8. Thailand

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1. INTRODUCTION

Thailand has progressed economically from a low to a middle-income country in a few decades. But, as the World Bank put it, Thailand faces 'a real challenge of sustaining its growth and transitioning into a higher income country'.[1] As Doner says:

> Thailand has achieved stunning GDP growth rates and has diversified out of a small number of agricultural products to become a global export leader in a wide range of agricultural and industrial goods . . . yet this impressive performance has been due largely to the efficient accumulation and mobilization of factor inputs rather than improvements in productivity.[2]

Similarly, Warr shows that productivity increases over a recent 20-year period were considerably higher in the agricultural and manufacturing sectors than in the more highly regulated (including entry restrictions that limit competition) service industries.[3]

Economists generally accept that institutions play an important part in economic development. For example, Burki and Perry, in a World Bank publication,[4] encourage governments to develop pro-market institutions rather than trying to stop intervention in markets. The key to increasing income lies in enhancing productivity. This is made possible not only by improving skills and technology, but also by developing pro-market

[1] Office of the National Economic and Social Development Board (Thailand) and The World Bank (2008), p. vi. Growth in total-factor productivity represents output growth not accounted for by the growth in inputs and so includes improved technology and knowledge of workers (i.e. improved human capital).

[2] Doner, Richard R. (2009), *The Politics of Uneven Development*, Cambridge: Cambridge University Press.

[3] Warr, Peter (2005), 'Boom, Bust and Beyond', in Peter Warr (ed.), *Thailand Beyond the Crisis*, London and New York: Routledge, p. 10.

[4] Burki, Shahik Javed and Guillermo E. Perry (1998), *Institutions Matter: Beyond the Washington Consensus*, Washington DC: World Bank.

institutions that allow greater competition in protected industries, in which competition law plays an important part.

Unlike most other countries in Asia, Thailand was not colonized. This means that social structures, laws, institutions and culture values were not imposed by a colonial administration. While Thailand modernized during the 19th and 20th centuries, there was a high level of continuity in economic, legal, and political structures that did not occur in countries subject to European rule. As a result, the role of pre-existing institutions, such as royalty and the nobility, have been important since the middle of the 19th century in setting current economic and political arrangements.

Following the 1997 Asian financial crisis, a Democrat party government under Prime Minister Chuan Leekpai introduced tough new economic policies in line with International Monetary Fund (IMF) proposals that recommended market-oriented reforms, including competition law. However, the Thai opposition Rak Thai party, led by Thaksin Shinawatra, argued that these reforms disadvantaged lower-income Thais. A subsequent election in 2001 gave a landslide victory to Thaksin and the implementation of competition law was put on hold. A military coup led to a new Democrat party government in 2006. In 2010, the Minister of Commerce asked his officials to review competition law, but no concrete proposals had been announced before the landslide election of the Pheu Thai party, led by Thaksin's sister Yingluck Shinawatra, in July 2011.

2. THAI HISTORICAL BACKGROUND

Thais are the main ethnic group in Thailand. The majority of Thai scholars believe that the Thai people originated in Southern China (from Guangxi or Yunnan). While Thais had been migrating to Southeast Asia for several centuries, a major migration followed the Mongol invasion of Southern China in the 1200s. The Thais assimilated into the existing, but declining, Indianized mainland Southeast Asian kingdoms of Pagan in Burma (the Mon and Burmans) and Angkor in Cambodia (the Khmer empire). While Thais initially assimilated into the pre-existing Hindu-Khmer kingdoms and culture, they started to set up their own competing kingdoms in the 1200s, including Sukhothai in north-central Thailand, the Lanna Kingdom (around Chiang Mai), and the Ayutthaya Kingdom (near Bangkok – founded in 1351). Ayutthaya was founded by a rich Chinese merchant, married to a Thai princess, which 'laid the foundation of Thailand's future strength: a subtle combination of Thai arms with

Chinese commerce'.[5] These kingdoms not only fought each other but were continually threatened by the Khmers, Burmans, Mons, Vietnamese, and later, in the 19th and early 20th centuries, by the European colonial powers.

Controlled by absolute monarchs, Thailand (or Siam as it was then called) began to modernize in the 19th century. This process was accelerated with the accession of the pro-British King Mongkut in 1851 and the signing of the Bowring Treaty with Britain in 1855. Before ascending to the throne, King Mongkut actively sought friendships with Catholic and Protestant missionaries and became competent in English, Latin, and several Asian Languages. King Mongkut did not embrace Western Culture or Christianity, but recognized that adopting Western science and technology was essential to ensuring Thai independence. By opening Thailand to trade and foreign investment, the treaty (and 15 subsequent treaties with other Western countries, including the United States, based on the Bowring Treaty) helped to ensure that foreign countries did not interfere with Siam's internal affairs. As a result, Siam, unlike all other Southeast Asian countries, was not colonized.

King Mongkut was particularly interested in ensuring that Thai royalty and other members of the elite were educated to Western standards and so brought in a limited number of foreign teachers to educate royal children. The opening up of the Thai economy to international trade after the signing of the Bowring Treaty allowed for some economic progress through the development of significant Thai rice exports.

While King Mongkut started changing the direction of Thai intellectual and cultural life, it was his son King Chulalongkorn who changed its administrative and political direction. To ensure that the governing elite were able to deal effectively with Western powers, King Chulalongkorn sent princes and other members of the elite to Europe to be educated. The latter also made sure that, through the princes, the royal family controlled government administration and weakened the nobility.

King Chulalongkorn also reformed the judicial, financial, and political structures of the state. Despite a revolt against the reforms in 1874, he gradually eliminated slavery and corvée labor (i.e. compulsory unpaid work), introduced money-based taxes, and instigated a conscription-based regular army. In 1893, he set up a central administration to replace the former, partly feudal provincial administration. European-style schools were built for children of the royal family.

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[5] Cotterell, Arthur (2011), *Asia: A Concise History*, Singapore: John Wiley and Sons (Asia).

King Chulalongkorn also abolished the feudal *phrai* system, which considerably reduced the power of the nobility and enhanced his own family's position. Under the *phrai* system, every commoner (*phrai*) had to register with the local ruler (*naai*) for military service and/or corvée labor; this obligation, however, could be obviated by paying a tax. King Chulalongkorn's abolition of the *phrai* system reduced the earning capacity of the nobility. From then on, the nobility had to rely on bureaucratic service for income and status. Central control by Bangkok replaced the previous local control by local rulers.

3. BACKGROUND POLITICAL HISTORY

For much of its history, Thailand was ruled by absolute monarchs. However, a military coup in 1932 instituted a constitutional monarchy. Since 1932, Thailand has been mostly ruled by military dictatorships.

Thailand under the absolute Monarchy was pro-British, and many of the Thai elite studied in the United Kingdom. This relationship diminished under Field Marshall Plaek Pibulsongkram (usually called Phibun in English), a member of the group that instituted the 1932 coup that introduced a constitutional monarchy. Phibun became prime minister in 1938 and made some substantial changes. For example, he imposed a military dictatorship, arrested members of the royal family, members of the opposition, and his rivals. Phibun was very much concerned with 'Thainess', or a strong nationalistic Thai identity. Under his rule, Thailand became more militaristic, xenophobic, as well as 'religiously' nationalistic, which included 'reconversion' of Siamese Christians back to Buddhism. In 1938, the populist writer Luang Wichit compared the Chinese in Siam with the Jews in Germany, and thought that Hitler's policies were worth considering in Thailand.

In 1939, Phibun changed the country's name from Siam to Thailand and started a nationalistic campaign that included anti-Chinese policies to try and curb ethnic Chinese dominance of the economy, and to restrict Chinese immigration, education, newspapers, and culture. He helped establish several state-run trading companies and banks and restricted a number of occupations and government positions to Thais. At the same time, Phibun was concerned that the country should appear civilized. So he decreed that Thais should wear modern Western dress. New Year's Day was changed from April – the traditional date – to 1 January. Thais, however, took the practical approach and now celebrate on both dates.

