

Regulation

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Searching for a new brand identity, TAT spurns the private sector

Sri Ayuthaya

A monthly round up and analysis of the events behind Thai politics

BUSINESSREPORT

Thailand

The Need For Reform

Law and legal reform in Thailand's public, private and civil sectors

Why Thailand's laws are no barrier to investment and development: Interview with Tilleke & Gibbins' Cynthia Pornavalai

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Interview

Cynthia Pornavalai

With 20 years experience and a prolific author, Cynthia Pornavalai has provided counsel across the banking, finance, property and commercial construction sectors on regulations, debt restructuring, mergers, acquisitions and legal due diligence. A graduate of Kyoto University and trained at Harvard, she is a Partner at Tilleke & Gibbins, perhaps Thailand's foremost legal firm on intellectual property regulation, corporate and commercial law, and is in fact older than Thailand's Ministry of Justice.

Reform may be lacking and negative perceptions abound, but considered support for Thailand's laws remains

A major economy in South East Asia that continues to rapidly industrialise, Thailand's legislative and governance structures remain opaque. An export orientated economy, governed by civil law, Map Ta Phut and 3G have revealed the holes in its regulatory environment. Cynthia Pornavalai explains how these gaps have affected the business environment in Thailand and what could be done to improve the operating environment for Thai and international businesses in country

Thailand's civil and commercial laws have not undergone a systematic reform since the 1920s. What legislative reforms do you consider critical for Thailand to regain its competitive momentum?

Thailand is a civil law country, so once codified, the principles enshrined in the laws rarely change, but are subjected to evolving interpretations and circumstance. They don't change with court rulings. When issues arise, the government develops new regulations to complement and encourage investment. Accordingly, wholesale reform is extremely rare and today the laws are being interpreted by the courts, the juridical council and guided, certainly since the 2007 constitution, by the people.

For competitive reform we must take into account that Thailand is an export-orientated economy, foreign investment is critical and that most of the money here comes from foreign investors and exports. We have to manufacture and export, we need a market and the transfer of technology. Maybe its not the model that we want at the moment, but that's the way it is.

If Thailand is indeed serious about increasing foreign investment, there should be reforms in foreign share holder limitations. We still have laws from the 1970s, notably

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the Foreign Business Act (FBA), that restricts foreigners from certain industries under three categories. These have not changed since the 1970s, but times have. Changing these laws, however, is frustrated by the perceived potential cost to Thai people and businesses.

New laws have trickled through the Board of Investment (BOI) and special laws like Regional Operating Headquarters (ROH), but ultimately the FBA is the foundation of all these

laws. If we do not have a basic amendment of this, at least in the number of the lists and what is included therein, we are still going to face the same challenges in the future.

That said, I believe that Thailand really is trying to be competitive. There was a major overhaul of corporate law in 2008 to improve the investment and business environment. Yet as in any jurisdiction, law reform lags behind development.

For Thai businesses, they need capital, markets and technology. The government needs to focus on increasing competitiveness, not protection. Despite government intentions, the stock market remains too complicated and too expensive a source of capital and most Thai businesses remain dependent upon the banks. The Banks have strict

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regulatory measures when they lend, but at the end of the day what gets these businesses the loan is a personal connection. Ultimately, the Thai business environment resembles a 'patron-client' relationship.

Reform of the FBA has been touted by successive administrations, but little has changed. Is Thailand likely to see any relaxation of the law or should businesses continue to look to BOI licensing and privileges?

This is certainly the case at the moment with the government distracted by a larger political agenda, leaving the business environment relatively unchanged - particularly in regards to the FBA. Nothing has happened for years despite proposed amendments and I don't see any chance of change at present.

The government probably has a *'if it's not broken, don't fix it'* approach given that they are distracted by larger political priorities. Besides which, businesses have been allowed to skirt the law for many years and very little has been enforced by the government. This means that there are many things that foreign investors will continue to do at this time, such as operating businesses with minority foreign ownership.

How effective have government bodies been in regulating the business environment? Do these agencies adequately cover the gaps and loopholes in existing legislation?

