



THE ASIA-PACIFIC INVESTIGATIONS REVIEW 2019

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Global Investigations Review

www.globalinvestigationsreview.com

The Asia-Pacific Investigations Review 2019

A Global Investigations Review Special Report

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This article was first published in October 2018
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The Asia-Pacific Investigations Review 2019

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Cover image credit: ismagilov/iStock/Thinkstock

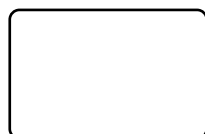
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ISBN: 978-1-78915-108-4

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Global Investigations Review is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. **GIR** gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers – the most readable explanation of all the cross-border developments that matter, enabling them to stay on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the GIR 100) and – after a successful court decision – obliged the DOJ to release the names of unsuccessful candidates for Foreign Corrupt Practices Act monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. All authors are leaders in their field and we are grateful to them all for their time and energy. We encourage readers and co-authors to share feedback and comments.

If you would like to get involved in future editions or have thoughts for us, please contact edward.perugia@globalinvestigationsreview.com.

We hope you enjoy reading *The Asia-Pacific Investigations Review 2019*.

Global Investigations Review

London

August 2018

Thailand: Anti-Corruption Compliance

Michael Ramirez
Tilleke & Gibbins

Foreign direct investment (FDI) is an important factor in Thailand's economic growth and stability and the country has focused intensely on efforts to consistently improve its standing as an FDI destination. The country has previously enjoyed popularity among foreign investors because it offers an attractive and modern legal framework, reasonable input costs and a favourable geographic location. Investment figures support the continued focus on Thailand as a hub for FDI.

Thailand is currently the 13th-largest FDI recipient in east Asia and South East Asia, according to the UNCTAD World Investment Report 2017. In fact, since the global economic downturn, Thailand has enjoyed generally increasing FDI, only experiencing a modest decrease in FDI in 2016, an effect experienced throughout the region. The general decrease in FDI in the region was attributed to sluggish cross-border M&A sales and significant divestments by foreign MNEs. The year 2016 also signalled Thailand as an investing country as the country's outflows increased by nearly seven times to a historical high of \$13 billion. By 2017, FDI recovered, increasing by 3.7 times. The Thai government has also acted to incentivise foreign investors with broadened tax exemptions under the New Investment Promotion Act BE 2560 (2017), an amendment to the Investment Promotion Act BE 2520 (1977).

The influx of FDI, combined with the substantial presence of existing foreign investment projects, places on-the-ground investors in an environment in which many factors need to be considered by local, regional and global counsel. Foremost among these considerations is the anti-corruption environment in which investors operate.

Overview of corruption

Few people question the cost of corruption. Though statistics on corruption are often questionable, available data suggests it accounts for a significant proportion of economic activity. Estimates by the World Economic Forum show the cost of corruption equals more than 2 per cent of global GDP, with over US\$2 trillion paid in bribes each year according to the World Bank.¹ Statistics show that Thailand has struggled to deal with various forms of corruption, with no substantial success. According to Transparency International, Thailand has slipped from 60th in the Corruption Perception index in 2001 down to 96th out of 180 countries, scoring an aggregate score of 37 where zero is highly corrupt and 100 is very clean.²

To address the problem in Thailand, a significant budgetary focus is concentrated on supporting anti-corruption agencies, with millions spent on wide-ranging media awareness campaigns. In addition, there have been substantial efforts recently to improve the corruption environment through legal reform, efforts the current Thai government intends to expand. The combined budgetary, media and legal focus marks a change in direction that, through time, should show returns.

It should be noted, however, that no efforts, however substantial, are expected to immediately change the challenging anti-corruption

environment in which domestic and foreign business operators function in Thailand. It is for this reason that investors should be diligent in efforts to understand the risks and the legal restrictions and protections available, and should work to develop programmes to minimise such risk through education, evaluation and compliance. This article seeks to provide an overview of the legal framework for anti-corruption regulation and enforcement, evaluative mechanisms available to business operators, and tools for minimisation of risk through compliance.

Overview of domestic law

Anti-corruption offences are covered by a number of laws in Thailand, including:

- the Thai Penal Code – BE 2499;
- the Offence of State Organisation Staff Act – BE 2502;
- the Act on Offences Relating to the Submission of Bids to State Agencies BE 2542;
- the Organic Act on Counter Corruption – BE 2542;
- the Rules of the Office of the Civil Service Commission on the Code of Ethics for Civil Servants – BE 2537;
- the Code of Morals and Ethics of Police – BE 2553;
- the Notification of the Office of the National Counter Corruption Commission Concerning the Provisions of the Acceptance of Property or Any Other Benefits on Ethical Basis by State Official – BE 2543; and
- the Act on the Establishment of the Criminal Court for Corruption and Malfeasance Cases BE 2559.

