucrat for the permission of doing the business. As Thailand shifted from absolute monarchy to a democratic country, such behavior has still endured in trade and business also. As an industry-oriented society, the traders or the investors still consider the act of giving the reward to the government officers or politicians as the pass to conduct the business or procure the project they want. This attitude may be very hard to change but definitely must be changed. The reason is that the businessmen will not assume the burden of paying rewards or bribes themselves. However, they will shift such burdens to the people, as they will cut the cost of doing business from corruption by operating the project with less quality, causing the continuous problems to the people and society. This paper will begin with the exploration of the current situation with the focus on some offences and the way to fight such corrupt conduct in Thailand.

II. THE CURRENT SITUATION OF CORRUPTION IN THAILAND

A. Corruption in the Current Public Sector

Currently, corruption in the public sector appears to be highly systematic, involving people working in both public and private sectors. It is very sophisticated and highly secretive in practice. The following are noted characteristics:

1. Corruption involving finance and accounting.

Government officials at all levels seize opportunities to misappropriate monies from the government budget, siphon public funds for their own personal interest and file falsified accounts or financial reports.

2. Corruption involving procurement.

This type of corruption involves taking advantage of laws, rules, and regulations as tools for gaining personal profit to be shared among officials and vendors. The practice may take different forms as follows:

- (i) In the case of procurement, government officials entrusted with the task of setting criteria and conditions for bidders often do so to the advantage of their connections, while discriminating against others submitting bids or proposals.
- (ii) In the case of procurement by negotiation or special procedure, the pricing of tools, equipment and materials to be procured must be examined. According to government regulations on procurement, at least two officials must conduct separate investigations on pricing from as many suppliers as possible. But in practice, the two officials appointed to conduct these investigations join in a price-fixing conspiracy which includes the vendors submitting the bids. The vendor and corrupt officials

* Public Prosecutor, Office of the Attorney General of Thailand.

collude to set artificially high bids so that the winning bid will be highly profitable. Having so conspired, the two official price investigators submit their findings along with a recommendation to approve a procurement contract with the lowest bidder on the basis of comparison with the collusively quoted higher bids.

- (iii) Even where there is no bid collusion, officials and vendors can still take advantage of certain loopholes in the procurement law and regulation to engage in corrupt practices. For example, bidding for a construction project may conveniently pre-set certain criteria or qualifications, which appear to be quite strict for selected prospective bidders to be fully qualified. In fact, such seemingly strict requirements are often used as tools for corruption. For example, bidding for a construction project may impose strict pre-qualification criteria that any qualified bidder must be registered as a bidder with government agencies, having formally registered an enormous amount of capital, essentially to exclude other smaller companies or bidders. In addition, the prospective bidders must also submit a portfolio of successfully executed projects for government agencies and those previous projects must have a value of more than 50% of the current prospective project. Such pre-arranged criteria and qualifications conveniently disqualify new bidders with less registered capital and with project value of less than 50% of the current one. These prospective bidders are simply discriminated against and systematically excluded from further bidding.
- (iv) Collusion with other potential qualified bidders. This scheme calls for prospective bidders, vendors, and suppliers to conspire and agree upon who shall be the lowest bidder in order to win the contract, while other bidders or vendors submit higher bids. Once the successful bidder is officially chosen and announced, an agreed sum is paid to the higher bidders. As a result, the government has to pay for the construction project at an exorbitant price, because the winning bid must be set high enough to cover the construction costs, the profit to be made by the winning bidder, the payment for each bidder involved in the scheme and bribes to colluding officials.

3. Vested interest in providing public services, conducting inspections and taking control, performing tasks or carrying out duties to ensure justice to citizens.

This practice involves government officials entrusted with tasks of providing public services, conducting inspections, taking control of specific affairs as well as performing tasks and duties concerning the justice system, who with unlawful intent, demand certain payment either in cash or in benefit in return for the service rendered to citizens who have contacted a relevant or competent agency or applied for certain licenses to engage in lawful business.

4. Paying bribes to win a monopoly.

For certain types of projects, government agencies may grant a monopoly. These agencies must screen a number of qualified private entities and decide on which entity is most qualified to run a government enterprise as a concession. Once a winning applicant is granted the monopoly concession, no other companies may compete. The law requires that applicants submit their proposals or bids for due consideration and proper screening. Their applications must include details of technical expertise, services to be provided, financial proposals and a statement explaining the extent to which the government interest is being served. The granting of a monopoly concession naturally gives rise to tremendous incentives to pay bribes or commissions to influential civil servants and politicians

In addition, there are other forms of corruption that involve government officials. These include falsifying vouchers to illegally reimburse expenses incurred in carrying out official functions or duties, siphoning of government property or claiming government property or office supplies and stationery as one's own private property and conducting private business during official working hours, and the like.

It should be noted that corruption in the public sector has tended to become more carefully planned and more prudently executed. Those involved in corruption choose to work systematically in teams with a clear division of their roles and responsibilities to cover their tracks and hide their wrongdoing. In addition, proxies are recruited and assigned to carry out the unlawful acts or to accept money or interest on behalf of the real culprits. Such schemes are designed to sever the linkage between the real mastermind and their cronies, leaving no implicating evidence to prosecute the ring leader. Once the monetary gains have been amassed, they are systematically transferred to others, who are proxies. The criminally earned money

can then go through a money-laundering process for safekeeping. Corruption in the public sector tends to involve corrupt individuals, ranging from politicians at local and national levels. These are the same people who formulate policies, with the criminal intent to share their gains with their supporting cliques with corrupt money from large-scale government projects financed by a great deal of money from national coffers.