When Germany occupied France in 1940, Phibun occupied disputed French territories in a short war in 1940–41. Japan mediated a ceasefire, and the provinces of Batambang and Siem Reap in Cambodia were ceded to Thailand and renamed Phibun Songkhram province. Phibun decided to collaborate with Japan and declared war on the Allies (the Japanese were already on Thai soil). However, when it became obvious that Japan was losing the war, Phibun was replaced by a civilian, Khuang Apaiwong, in July 1944.

In 1947, following factional disputes within the government, Phibun staged another coup. To win acceptance by the West, Khuang was initially re-appointed as prime minister. But in 1948, Khuang Apaiwong was forced from office and Phibun became prime minister again. Between 1948 and 1957, Phibun became a close ally of the United States and supported their efforts to contain the Communist threat in Indo-China. As a result, Thailand not only regained its credibility with the West, but benefited considerably from the American aid that poured into Thailand. Thai military and police forces grew rapidly, and so, it seems, did the bank accounts of those in charge.

The events of October 1973 led to a revolution in Thai politics. For the first time, the student-led urban middle class opposed military rule and clamored for a change to democracy, with the apparent approval of the King. The military leaders were forced to step down and fled to the United States or Taiwan. However, the 1973 election failed to produce a stable party majority, so the government was unable to carry out a coherent reform program. Sharp increases in oil prices in 1974 led to recession and inflation, further weakening the government. Still, the government was able to successfully secure the withdrawal of United States forces. The revolution caused a power shift in Thailand:

> The political and economic events that took place in 1973, namely, the October 14 revolution which overthrew the quarter century of military rule and the worldwide oil crisis, constitute an evolutionary force that changed the existing power structure in Thailand. The traditional political system sustained by the overwhelming leadership of the army and the politic-bureaucrats was transformed into a more multi-polar structure consisting of the King, the army, the technocrats, the capitalist groups, and organised citizens . . . These changes finally undermined the existing hierarchical social order established on the basis of the Thai 'feudal' system . . . Furthermore, these social changes have been promoted by both the growing political consciousness of the people since the October 14 revolution and a changing mode of life resulting from industrial development.[6]

[6] Suehiro, Akira (1996), *Capital Accumulation in Thailand 1855–1985*, Chiang Mai: Silkworm Books.

Following the massacre of student demonstrators at Thammasat University in 1973, democracy was briefly restored, but military rule was re-imposed in 1976. Rivalry within the Army created political instability until General Prem Tinsulanonda took over in 1980. Prem gradually relaxed political restrictions and restored parliamentary democracy as the threat of Communism receded. However, Prem remained in control until newly elected Prime Minister Chatichai Choonhawan took over in 1988. However, Chatichai appointed ministers renowned for their involvement in money, politics, and lucrative contracts. In a *New York Times* obituary dated 7 May 1998, he was described as:

> A brilliant military officer, long-serving diplomat and flamboyant public figure with his cigar, his glass of wine and his Harley-Davidson motorcycle, Mr. Chatichai presided as Prime Minister from 1988 to 1991 over the headiest years of Thailand's boom economy, when the annual growth rate soared as high as 13 percent. But he also led what came to be known as the 'buffet cabinet,' a ministerial lineup whose excesses and corruption led to his Government's replacement by a military leadership. He was known for his blithe repetition of the phrase 'No problem' when criticized for his Government's excesses.[7]

Apart from a short period of military rule in 1991–2, Thailand was subsequently ruled by civilian governments until 2006, but the Army tried to maintain its control through political parties after the 1992 elections. The next few years were highly unstable as governments were brought down by no-confidence votes in parliament, usually accompanied by allegations of corruption and political turncoatism (the switching of political alliances). Constitutions were torn up and rewritten with each coup:

> At the root of the problem was the fundamental tension between two groups of elites: those who advocated a parliamentary system modeled along Western lines and those who favored what they considered to be 'Thai democracy', which could survive nicely with a strong man in power and without allegedly dysfunctional trappings such as elections and parliament . . . The most prominent advocates of 'Thai democracy' were in the military. Like other counterparts in Indonesia, Burma and elsewhere, they came to see themselves as the most faithful guardians of Thailand's core institutional nation, religion and monarchy . . . The military possessed a fundamental contempt for civilian politicians, who were seen as corrupt incompetent, and ineffective in protecting the country from the Communists.[8]

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[7] See Mydans, Seth (7 May 1998). 'Chatichai Choonhavan, 76, Ex-Prime Minister of Thailand'. *The New York Times*. Retrieved from http://www.nytimes.com/1998/05/07/world/chatichai-choonhavan-76-ex-prime-minister-of-thailand.html?src=pm (last accessed 1 August 2011).

[8] Ricklefs, M.C., Bruce Lockhart, Albert Lau, Portia Reyes and Maitrii

A new constitution (known as the 'People's Constitution') was introduced in 1997, bringing with it a number of reforms. The latter included the changing of the Senate from an appointed to an elected body, the boosting of the judicial system to take on official corruption, and a greater emphasis on citizen rights. Politics and economics have always been inseparable in Thailand. Many politicians were 'godfathers' in their provinces and acted mainly in their own rather than in national interests. The 1997 Constitution was an attempt to curb the power of vested business interests.

In 1998, Thaksin Shinawatra, a member of a Sino-Thai family from Chiang Mai and the head of a major telecommunications company, formed a new party called *Thai Rak Thai* (Thais love Thais). The party won an election in 2001, heralding what many people have said was a new chapter in Thai politics. Thaksin introduced what became known as 'Thaksinomics', which included providing funds for rural areas, including low-interest loans and a government-funded universal health scheme. A new election in 2005 elected the *Thai Rak Thai* party with a parliamentary majority for the first time in Thai history.

Thaksin was criticized for his economics and the fact that he was intolerant of criticism and consequently exerted pressure on the media. There was also a perception that he benefited greatly from government contracts and concessions (including the sale of his Shin Corp without paying taxes). Thaksin took a strong line on the war on drugs, and he gained considerable adverse publicity as a result of extra-judicial killings of drug dealers. Perhaps more ominously, he was commonly perceived as disrespectful towards the revered King Bhumibol. A protest movement (led by the People's Alliance for Democracy, the PAD or 'yellow-shirts') forced a new election in 2006, which Thaksin won. However, the victory was short-lived as a military coup occurred later that year, supported by certain members of the nobility and elite civilians, so ending the longest period of civilian rule in Thailand's history.

The election of Thaksin's sister, political novice Ms Yingluck Shinawatra and leader of the Pheu Thai party, as prime minister in 2011 suggests a move back towards a properly functioning constitutional monarchy, begun in 1932. However, there are some who argue she campaigned on the policies of her brother, who, they argue, is still in control.

Aung-Thwin (2010), *A New History of Southeast Asia*, New York: Palgrave, Macmillan.

4. CHINESE INFLUENCE ON BUSINESS IN THAILAND

For much of its history, Thailand, like other Southeast Asian countries, did not suffer from land shortages so much as labor deficits. As Thailand was mostly sparsely populated for much of its history, wars between Southeast Asian kingdoms were fought mainly over people and not land. Victory meant being able to import labor forcibly.

The Chinese have always played a major role in the Thai economy. From the 1200s, most migrants from China were peasants, tradesmen, and artisans who either had their own businesses or worked for other businessmen – mostly from their own family or clan group. There were several reasons for the migration. First, the Thai kings allowed the Chinese to settle and to marry into the Thai royal family. But while the Thais were allowed to marry Chinese settlers, marriage with other foreigners was not permitted.[9] Section 37 of the Family Law section of the Law of the Three Seals (the ancient Thai law) described foreigners such as the British, Indians, Malays, and whites as evil – and Thais would be punished by death for having an affair or marrying such people. Chansiri suggests the reason for favoring Chinese was due to the fact that they were also Buddhists and so marriage did not require conversion. Thai kings saw the latter as a potential threat to the Kingdom's religion and stability. Moreover, there was an agreement between the Chinese emperors and the Thai kings that allowed the Chinese to live in Thailand and to be appointed to government service. Later, China also allowed children born in Thailand of Chinese parents to gain Chinese citizenship (but this was withdrawn in 1949).

