EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION

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I. INTRODUCTION

For a period of time, corruption has been considered a main problem of many nations as it has become widespread, and poses a serious threat to economic and social development, political stability and the rule of law. In response to this serious threat, an effective international legal instrument is necessary. As a result, in 2003, the General Assembly adopted the United Nations Convention against Corruption (hereinafter "the UNCAC") which entered into force on 14 December 2005. At present, 136 United Nations Member States have become parties to this Convention. The UNCAC aims to provide global framework for combating corruption. Its new approaches highlight the significant aspects of preventive measures, criminalization, international co-operation through mutual legal assistance and extradition; and asset recovery.

To illustrate the serious harm of corruption, I would like to emphasize the statement of Mr. Kofi Annan, a former UN Secretary General at the adoption of the General Assembly of the UNCAC that "Corruption is found in all countries – big and small, rich and poor but it is in the Developing Countries world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key factor in economic underperformance and a major obstacle to poverty alleviation and development."[2]

Thailand is fully aware of the harms of corruption as it has caused considerable damage to the national economy, jeopardizing national security and undermining the rule of law. Since Thailand became a signatory to the UNCAC in December 2003, many steps pertaining to the UNCAC ratification process have been undertaken and realized. However, a number of domestic legislations still need to be amended to be in conformity with the UNCAC, particularly on the issue of asset recovery, the statute of limitations and international co-operation. In order to successfully eradicate corruption, the effectiveness of legal frameworks, mechanisms and the role of involved agencies in the criminal justice system are essential. For this purpose, Thailand has made utmost efforts to improve and develop its domestic legal regime so as to be in line with the Convention. As soon as the Thai legal regime is in compliance with the new benchmark set by the UNCAC, Thailand will make the ratification of the UNCAC its first priority. This achievement would assure the international community as well as prospective foreign investors of Thailand's transparency, accountability and fair treatment.

This paper focuses not only on the current situation of corruption in the public sector in Thailand but also on how the Thai criminal justice system responds to corruption. Particular attention is given to the legal framework and measures in combating corruption. This paper also emphasizes the recent improvement of the Thai legal framework, its mechanisms and measures to effectively combat corruption as well as its negative effects and obstacles. Finally, this paper gives concrete recommendations on ways to improve the Thai legal framework and system to more effectively respond to corruption.

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[2] www.unodc.org. Corruption Control in Public Procurement, Report of the Second Regional Seminar on Good Governance for Southeast Asian Countries, 23-25 July, Bangkok, Thailand Resource Material, UNAFEI, p.25

II. CURRENT SITUATION OF CORRUPTION IN THAILAND

Thailand is among the countries long affected by corruption in both the public and private sectors. According to the Corruption Perception Index 2008 (CPI), in the Asia Pacific Region, a survey done by Transparency International, Thailand ranked 13 out of 32 countries with a score of 3.5 and ranked 80 out of 180 countries worldwide.[2] However, from 2002 to 2008 CPI shows that Thailand improved its score, though 3.5 remains troublingly low and indicates a serious corruption problem in the public sector. Nevertheless, Thailand's corruption situation seems to be slightly above the average in comparison with those of other ASEAN countries, e.g. Myanmar, Cambodia, Lao PDR, Philippines, and Indonesia, with their CPI 2008 scores ranging from 1.3 to 2.6. Even though Thailand has fought corruption for many decades in which various legislative and social strategies and measures, either preventive or suppressive, have been imposed to solve this problem, corruption in Thailand still persists and has become more sophisticated and difficult to address.

A. Definition and Concept of Corruption in Thailand

In General, "Corruption" or "*Thujarit*" in Thai means "breaking or violating laws and ethics which include refraining from carrying out lawful duty."[3] However, a more generally accepted definition is "illegal exercise of duty and authority of state officials for personal gain". This reflects a recognized concept that corruption occurs when an official exercises his or her official power or authority for personal interest. However, corruption is not limited to monetary gain, it rather includes other forms of monetary benefit such as giving stocks or shares or getting special discounts when buying goods or services, etc. According to academics' statements regarding the concept of corruption in Thailand, "Corruption problem is the "national disease" of Thailand for decades. This disease has existed in Thailand for a very long period of time. There is still no kind of medicine to prevent and eliminate the growth and development of this disease."[4]

Corruption in the public sector appears to be a highly systematic and sophisticated practice involving people in both public and private sectors. Characteristics of corruption in the public sector can be briefly characterized as follows:

1. Corruption involving Finance and Accounting

It is observed that government officials at all levels seek opportunities to undertake misconduct on the government budget by misappropriate taking money or siphoning public funds for their own interest and falsifying accounts or financial reports.