B. Corruption in the Private Sector

Corruption in the private sector can be divided into the following categories:

1. Corruption in Partnerships, Companies, and Legal Entities

The corruption prevalent among business entities in the private sector is generally aimed at amassing as much return as possible for the business entity itself. Within this frame of reference, it may also be the case that company directors or members of management are involved in corrupt practices, embezzlement, and cheating the company or shareholders. They may also be involved in doctoring accounting systems to cover up corrupt practices. For example, they may arrange to have two sets of financial records with different entries and results. They can also avoid issuing proper receipts to customers or be involved in tax evasion or tax fraud.

In the case of limited public companies, some directors or management of the company may abuse their power and authority for their own personal gain or that of relatives instead of creating maximum benefit for the company and shareholders. The following are some cases:

- (i) Connected lending. It is the way the major shareholders try to distribute the profits they gain to other companies they own or to their relatives, instead of distributing such profits among the shareholders. The way to do that is to grant approval of a loan or credit facilities to such company without any intent to demand repayment of such a loan
- (ii) Siphoning of company funds. This is the case where the profit of a company owned by different groups of investors is siphoned to another company owned by only one group of shareholders. For instance, when a company has earned a large profit from good performance, a controlling bloc of major shareholders strongly suggests that part of the profit should be invested in another company owned by them before sharing profit with other shareholders.

In some cases, large purchase orders with due approval from management or major shareholders can be issued to buy raw materials at prices inflated against market prices from another company owned by a majority shareholder or bloc of shareholders. This action allows some major shareholders to amass huge profit, while the company itself makes much less profit than it should.

- (iii) Insider Trading. On some occasions when the directors of the company have direct and easy access to inside data or information, their friends and colleagues take full advantage of such information, making it possible for them to determine the direction of investment, when to buy or sell more shares of the company prior to the public announcement of results of the company's performance. In this way huge profit can be made from changes in the prices of shares, while other investors deprived of such inside information would be unable to prepare for such a situation.
- (iv) Corruption in other forms. This may involve granting profit or investment returns to directors at higher rates than should be, granting the shares at par and paying exorbitant rates of meeting allowances

2. Corruption in Financial Institutions

This may involve misappropriation or falsifying withdrawal slips to withdraw money from a client's account. High ranking executives who falsify document to make illegal transfers from a client's account or illegally approve loans to friends and colleagues are acting against the rules and regulations of the bank.

III. EXISTING LEGAL REGIMES AND MECHANISM TO INVESTIGATE PROSECUTE AND ADJUDICATE (INCLUDING CONFISCATION AND RECOVERY OF THE PROCEEDS OF CORRUPTION)

A. Legal Measures for Prevention of Corruption in the Public Sector

1. Mandatory Declaration of Assets and Liabilities

By law, it is part of official duties, their spouses and children under 20 years of age have to declare assets and liabilities specifically for those at managerial or executive levels, including political and high ranking position holders. This disclosure is strictly required at the time of assuming office, every three years in office, upon leaving office, and on the first anniversary of leaving office.

2. Unusual Wealth Inquiry

According to the Organic Act on Counter Corruption, 1999, cases of state officials having acquired or accumulated an unusual amount of wealth or a marked increase of assets or an unusual decrease of debt or having acquired an unjustifiable amount of assets as a result of performing or carrying out official duties and functions or of exercising power or authority, constitute a case of unusual wealth. In such cases, the National Counter Corruption Commission (NCCC) shall conduct an inquiry, while the burden of proof of innocence falls on the accused. The NCCC is also fully mandated to issue an order to freeze or to seize the assets temporarily, pending further inquiry. After the final consideration that they are unusually wealthy, the NCCC may submit the case to the Attorney General to propose the case to the Supreme Court's Criminal Division for Persons Holding Political Positions to confiscate the assets, in cases where the accused is a political position holder. In case the accused is an ordinary state official, the NCCC shall pass the case to the Office of the Attorney General for any competent court to try the case.

3. Conflict of Interest between Public Interest and Personal Interest of State Officials

According to the Constitution, Ministers, the Election Commissioners, and judges of the Constitutional Court are all strictly prohibited from assuming any post and position in the private sector. Also, the Election Commissioners and judges of the Constitutional Court are specifically prohibited from engaging in any freelance work. Also, the Prime Minister and Ministers are prohibited from being partners or shareholders or from being part of the management of any enterprise in the private sector.

4. Prohibition on Acceptance of Property or any other Benefit

Thai law prohibits all state officials or any person who has left the government service not exceeding 2 years from accepting any gift or any benefit in the amount exceeding 3,000 baht, except from next of kin. Violating this law must be punished.

5. Controls on Procurement by Government Agencies

The procurement process in Thailand is based on the three following principles:

(i) Proper procedures for procurement must be fair, prudent, transparent and accountable

Guideline adopted by the cabinet requires the following procedures to be closely followed:

(a) Registration of Bidding Announcements

(b) Specific duties and clearly defined responsibilities shall be assigned to certain officials involved in the dissemination of bidding information and announcements.