Beginning in the 1700s and 1800s, global trade expansion occurred from both the East and the West. From the West came the British buying tea from China, and, following Muslim and Portuguese traders, exporting opium from India to China in return. From China came traders seeking pepper, spices, and forest products from Southeast Asia. The expanding economy in China and increasing demand for products saw the migration of Chinese laborers to Southeast Asia to produce the products to be exported to China. A major Chinese immigration, encouraged by the Thai government, took place between the early 1800s and 1937. The Chinese worked in menial jobs 'that the Thai refused to do such as trading, which the Thai considered uncivilized'.[10]

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[9] Chansiri, Disaphol (2008), *The Chinese Emigrés of Thailand*, New York: Cambria Press.

[10] Id, p. 28.

As Chinese immigration increased during the early 1800s, the Thai government had a cheaper alternative to the *phrai* system. The Chinese were not *phrai* and so were exempt from the corvée system. Both the increasing availability of Chinese labor and the desire to modernize Thailand allowed King Chulalongkorn to abolish the *phrai* system. Increasingly, the government employed the Chinese to build railroads and canals rather than relying on forced, unpaid, corvée labor. But another reason for the abolition was King Chulalongkorn's desire to ensure that the government was dominated by the Royal Family (the princes) rather than the nobles. Abolition of the *phrai* system reduced, considerably, the personal power and revenue of the nobles – which depended on the men under their control. As Ricklefs et al. put it: 'From now on, the nobility would be essentially bureaucratic in that their status and their revenue would be earned primarily through government service'.[11]

By the beginning of the 20th century:

> . . . a 'tripod structure' was established among the major capitalist groups of Thailand, the Europeans, the Privy Purse Bureau, and the Chinese . . . By contrast, there was no marked development of any native group of capitalists. Most of the Thai people were alienated from not only capitalist activity but also from wage labour in the growing industries . . . Under the development of an ethnic division of labour, the national economic interest was mainly represented by the Chinese . . . their business expansion depended crucially on two elements: (1) domestic political power and (2) the worldwide networks of trade, credit and information that the Europeans had set up in Asia. For example, the growth of the Chinese tax farmers was still connected to the political patronage of the kings and high-class bureaucrats, while the rise of the Chinese compradors was dependent essentially on the European powers.[12]

The Communist takeover in China in 1949 led to large numbers of Chinese migrating to Thailand. Concerned about Chinese dominance of business, General Phibun forced the Chinese to dress and speak like Thais, send their children to Thai schools, and pledge allegiance. As a result, the Chinese in Thailand are highly assimilated into Thai society.

Foreign trade from the early 1800s became dominated by the Thai ruling elite and local Chinese businessmen. Chinese immigrants arriving in Bangkok during the early 19th century found far greater employment opportunities as merchants and craftsmen than in China, and they soon dominated Thailand's expanding economy. The Chinese immigrants, however, brought an opium problem. In 1811, King Loetlahnaphalai

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11 Ricklefs (n 8).
12 Suehiro (n 6).

(Rama II) banned the sale of opium, and in 1839 King Nangklao (Rama III) introduced the death penalty for major traffickers. During the reign of King Nangklao a tax-farming system was introduced. Businessmen who offered the highest bids were appointed as tax collectors for government monopolies. The Chinese dominated tax-farming.

In 1852, King Mongkut (Rama IV) bowed to British pressure and established a royal opium monopoly franchise that was ‘farmed out’ to local entrepreneurs, mostly wealthy Chinese traders. In 1855, King Mongkut, under further British pressure, signed the Bowring Treaty. The important consequence of the Bowring Treaty was not only the expansion of rice exports, but also the fact that the British could do as they liked in Thailand. All royal monopolies were abolished and import and export duties were taxed at a flat rate of 3 percent. British citizens could not be arrested nor tried in a Thai court. Other European countries and the United States followed. For the latter, this meant that they achieved many of the benefits of colonization without having to develop the country by providing infrastructure or having a colonial administration imposed upon them.

5. CURRENT POLITICAL SYSTEM

In addition to the parliament, executive, and judiciary, both the monarchy and the military have been important in Thailand’s political life. While the monarchy has played a major role throughout Thailand’s history, the military have played a particularly important role since 1932 – the Thai military being the best organized and most disciplined political group.

Since 1932, Thailand has had 17 constitutions, reflecting the many military coups. All permitted a constitutional monarch but they have varied widely in political governance. Most allowed for parliamentary democracy, but some (for example, the 1957 charter) specified dictatorships. Both single and bicameral parliaments have been established and members of parliament have been both elected and appointed. King Bhumibol (Rama IX) – who has been on the throne since 1946 – commands considerable popular respect and moral authority, but has little direct power under the Constitution.

The 1997 Constitution, known as the ‘People’s Constitution’, was the first constitution to be drafted by an elected assembly and involved considerable public consultation. A bicameral legislature was established and human rights were included for the first time. Voting was made compulsory to help reduce vote buying, and members of parliament were required to have a bachelor’s degree. Greater separation between parliament and the executive was instituted – members of parliament had to resign from parliament to become cabinet ministers. Many human rights were recognized, including the right to peacefully protest against military coups (taken away following the 2006 coup), the right to free education, and others. Constitutional checks and balances were introduced, including the creation of a Constitutional Court, an Administrative Court, a national Human Rights Commission, and an Ombudsman. In general, the 1997 Constitution was seen as being a major step forward in promoting democracy in Thailand. Some felt it went too far. One of the members of the Drafting Committee, Amorn Chantarasomboon, said that the Constitution threatened a 'tyranny of the majority'.

Thailand's current constitution dates from 2007, replacing an interim constitution that was instituted after a military coup in 2006. The 2007 Constitution was written by the military-installed legislative body and approved by a referendum (public criticism of the draft was made illegal). The 2007 Constitution included the appointment of some of the Senate members and amnesty for the coup leaders. Under the 2007 Constitution, the National Assembly consisted of two chambers – the Senate and the House of Representatives. The Senate has 150 members, 76 of whom are directly elected (one per province). The remaining 74 are appointed by a panel comprised of judges and senior independent officials from a list of candidates compiled by the Election Commission. The Lower House has 480 members, 400 of whom are directly elected from constituent districts; the remainder are drawn proportionally from party lists.

The election of Yingluck Shinawatra's government in July 2011 will be likely to increase demands for constitutional reform – most likely in the direction of the aborted 1997 Constitution. The 1997 Constitution was designed to provide a very stable executive branch; this proved to be true as the Thaksin administration was in power for four years – the first time in Thai political history.

6. THAILAND'S LEGAL SYSTEM

Thailand's legal system blends traditional Thai and Western law (both common and civil law). The Constitutional Court is the highest court of appeals whose members are nominated by a committee of judges, leaders in parliament, and senior officials. The nominated members are then confirmed by the Senate and appointed by the King. However, its jurisdiction is restricted to defined constitutional issues. The Courts of Justice have jurisdiction over both criminal and civil cases. There are three levels: Courts of First Instance, the Court of Appeals, and the Supreme Court of Justice. Administrative courts have jurisdiction over cases involving members of the public and the government, as well as in cases where one government body sues another. In Thailand's southern border provinces, Provincial Islamic Committees have limited jurisdiction over probate, family, marriage, and divorce cases. However, the status of the law as an institution has been problematic.

> The rule of law has never been well established in Thailand. The rich and powerful customarily get away with wrongdoing. Part of Thaksin's complaint over the asset case in 2011 was that he was being victimized for practices that were conventional. He and his boosters painted the issue as nothing about law or correctness at all, but a conflict between an old elite of aristocratic background and appointed power versus a new vanguard based on entrepreneurial skill and electoral support.[13]

7. CURRENT ECONOMIC SITUATION

Before World War II, Thailand had a high rate of growth in trade and agriculture; the expansion of paddy fields contributed to an increase in rice exports. But there was little advancement in manufacturing industry. Industrial structure was largely traditional and productivity was low. However, Thailand has undergone a high rate of economic growth since the early 1960s.