2. Corruption in Public Procurement

This type of corruption involves taking advantage of laws, rules and regulations as tools for gaining personal profits to be shared between officials and vendors. This could be considered corruption on a grand scale involving politicians, government officials and the private sector in which they all conspire to siphon money off the government budget. Also, it can be seen as a link to the abuse of power by high-ranking officials. There are various practices, such as in procurement, which impose strict pre-qualification criteria appearing to favour some bidding companies and discriminating against others. Another example is in case of collusion among potential qualified bidders ("*Hua*" in Chinese), when prospective bidders agree upon who shall be the lowest bidder to win the bidding while the other bidders submit higher bids.

1. Corruption involving interests vested in providing public services, conducting inspection, taking control of specific affairs or carrying out duties to ensure justice.

This practice involves government officials entrusted with the tasks of providing public services performing their tasks with unlawful intent by demanding certain payment in return for the service rendered.

2. Corruption involving bribes to be granted a monopoly business.

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[2] Transparency International. Corruption Perception Index 2008 (www.transparency.org)

[3] Sawang Boonchalerm – Viphas, *Enforcement of law for the purpose of Suppressing Corruption and Malpractice in Thailand*, Thammasart University, B.E. 2544 (2001), p. 3.

[4] Suvitcha Piarat, editor, *10 Nation Crisis* B.E. 2550, Baan Pra Arhit (2007), p.67-69.

For certain types of projects, government agencies may grant a monopoly in which they shall screen a number of qualified private entities and decide which entity is the most qualified entity to run a government enterprise as concession. Therefore, the granting of monopoly gives rise to tremendous incentives for private entities to pay bribes to influential responsible officials and politicians. In sum, corruption in the public sector tends to become more carefully planned, more prudently executed and involves corrupted individuals, ranging from politicians and government officials at local and national levels. Those involved in the the scheme choose to work systematically in teams with a clear division of their roles and responsibilities to cover the tracks and hide the wrongdoing with the unlawful intent of illegally gaining money from the government budget. Once the monetary gains have been amassed, they are transferred to many people involved at many stages and then go through a money laundering process for safe keeping.

III. LEGAL FRAMEWORK GOVERNING CORRUPTION UNDER THE THAI LEGAL REGIME

Even though Thailand became a signatory to the UNCAC in 2003, it has not yet ratified the Convention. However, Thailand is in the process of reviewing and harmonizing its domestic legislation to ensure its compatibility with the UNCAC instruments. At present, three draft pieces of legislation on asset recovery, mutual legal assistance in criminal matters and the statute of limitations are under the consideration of the Council of State. Once these three proposed laws are approved by the Parliament, Thailand will be able to ratify the UNCAC. Moreover, Thailand has enacted a number of anti-corruption laws, particularly in relation to the criminalization of corruption, which are fully in consistent with the UNCAC. Nevertheless, some issues remain to be discussed, as follows. below

A. Criminalization of Corruption and Relevant Acts

The issue of criminalization of corruption and relevant acts provided in the UNCAC, Articles 15 to 25, including offences such as bribery of national public officials, embezzlement, misappropriation or other diversion of property by a public official, embezzlement of property in the private sector, trading in influence, abuse of function, are also stipulated as offences under the Penal Code Sections 143, 144, 148, 149, 150 – 154, 167, 169, 201; the Organic Act on Counter Corruption B.E. 2542 (1999); the 2007 Constitution of Thailand; the Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (1996); or the Regulations of the Office of the Prime Minister on Procurement B.E.2535 (1992), and so on. Therefore, Thai legislation is mostly consistent with the criminalization provided under the UNCAC. However, some offences carried out in support of corruption, including obstruction of justice, concealment or laundering the proceeds of corruption and the limited scope of predicate offences under the Anti-Money Laundering Law, which may not cover some kinds of corruption, remain necessary issues to be explored.