(c) Bidding via the Postal Service is classified as one of the special methods subject to close monitoring and constant inspection. A central repository is established. This method is conceived as a means of dealing with the problem of local influential figures, who are likely to exert influence over government bidding. Any violation of this method shall be punished.

(ii) Administrative Discipline and Penalties

Ministerial rules and regulations have imposed clear control measures on the following activities:

(a) Receiving payment or accepting money

(b) Safekeeping of money and delivery of cash to the Finance Section

(c) Withdrawal from and Payment to the Finance Section

- (d) Budgetary management and debt commitment
- (e) Collection of income and earnings, fees, loans and accounting, etc.

Failure to comply with the above rules and regulations is a serious breach of budgetary and fiscal discipline subject to a fine equivalent to 12 month's salary and other administrative disciplinary action.

(iii) Internal Control

If found that there is negligence or failure to comply with the recommendation of the Auditing Commission, the Auditing Commission will call such office to clarify and may report to competent officers to take necessary legal action against such officer.

B. Legal Measures for Suppression of Corruption in the Public Sector

1. Recall

Persons subjected to recall are the political position holders and high ranking officers including judges and public prosecutors. The causes of recall are cases of being accused of unusual wealth originating from the execution of duties or the exercise of power and authority, or being accused of dishonesty in carrying out official duties. The beginning may come from the people in the number of 50,000, the member of the House of Representatives not less than one-fourth, make the petition to the President of the Senate. If the President of the Senate deems the petition in compliance with the law, he then submits it to the NCCC. Once the NCCC considers that the petition has sufficient grounds and merits further action, the accused shall be barred from office until the Senate passes a resolution on the case. If the Senate Votes with not less than three-fifths present in favor of recall, the accused shall then be barred from their position.

2. Criminal Action Against Political Position Holders and State Officials

The National Counter Corruption Commission has the duty to investigate and make an inquiry which will be submitted to the Attorney General in cases when the politicians or the government officials were accused of committing wrongdoing in the course of their duty. If the Attorney General agrees, the case with the politicians being accused will be filed with the Supreme Court's Criminal Division for Persons Holding Political Positions. But if the accused is a state official, the case shall be prosecuted in a competent court of law. It should be noted that the inquisition system is used in the Supreme Court's Criminal Division for Persons Holding Political Positions while the accusation system is used in competent courts of law. Some academics and scholars comment that as both of them are cases of corruption, the inquisition system should be used in both courts.

3. Freezing, Seizure and Forfeiture of Assets to the State

The Anti-Money Laundering Act treats offences against official positions, offences against positions in the justice system, offences against official positions, or corrupt practices against an official duty as predicate offences. The Transaction committee can issue an official ban on business transactions if there are grounds to believe that they are related to money-laundering. The Secretary-General also can order a confiscation or temporary seizure of assets and then report the case to the Transaction Committee if there are grounds to believe that the assets may be transferred or concealed. As regards assets suspected of having been acquired by illegal means, the competent authorities can compile all evidence, submit to the public prosecutor for consideration and file a request seeking a court order to forfeit such assets to the state.

C. Legal Measures for Prevention of Corruption in the Private Sector (focusing on Bribery and Embezzlement)

Thai law prohibits the director from taking out any loan from the company including the commercial bank. Thai law also stipulates that a public company shall properly prepare a balance sheet for every 12-month period and submit it for consideration to the shareholder, and also to the registrar.

Furthermore, public companies may be audited by the auditor who was appointed by the ministry of commerce from the request of shareholders not less than one-third or with the total shares not less than one-fifth. In commercial banks, it may be scrutinized by the inspector appointed by the Ministry of Commerce and the Bank of Thailand.

D. Legal Measures for Suppression of Corruption in the Private Sector

Directors in public limited companies may be recalled by the company or by the shareholder, with a combined total share not less than 5%. In case of commercial banks and securities companies, the Bank of Thailand and the Securities and Exchange Commission can issue orders to such entities to recall any company director if it is proven that their performance may be detrimental to the interest of the public.

IV. THE CURRENT SITUATION OF, PROBLEMS AND CHALLENGES IN, THE INVESTIGATION AND ADJUDICATION (INCLUDING CONFISCATION AND RECOVERY OF ASSETS)

A. Current Situation, Problems and Challenges, Focusing on Measures/Mechanisms Relevant to Punishing Offenders Effectively

1. Criminalization of Corruption and Related Acts

Thailand always develops its own law to be in line with the international standard. However, as the UNCAC is rather new and complicated and Thailand has struggled through internal commotion for several years, implementing every aspect of the UNCAC is a difficult task. Criminalization is one example. Thailand still has not criminalized the act of offering or giving assets to foreign public officials and officials of public international organizations and the misconduct of duty by foreign public officials and officials of public international organizations.

It is noted that in recent years, there is one case that the U.S. has indicted and punished a husband and wife who have given assets as a bribe into the account of the daughter of the director of the Tourism Authority of Thailand as the reward to give the license of organizing a film festival in Thailand. As the U.S. Court has punished the couple who pleaded guilty, the National Counter Corruption Commission also requested the evidence from the U.S. side to use in the investigation of the officer accepting bribes. It should be noted that as Thailand does not have the offence of paying bribes to foreign officer, Thailand cannot request the extradition of the husband and wife. On the other hand, if the U.S. wants to extradite the governor from Thailand, Thailand also cannot proceed with the extradition process because Thailand does not have the offence of being the foreign officer taking bribes according the double criminality rule in extradition law. It is evident how important criminalization is and at present Thailand is in the internal process of having the Thai Penal Code changed in such manner.

