

FINANCIAL INVESTIGATION AND ASSET RECOVERY: AN EFFORT TO COMBAT CORRUPTION IN THAILAND

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I. INTRODUCTION

Corruption is a serious threat to humanity. It can take many forms, such as bribery, embezzlement, graft, bid rigging, cronyism, money-laundering, tax evasion and extortion. Whatever form corruption takes, it always comes at someone's expense, especially the public funds. As a result, corruption is detrimental to the development of the State. It denies citizens access to basic public services, damages the economy and undermines political stability, leading to weaker institutions and less prosperity of the people and the country.

Recently, the problem of corruption has become more complicated. Rapid growth of trade and investment opportunities, as well as the free movement of capital and people across borders, creates an environment where corruption flourishes undetected and unpunished. In today's interconnected world, corruption is intrinsically linked to money-laundering, terrorism and organized crime, all of which have impacts that can be felt among the international community. The United Nations Secretary General, António Guterres, recently noted that the annual costs and damages brought upon by transnational corruption amount to a staggering 3.6 trillion US Dollars in the form of bribes and stolen money.¹ To make matters worse, when countries decide to pursue justice through stolen asset recovery actions, there are considerable challenges to overcome, for example, inscrutable offshore secrecy accounts and asset holdings, bureaucratic obstacles in mutual legal assistance, and low investigative and prosecutorial capacity.²

The aim of this paper is to make a contribution to the existing financial investigation and asset recovery framework by providing an overview of the financial investigation and asset recovery process of Thailand through the roles of the National Anti-Corruption Commission (NACC) as the designated agency responsible for combating corruption in Thailand. The first part of this paper will explain the power and duty of the NACC for a better understanding of the organization and its roles. Then it will describe the method of financial investigation as a part of corruption investigation, followed by the process to recover the proceeds of corruption crime. Lastly, this paper will present a number of challenges practitioners encounter in conducting financial investigation and recovery of illicit assets.

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¹ Guterres, António (2018). Message on International Anti-Corruption Day. 9 December. Available at <https://www.un.org/en/events/anticorruptionday/messages.shtml>.

² Stolen Asset Recovery Initiative (2018). StAR Annual Report 2018. Available at <https://star.worldbank.org/sites/star/files/star-annual-2018-09-reduced.pdf>.

II. THE NATIONAL ANTI-CORRUPTION COMMISSION OF THAILAND

The National Anti-Corruption Commission of Thailand, or NACC, was established in 1999 as an independent constitutional body with the power and duties to counter corruption in the Kingdom of Thailand. Under the Organic Act on Anti-Corruption, the NACC has the authority to conduct investigations into allegations of public corruption and other related offences. Such offences include bribery of domestic and foreign public officials, embezzlement, bid-collusion in public procurement, unusual wealth or illicit enrichment of politicians and high-ranking public officials, and malfeasance in public office, among others. Besides corruption investigations, the NACC is authorized to inspect assets and liabilities of politicians and high-ranking public officials to verify the accuracy of the declared assets and liabilities and to identify unusual changes in assets which might have resulted from unusual wealth or illicit enrichment.

Furthermore, the NACC is the designated lead agency responsible for ensuring Thailand's implementation of international obligations and agreements relating to anti-corruption. As a State Party to the United Nations Convention against Corruption (UNCAC), the first and only legally binding international instrument of its kind, Thailand has recently amended its Organic Act on Anti-Corruption B.E. 2561 (2018) as part of its ongoing efforts to fully comply with UNCAC.

Below is a table showing provisions of the amended Organic Act on Anti-Corruption B.E. 2561 (2018) that have been implemented based on UNCAC:

UNCAC		Organic Act on Anti-Corruption, B.E. 2561 (2018)
Article 2	Use of terms	Section 4
Article 10	Public reporting	Section 32
Article 12	Private sector	Section 176
Article 13	Participation of society	Section 32
Article 16	Bribery of foreign public officials and officials of public international organizations	Section 28(4) Section 97 Section 173-176
Article 25	Obstruction of justice	Section 177
Article 26	Liability of legal persons	Section 176
Article 29	Statute of limitations	Section 7
Article 31	Freezing, seizure and confiscation	Section 83 Section 84

UNCAC		Organic Act on Anti-Corruption, B.E. 2561 (2018)
Article 36	Specialized authorities	Section 41 Section 138
Article 43	International cooperation	Section 138 Section 140
Article 46	Mutual legal assistance	Section 140
Article 47	Transfer of criminal proceedings	Section 139
Article 48	Law enforcement cooperation	Section 140
Article 53	Measures for direct recovery of property	Section 34(5)
Article 55	International cooperation for purposes of confiscation	Section 140