The 'beauty' and perhaps the 'curse' of the Thai government and the bureaucracy is that it is very flexible. When you go to certain jurisdictions, like Japan for example, the bureaucracy will follow the law down to the line and to the dot. Here it is flexible. Bureaucrats can interpret certain regulations to make them favourable or very difficult for you to proceed, perhaps benefiting others. I believe it balances out at the end of the day, but, because of the circumstances that dictate the interpretations, there can be large 'transactional costs'.

Does this opaque legislative environment, where it is subject to interpretation, deter investment and businesses?

Not based on our experience. Its only when things get difficult that businesses seek to leverage some kind of flexibility. In most business models the legislative environment, however opaque, has been factored in.



No. You have to consider how important the Thai economy and business is to investors. This country has a huge population, the standard of living is getting higher, it is becoming an industrialized country and a major economy, certainly in South East Asia. When investors look at countries they don't look at regulations alone, but the whole package. And if they can pressure the government to change the law they shall do so. If they really want to come in they will do so because of the other factors. They will either skirt the law, go around it, or fight for a new regulation to come into place.

Furthermore, the private sectors involvement is largely limited to consultative committees, but it is the government's decision at the end of the day as to whether it takes this on board. One such body, the Joint Foreign Chambers of Commerce Thailand (JFCCT), though not a legally recognised body, is still powerful and can send out strong signals. However, the US's Treaty of Amity remains a big issue and can upset the consultative process amongst the business community.

The treaty is technically in breach of WTO regulations which is why they try to keep it under the radar and under review almost every year.

Given these issues, is the government perhaps less concerned with reform?

I think the government is proactive compared to other Asian states in trying to increase investment and promote a more investor-friendly environment, through the BOI for example. The basic laws, such as the FBA, still cannot be changed in the current environment, but the government continues to create certain enclaves of business friendly opportunities through smaller laws and regulations.

If foreign investors think that the regulatory environment is a negative for them then that's over cynical,

Yet Map Ta Phut and 3G have revealed the holes in governance and legislation. What precedents has T&G drawn from these two incidences and how are they likely to affect existing and future (domestic and foreign) commercial interests and sentiment?

These incidents are very new so the lessons we can take from these are still not fully formed.

What is clear from Map Ta Phut is that although certain government officers can interpret the law, at the end of the day, where differing regulations exist, a judicial review can overturn everything - no matter how much ire this may raise amongst larger investors. The other lesson we have taken from this, particularly myself, is that the Thai people are becoming far more aware of their rights. In the past the government did not take that much attention of human rights and the views of the people. Now they are emboldened and all parties must be more attentive.

For 3G, I think that, ultimately, there was a lack of strategy and vision to move forward. This was exacerbated by a lack of consultation with the people. Though the private sector is very active in pushing these initiatives forward, ultimately, it too is subject to government regulation and the responsible authorities. I suspect that no one actually thought it could be this difficult, nor anticipated the effect of certain interests.

Is there a reluctance by businesses to engage to with the government as a result of these issues?

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I don't think most investors think that way. There is a great deal of rhetoric, but the government closes an eye and business continues. If the government does choose to act on it - for example concerning Thaksin's assets and nominee holdings - then they can easily do so as they have the necessary tools.

The government has encouraged the establishing of ROHs in Thailand, yet has introduced legislation that frustrates company operations. How do you explain these contradictions?

The smaller laws that have come in - for example, board meetings must be attended by all members, whereas it was previously permissible to have a telephonic Board, and shareholder's meetings that must be announced by sending notice and printed in non-mainstream newspapers, I don't even remember the names - are quite surprising given the easing that took place in 2008.

These contradictions are not borne of overlapping jurisdictions, but the interpretation of the law, in this case, from the Ministry of Commerce itself, and issuance of ministerial regulations. The origins of many of these issues is that laws under the civil code have to cover present and future eventualities and so are drafted very broadly, with deliberate ambiguity to allow broader interpretations.

It is a fact of the business environment here. It is hard to explain, but I think that it is up for review given that there have been so many complaints.

One reform proposed by the government is the 'Asset tax' that will go some way to assisting the redistribution of the tax burden. If passed, what effect do you think this will have on the property market? Is there a risk of an unintended cooling of the markets?

This may have a short term impact in cooling the market as a lot of domestic property investment is speculative, but its not the first time that this has been proposed. It has been on the cards for many years, and though it is a good thing which I believe should be passed, whether for populist reasons or not, it has always been very difficult given that most law-makers are land owners.