2. Measures/mechanisms to Encourage Persons Who Have Useful Information to Cooperate with Investigative and Prosecutorial Authorities

Thailand has used witness protection laws for many years. They could be divided into two measures: general measures and special measures. General measures are used in lighter crimes and are conducted by the police who will protect the witness, spouse, parents and children and others closely related to the witness. Another is the special measure which is used in serious crime. The protections include change of residence, identity and employment, getting cost of living allowances and allowing maintenance of the witness's livelihood.

Although Thailand has the witness protection law, this is not enough considering there are still many people who have reported misconduct to the legal officer and were killed. There is the law that the general people who report corruption to the NCCC may receive a bribe according the rule promulgated by the NCCC. However such a case has never occurred. There is also no law to protect the livelihood and life of the whistle-blower. Such whistle-blowers may be persecuted by influential persons or their bosses. It is very important to guarantee the whistle-blower the protection that makes him not afraid of revenge and threat. By having more people willing to cooperate, it would be easier for the anti-corruption agency to conduct investigations, and also it would cause those who are thinking of doing something wrong to refrain. In order to ensure the effectiveness of this measure, there must be clear laws for whistle-blower protection, which is distinct from witness protection. The law must clearly define the act of whistle-blowing, the process of protection, the conditions for protection and the rewards associated with whistle-blowing. NCCC can consider investing in technology to use in helping to protect peoples' identities such as anonymous e-mail channels.¹

¹ Assistant Professor Dr. Ake Tangsupvattan, Assistant Professor Dr. Ora-orn Poocharoen, "International Counter Corruption Measures and Practices: Application for Thailand", pp. 15.

As many corruption cases are matters that were known only among wrongdoers, such as the briber and bribee, separating one of them as the witness is very important to prosecute the case effectively. Thailand has the law that permits the public prosecutor to separate the wrongdoer as the witness. There are so many cases that the courts punish the culprits even though one of them who is separated as the witness testifies against them. However, the court will also consider other circumstantial evidence. As some perpetrators who become witnesses should have been punished also or sometimes it is not clear whether or not the public prosecutor will win the case, plea-bargaining should be used also. The plea-bargaining law has been proposed in Thailand but it has never worked out. As the international organized crime and complex crimes become prevalent, plea-bargaining should be another method to catch up with such change if there is an effective method to check and balance such method.

3. Special Investigative Techniques

It is evident that the conduct of corruption is known only among the perpetrators. Furthermore, the persons who commit such crimes always are influential and have their network and understand how to hide the evidence. As a result the ordinary way of investigation may not be enough to catch up with such crime or may end up in an inefficient investigation. The public prosecutor may deny prosecuting the case as it is useless to conduct the case in the court. In this way, the following special methods may be essential tools to reach the evidence and the perpetrators:

(i) Intelligence Progress

It means any conduct according to the duty to be in line with the specific law in order to search, compile, synthesize, and to collect the information from reliable sources in order to enlarge the investigation.

(ii) The Undercover Operation

It means any conduct which hides its status or purpose by concealing the real purpose or to hide the operations of the officers, including the protection under the supervision or the order or the tracking of the officer such as tracking by electronic instruments, interception, controlled delivery, hiding, or tempting.

These two methods are used only in narcotics investigation and the investigation under the Special Investigation Act. They should be used also in counter-corruption investigations.

4. Other Criminal Justice Measures

(i) Shifting the burden of proof

At present, to confiscate the assets as presumed being unusually wealthy, the burden of proof is on the defendants to prove that their assets come from a legal source.

(ii) Criminalization of the Status of Being Unusually Wealthy

Thailand has not criminalized the status of being unusually wealthy as the criminal offence in line with Article 20 of NCAC. What Thailand does now is only conduct the forfeiture of the assets. This is not enough to hinder the villain from committing the vicious act.

(iii) Modify the definition of unusually wealthy

The NCAC defines the meaning of unusually wealthy or unjust enrichment as a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. The Organic Act on Counter Corruption, B.E. 2542 (1999) defines the meaning of unusual increase of assets as “the phenomenon where the assets and liabilities listed in the account showing assets and liabilities submitted by the person holding a political position upon vacation of office differ from the account showing assets and liabilities submitted at the time of taking office, in the manner that the assets unusually increase or liabilities unusually decrease. It also defines the meaning of unusually wealthy 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 in a consequence of the performance of duties or the exercise of power in office in the course of duty.

It should be noted that the requirement in the NCAC is broader in scope than the Thai anti-corruption law. Thai law in this matter is not in compliance with the NCAC and should be modified to be in line with the NCAC.

(iv) Extending the Prescription Period of the Allegation of Unusual Wealth

The last paragraph in section 75 of the Organic Act on Counter Corruption, B.E. 2542 (1999) provides that "The allegation of unusual wealthiness [wealth] shall be made at the time the alleged culprit is a State official or has ceased to be a State official for not more than two years. This provision may have a loophole as in the case that the fact occurred later and the politicians has not reported some assets or such fact occurs after the two-year elapsed time. The NCCC cannot conduct the investigation and inquiry on such politicians. The prescription period should be extended or there should be no prescription period at all.