The 1997 Constitution, or the so-called the "People's Constitution", was promulgated as a successful achievement which gives practitioners the necessary teeth to penalize corruption and effectively control corruption in Thailand. Moreover, this People's Constitution also established the National Counter Corruption Commission (NCCC), an independent agency, whose mandate, according to the Organic Act on Counter Corruption B.E. 2542 (1999), is to conduct investigations and take legal action against politicians and government officials regarding alleged corruption. It is clear that the measures provided under this Organic Act include, but are not limited to, the mandatory declaration of assets and liabilities, an unusual wealth inquiry, imposition of the provision prohibiting transactions relating to the conflict of interest of state officials, and prohibition on acceptance of property or any other benefit. The Supreme Court's Criminal Division for Persons Holding Political Positions, established in September 1999 by the provision of the 1997 Constitution, and the Organic Act on Criminal Procedure for Persons Holding Political Positions B.E. 2542 (1999) are other legislative highlights of the fight against corruption in Thailand. The structure, authority and responsibility of the NCCC, as well as those of the Supreme Court's Criminal Division for Persons Holding Political Positions, together with its special procedure, role, duty and authority are explored later in this paper.

B. Safeguarding and enforcing Integrity

The former 1997 Constitution imposed various preventive and suppression measures, checks and balances and other mechanisms to secure the accountability of politicians and bureaucrats to the public. It empowers the public to remove high-profile politicians and high-ranking government officials in case of the suspicion of corruption. It is provided under this law that at least 50,000 citizens can sign a petition to the

Senate President, who would send it to the National Counter Corruption Commission for investigation. If there is sufficient evidence, the accused could be removed from the position. It is the first time that citizens can be directly involved in scrutinizing state performance. Later, under the new Constitution enacted in 2007, Article 271 ensures the same direct public involvement as the 1997 Constitution. However, it is even easier to remove high-ranking officials and politicians from their position as it requires only at least 20,000 citizens to sign the petition to the Senate for further removal procedure.[5]

Apart from the laws mentioned above, there are some other pieces of legislation that played an important role in combating corruption, such as the Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (1996); the Civil Service Act B.E. 2535 (1992); the Organic Act on the Election of Members of the House of Representatives and Senators B.E. 2541 (1999) as amended to No. 3 B.E. 2543 (2000). The Regulations of the Office of the Prime Minister on Procurement as amended to No.5 B.E. 2542 (1999) is further legislation promulgated to prevent corruption in public procurement. It has been revised to be in line with the model law on public procurement of the UN Commission on International Trade Law (UNCITRAL). This law guarantees the basic principles of proper procedures to ensure fairness, prudence, transparency and accountability through the bidding process in public procurement.

C. Freezing, Seizure and Forfeiture of the Proceeds of Corruption

Besides the aforementioned legislation involving corruption issues in Thailand, another piece of legislation which is in line with the UNCAC principles with regard to the laundering proceeds of crimes is the Anti-Money Laundering Act B.E. 2542 (1999), as amended in 2003 and 2008. It is stipulated under this law that the offence relating to malfeasance in office is one of the predicate offences for the purpose of prosecuting the offence of money laundering. This Act established the Anti-Money Laundering Office (AMLO), which is an independent agency under supervision of the Minister of Justice. The AMLO serves as the Financial Intelligence Unit (FIU) which is responsible for analysing suspicious transactions and conducting investigations leading to the seizure and forfeiture of assets acquired with proceeds from the commission of predicate offences, including corruption. This Act also set up the Transaction Committee, under the AMLO, in order to audit the suspicious transactions referred by financial institutions or assets involved in the commission of offences. According to Section 48, in the case of examining reports and data on financial transactions, if there is probable cause to believe that there may be a transfer, distribution, placement, layering or concealment of any assets related to the offence, the Transaction Committee or the Secretary General of the AMLO shall have the power to temporarily restrain, seize or freeze that asset for a period not exceeding ninety days and then shall report to the Board for further process. Once the AMLO completes its evidence gathering process, where there is sufficient evidence to believe that an asset is related to commission of the predicate offence, the Secretary General shall forward the case to the Office of the Attorney General for the prosecutor's consideration to file a petition seeking the Civil Court's order to forfeit those assets for the benefit of the State.