Between 1955 and 1988, economic growth per capita in Thailand averaged 3.9 percent per year. Only four countries were able to surpass this growth rate – Brazil, Malaysia, South Korea, and Taiwan.[14] Poverty was reduced considerably during this period.

Over the last 50 years, Thailand's economy has been transformed from a traditional agricultural economy into an export-oriented one. Its agricultural sector has been dominated by rice produced by small farmers connected with mainly ethnic Chinese bankers, millers, and merchants. Other countries in colonized Southeast Asia, on the other hand, were dominated by large landowners.

In 1958, Field Marshall Sarit Thanarat staged a coup that changed the direction of the Thai government's industrial policy. Private enterprises were promoted, and multinational investments were encouraged. A new

[13] Phongpaichit, Pasuk and Chris Baker (2009), *Thaksin*, Chiang Mai: Silkworm Books.

[14] Christensen, Scott, David Dollar, Ammar Siamwall, Pakorn Vichyanond (1993), *The Lessons of East Asia: Thailand the Institutional and Political Underpinnings of Growth,* Washington DC: World Bank.

'tripod' structure was created, consisting of state and public enterprises, multinational corporations, and Chinese-Thai private capitalist groups.[15]

Initially, economic policies were directed at import substitution, but from the 1980s onwards, an export-oriented industrialization strategy was adopted. Industrialization started with traditional agricultural and labor-intensive goods such as garments and textiles. Following on were medium- to high-technology industries producing computer accessories, electronic parts, and motor vehicle parts. Foreign direct investment fueled this expansion – in particular, investment from Japan and the United States in automotive, electronic, and electrical equipment sectors.

This expansion shifted economic development from import substitution to development that was more export-oriented. During this period:

> . . . as far as the pattern of [Chinese owned] business expansion was concerned, they frequently shared the same characteristics with the previous Chinese groups. For example, commercial bankers expanded their businesses by depending on the political patronage of military leaders. On the other hand, industrial groups crucially depended on foreign capital and technology for their rapid growth. Generally speaking, these industrial groups were mainly engaged in marketing developments while foreign partners were responsible for production technology. Thus, we can easily find the reappearance of the three traditional characteristics of domestic capitalist groups, namely, 'politically patronized', 'externally dependent', and 'merchant oriented'. At least until the 1970s they could not overcome their historical limitations due to the predominance of both foreign economic forces and the Thai bureaucratic polity.[16]

The 1973 'revolution' and the oil crisis that year threatened the economic and political system. Domestic businesses were forced to improve business practices, while business connections with the military were criticized. Economic growth was seen as the best way of stemming the Communist threat. Increasingly, technocrats were called upon to deal with developing problems, thereby increasing business influence on national economic policy-making.

Agriculture is important to Thailand, employing about 40 percent of the labor force, despite agriculture accounting for only about 12 percent of gross domestic product (GDP). While rice is Thailand's most important agricultural product, other significant products include fish, tapioca, rubber, corn, and sugar. Exports of processed foods such as canned tuna, canned pineapples, chicken cuts, and frozen shrimp are also important. Manufacturing is also important, including computers, electrical and

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15 Suehiro (n 6).
16 Id.

electronic products, furniture, wood products, canned food, toys, plastic products, gems, and jewelry. High-technology products such as integrated circuits and parts, hard disc drives, electrical appliances, automobiles (mostly light pick-up trucks), and automobile parts are now leading Thailand's growth in exports. Tourism also contributes significantly to the Thai economy. The United Nations Economic and Social Commission for Asia and the Pacific found that tourism contributed 14.3 percent of GDP and 12.6 percent of total exports in 2006.[17]

Thailand's traditional major export markets have been the United States, Japan, Europe, and ASEAN member countries (Singapore, Malaysia, Indonesia, the Philippines, and Vietnam). Growing export markets include China, Hong Kong, Australia, the Middle East, South Africa, and India. For example, in 2009, the major Thai exports were to the United States (10.9 percent), China (10.6 percent), Japan (10.3 percent), Hong Kong (6.2 percent), Australia (5.6 percent), and Malaysia (5 percent).[18] Thailand is a member of the World Trade Organization (WTO) and the Cairns Group of agricultural exporters.

Bangkok, its surrounding areas, and Phuket have the highest per capita income levels in Thailand, while the rural northeast is the poorest. An important policy objective of recent Thai governments has been to reduce the regional income disparity partly caused by rapid economic growth in and near Bangkok. Policies to stimulate regional economic growth have included populist and crop price support schemes.

Thailand is now a middle-income country that has a population of slightly over 66 million, with a gross national income (GNI) per capita of $9,947.[19] Its GDP in 2007 was US$54,583.79 billion, with an annual growth rate in recent years of almost 4 percent. Between 1977 and 2004, increases in total factor productivity (TFP) added about 1 percent to

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[17] United Nations Economic and Social Commission for Asia and the Pacific (2007), p 24.

[18] Economy Watch, 'Thailand Trade Statistics, Export Statistics, Export Partners and Products, Import Statistics, Import Partners and Products'.

[19] GNI per capita is based on purchasing power parity (PPP). PPP GNI is gross national income (GNI) converted to international dollars using purchasing power parity rates. An international dollar has the same purchasing power over GNI as a US dollar has in the United States. GNI is the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad. Data are in current international dollars. Source: World Bank, International Comparison Program database at http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?REPORT_ID=9147&REQUEST_TYPE=VIEWADVANCED (last accessed 2 February 2013).

Thailand's aggregate growth.[20] The source of this growth was mainly the movement of rural workers into more productive manufacturing jobs. By comparison, TFP increases per annum between 1975 and 2000 for other East Asian Economies were: China (3.9 percent), Indonesia (0 percent), South Korea (1.1 percent), Malaysia (0.9 percent), Singapore (1.8 percent), Taiwan (2.4 percent), and Thailand (1.4 percent), suggesting that Thailand has considerable scope for improving its productivity via better technology and education.[21]

The World Economic Forum's 'Global Competitiveness Report 2008–2009' placed Thailand in the 'second stage of development' along with Malaysia and Brazil, whereas Hong Kong, Japan, Korea, and Singapore were placed in the third (and highest stage). Thailand's overall competitiveness ranking was 34th out of 134, but it had fallen six places from the previous year. The report commented that Thailand's competitive strengths were market size, an efficient labor market (due to strong employer-employee relations), and good transport infrastructure. Its competitive weaknesses included low technological readiness (66th), with low penetration rates for internet, broadband, and mobile phones, concerns about the soundness of the banking sector, and a weakening of government institutions.[22]

In 2008, in a major joint report by the Thai Office of National Economic and Social Development and the World Bank, it was noted that Thailand's technological capacity lagged behind for four main reasons:

- The business sector – the medium and large-sized firms responsible for most technology development, in particular – are unmotivated and unwilling or unable to invest substantially in R&D whether in-house or through outsourcing . . . Absorbing technology from abroad is viewed as the lower cost and preferred route to technology upgrading.
- Numerous government programs to encourage R&D and technology development have failed to produce the desired effect.
- The supply of S&T (science and technology) workers as a percentage of university graduates is below that of Thailand's principle competitors. But perhaps more serious are the deficiencies in the training of these workers, which reflects the quality of Thai secondary education and universities, even the leading ones.

[20] Office of the National Economic and Social Development Board (Thailand) and the World Bank. (2008), *Towards a Knowledge Economy in Thailand*, Washington, DC: Office of the National Economic and Social Development Board (Thailand) and the World Bank.

[21] Id, p. 9.

[22] World Economic Forum (2010), 'The Global Competitiveness Report 2010–2011'. Retrieved from httphttp://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf (last accessed 2 February 2013).