(v) Modify the Law to Make the Running of the Statute of Limitations Stop or Eliminate the Statute of Limitations

There is a very famous case where the financial advisor of the commercial bank of Thailand cooperated with the director to embezzle money in the amount of several millions dollars by giving the loan with defunct credit to their associates leaving such commercial bank insolvent. Such financial advisor fled from Thailand to Canada. As the statute of limitations was running, Thailand coordinated with Canada to arrest him and put him in house arrest during the extradition process. As the extradition process of Canada is quite complicated and gives the right to the accused to appeal both to the Ministry of Justice and to the Court, the extradition took more than 15 years before he was extradited back to Thailand. Fortunately, the statute of limitations has only elapsed for the lesser offence. Thailand can still punish the severe offence, but this has instigated law scholars to consider the statute of limitations.

As most of the corruption offences in Thailand have statutes of limitations elapsing at 20 years, most of the culprits, who usually are influential and rich, always use such loopholes by evading the officer by getting out of the country or bribing the officer not to arrest them. When the period of 20 years elapses, they appear again and live normal life as if nothing happened because the criminal justice system cannot do anything with him. As the corruption conduct is deemed as the severe offence, affecting the public security and national interest of the country, many scholars suggested that these offences should have no statute of limitations at all or its running should be stopped since they fled from the country.

(vi) Apply the Inquisitorial System in the Court Proceedings Against the Government Officer

In the inquisitorial system the Supreme Court's Criminal Division for Persons Holding Political Positions has the authority to find the evidence by itself in the trial against the politicians. The law should be changed to use this system in the Court of Justice in the case of corruption by government officers. This should be a practical method for the corruption case which becomes more sophisticated and involves influential persons.

(vii) The Public Procurement Laws Should Be Equal to the Act

As the level of public procurement law is lower than the Act, the politicians usually use this loophole to evade the compliance with the public procurement law which opens the way for corruption. There also should be a central committee to consider the policy of public procurement, issue the bylaws to control the public procurement and consider which project should be exempted from that bylaw. There should also be the list of the constructor or service provider and the regulation to withdraw the registration.² This will be convenient to look into the behaviour and prevent any misconduct.

(viii) The Standard for the Act on Acquiring the Private Entity to Co-work with the Government Project³

There should be the lowest standard relating to administrative contracts with the government regarding the Act on Acquiring the Private Entity to Co-work in the Government Project. This will open the contract to public scrutiny and decrease any disputes of the parties to the administrative contract.

5. International Cooperation

(i) Extradition

(a) The Rule of Specialty

As mentioned about the Thai Extradition request from Canada, the financial advisor committed about 14 acts, offering the loans on separate occasions. Thai public prosecutors had a meeting with Canadian public

² Professor Sawang Boonchalermvipas and associates, Analysis of the right duty and obligation of state members to UNCAC with relate Thai law, pp. 254.

³ Ibid. at 259-260.

prosecutors about how to make the request for extradition. The recommendation of the Canadian public prosecutor was that as the Canadian extradition process would take a long time, the Thai public prosecutors should request the extradition for only one act because requesting all of acts should make the process more complicated and time-consuming. This would also leave room for the defence lawyer to take the opportunity to complicate the case and prolong the process till the statute of limitations elapsed. The Rule of Specialty, which is the international customary law, requires that confinement for proceedings or punishment of the extradited person in the requesting country for other offences committed prior to executing extradition cannot be carried out, except if the requested state consents. Thai public prosecutors got the recommendation from Canadian public prosecutors that Thailand should make the request for consent as an exception to the Rule of Specialty from the respective authority, which is the Ministry of Justice. As the accused was sent back to Thailand two years ago, Thai public prosecutors requested the consent from the Canadian Ministry of Justice to give the consent for Thai Public Prosecutors to prosecute the accused with other acts. However, the Canadian Minister of Justice rejected and as a result, Thai public prosecutors could not prosecute the accused with the acts Thai Public Prosecutors had not requested 15 years ago. Thailand lost the opportunity to prosecute the accused for almost every offence and leave the complexity of getting the assets back by criminal procedure. It is clear that it is not the fault of the Thai public prosecutors. They followed the recommendation of the Canadian Public Prosecutor. As the one who gave advice and who rejected the request for the exception to the Specialty Rule was not the same person, there is no guarantee that the latter will follow or recognize the advice of the first one. This may be the defect of the Rule of Specialty and long extradition process.

(b) The Exception of Double Criminality Rule

The Double Criminality Rule, which is the international customary law, requires that the requesting country and the requested country must both criminalize such conduct the extradition request is based on as a criminal offence. As the UNCAC article 44 paragraph II stipulates that “a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law,” it is evident that the UNCAC tries to make an exception to the Double-Criminality Rule. As most of the Thai Extradition Treaty concluded with foreign countries stipulate the Rule of Double Criminality and those treaties must be legislated by the Parliament, it is questionable that such exception by the UNCAC may be held as the modification to the law and must be approved by the Parliament also. As the legislation process of Thailand always take a very long time, Thailand may be criticized as the country which has not implemented the UNCAC and cannot make use of the exception in UNCAC until the law implementing the UNCAC has been approved by the Parliament.

(ii) Mutual Legal Assistance

Thailand has the Mutual Legal Assistance in Criminal Matters Act as a tool to assist other countries who request assistance from Thailand and to request the assistance from other countries. The assistance includes the matter of investigation, inquiry, any kind of gathering evidence and any criminal matters except extradition which has another specific law to be applied. There is the central authority, which is the Attorney General, to consider and dispatch the foreign requests to the competent authority to proceed with the request, and the Attorney General also receives the request from the Thai criminal agency and makes the formal request to the foreign countries.