Is existing Thai legislation and governance structures appropriate to the demands of the forthcoming ASEAN Economic Community (AEC) in 2015?

Because the AEC has been approved, every country has to meet the legislative demands. However, whether Thailand will meet this in time, we will have to see. There is a wait-and-see approach amongst all the countries and

jurisdictions. Legislative reform is pending the others' reciprocation.

Currently, there are certainly gaps, such as employment laws, Thailand's requirement for work permits, limitations on nationals working in certain professions and, of course, the FBA. These kind of laws are impediments to this economic unification, but these will eventually be eased out - at least amongst the AEC - due to foreign government and market pressures. The only way to grow the market and the economy is to give in to these pressures - its the principal of trade.

Since 2006, Thailand's judiciary has been required to rule on increasingly politically sensitive cases. Has this compromised the perceived impartiality of the Thai judicial process and how are these concerns reflected in the commercial sector?

Ninety per cent of our clients are foreigners. I do not know whether they are aware of how the judicial system really works, but most of them are uncomfortable with it. They perceive it to be biased toward Thais or certain other individuals. I, however, have never seen such bias in the conduct of my work. Thailand may be perceived as a third world country with backward laws, but the judiciary is very balanced.

Foreign businesses certainly shy away from court proceedings, but this is principally due to the time required to complete court proceedings. It might take one year to reach the first hearing after filing a suit, judgement may take a couple of years, this can then be appealed and then may even be sent to the supreme court. It is easy to waste six years in court and get nothing. This is also exploited tactically by either party to a conflict to frustrate resolutions of an issue. It is this slow judicial process that is the impediment, not perceived impartiality or bias.

The Civil Court Civil Procedure Act has however been reformed and successive hearings held over days not weeks are becoming more common. However, it may still take a year to get to get the first hearing. The judicial system has also set up specialist courts including the International Property and International Trade Court (est. 1996) and so some cases can go through these. Hearings can be granted in a few months and a case finished within one year.

Lastly, is existing IP legislation in Thailand appropriate to its needs? Is effective enforcement possible given the complicity of some authorities, that the industry is a substantial source of revenue, employment and the government's own patent infractions concerning HIV antiviral drugs?

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Enforcement here is inadequate because authorities are asked to do so much and the courts not enough. Street market enforcement does not work. People have been doing it for 15 years and everyone's sick of it. The key is not in strengthening the legislation, but for IP owners to enforce their rights through the court. This is now happening across the region with foreigner confidence in court outcomes and transparency. This is happening in China and is beginning to in Thailand, but we are maybe five to eight years away.

Ironically, despite Thailand having South East Asia's oldest specialised IP court, there is now very little counterfeit manufacturing in Thailand. I was just in Ubon Ratchathani last week. Crossing the Lao border, every single trader was mainland Chinese. I have seen it on all border crossings, Laos, Cambodia, Burma. Its just trading here in Thailand and most Thai factories are pretty full doing legitimate manufacturing. Quite simply, the Chinese do it better and cheaper.

In regards to Thailand's HIV anti-viral drugs compulsory patent - that's the only thing people remember about Thailand. However, not everyone realizes that under the WTO TRIPS every country has the right to require a compulsory patent.

The problem with the execution of that sovereign right in Thailand was the application process. The Department of Intellectual Property, which that had a critical role to play, was circumvented in the process led by the Ministry of Public Health. Had those patents experts been involved at an earlier stage then drug companies would have been able to negotiate something with the government. Its not that Thailand did a bad thing, its that the process was circumvented.*

**Alan Adcock, Deputy Director, Intellectual Property contributed to this answer.*

IP infringement will likely always take place so long as there are discrepancies in the application and enforcement of existing laws. Like most countries in the Asia Pacific, Thai law is WTO TRIPS (Trade Related Aspects of IP) compliant that every WTO signatory must commit to. The problem with the IP laws in Thailand is the same in all Asia Pacific jurisdictions - the lack of enforcement.

Most foreign IP owners believe it is the government's responsibility to enforce IP law, which is true, but in the west it is the responsibility in practice of the IP owner to do a lot of the enforcement via investigations and court action. IP owners here are somewhat gun-shy when it comes to court participation, traditionally relying on the government authorities to perform the role of the court. This is not the way IP laws are structured in the west.