- Although technology development in Thailand has derived benefits from globalization, this has been in the form of technology that is embodied in equipment. FDI [foreign direct investment] by MNCs [multinational corporations] has transferred amazingly little tacit knowledge, and disembodied technology through vertical or horizontal spillovers. Only a handful of companies have set up research facilities in Thailand, and the scope of the research carried out is limited. Thailand has a substantial diaspora of S&T workers in the U.S., Taiwan (China), Singapore, and Malaysia. However, this diaspora has not been a source of local entrepreneurship, venture capital, angel investors, or a vehicle for the technological leadership unlike the Chinese and Indian diasporas.[23]

Quality education has been a low priority for successive Thai governments. For a long time, the Thai education system has stressed basic literacy (on which it measures well in international comparisons), but also rote memorization. By contrast, other Asian countries such as China, India, Singapore, and Taiwan have invested substantially in university education and have promoted higher-value skills. As a result, they have developed innovative companies able to compete internationally. Thailand, on the other hand, has continued to rely on low-value, export-oriented manufacturing. Large Thai conglomerates (which have grown through government licenses) have been more concerned with shielding local industries from international competition than developing competitive, export-oriented products.

Thailand now has the second largest economy in Southeast Asia (after Indonesia). Its economy is now export-dependent, with exports accounting for more than two-thirds of GDP. In 2010, its economy grew at 8.0 percent, making it the fastest-growing economy in Southeast Asia and one of the fastest in Asia. Its per capita income ranks fourth in Southeast Asia after Singapore, Brunei, and Malaysia. Thailand has a strong automobile industry and has been called the ‘Detroit of Asia’.[24]

Following the success of export-oriented growth in Hong Kong, Singapore, South Korea, and Taiwan, a number of countries in Southeast Asia decided to follow suit (e.g. Indonesia, Malaysia, and Thailand). Hence the Thai government, under Prime Minister Prem, from 1980 onwards opened Thailand to some degree to international trade. As a

[23] Office of the National Economic and Social Development Board (Thailand) and The World Bank, pp. 106 –7 (n 20).

[24] Languepin, Olivier (2 August 2010), ‘Thailand’s Automotive Industry Overview’, *Thailand Business News.* Retrieved from http://thailand-business-news.com/news/headline/19360-thailand%E2%80%99s-automotive-industry-overview (last accessed 2 February 2013).

result, between 1985 and 1996, Thailand had average growth rates of 10.4 percent – earning it the status of a 'tiger economy'. However, unlike Indonesia, Malaysia, South Korea, and Taiwan, Thailand failed to open up its protected, monopolistic domestic industries. Local industries remained protected and inefficient.

Rapid growth came to a halt with the Asian Financial Crisis, which started in Thailand in 1997 after the collapse of the Thai baht. Prior to the crisis, there was a rapid reversal of private capital inflows into Asia. The withdrawal of foreign capital had several consequences. Most immediately, exchange rates depreciated. After an initial defense of the baht (which had been largely pegged to the US dollar) by the Thai government, the baht was floated. Domestic interest rates soared. The combination of real exchange rate depreciation and sharply higher interest rates led to a rapid rise in non-performing loans (NPLs) in the banking sectors in Thailand and elsewhere in Asia, particularly in loans to real estate developers. Many real estate developers had borrowed in unheeded US dollar-denominated loans from domestic and foreign banks to finance real estate projects. These projects subsequently failed due to the high repayment costs following the currency depreciation. In addition, some banks were net US dollar borrowers, which meant a sudden loss of bank capital, and consequently a substantial reduction in the market value of bank capital. Thailand's level of foreign debt before the crisis was so high as to make the country effectively bankrupt. As the crisis spread, most of Southeast Asia saw depreciating currencies, reduced asset prices and stock market values, and a rapid rise in private debt.

Thailand's future economic prospects depend on being able to move away from low-wage industries to more value-added industries as Southeast Asian competition is growing. But Thailand's lagging education sector and the shortage of engineers and skilled technical personnel may limit its future growth, despite the government's push for an increase in the proportion that creative industries contribute to GDP (from 12 percent to 20 percent by 2015). Better economic performance would also depend on Thailand opening its financial sector in particular to foreign competition, improving the foreign investment climate, and stimulating domestic investment and consumption to reduce reliance on exports. Logistics networks and electricity generation increasingly run the risk of bottlenecks and may pose a challenge to growth.

The 'Global Competitiveness Report 2010–2011' of the 2010 World Economic Forum[25] said the following about Thailand:

[25] World Economic Forum (n 22).

> Thailand, at 38th position, has fallen 2 places this year and 10 ranks since 2006. The assessment of public institutions continues to deteriorate (70th) after a drop of 30 places over the past four years, likely related to recent problems of social unrest and political instability in the country. However, Thailand continues to benefit from its relatively large domestic and export markets (23rd), its excellent transport infrastructure (23rd), the efficiency of its labor market (24th), and a relatively well functioning goods market (ranked 41st). In addition, the country's business environment is relatively sophisticated with developed clusters (34th) and companies operating across the value chain. Going forward, in addition to urgently improving its institutional framework, the country needs to step up its efforts to improve its health and educational systems and encourage wider adoption of new technologies for productivity enhancements. Such efforts will then buttress the country's innovation potential, which will become increasingly important as it moves toward the most advanced stage of economic development.

8. RELATIONS BETWEEN BUSINESS AND GOVERNMENT

Thailand's economy is characterized by strong relationships between the business and government sectors, described as a 'clientalistic' (i.e. usually informal) political system where political leaders (patrons) provide jobs, local investment, or services for their supporters (clients).[26] This kind of relationship (common in Southeast Asia) is due to the fact that many businessmen are of Chinese descent. Indigenous resentment meant that ethnic Chinese avoided direct confrontation with those in power; instead, they relied on more indirect means of gaining political influence and power.[27]

In Transparency International's 2010 Corruption Perceptions Index, which measures the perceived level of public sector corruption, Thailand ranked 78 out of 178. The report went on to state:

> In conjunction with the Centre for Philanthropy and Civil Society, TI Thailand has carried out surveys to measure how Thai people value democracy and good governance, and their perceptions of the linkages between integrity, governance and corruption. Over 2,000 people were interviewed, with 53.3 percent agreeing that 'too much honesty will result in being taken advantage of.'

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[26] Eisenstadt, S.N. and Louis Roniger (1980), 'Patron-Client Relations as a Model of Structuring and Social Exchange,' *Comparative Studies in Society and History*, 22(1), pp. 42–77.

[27] Macintyre, Andrew (1994), 'Business, Government and Development: Northeast and Southeast Asia Comparison', in Andrew Macintyre (ed.), *Business and Government in Industrializing Asia*, Sydney: Allen and Unwin.

Christensen and Siamwalla note that corrupt acts are rarely exposed and that 'It is one of the core elements of the system of patronage . . . [and is] testimony to a conspicuous absence of accountability in the Thai body politic . . .'.[28]

An important source of government revenue after World War II was the tax on rice exports. During the 1960s, the Thai government used rice export taxes to finance industrial development from the 1960s until the 1980s.[29] In addition, 'in order to extract more surplus from the rice sector, the government also required rice exporters to exchange their earnings to the domestic currency through the Bank of Thailand at about two-thirds the market exchange rate'.[30] By 1965, rice export taxes alone accounted for one-tenth of total government revenue.[31] These revenues were used to assist a small number of businesses. In addition, a small number of favored banks were assisted by a ban on new bank entry, which limited foreign banking expansion. Rice tax revenues 'virtually guaranteed the easy availability of credit to a small number of Thai entrepreneurs'.[32]

Since the 1960s, government industrial policy has tended to favor large firms and a few entrepreneurs. Large firms are controlled by a small number of tycoon family groups. For example, 50 of Thailand's largest 100 manufacturing firms belong to one of 16 conglomerates. These conglomerates control about 90 percent of the total Thai business assets.[33]

Several alternate models are available when considering the relationship between business and government. Public choice theory argues that everyone is motivated by self-interest, and so everyone tries to use the government to obtain rents (in economics a payment for goods and services above that needed to supply the good or service), so subverting the competitive process.

The solution is less government intervention. The New Institutional School argues that rent-seeking is wasteful and corrupt; moreover, because it increases transaction costs, rent-seeking also results in welfare losses and

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28 Christensen et al. (n 14), pp. 7–8.