The Mutual Legal Assistance in Criminal Matters Act has been proposed to be improved in some matters to be in line with the UNCAC. The process is in the drafting stage by relevant agencies and may be proposed to the Cabinet and the Parliament soon. The matters other than the confiscation and recovery of assets which will be discussed later are as follows:

(a) Authorize the Attorney General to Dispatch Useful Information to Foreign Countries

If the Attorney General found that there is some evidence or information relating to the wrongdoing or assets relating to the offence that will be useful in the investigation, the inquiry, the prosecution or the proceedings of other countries, he or she may dispatch such information to the foreign country even though there is no request from such foreign country.

(b) The Persons in Custody Can Be Transferred for the Benefit of Assistance in the Level of Law Enforcement and Judicial Authority.

As in the present law, the transferring of Persons in Custody can be done only for testimonial purposes. A new law has been proposed that the transferring of Persons in Custody could be done for the purpose of assistance both in the criminal investigation and court proceedings.

(iii) Law Enforcement Cooperation

Other than the Mutual Legal Assistance in Criminal Matters Act, which is used as the main tool for incoming and outgoing requests for the assistance, Thai criminal agencies always have the agreement with other foreign-counterpart criminal offices in helping each other in the matter of criminal assistance. The Office of the Attorney General also concludes the Memorandums of Understanding regarding the assistance in knowledge and duty with Indonesia, Laos and Vietnam. In the near future, Thailand will conclude the MOU with ASEAN countries. It should be noted that Thailand gets a lot of support from developed countries in supplying the knowledge and techniques in investigation or accepting the Thai officers to be trained in those countries.

B. The Current Situation, Problems and Challenges, Focusing on Measures/Mechanisms Relevant to the Effective Confiscation of Illegal Benefits and Recovery of Assets

1. Measures to Identify, Trace, Freeze, and Confiscate Instrumentalities and Proceeds of Corruption — Related Offences

These measures can be divided into civil measures and criminal measures which will be discussed as follows:

(i) Civil Measures by Anti-Money Laundering Office

Civil measures are different from criminal measures in that the civil measures need not prove that the defendant is guilty of the charge. There must only be proof that the corrupt assets are derived from the corruption by weighing the evidence more than a 50% probability. The process begins when the Transaction Committee issues an order for temporary asset seizure or attachment for a period not exceeding 90 days. This process can be done if there is the reasonable belief that there may be a transfer or dispatch of the assets related to the predicate offence. The public prosecutor can then prosecute the case by filing a petition to the Civil Court asking the Court to issue an order that such asset be vested in the state. If the public prosecutor can prove that such asset has been acquired from a predicate offence, even though the owner is not judged guilty by the Court, the Court will issue an order that such asset be vested in the state. It should be noted that even if the corrupt assets are transformed, they still can be forfeited. There is the benefit in this law also that there is the presumption that the assets of the owner or the transferee involved in the predicate offence will be presumed to relate to the offence or to have been acquired dishonestly. If the owner or the transferee cannot rebut the presumption, the assets will be vested in the state. It should be noted that the forfeiture under the AMLO law almost covers all the requirements under the UNCAC except the forfeiture of the property used or possessed for use in the commission of the offence by the accused.

It should also be noted that the predicate offence relating to corruption in the Thai Anti-Money Laundering Law is limited to malfeasance in office and malfeasance in Judicial Office only. This is deemed as not in line with UNCAC as the UNCAC covers the offence against officials also. This results in the impossibility of freezing the assets derived from the offence against an official. The Anti-Money Laundering Law should be modified to contain the offence against officials as the predicate offence.

(ii) Criminal Measures by Criminal Code and Criminal Procedure Code

The Criminal Procedure Code authorizes the inquiry officer to freeze or seize the assets that may be used as evidence or for the benefit of compiling the evidence. This law may be used for the tangible assets or any assets other than the money but may be an obstacle in freezing or seizing money. As the corruption case always involves the transfer of the money, freezing the money may be not the objective in compiling the evidence as the argument may be that the inquiry officer can only have the statement of the financial account. The conduct of freezing the money by the inquiry officer may be raised by the defence lawyer and if the court agrees, the inquiry officer may be convicted of wrongfully exercising of his function. Even though Section 33 of Criminal Code provides that the Courts have the power to forfeit property acquired by a person through the commission of an offence, there may be no money left to be forfeited if the Criminal Procedure Code still stipulates that.

It should be noted that the forfeiture in the Criminal Code can only be done with the direct-derived asset. If such asset has been transformed, it cannot be forfeited. This is considered as not in line with the UNCAC.

(iii) Other Matters

- (a) As the UNCAC supports the notion of value-based forfeiture of assets which will be more effective in the case of incapacity of finding the exact-derived assets, Thailand has not implemented this notion and the respective authority should encourage the government to legislate such law.
- (b) Thailand should set up special agency which is independent, without interference from politicians, which is empowered to follow the corrupt assets. At present, as there is still no such agency, the NCCC may set up an ad hoc agency in the meantime.⁴
- (c) Thai law should be modified to deem foreign governments as juridical persons so it can follow the corrupt assets and conduct the litigation in Thailand to recover the assets.
- (d) The Thai Money Laundering Law should be provided to include the laundering of assets, not only money.
- (e) The NCCC should have the power to seize or freeze the assets believed to be acquired from the offence of dishonestly exercising duty, other than in unusual wealth cases.