Apart from actively engaging and coordinating national efforts to improve Thailand's anti-corruption legal framework to be in compliance with international standards and best practices, the NACC attaches great importance to the investigation of cross-border corruption cases. In 2013, the NACC established the Thailand Anti-Corruption Coordination Centre (TACC) to act as a focal point to (i) promote and coordinate national efforts to effectively implement UNCAC and other related international and regional instruments; (ii) provide operational guidance and support as requested, both through formal and informal channels, by domestic and foreign law enforcement counterparts which are conducting investigation on corruption cases involving Thai nationals or Thai territory.³ In addition to international cooperation in regard to transnational corruption investigations, TACC also facilitates and collaborates closely with the StAR/INTERPOL Global Focal Point on Asset Recovery⁴ and the International Centre for Asset Recovery (ICAR)⁵ on international asset recovery efforts, especially in the exchange of information and intelligence sharing between agencies.

³ See www.nacc.go.th/tacc.

⁴ A joint collaboration between INTERPOL and the Stolen Asset Recovery (StAR) Initiative to provide a secure information exchange platform for criminal assets recovery. Anti-corruption practitioner and prosecutors from more than 120 countries have been nominated as focal points to assist one another on matters relating to the tracing, freezing, seizing, confiscating and recovering of proceeds of corruption.

⁵ Established by the Basel Institute on Governance as an independent non-profit centre of excellence in asset recovery in 2006.

III. OVERVIEW OF FINANCIAL INVESTIGATION AND ASSET RECOVERY IN THAILAND

A. Financial Investigation

There is a challenge that most practitioners face at least once when conducting corruption investigations: how to prove that there is corruption. High-profile cases of corruption almost always involve actors from different jurisdictions, and the money used in corruption is usually transferred through complex channels, which often involve banking institutions of various countries. The financial strategies used to conceal the methods used to perform a corrupt act or the proceeds derived from it are becoming increasingly sophisticated. High-level corruption organizes extensive resources to effectively camouflage the bribes and to transfer the acquired assets to safe financial havens, especially offshore or other shell companies. The complexity and sophistication of these systems causes considerable obstacles for practitioners, and seems to be in favour of both bribe givers and bribe takers.

Therefore, a crucial element to successful investigations and prosecutions of corruption cases is competent financial investigation. It is vital to focus on all possible financial angles when conducting corruption investigation to uncover and prove corruption crimes by tracing the movement of money and other assets. These illicit assets are key evidence to strengthen the case and to secure conviction. It might also reveal further connections to additional suspects and other offences. Most importantly, by identifying and locating the corrupt assets, the competent authorities can then start on the process to recover said proceeds of corruption back to the country.

The first step in financial investigation and the asset recovery process is to identify, trace and locate the ill-gotten gains of the corrupt acts, as well as the methods in which the assets are laundered. This requires gathering financial intelligence from various sources of information on assets used in or derived from corruption. Financial intelligence is collected by public and private organizations and used by competent authorities in investigation of money-laundering cases and associated predicate offences, including corruption cases. It is imperative for law enforcement agencies to be able to gather, assess, analyse and provide reliable, accurate and relevant information concerning the financial trails.

A main source of financial intelligence is bank information. Nevertheless, movements of money can also be traced using databases and registers, e.g. tax statements, property ownership registry, enterprise/company registration, data of stock exchanges and available information about salaries, income and spending, such as bills and expense reports.

Moreover, law enforcement authorities should take full advantage of whatever beneficial transparency laws are at their disposal. In Thailand, the law requires the full disclosure of assets and liabilities of politicians and high-ranking public officials.⁶ This provides the competent authorities with an invaluable tool for determining an individual's demonstrable network and whether there are reasons to believe the suspect to have other illegally obtained assets to support him or her.

⁶ Section 102, Section 103 and Section 105 of the Organic Act on Anti-Corruption B.E. 2561 (2018).