29 Warr, Peter (2001), 'Welfare Effects of an Export Tax: Thailand's Rice Premium', *American Journal of Agricultural Economics*, 83(4), pp. 902–20.

30 Choeun, Hong, Yoshihisa Godo and Yujiro Hayami (2006), 'The Economics and Politics of Rice Export Taxation in Thailand: A Historical Simulation Analysis, 1950–1985' *Journal of Asian Economics*, 17, pp. 103–25.

31 Id.

32 Rock, Michael T. (2000), 'Thailand's Old Bureaucratic Polity and its New Semi-Democracy', in Mushtaq H. Khan and Jomo Kwame Sundarem (eds), *Rents, Rent-seeking and Economic Development: Theory and Evidence in Asia*, Cambridge: Cambridge University Press.

33 Suehiro (n 6).

in the misallocation of resources, including entrepreneurial talent. An alternative, proposed by Mushtaq Khan, argues that the usual way of treating rent-seeking is to focus only on monopoly rents, which are always regarded as bad. Khan points out that other kinds of rent – innovation, learning, skill and management, monitoring and transfer rents – should also be considered. Khan argues that innovation rents (high returns from successful innovations), are particularly important.[34]

To see the impact of rent-seeking requires examining the way rents are distributed to those seeking the rents. Distributing rents to those who can use it productively will naturally lead to better outcomes. In South Korea, an institutional policy that ensured rents went to businesses (and not to non-business groups) helped contribute to high levels of growth despite corruption. On the other hand, Khan points out that while Thailand did not achieve growth rates as high as South Korea's, Thailand's development was different due to the fact that Thailand was never colonized. An absence of colonial rule meant no major changes to the pre-existing social structure. This allowed for small capitalists, mostly Chinese, to continue accumulating wealth and eventually graduate to become large capitalists. In Thailand, the absence of colonization prevented the formation of organized political groups who, in other Asian countries, would seek to occupy the economic space occupied by the colonists in the economic sphere and take over the rent-seeking niches vacated by former colonial business interests. The Thai government in the 1970s promoted Thai-Chinese business groups, which generated transfer and learning rents but not much in the way of innovative rents.

Khan's hypothesis[35] places considerable emphasis on Thailand's unique history as one of only a handful of developing countries that were never colonized. As a result, importantly, the Thai political economy was dominated by big business by the 1970s. Since then, the political influence of Thai capitalists has increased to the extent that it has gradually displaced the army and the bureaucracy as the central political actors, epitomized by the assumption of the prime ministership by Thaksin in 2001.

Khan's approach is supported by Doner and Ramsay, who argue that, for countries to develop effective markets, governments must establish institutions and rules that allow firms to keep the rewards of their enterprise

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[34] Doner, Richard F. and Ansil Ramsay (2000), 'Rent-seeking and Economic Development in Thailand,' in Mushtaq H. Khan and Jomo Kwame Sundarem (eds), *Rents, Rent-seeking and Economic Development: Theory and Evidence in Asia*, Cambridge: Cambridge University Press.

[35] Id.

so that government bureaucrats do not confiscate their wealth.[36] In addition, governments must persuade firms that they will not save inefficient firms from collapse – 'signaled' by tough budgets (so government funds are not available) and ensuring there are effective competitive pressures (e.g. by reducing entry barriers). However, the institutions that allow firms to retain wealth and signal that the government will not bail out inefficient firms can differ.

Doner and Ramsay identify four kinds of markets that can facilitate competitive pressures: (1) free markets, which simply establish and protect property rights and do not impose market entry restrictions; (2) statist (like that of South Korea), where governments, instead of establishing clear property rights, 'use the threat of confiscation to induce performance and compliance with state guidelines. Competitive pressure results not from ease of entry by domestic actors, but by state-imposed contests in which a domestic firm is pitted against foreign competitors by tying its access to capital, inputs, and opportunities to its capacity to produce globally competitive goods' (Doner and Ramsay, 2000, p. 151); (3) 'federalism, Chinese style', where property and contract rights are minimal, but where political reform (having placed limits on central government) led to competition for revenues from provincial government, and so limited their willingness to restrict entry by revenue-generating firms; and (4) the Thai 'hard-budget clientalism' model, where formal property rights are weak but confiscation is rare due to patron protection. Relatively free entry is allowed into markets due to competition within the Thai elite, the ability of clients to find new patrons, and the government encouragement of foreign investment. Thai clientalism has led to competitive market structures in major industries including rice, cars, textiles, and others. The process is described by Doner and Ramsay as follows:

> In the Thai case, ethnic Thai political officials had the power and status to 'sell' access to the means of production and markets to Sino-Thai businesses who themselves could not operate in the public, political sphere prior to the 1970s . . . fragmented political patrons eager to obtain extra-bureaucratic funds helped to facilitate a constant flow of new private sector 'claimants' access to markets. Put simply, an aspiring entrepreneur could nearly always find a patron . . . Thailand's particular type of clientalism also protected Sino-Thai entrepreneurs from the most economically destructive form of corruption. This is the one in which 'numerous bureaucrats need to be bribed to get a government permit, and bribing does not guarantee that some other bureaucrat, or even the first one, does not demand another bribe . . . High-ranking military and civilian

[36] Id.

> officials had strong vested interests in seeing their business clients succeed economically and could protect them from harassment.' (2000, pp. 153–4)[37]

The main groups involved in economic policy-making are the Thai Chamber of Commerce, the Federation of Thai Industries (FTI), and the Bankers Association. Thai labor organizations are relatively weaker.[38] The military in Asia has been more involved in politics than in Western countries because in Asia the military see economics and politics as an essential and legitimate part of their interests.[39] In Thailand, the military influences economic and political matters in its own – rather than in the overall public's – interests.[40] For example, in 1991, Tamada asserts that the real reason for the military's role in politics was to protect their economic interests.[41]

While many writers focus on the financial aspects of the 1997 crisis, Hughes argues that the foundations of the crisis were the risky capital flows to Asia, which were put into non-productive projects such as real estate and stock speculation.[42] Much of this capital was also stolen. This fact was ignored by the International Monetary Fund, the World Bank, and the Asian Development Bank. The 'root cause of the crisis . . . was that financial intermediaries were not always free to use business criteria in allocating credit . . . well connected borrowers could not be refused credit . . . created by implicit or explicit government guarantees against failure'.[43] Hughes describes the process as follows:

> . . . privileged local entrepreneurs originating in protected domestic industries were able to prevent the completion of liberal reforms that would have led

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37 Id.

38 See Phongpaichit, Pasuk and Chris Baker (2002), *Thailand: Economy and Politics* (2nd edn.), Kuala Lumpur: Oxford University Press.

39 Hoadley, J.S. (1975), *Soldiers and Politics in Southeast Asia: Civil-Military Relations in a Comparative Perspective*, Cambridge MA: Schenkman Publishing.

40 Beeson, M., A.J. Bellamy and B. Hughes (2006), 'Taming the Tigers? Reforming the Security Sector in Southeast Asia', *The Pacific Review*, 19(4), pp. 449–72.

41 Tamada, Y. (1995), 'Coups in Thailand, 1980–91, Classmates, Internal Conflicts and Relations with Government of the Military', *Southeast Asian Studies*, 33(3), pp. 317–39.

42 Hughes, Helen (Spring 1999), 'Crony Capitalism and the East Asian Currency and Financial "Crises"', Sydney: Policy Centre for Independent Studies, pp 3–4.

43 Moreno, R., G. Pasadilla, E. Remolona (1998), 'Asia's Financial Crisis: Lessons and Policy Responses,' in R. Moreno and G. Pasadilla (eds), *Asia: Responding to Crisis*, Tokyo: Asian Development Bank Institute.