In short, this asset forfeiture is so called the civil asset forfeiture system, for confiscating assets identified as having been acquired with the proceeds of specific predicate criminal offences without requiring an indictment or prior conviction against the accused as to the criminal confiscation system in criminal cases.

D. International Co-operation in conformity with the UNCAC

As the world becomes increasingly globalized, corruption has become widespread and more sophisticated. Corruption in one country may affect another country and poses a threat to the global economy and security. To successfully combat corruption, international co-operation, particularly mutual legal assistance in criminal matters and extradition, are the key tools required under the UNCAC.

According to the UNCAC, Member States are bound to assist other State Parties in gathering and transferring evidence through mutual legal assistance. More specifically, Article 43 of the UNCAC obliges States Parties to extend the widest possible co-operation to other states in the investigation and prosecution of offences defined in the Convention. Prior to the existence of the UNCAC, Thailand promulgated the Act on Mutual Assistant in Criminal Matters B.E. 2535 (1992) which is in line with the UN Model Law on Mutual Legal Assistance in Criminal Matters and compatible to international standards. This Act provides wide ranges of assistance such as investigation, inquiry, prosecution, forfeiture of property and other

[5] Constitution of the Kingdom of Thailand B.E. 2550 (2007), Section 271.

proceedings relating to criminal matters on a bilateral treaty basis or reciprocity rule in case there is no treaty between the Requesting and Requested States, consistent to the principles provided under Article 46 of the Convention. Among the topics to be amended so as to comply with the UNCAC is the provision regarding asset recovery. The amendment is now pending for the Thai Parliament's approval. Moreover, Thailand has signed a Mutual Legal Assistance Treaty among liked-minded countries in ASEAN in 2006 and is currently in the process of reviewing its domestic legislation to fully comply with this ASEAN region instrument.

Extradition is another issue of international co-operation emphasized under the UNCAC. Recently, the new Extradition Act B.E. 2551 (2008), providing that the Attorney General is the Central Authority, was enacted in August 2008. This new law was designed to be more modernized and consistent with the present context of international co-operation as well as to meet international standards, eg. the rule of "prosecute or extradite". It also corresponds to the principles in Article 44 of the Convention. For example, the offence of corruption under the domestic regime is considered an extraditable offence. Moreover, this Act accepts the rule of dual criminality on the action-based basis rather than the offence-based basis which is in consistent with Article 43 of the UNCAC. Like mutual legal assistance, if there is no treaty between Thailand and the Requesting State, Thailand would be able to render co-operation on the reciprocity basis. However, in most common law countries, the reciprocity basis would not justify an extradition request if there is no treaty between the Requested State and the Requesting State, or any other applicable multilateral treaty such as the UNCAC as a ground for an extradition request. Therefore, when ratified, this convention would enable Thailand to broaden its capacity to request extradition of those common law countries. In addition, Thailand has also engaged in bilateral treaties with 13 countries regarding mutual legal assistance and ten countries on extradition and is under negotiations for a treaty on extradition and mutual legal assistance in criminal matters with countries in the Asia Pacific region.

E. Statute of Limitations

In accordance with Article 29 of the UNCAC, Member States are urged to impose the provision stipulating a long period of the statute of limitations for offences of corruption and related offences, or the suspension of the statute of limitations where the alleged offender evades the administration of justice under their domestic legal regime. Hence, it is questionable whether the period of statute of limitations set by the current law is long enough to bring corrupted officials or politicians to justice. Some academics and practitioners called for the abolishment of the statute of limitations for the prosecution of corruption. However, Thailand is now amending the Penal Code to extend the time limit for prosecution of corruption to thirty years and provide the option for the suspension of the statute of limitation where the alleged offender flees to other countries. At present, the draft law is pending for consideration in the Council of State. It would be passed to the Thai Parliament for further approval if approved by the Council of State.