Financial Intelligence Units (FIUs) also play a significant role in financial investigation. They generally act as an intermediary between financial and other reporting entities on one side and law enforcement authorities and prosecutors on the other. FIUs' main tasks are to receive and analyse suspicious transactions reports and other information relevant to money-laundering, associated predicate offences and terrorist financing.⁷ Then they direct their analysis results to the competent authorities. Most importantly, FIUs are also responsible for the exchange of financial information internationally with counterpart FIUs and other foreign competent authorities.⁸

The NACC, as a designated national agency with the power and duties to counter corruption in Thailand, has authority to request information from banks and other financial entities.⁹ However, if the financial intelligence required needs to be obtained from other states, the NACC would often collaborate with the Anti-Money-Laundering Office (AMLO)¹⁰ which is the designated FIU of Thailand. The reason is that AMLO has the advantage of utilizing its own channels of cooperation with its partners, whether agency-to-agency or through other international cooperation, such as the Egmont Group, the Asia/Pacific Group on Money Laundering (APG) and the Financial Action Task Force (FATF).

B. Freezing or Seizing Illicit Assets

When conducting financial investigation, if there is a circumstance indicating the possibility of the transfer, move, transformation or concealment of the corrupt assets, the NACC has the power to issue an order of temporary seizure or freezing of such assets in the case where the commission of the offence has a criminal penalty.¹¹ In case of assets relating to the unusual wealth offence, the NACC has the power to issue an order of temporary seizure or freezing of such assets which must be within one year from the date of the seizure or freezing or until the court passes a final judgment dismissing the case.¹²

The purpose of freezing or seizure of illicit assets is to prevent the dissipation of assets, i.e. transfer, destruction, conversion, disposition or movement. However, there are other aspects that should be taken into consideration before freezing or seizing assets. One is that freezing or seizing assets might alert the suspect of the ongoing investigation. Another is the time limitation of the freezing or seizure order. Also, the management of the frozen or seized assets might have to be deliberated before deciding to serve the freezing or seizure order.

C. Asset Recovery

After identifying and tracing the illicit assets, and freezing or seizing them if needed, the next step in conducting asset recovery is the confiscation and return of the assets. As a general concept, confiscation and return of stolen assets helps take away the profit of corruption and provides restitution to victim countries and individuals. The international community has long recognized that the return of stolen assets and money back to the country of origin is necessary as they provide

⁷ Stroligo K., Hsu C., & Kouts T., *Financial Intelligence Units Working With Law Enforcement Authorities and Prosecutors* (Washington DC: International Bank for Reconstruction and Development/The World Bank, 2018) 7.

⁸ Ibid.

⁹ Section 34(4) of the Organic Act on Anti-Corruption B.E. 2561 (2018).

¹⁰ AMLO is an autonomous government agency and is mandated under Section 40 of the Anti-Money Laundering Act, 1999 and its amendment.

¹¹ Section 69(1) of the Organic Act on Anti-Corruption B.E. 2561 (2018).

¹² Section 69(2) of the Organic Act on Anti-Corruption B.E. 2561 (2018).

essential resources for the financing of public services and investments in infrastructure, which is vital for growth and development of the country. According to the StAR Initiative's Asset Recovery Watch database, approximately 8.2 billion US Dollars of stolen funds have been frozen, confiscated or successfully returned to affected countries since 1980.¹³

As stated in Section 83 of the Organic Act on Anti-Corruption B.E. 2561 (2018), in case of proceedings against persons holding political positions, if the alleged culprit or the person participating in corruption has used or acquired property in an unlawful manner as a result of the commission of corruption, the NACC or the Attorney General of Thailand, as the case may be, may file a motion with the Supreme Court's Criminal Division for Persons Holding Political Positions for the confiscation of such properties, unless it is the property of another person who has no connivance with the commission of the offence.¹⁴ If it is a case against public officials, the proceedings would be held in the Central Criminal Court for Corruption and Misconduct Cases, and the asset confiscation request would be filed with the Central Criminal Court for Corruption and Misconduct Cases.¹⁵

Additionally, the Organic Act decrees the illicit properties that can be confiscated under Section 83 as follows:

- (i) Property which any person used or had in his or her possession for use in the commission of the offence;
- (ii) Property or interest that can be calculated into monetary value, which has been given, requested to give or pledged to give to the alleged culprit by any person in an unlawful manner;
- (iii) Property or interest that can be calculated into monetary value which a person has obtained from the commission of or from his involvement as an instigator, an aider and abettor, or a publisher or announcer in order for another person to commit the offence;
- (iv) Property or interest that can be calculated into monetary value which a person has obtained from a disposal, distribution or transfer in any manner of the property or interest under (i) or (iii); and
- (v) Fruits or any other interest occurring from the property or interest under (i), (iii) or (iv).¹⁶

Furthermore, there is a new provision in regard to the value-based confiscation in the amended Organic Act on Anti-Corruption B.E. 2561 (2018). It is stated in Section 84 of the Organic Act that the NACC may undertake a calculation of value of the property at the time of the acquisition of such property by the alleged culprit or the value of the property at the time that the NACC has

¹³ United Nations, Conference of the State Parties to the United Nations Convention against Corruption (2019). Progress report on the implementation of the mandates of the Working Group on Asset Recovery, 20 March. CAC/COSP/WG.2/2019/2.