2. International Cooperation for the Purpose of Identifying, Tracing, Freezing and Confiscating Instrumentalities and Proceeds of Corruption and Related Offences

Thailand has the Mutual Legal Assistance in Criminal Matters Act (MLA) as the legal tool to accomplish both incoming and outgoing requests of identifying and tracing of instrumentalities and proceeds of corruption and related offences. For the request from foreign countries, the Attorney General usually forwards the request to the inquiry officer of the Royal Thai Police while the Attorney General will forward the request from Thai agencies to another country. Regarding the freezing and confiscating, the MLA is still applied but can be divided as follows:

(i) The Search and Seizure for the Purpose of Gathering Evidence

In the incoming search request, according to the Thai Constitution and Criminal Procedure, the competent authority, after receiving the request from the Attorney General, will request the search warrant from the court and after getting the warrant can search the premises according to such warrant.

If the foreign country submits the request for seizure, including the freezing of the assets to the Thai Attorney General, the Thai Attorney General will submit the request to the public prosecutor in the International Affairs Department for consideration. The public prosecutor then will consider the objective of the request. If the objective of the request is to gather the evidence, the public prosecutor will propose to the Attorney to send such request to the inquiry officer.

According to a proposed law on the MLA, all of the seizure requests without the foreign court's order or judgment, no matter if the purpose is for the gathering of evidence or forfeiture, must be submitted to the court. If found that there is the reasonable belief that there may be the transfer, dispatch, concealment or hiding of assets from the forfeiture or from the enforcement by paying money in place of the forfeiture or resulting in the depreciation of the assets causing the futility of forfeiture, the court will issue the order to seize the assets. This law is in the process of being proposed to the cabinet.

(ii) The Seizure or Forfeiture of the Property

As mentioned, that the public prosecutor will consider the purpose of the seizure request after getting the request from the Thai Attorney General, in the case that the purpose of the request is to seize the assets for forfeiture in the future, the MLA Act requires the competent authority, which is always the inquiry officer, to apply to the Thai court having the jurisdiction over the location of the property for the order of its seizure. Where the foreign court has made a pre-judgment order seizing the property or made a forfeiture order against it but the order is not yet final, the Thai Court, if it thinks fit, may make an order seizing it if it is seizable under Thai laws.⁵

⁴ Professor Sawang Boonchalermvipas and associates, The Conclusion of Analysis of the right duty and obligation of state members to UNCAC with relate Thai law, pp. 19.

⁵ Section 33 para. 2 of the Act on Mutual Assistance in Criminal Matters, B.E. 2535.

In the case that there is a foreign request to forfeit assets in Thailand, the property specified in the request from a foreign state may be forfeited by the judgment of the Court if there is a final forfeiture judgment of a foreign Court and it is a forfeiture under Thai laws.⁶

Considering the requirement that the assets must be seizable under Thai laws, it is evident that the law cannot be used in a practical way. The reason is that Thai law always requires that any forfeiture of assets must also come from the judgment that the defendant is guilty. This makes it impossible to enforce the law because many foreign forfeitures may result from the civil procedure which is conducted under the anti-money laundering law with no need for the criminal judgment against wrongdoers. Another defect is that in criminal forfeiture, if the defendant is dead, the court proceedings, including the process to forfeit the assets, must be abandoned. As a result of impractical laws and ineffective enforcement, the proposed law on MLA has been drafted in two ways as follows:

- (a) The Foreign Assistance Request to Freeze or Seize the Assets according to the Pre-Judgment Order of the Foreign Court

In this case, the competent authority will request the court, of which the assets or the related person is in the jurisdiction, to issue the freeze or seizure order, if it is evident that such foreign court has jurisdiction over such case and there is the reasonable belief that there may be the transfer, dispatch, concealment or hiding of assets from the forfeiture or the enforcement of paying money in place of the forfeiture or resulting in the depreciation of the assets causing the futility of forfeiture.

- (b) The Foreign Assistance Request to Forfeit the Assets or Requiring any Persons to Pay the Money in Place of the Forfeiture According to the Final Order or the Final Judgment of the Foreign Court

In this case, the competent authority will request the court, of which the assets or the related person is in the jurisdiction, to issue the freeze or seizure order, if it is evident that such foreign court has jurisdiction over such case and in such foreign proceeding the defendant, the accused and the right owner has the opportunity to prove their rights.

3. Return and Disposal of Confiscated Assets

As the Thai Criminal Law and Thai MLA law stipulate that the properties forfeited by the judgment of the Court shall be vested in the State, this process was considered as not in line with the UNCAC. The proposed MLA law proposes that the corrupt assets seized or money needed to be paid in place of the seizure by the final order of the Thai Court may be demolished or changed to become useless unless the treaty provides otherwise. As the assets or the money in place of them may be recovered by the requesting state under the treaty, the Central Authority shall petition the court in order to have the order to submit those assets or money to the Central Authority in order to return to the requesting state. This would be done only after deducting the expense Thailand has paid in the process relating to such forfeiture or the essential expenses paid for the return of assets or money to the foreign state. This deduction must be done unless the treaty provides otherwise. Any gains incurred from those assets or money before the return of them should be vested in Thailand.