IV. CURRENT MEASURES AND MECHANISMS IN PREVENTING AND COMBATING CORRUPTION

A. Competent Agencies mandated to Prevent and Suppress Corruption in Public Sector

The 1997 Constitution gave birth to number of mandated organizations and agencies. These bodies are authorized to prevent and suppress corruption in the public sector by closely monitoring and efficiently controlling the performance of government officials. They are intended to ensure transparency, accountability and fairness, and to guarantee the basic civil and political rights and well-being of Thai citizens. In 2007, there were a number of agencies established by the Council for Democratic Reform to investigate a number of corruption charges by the former Prime Minister Thaksin Shinnawattra's government. At present, the legally mandated organizations and agencies dealing with corruption in the public sector include: the National Anti-Corruption Commission (NACC); the Ombudsman; the Anti Money Laundering Office (AMLO); the Royal Thai Police; the Department of Special Investigation; the Office of the Attorney General; the Supreme Court's Criminal Division for Person Holding Political Positions; Office of the Auditor General and the Office of Public Sector Anti-Corruption Commission. This paper will underline some of these organizations' roles, power and functions.

1. The National Anti-Corruption Commission (NACC)

The National Counter Corruption "NCCC" is an independent agency established by the 1997 Constitution and the Organic Act on Counter Corruption B.E. 2542 (1999) ("the Organic Act") as a constitutional body

separate from the executive body which reports directly to the National Assembly. In 2008, the National Counter Corruption Commission changed its official name to the National Anti-Corruption Commission (NACC).[6] NACC consists of four branches which are the Operational Branch, comprising Ethics & Integrity Promotion and the Corruption Prevention Group, the Asset Inspection Group and the Corruption Suppression Group; the Administrative Branch; the Technical Branch; and the Unit attached to Secretary-General. The NACC has been charged with three functions, including the declaration and inspection of assets and liabilities, prevention of corruption and suppression of corruption. Moreover, the NACC has been authorized to conduct investigations of complaints against persons holding political position or government officials who are accused of being unusually wealthy, abuse of power and authority as stipulated in the Penal Code or committing offences against their own duties. In other words, the NACC has broad inquisitorial powers in public sector corruption cases; the authority to overrule the Attorney General in certain specific instances; independence in initiating investigation and prosecution (exception); and the right to examine the assets of politicians and state officials when there is suspicion of unusual wealth.[7]

Furthermore, according to the Constitution of the Kingdom of Thailand B.E. 2550 (2007), Section 250, the NACC is authorized to conduct the inspection on assets and liabilities of persons holding political positions, or any government officials, for the purpose of removal of those politicians and state officials, to carry out investigation and to take legal action against officials or employees on the charge of corruption. As the NACC has very broad duties and power in inquiring into all kinds of corruption offences committed by government officials at all levels, the NACC has a severe caseload problem. In 2007, there were 11,591 complaints carried over to the NACC together with 2,723 newly submitted complaints, totalling 14,314 complaints, of which 9,148 complaints were completely investigated (including the cases forwarded to other agencies and the cases which lacked evidence) by the end of 2007.[8] However, in 2008, the NACC handled 8,604 complaints, of which 2,955 complaints were new cases and thus established offences for 61 cases and 2,285 cases were forwarded to other agencies for further consideration. Hence, the Office of Public Sector Anti-Corruption Commission (PCCA), a new investigative authority responsible for investigation of lower-ranking government officials was established in 2008 to help the NACC handle corruption cases committed by low-ranking government officials.

2. The Office of the Attorney General

According to the 1997 Constitution and the 1999 Organic Act on Counter Corruption, the Office of the Attorney General (OAG) plays a vital role as a significant organ in the criminal justice system in combating corruption in the public sector. According to the 2007 Constitution, the OAG is newly established as a constitutional independent body. After completion of investigation, the NACC shall refer the corruption case with adequate legal grounds (*prima facie*) to the Attorney General for prosecution in the case of a criminal offence allegedly committed by an accused who is a person holding a political position or any state official.[9] It is provided under the law that only the Attorney General is authorized to prosecute the accused by filing the criminal charges to the Supreme Court's Criminal Division for Persons Holding Political Positions in case the accused is a politician, or to any other Competent Court in case the accused is a state official, if there is adequate ground for prosecution on the charge of corruption. If the Attorney General is of the opinion that the inquiry file has insufficient evidence for the prosecution, he will send the inquiry file back to the NACC for further inquiry. In such case, the NACC and the OAG shall set up a "working committee" for the purpose of collecting further evidence necessary for the Attorney General in making a prosecution order and bringing the case to the Court. In cases where such a working committee fails to reach an agreement regarding the next legal proceedings, the NACC has the power to proceed the case to the competent court by itself or hire a lawyer to do so. According to Section 80, the Organic Act on Counter Corruption 1999, if the NACC has conducted its fact finding and passed a resolution that the alleged has become unusually wealthy, it shall refer the case to the Attorney General for his further consideration by filing a motion to the Supreme Court of Justice's Criminal Division of Persons Holding Political Positions in case the alleged criminal is a person holding a political position, or to any Court having jurisdiction over in case of a state official, to seek a court order to forfeit assets to the State domain. If the inquiry file is not completed, the