¹⁴ Section 83 of the Organic Act on Anti-Corruption B.E. 2561 (2018).

¹⁵ Section 93 of the Organic Act on Anti-Corruption B.E. 2561 (2018).

¹⁶ Ibid.

passed a resolution that the alleged culprit commits an offence, depending upon whichever value is higher at that time.¹⁷ As a result, the NACC may file a motion with the Supreme Court's Criminal Division for Persons Holding the Political Positions for issuance of an order to make monetary payment or confiscate any other property of the same value of the alleged culprit.¹⁸

In cases where there is a request for assistance concerning stolen assets from a foreign country under the law on mutual legal assistance in criminal matters, the NACC has the power to confiscate such assets, as Section 83 and Section 84 of the Organic Act would apply *mutatis mutandis*.¹⁹ However, the confiscated assets would not become properties of the state, unlike other illicit assets, and the management of the confiscated assets would be in accordance with the agreement made with the requesting country.²⁰

IV. CHALLENGES

The more the world advances, the more complex and intricate corruption practices become. There are several challenges practitioners encounter when trying to deal with corruption these days. As has been stated earlier, high-level corruption employs extensive resources to conceal the acquired assets and to transfer the proceeds of crime to safe financial havens. The sophistication and complexity of these crimes require financial experts who are well-trained and highly experienced in dealing with financial crimes. However, in practice, the law enforcement agencies responsible for counter corruption often do not have such specialized knowledge. The lack of sufficient capacity and appropriate training of law enforcement practitioners shows a clear and pressing need for more specialized training and capacity-building, especially in financial forensics.

Another difficulty practitioners often face when conducting forensic accounting is the uncooperativeness of financial intermediaries or the states where the illicit assets are situated, especially the so called "financial havens" or offshore countries. It is very rare for legal authorities of the fiscal haven countries to collaborate with law enforcement agencies in legal investigations. As a result, an enormous effort is required in forging good relationships between countries whose wealth has been looted and the financial centres where it ends up.

In addition, the recovery of proceeds of corruption needs international cooperation, whether agency to agency or state to state, to be effective. Therefore, it is imperative to establish anti-corruption alliances across the world to set up a strong support system for countries' asset recovery efforts. Law enforcement practitioners need to work together across agencies, sectors and borders to make sure that the countries' diverted public wealth finds its way back home to the people to whom it belongs.

¹⁷ Section 84 of the Organic Act on Anti-Corruption B.E. 2561 (2018).

¹⁸ *Ibid.*

¹⁹ Section 140 of the Organic Act on Anti-Corruption B.E. 2561 (2018).

²⁰ *Ibid.*

V. CONCLUSION

The United Nations recognizes corruption as one of the biggest impediments to achieving its 2030 Sustainable Development Goals.²¹ Corruption deprives people of schools, hospitals and other basic services, drives away foreign investment and strips nations of their natural resources.²² Combating corruption is a global effort that requires dedication from all countries.

As the main motivation for committing corruption is beneficial gain, countries can remove the incentive for engaging in corrupt practices by depriving the perpetrators and others from the benefit of such crimes. In order to achieve that, countries must have effective legislation and procedures to freeze, seize and confiscate proceeds of corruption, as well as facilitate international cooperation.

However, in today's inter-connected world, corruption has become more sophisticated and is inherently linked to other transnational crimes such as money-laundering, terrorism and organized crime. The rapid growth of trade and investment opportunities, as well as the free movement of capital and people across borders, also plays an important role in creating an environment where corruption flourishes undetected and unpunished. Consequently, to keep up with this new threat, law enforcement agencies need to have sufficient capacity to conduct financial investigation to trace and freeze corrupt assets, collaborate with foreign counterparts and have effective mechanisms for sharing assets confiscated with the requested countries.

²¹ United Nations, Law and Crime Prevention (2018). The costs of corruption: values, economic development under assault, trillions lost, says Guterres. 9 December. Available at <https://news.un.org/en/story/2018/12/1027971>.

²² Ibid.