Another matter that should be raised is asset sharing. Thailand should promulgate a law to allow the requested country, to which Thailand sends requests to forfeit the corrupt assets, to have a part in the corrupt asset as the incentive to assist Thailand in the forfeiture of the assets. In another way, Thailand may promulgate the law to let Thailand request part of the assets Thailand forfeits to another country.

V. THE CURRENT SITUATION OF, AND PROBLEMS AND CHALLENGES IN, STRENGTHENING THE INDEPENDENCE OF CRIMINAL JUSTICE AUTHORITIES AND THEIR PERSONNEL

The Constitution of Thailand B.E. 2540 is deemed as the revolution of Thai politics and society. Regarding the politics and society, the Constitution has built the various independent organizations in order to control, supervise and inspect the politicians. The main independent agency to curb corruption, especially

⁶ Section 33 para. 1 of the Act on Mutual Assistance in Criminal Matters, B.E. 2535.

the corruption by politicians, is the National Counter Corruption Commission or NCCC. As the NCCC and other independent organizations have worked to fight corruption for the last 15 years, there are still some defects in those organizations, and there are still many aspects not in line with the UNCAC which will be discussed as follows:

A. The Independence of the Secretary of the Money-Laundering Office and the Director of the Department of Special Investigations

There is the proposal that as the bosses of both agencies have much influence in corruption cases and their supervision can greatly affect the corruption case, they should be appointed independently from the government. There is the proposal that their appointment should also be approved by the House of Senators in order to prevent from using the AMLO and DSI as a tool for political purpose.

B. The Independence of the Attorney General

The appointment of the Attorney General must be approved by the House of Senators. As one of the main objectives of the Office of the Attorney General is to protect the interests of the state, the Attorney General and many high ranking public prosecutors have been proposed to be the board of committee in the various public entities or state enterprises which needed to be approved by the Cabinet. As they are appointed in the state enterprises which have so many interests in them and they have to work closely with the politicians, it is impossible to say that they are free from the influence of the politicians which possess so much authority. There is some suggestion from some scholars that the Attorney General and the public prosecutors should not be appointed to be the board in the state enterprise. Some others propose that there should be special public prosecutors and a committee of special public prosecutors (CSPP) whose work is specific to prosecuting the politicians. The CSPP should be selected with as little influence as possible as in the case of NCCC and should be appointed by the House of Senators as in the case of NCCC

C. The Independence of the Committee of the Office of Anti-Corruption in Public Sector

The Committee of the Office of Anti-Corruption in Public Sector (COAPC), which has the authority to investigate government officers from level 7 downward, is appointed by the Cabinet with the approval of the House of Representative and the House of Senators. As the COAPC may find the evidence of corruption linked with the politicians, and their work is to fight corruption like NCCC, some scholars suggest that its appointment should be free from politicians as in the case of NCCC.

D. The Independence of the Inquiry Officer and the Police Officers

As the Inquiry Officers and the Police Officers are set by the law to have roles in cooperation with the COAPC in the investigation of the corruption case, and the file of the inquiry officer is deemed as the file of the COAPC. There should be measures to guarantee the independence of the inquiry officer and the police officer whose work deals with corruption which may involve politicians.

E. The Independence of the Independent Agencies from the Setting of Salaries by the Politicians

As the salary of the officials in the independent agencies is issued by the law which has to be approved by the House of Representatives, it cannot be said that those independent agencies are far from the influence of politicians. The suggestion is that salary should be increased each year according to the inflation rate. This may be difficult as the politicians always want to reserve their power as they can use the desire to raise the salary as the bargain for their benefit. However, in order to work independently for the sake of public security and the trust of the people, all independent agencies should work together to promote such law.

VI. CONCLUSION

As various independent public agencies in fighting corruption have emerged by Constitution B.E. 2540, they, especially the NCCC, have been working hard to fight corruption for 15 years. Their work may be successful in some aspects but there is still a long way to go. As the international survey shows its result every year, Thailand still is stagnant in the bottom index as one of the most corrupted nations. This result shows that Thailand still has plenty to do in fighting corruption. As the UNCAC has set the standard for the member states to follow, it is evident that Thailand has to modify a lot of statutes to be in line with the UNCAC. It is believed that effective statutes, together with the capabilities of the anti-corruption public agencies, will be used as effective tools to fight corruption. This may be true in some aspects but not all. It is

believed also that even though the law is good, if the law enforcement and the cooperation of people are bad, the enforcement of the law cannot be effective. As in so many developed countries, the awareness and the conscience of the people also plays the important, or maybe the most important, role in fighting corruption. Some countries that used to be the most corrupt countries use participation of the people, together with the effective suppression, to eradicate corruption. As Thailand has its own survey recently, almost all Thai people think that the politicians are still good if they work effectively for the people even though they are corrupt. This attitude is tremendously dangerous to Thai society morally and economically both at present and in the future. Corruption is not just about the money but it is also about moral value. If the people in the country do not have morality, the country may not survive. The campaign to fight corruption will maintain the morality and create peaceful society. As moral value is something that has to be instilled, the mind-set of the adult may be hard to change. It is my belief that the education for the young people to instill anti-corruption attitudes should be an effective tool for the future of the country. Other than modifying the law as the effective tool to suppress corruption, the anti-corruption agencies, the government and the Thai people should collaborate to instill goodness and morality, focusing on corruption, to the general public and especially for the children for the bright future of the country.