[6] National Counter Corruption Commission, Resolution 40/2551 dated 15 July B.E. 2551 (2008) (http://www.nccc.thaigov.net)
[7] Executive summary, 1st JFCCT/NACC Anti-Corruption Forum, 27 May 2009, Bangkok, Thailand.
[8] NACC Annual Report, 2007.
[9] Organic Act on Counter Corruption B.E. 2542(1999), Section 56.

working committee shared by both agencies will be set up to process the case similar to the proceeding of criminal prosecution clarified above.

3. The Supreme Court's Criminal Division for Persons Holding Political Positions

To be consistent with the establishment of the NCCC, the Supreme Court's Criminal Division for Persons Holding Political Positions was established in September 1999 by the provision of the 1997 Constitution and the Organic Act on Criminal Procedure for Persons Holding Political Position B.E. 2542 (1999) as the special division under the Court of Justice, rather than the Specialized Court, to better handle corruption cases involving political position holders. The "political position holders" means the Prime Minister, members of the House of Representatives, members of the Senate and other political office holders. However, the jurisdiction of this Court is limited to cases in which political position holders are accused of being usually wealthy, committing an offence against his or her own duty as stipulated under the Penal Code and the Organic Act on Counter Corruption, abusing his or her power, committing corruption against his or her duties or being the key offender, instigators, or the one issuing instruction or order to accomplice or support in such criminal offences.

Regarding the special procedure under the Supreme Court's Criminal Division for Persons Holding Political Positions, the Rules on Criminal Procedure for Persons Holding Political Positions B.E. 2543 (2000) stipulates various special proceedings which are different from normal criminal proceeding. For instance, the data recorded in or processed by computer (electronic file) is admissible as evidence under Rule 13. Furthermore, under Rule 20, the Court may permit the hearing of witness being outside the court conducted by mean of video conference. Moreover, the trial is founded upon an inquisitorial system (semi-inquisitorial system), rather than an accusatorial one, by which the court shall mainly rely on the NCCC's inquiry file or evidences produced by the public prosecutor. However, the quorum of judges may conduct an investigation in order to obtain additional facts or evidences as it thinks proper.

4. The Office of Public Sector Anti-Corruption Commission

According to Section 250 of the current 2007 Constitution, the NACC has duty to investigate only corruption offences conducted by persons holding political positions and state officials with high-ranking executives or government officials holding position of director or its equivalent and upwards. The newest investigative authority responsible for investigation of lower ranking government official is the Office of Public Sector Anti-Corruption Commission ("PCCA") established in 2008 which belongs to the Ministry of Justice pursuant to the provision of the Act on Public Administrative Measure in Counter Corruption B.E. 2551 (2008) entered into force on 25 January 2008. However, PCCA has not yet performed its full function as the regulation and legislation provided under the Act is still in drafting process. In the meantime, the investigation of suspected corruption offence conducted by lower government official is temporarily handled by NACC. After completion of inquiry, if the disciplinary offence is found, NACC shall refer the case to the government agency for which the accused works to start the disciplinary action against the accused. On the contrary, if the corruption offence is found, it would refer the case to Office of the Attorney General for prosecution.

V. LEGAL MEASURES FOR PREVENTION AND SUPPRESSION OF CORRUPTION IN THE PUBLIC SECTOR

Since the 1997 Constitution, its Organic laws and the new 2007 Constitution entered into forced, Thailand has introduced new, modernized and effective measures to cope and combat the growing corruption practices in the Thai Public Sector.