> to competitiveness in domestic markets. In the middle of the 1990s, crony interests in Thailand, the Republic of Korea, Malaysia, and Indonesia, desiring to protect the dollar value of their assets, exerted pressure on Ministries of Finance and central banks to maintain exchange rates at overvalued levels. Short term loans were sought abroad to shore up the overvalued exchange rates. Current account deficits expanded. When acute foreign investors realised the weakness of the investments they had funded, they began to withdraw as much short-term capital as they could. Local investors fled to safe currencies . . . Export incentives thus also had to be introduced to counter the high costs of inefficient production for domestic markets. They created new distortions. The ensuing combination of import substituting and export subsidies allowed favoured interests (cronies) to obtain monopolistic positions. Fiscal and financial policies were distorted to favour crony capitalists.[44]

When Thaksin Shinawatra, a businessman, became prime minister in 2001, he introduced policies to increase domestic activity and reduce Thailand's reliance on foreign trade and investment. Economic policy was refined, and a 'dual track' economic policy was introduced promoting increased domestic activity with the encouragement of open markets and foreign investment. This set of policies is popularly known as Thaksinomics.

Thaksin was particularly concerned that the government should be run by businessmen – using business principles – rather than by bureaucrats. Pasuk Phongpaichit argues that the 1997 crisis '. . . convinced Thailand's big businessmen that they needed to control the state – so they could run it better, and so they could use it to defend themselves against the aggressive side of globalization revealed during the crisis'.[45] 100 new parliamentary seats were created filled by representatives of 15 major business groups – not only introducing business-friendly policies but also enriching themselves via special privileges such as debt relief, access to new share issuing, and numerous other methods.

Thaksin wanted to 'accelerate the economy by protecting and promoting domestic capital while maintaining Thailand's attraction as a site for multinational companies . . . Thaksin's enormous wealth was created by political means – the state's grant of monopolistic concessions. Thaksin was drawn into politics because such concessions had to be constantly tended by political means.'[46]

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[44] Hughes, pp. 3–4 (n 42).

[45] Phongpaichit, Pasuk (2004), 'Thailand under Thaksin: Another Malaysia?' Perth: Asia Research Centre, Murdoch University.

[46] Phongpaichit and Baker (n 13).

9. THAILAND'S COMPETITION LAW

Thailand's first competition law was the Price-Fixing and Anti-Monopoly Act 1979. The Act had two objectives – consumer protection and price regulation. A Democrat party government under Prime Minister Chuan Leekpai introduced the Trade Competition Act BE 2542 in 1999.

> Working Committee modeled substantial parts of the Trade Competition Act of 1999 after the South Korean Monopoly Regulation and Fair Trade Act (MRFTA), the Taiwanese Fair Trade Law (FTL), the Japanese Anti-Monopoly law of 1947, and the German Act against Restraints of Competition.[47]

Section 87 of the then Constitution of the Kingdom of Thailand BE 2540 (1999) required the Thai government to enact a competition law. This is the explanation given in an explanatory note in the Trade Competition Act 1999, which reads:

> The reason for enacting this law is that the Price Control and Anti-Monopoly Act of 1979 had been repealed and that law had both the price control provisions and anti-monopoly provisions. It is deemed appropriate to improve provisions relating to anti-monopoly and separate those provisions from price-control provisions. The purpose of this law is to prevent monopoly, the restraint of business competition that will lead to the promotion of free competition, and the prevention of unfair business practices. Therefore, it is necessary to enact this law.

However, Thanitcul offers an alternate explanation. He argues that the Act is a result of the rapid economic growth in Thailand between 1987 and 1992, driven by the depreciation of the US dollar (the Thai baht was largely pegged to the US dollar), foreign investment from Hong Kong and Taiwan, and low international petroleum prices.[48]

A Working Committee was set up by the Ministry of Commerce (MOC) comprising MOC officials and university professors to examine whether the Price-Fixing and Anti-Monopoly Act 1979 was still suitable. The Committee visited a number of countries in Asia and did a comparative study between 1992 and 1995. The Working Committee concluded there

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[47] Thanitcul, Sakda (2006), 'Competition Law in Thailand' in Cassey Lee and May Fong Cheong (eds), *Competition Policy in Asia: Models and Issues*, Malaysia: University of Malaya Press.

[48] Thanitcul, Sakda (2002), 'Competition Law in Thailand: A Preliminary Analysis', *Washington University Global Studies Law Review*, 1, p. 171.

were two flaws: the first related to the difficulties involved in price-fixing in a rapidly changing economy, while the second concerned the fact that 'in order to enforce the Act's anti-monopoly provisions, it was first necessary for the Price-Fixing and Anti-Monopoly Committee to officially declare which good is 'controlled' by business.

Another explanation for the enactment is that the Act was introduced due to the requirements of the IMF as a condition for the assistance package following the 1997 financial crisis. Thai business leaders believe that the MOC initiated the Act due to pressure from the United States.

The Act was a political compromise; for example, the regulator – the Trade Competition Commission (TCC) – is not an independent agency. The Chairman is the Minister of Commerce. Ex-officio members are senior bureaucrats (for example, the Secretary-General of the TCC is the Director-General of the Department of Internal Trade) and the staff of the TCC are officials of the Department of Internal Trade. There are also between eight and twelve 'qualified persons' with backgrounds in law, economics, commerce, business administration or public administration. Qualified persons must not be political officials or holders of political positions in a political party. The appointment of outside (part-time) members must be approved by Cabinet, with a two-year term of office.

The Commission works by appointing specialized sub-committees comprising between four and six persons, qualified in the various areas, to consider conduct relating to sections 25, 26, 27, 28, 29 and mergers under section 37. Criminal prosecutions are recommended to the public prosecutor. The Office of the Competition Commission was established under the Department of Internal Trade, with the Director-General of the Department of Internal Trade as Secretary-General. The Office's powers include carrying out the work for the committees appointed by the Commission, monitoring the conduct of business operators, and conducting business studies. Certain officials have the power to issue written summons requiring persons to produce statements etc. and to enter premises to search for evidence without a search warrant where offenses are 'evidently being committed in the place'.

While the overall intention of the Act was to regulate business conduct, the Senate insisted on including a structural provision. Section 30 provides that:

> The Commission shall have the power to issue a written order requiring a business operator who has market domination, with a market share of more than seventy five percent. To suspend, cease or vary the market share. For this purpose, the Commission may prescribe rules, procedures, conditions and a time limit for compliance therewith.

Exemptions from the Trade Competition Act were given to central, provincial, and local governments, state enterprises, farmer's cooperatives, etc., and businesses exempted by Ministerial Regulation. However, export and import cartels are not exempt, nor are depression cartels or small business cartels. Thanitcul notes that the exemption of state enterprises was the most controversial provision (as they competed with private companies in the electricity, telecommunication, and railway sectors).

The Trade Competition Act includes a prohibition on the abuse of dominant position (section 25); overly concentrative mergers (section 26); horizontal and vertical restraints (section 27), and various unfair trade practices (section 29).

Abuse in section 25 includes *exploitative* conduct (i.e. setting high prices), a number of vertical restraints, and interfering with other business operations. Section 25 is modeled on the South Korean MRFTA because of the presumption that the South Korean economy was similar to that of Thailand. Section 25 states that a dominant firm abuses its position by:

1. Unfairly fixing or maintaining the levels of sale or purchase prices of goods or services.
2. Setting conditions which, directly or indirectly, unfairly compel other business operators who are customers of the Business Operator to limit the provision of services, production, purchase or distribution of goods, or their opportunity to choose to buy or sell goods, accept or provide services, or obtain credit from other business operators.
3. Suspending, reducing, or limiting services, production, purchase, distribution, delivery, or importation in (Thailand) without reasonable grounds, to destroy or damage goods in order to reduce supply to less than market demand.
4. Interfering with the business operations of other people without reasonable grounds.

Sections 3 and 8 authorize the TCC, with the approval of Cabinet, to prescribe the market share and sales turnover that presumes a firm to have a dominant market position. In January 2007, the Cabinet approved a new definition of dominant market position. Under the Act, so that a dominant market position occurs:

> when a business operator sells any product or provides any service, the former having had a market share of 50 percent or more in the previous year, and whose sale proceeds amounted to 1 billion baht or above, or when the first three ranked business operators of any product or service, during the previous year, had a market share of 75 percent or more and, whose sales proceeds were 1 billion baht or more. This excludes a business operator whose market share

> in the past year was less than 10 percent, or a business operator whose sales proceeds in the past year were less than 1 billion baht.