A. Mandatory Declaration of Asset and Liabilities

This measure, under Section 32, 39 of the Organic Act in Counter Corruption 1999, mandates persons holding political position and government officials, specifically for those at managerial and executive level, to declare assets and liabilities including those of their families. The objective of this measure is to ensure transparency and accountability. Regarding the asset scrutiny, 20,000 citizens may request for the securitization of the assets and liabilities of the state officials (high ranking/low ranking official). The failure to comply with this legal obligation will result in the accused being criminally charged and banned from being a political or public official for five years.

1. Unusual Wealth Inquiry

In accordance with Section 75, the 1999 Organic Act on Counter Corruption, if any state officials, either holding political position or being a government official is accused of being unusually wealthy, the NCCC shall conduct an inquiry with regards to the alleged unusual wealth. If the NCCC found such unusual wealth to be suspicious of corruption, the NCCC shall refer the case to the Office of the Attorney General in order that the public prosecutor may file a petition seeking the Court order to forfeit such assets to the public domain. In case that the accused is a person holding political position, the Attorney General shall bring the case to the Supreme Court's Criminal Division for Person Holding Political Positions. In case the accused is a state official, the public prosecutor may bring the case to any competent Court similar to the procedure of criminal prosecution mentioned above.

2. Provisions and Measures to bar Conflicts of Interest

The 2007 Constitution and the 1999 Organic Act on Counter Corruption have imposed provisions that bar state officials from engaging in personal or private business that may have conflicts of interest with the public interest the said accused posseses.

"According to section 100 of OACC, this provision bars the state officials from carry out a transaction or business by

(1) being a party to or having interest in a contract made with a Government agency where such State official performs duties in the capacity as State official who has the power to conduct supervision, control, inspection or legal proceedings;

(2) being a partner or shareholder in a partnership or company which is a party to a contract made with a Government agency where such State official performs duties in the capacity as a State official who has the power to conduct supervision, control, inspection or legal proceedings;

(3) being a concessionaire or continuing to hold a concession from the State, State agency, State enterprise or local administration or being a party to a contract of a directly or indirectly monopolistic nature made with the State, a Government agency, State agency, State enterprise or local administration, or being a partner or shareholder in a partnership or company which is a concessionaire or a contractual party in such manner;

(4) being interested in the capacity as a director, counsel, representative, official or employee in a private business which is under supervision, control or audit of the State agency to which such State official is attached or where such State official performs duties in the capacity as State official, provided that the nature of the interest of the private business may be contrary to or inconsistent with public interest or the interest of the Government service or may affect the autonomy in the performance of duties of such State official.

The provisions of paragraph one shall apply to spouses of the State officials under paragraph 2. For this purpose, the activities carried out by the spouse shall be deemed as the activities carried out by the State official".

Regarding the scandal involving the former Prime Minister of Thailand who has been alleged to have committed an offence under Section 100 cited above, there has been a controversial debate among academics and practitioners whether the wrongdoing under this provision should be categorized as a criminal offence or moral misconduct. Many scholars argued that the said wrongdoing is more likely a policy corruption rather than apparent corruption. To illustrate this case, the first defendant, a high-ranking state official, was alleged to have committed the offence based on the action of his spouse, the second defendant, stipulated under the 1999 Organic Act on Counter Corruption, Section 100 Paragraph 2. Section 100 of the said Act can be viewed as an absolute prohibition provision for a state official to engage in the activities as prescribed in Section 100 (1) to (4) and, by virtue of Paragraph 2, the act of the spouse is deemed to be the act of the state official. Some academics and practitioners view this section as a sample of "vicarious liability" to punish one person base on the guilt or action of another person. However, the Supreme Court's Criminal Division for Person Holding Political Positions convicted the first defendant pursuant to the Section 100 to two years' imprisonment and acquitted the second defendant on the charge under Section 100 since

Section 122 which prescribes punishments for violation of Section 100 mentions the state official only but not the spouse. It can be seen that the deeming provision in Paragraph 2 of Section 100 is only intended to ensure effective enforcement of the prohibition without leaving any gap for the state official to use as excuse; it is not designed for the purpose of punishing the spouse of the state official.

3. Prohibition on Acceptance of Property

The 1999 Organic Act on Counter Corruption states that state officials at all levels are strictly prohibited from accepting property or any other benefits from any person except for the property or benefit legally acquired in accordance with the rule and regulations issued by virtue of law.

B. Control of Procurement by Government Agencies

The key criteria for proper procurement is prescribed in the Regulation of the Office Minister relating to Parcel 1992 to ensure equal opportunity regarding state biddings and to guarantee maximum efficiency of government budget spending.

VI. RECOMMENDATIONS AND CONCLUSION

It is generally known that corruption has long been one of the major problems that hinders the development of Thailand and that there is no single clear solution to fight against corruption. Effective corruption control requires not only comprehensive legal regime, effective preventive and suppression measures but also the serious co-operation among involved agencies in criminal justice system, private sector and the public to participate more in tackling this serious problem.

Thailand has made utmost efforts to combat and control corruption particularly corruption in public sectors. It has been amending domestic legislation as well as developing and improving its current legal regime and measures to effectively fight against corruption. These preventive and suppression measures include mandatory declaration of assets and liabilities, unusual wealth inquiry, legal provision prohibiting the engagement in transaction that impose the conflict of interest in nature and prohibiting the state officials from accepting gift, assets, property or any other benefits. Moreover, the Thai legal framework imposes strict and transparent public procurement procedures; the freezing, seizure and forfeiture of assets and proceeds of corruption crime to the State; and takes harsh criminal action against corrupt politicians and state officials.

However, these measures are not yet sufficient to significantly alleviate the corruption problem in Thai society. In order to deal with this issue more effectively, the amendment of legislation and other measures should be taken into account as follows:

1. Improvement of Legislation regarding Corruption in the Private Sector

Many academic and criminal justice authorities found massive corruption in the public sector arising from corruption in the private sector. There is a theory that a business tycoon who seeks monopoly business from the government would mostly use money or other kinds of benefits to bribe politicians and high-ranking officials in order to win the bidding. Thus, to prevent this massive corruption, not only the appropriate legislation pertaining corruption in the private sector should be enacted but severe penalties as a punishment of the offence at the same level as those of corruption in public sector should be imposed.

2. More Effective Measures of Witness Protection

Although Thailand promulgated the Act of Witness Protection B.E. 2546 (2003), this law does not provide a total solution to the problem since the agencies involved cannot provide adequate protection to the witness. Moreover, the witnesses or persons possessing the information seem to be reluctant to report the suspicion of corruption or co-operate with the agencies involved. Therefore, the government agencies should raise the public's awareness through a government campaign. The government should also put in place measures and mechanisms to encourage people to supply the information to and co-operate with investigative and prosecutorial authorities as well as to report the suspicion of corruption while, in the same time, provide adequate protection and benefit to the witness in return. According to Section 62, the current 2007 Constitution, it was the first time to provide a the Whistle Blower Protection provision under the Thai legal regime. It is provided that the person who bona fide provides to an agency responsible for the scrutiny of

the exercise of state powers or to State Agency information in connection with performance of duties of person holding political positions, State agencies or State officials shall be protected. Moreover, a Whistle Blower Protection Act is currently being drafted under initiative of the NACC. This law will mandate the protection and possibility of promotion for informants when it comes into effect.

3. Speed Up Thailand's Ratification of the UNCAC

Since Thailand singed the UNCAC Convention in 2003, Thailand has not yet ratified the Convention as it is still in the process of reviewing and harmonizing domestic legislation to ensure its compatibility with the Convention. Therefore, it is the country's urgent task to speed up the process of legislative amendment to comply with the UNCAC requirements and ratify the Convention so as to acquire more international co-operation as well as to meet international standards. Furthermore, Thailand should expand its co-operation with other developed and developing countries in negotiating extradition and mutual legal assistance treaties to foster greater co-operation in combating and fighting against corruption.

In conclusion, I strongly believe that to successfully and effectively combat corruption one must have a basis of realization of merit and moral satisfaction in mind, with particular attention paid to the promotion of a merit management system, such as "good governance". Furthermore, innovative and comprehensive measures are among those vital tools for effective long-term corruption prevention. Besides, in order to control and eradicate corruption, transparency, accountability and checks and balances principles need to be in place. While the world today seems to pay very much attention on economic recovery, it should be noted that the growth of the corruption crime rate has a direct correlation with economic recession and one problem should not be neglected in favour of the other. Therefore, it is the duty of involved criminal justice agencies to work harder, to make greater efforts and to foster strong co-operation both at domestic and international levels in fighting against corruption in all its forms.