Section 26 deals with mergers and is modeled after Article 6(1) of the Taiwanese FTL. The TCC regulates business combinations, including mergers and the purchase of assets or shares. The Working Party intended that this provision would only apply to large business combinations. The TCC is authorized by sections 26 and 28 to prescribe the criteria for a large business combination. The TCC has not prescribed the criteria as yet, some 13 years after the law was enacted.

Section 27 prohibits certain horizontal and vertical agreements, in particular those which: fix sales or purchase prices, enter into an agreement to control or take over a market, bid-rigging, imposing certain geographical restrictions, tying, fixing output levels, maintaining or raising price whilst reducing quality, appointing sole distributors, and fixing conditions or methods of operation in the purchase or distribution of goods and services. Firms may seek authorization for some of these practices. This section combines the provisions dealing with undue collaborative activities in the South Korean MRFTA and Taiwan's prohibition of non-price vertical restraints and exclusionary practices.

Section 28 contains an unusual and unique provision. It says:

> A business operator who has business relation[s] with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.

Apparently, the provision was introduced to allow wealthy Thais to buy luxury cars directly from foreign manufacturers without having to go through local Thai dealers. It effectively allows for parallel imports and so promotes competition by preventing foreign producers from price-discriminating against consumers in Thailand.

Section 29 is a 'catch-all' provision dealing with unfair business practices – which can also cover exclusionary conduct and appears to be based on Article 24 of Taiwan's FTL. It provides that:

> A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

This is broad and could be used to achieve other objectives, such as the protection of small businesses, rather than economic goals such as efficiency. Section 29 does not require market dominance, but it does cover practices where there is unequal bargaining power. Again the provision appears to borrow from South Korean law:

> The South Korean MRFTA focuses primarily on regulating the behavior of the thirty largest Korean *chaebols*, but it also aims to regulate the unfair trade practices of a number of medium-sized firms. Article 23 of the MRFTA (Prohibition of Unfair Trade Practices) is patterned closely on the Japanese Anti-Monopoly Law. Between 1981 and 1990, there were only eleven complaints of abuses of market dominant firms while there were 22,592 complaints against unfair trade practices.[49]

It should be noted that section 29 is probably too vague to be effectively enforced. In contrast, the Japanese Antimonopoly Act and the South Korean MRFTA requires the Japan Fair Trade Commission and the Korean Fair Trade Commission to specify the unfair trade practices. Currently, 16 kinds of business practice have been officially specified by the Japan Fair Trade Commission (JFTC) and eight by the Korean Fair Trade Commission (KFTC). The Thai Act is silent on this requirement.

Action taken by the Trade Competition Commission under section 29 rather than section 25 against Honda (who allegedly had an 80 percent market share and engaged in exclusive dealing by preventing retailers from selling competing brands), suggested that:

> [t]he fact that this case was handled differently from the whiskey and beer abuse of dominance case raised [the] suspicion of selective enforcement of the competition law in favor of powerful local businesses and against foreign companies with little or no political connections.[50]

There is an Appellate Committee consisting of not more than seven qualified persons (in law, economics, business or public administration) appointed by the Cabinet. Appellate Committee members may hold office for four years. The Appellate Committee considers appeals and may issue an order suspending the execution of the Commission's Order.

Criminal penalties are available for failing to comply with written summons, including imprisonment for up to one year and/or a fine of

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[49] Thanitcul (n 47).

[50] Nikomborirak, Deunden (2006), 'The Political Economy of Competition Law: The Case of Thailand' *Northwestern Journal of International Law and Business*, 26, p. 597.

20,000 baht (about US$650). Violations of sections 25, 26, 27, 28 or 29 can lead to imprisonment for up to three years and/or a fine not greater than 6 million baht (about US$195,000). Where the offence is committed by a juristic person (e.g. a company), then the managing director, managing partner, or the person responsible for the operation of the company, etc. shall be subject to the same penalty unless it can be shown that the person did not know about the conduct or took reasonable steps to prevent it (section 54). Persons suffering losses as a result of violations of sections 25, 26, 27, 28 or 29 may seek compensation, but the action lapses if the claim is not submitted to the court within one year of the person suffering the damage (section 40).

10. AN ASSESSMENT SO FAR

Thanitcul has noted that the Working Committee was trying to ensure that competition law reflected the Thai industrial structure. He also noted that the Working Committee believed that the structure of Thai economy:

> . . . falls somewhere in-between South Korea's economic structure, where thirty *chaebols* dominate the domestic market, and Taiwan's where 98 percent of firms are small and medium sized enterprises (SMEs). The Thai economy is closer to the Taiwanese economy because (1) there are fewer market dominant firms in Thailand than in South Korea, and (2) most of the Thai firms are SMEs. Furthermore, unlike the South Korean Government, the Thai government has never adopted nationalist economic policies to promote national champions. The hallmark of Thailand's economic development is neo-liberalism: trade and investment liberalisation with few government industrial policies.[51]

Mark Williams provided an early assessment of the first five years of the operation of the law. He identified a number of weaknesses, including uncertainties and ambiguities in the Act, the extensive use of criminal penalties, the absence of civil penalties and structural remedies (except where a firm has more than a 75 percent market share), the fact that the Competition Commission was too large to be effective, that it was filled with part-time political appointees, lacked independence from the Ministry of Commerce, and that competition advocacy was weak. He suggested that the 'selective use of the law for political ends' was a distinct possibility, and a lack of transparency and the procedural safeguards of

[51] Thanitcul (n 47).

natural justice were approved.[52] Williams quoted a report from the Sasin Business School of Chulalongkorn University in the following terms:

> Local competition has actually eroded due to the increased focus of Thai business groups on markets in which they already have dominant positions. The Competition Commission has few effective instruments to act against companies which have market power, and the Act does not apply to State-owned companies. Many large business groups have strong connections with the government and have enjoyed protected market positions in Thailand for periods of time, and at the same time, the development of small and medium sized enterprises has been stunted.[53]

Nikomborirak explains why, despite seven years of the Act's operation, enforcement has not been impressive:

> The performance of the TCC has been dismal, especially after the January 2001 installment of the new government dominated by large businesses. The Committee met only nine times in six years, four of which took place during the inaugural year. The latest meeting took place on May 14, 2004.[54]

Nikomborirak went further and concluded that there was no 'clear political mandate' to enforce the law. Because of an absence of rules and regulations to ensure transparency, the limited enforcement in Thailand 'tends to be selective and arbitrary'. In particular, she characterized competition law as a 'paper tiger' that 'could not stand against the powerful lobbying of large businesses that have more recently become involved in politics'.[55] The very weak record of implementation continued for the next five years, but in early 2010 the Minister of Commerce, Pornthiva Nakasai, asked the Department of Internal Trade to review the Trade Competition Act. The review was to consider the structure and composition of the Commission, making the TCC independent of the Ministry of Commerce, increasing transparency, strengthening the penalties for violation, extending the Act to state-owned enterprises, and developing guidelines and definitions for terms in the Act.

However, by the time of the election of a new government in July 2011, no report had been made. Consequently, it remains to be seen whether

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[52] Williams, Mark (2004), 'Competition Law in Thailand: Seeds of Success or Fated to Fail?' *World Competition*, 27(3), pp. 459–94.

[53] Id, quoting from a newspaper report 'Economic Rebuilding: Government Told to Foster Competition' (6 May 2003), *The Nation Bangkok*.

[54] Nikomborirak (n 50).

[55] Id.

vested interests will be able to continue to thwart the proper implementation of competition law in Thailand.

The lack of an organized pro-competition lobby and the strength of domestic business resistance make it unlikely that substantial improvements in implementation will be made in the near future. External pressure as a result of the looming inception of the ASEAN economic community, which mandates pro-competitive policies and laws, may provide an external impetus to progress.

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