In general, the offeror of the bribe, the facilitator and the receiver may all be subject to criminal penalties.

Core elements of the law for a bribery crime to be established include:

- the recipient of a bribe must be a Thai public official;
- the offence of bribery occurs when parties reach an agreement to offer and accept a 'benefit' (an official is guilty even though he or she was paid to perform his or her own legal duties); and
- the term 'benefit' is defined broadly to cover both tangible and intangible assets, and does not have to be calculable in monetary terms.

The Thai Penal Code does not provide a definition of 'public official'. However, the Supreme Court has held that a person will be regarded as a 'Thai public official' if he or she is appointed by the Thai government (Decision No. 700/2490):

- to perform governmental functions (Decision Nos. 82-86/2506);
- whether on a regular or non-regular basis (Decision No. 533/2485) (iv) regardless of whether he or she is a Thai national (Decision No. 700/2490); and
- regardless of whether he or she receives remuneration from the government (Decision Nos. 1397-1398/2500).

The Organic Act on Counter Corruption, BE 2542 also prohibits 'state officials' (individuals who were state officials within the last two years of the relevant act) from accepting property or benefits, unless they fall under the exemption of the Thai National Anti-Corruption Commission (NACC). No motive is needed to violate this provision. Violation of this rule shall be deemed as a breach of duties and may also constitute a dishonest discharge or non-discharge of duties under the Penal Code.

Importantly, recent 2015 amendments to the Anti-Corruption Act have broadened the scope of liability for wrongdoers, a clear objective of the current Thai government. For example, liability may now be extended to include corporate entities and senior management for bribery offences committed by employees, agents and others acting on behalf of the company where the act is for the benefit of the company and the company has failed to implement 'proper internal measures' to prevent the wrongdoing. This is a move to prevent a previous loophole, in which bribery by a corporate entity was not generally prohibited unless it constituted a bid-rigging violation in connection with a price proposal with governmental agencies according to the Bid-Rigging Act, BE 2542 or considered as an unfair practice under the Trade Competition Act, BE 2542.

These important amendments and the political commitments from the current government portend a continued strengthening of the anti-corruption legal framework and culture.

Quota for acceptance of gifts by state officials

In 2000, the NACC issued a ministerial notification providing that any acceptance of property or benefits by state officials must not be valued at more than 3,000 baht. If an official finds it necessary to accept a gift worth more than 3,000 baht, a report is required to be made to the state official's supervisor. This is an accommodation that seeks to provide certain exceptions for culturally acceptable gift-giving. That being said, much confusion has been caused by this rule as there are no specific guidelines for how an action will be treated as a violation. Further refinement and clarification is warranted.

Annual requirements for companies

Corrupt behaviour may also be regulated and enforced under the Thai Civil and Commercial Code, which requires Thai private limited companies to prepare financial statements once a year, have them audited by an auditor, and submit them to shareholders for approval within four months from the date specified in the financial statements. Failure to meet this obligation may result in a maximum fine of 20,000 baht to the company and a maximum fine of 50,000 baht for each of its directors (Act Prescribing Offences Relating to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations, BE 2499).

International law and extraterritorial effect

Thailand became a signatory to the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified the UNAC on 1 March 2011. But, it has yet to enact the full panoply of domestic laws necessary to meet its obligations under the UNCAC, although recent legal developments have placed Thailand closer to a position of compliance.

For example, recent amendments to the Organic Act on Counter-Corruption include extension of liabilities for extraterritorial acts. Specifically, coverage has been extended to those giving bribes to foreign state officials and workers of international organisations. Liability, including corporate criminal liability, may also extend to the foreign state officials and organisations themselves, a significant

step to place Thailand in conformity with its international commitments to combat corrupt behaviour.

While these are steps in the right direction, Thailand still has far to go to improve its anti-corruption laws and procedure. Thailand is not yet a signatory to the OECD Convention, although the NACC reports that Thailand does cooperate with members of the OECD Anti-bribery Convention on international bribery cases. In addition, anti-corruption enforcement has been inconsistent. More needs to be done to encourage robust investigative efforts, resource allocation and enforcement, prompting a commitment recently made by the Thai government.

Interacting with overseas regulators

Under the Mutual Legal Assistance in Criminal Matters Act 1992, Thailand has signed bilateral agreements for mutual legal assistance in criminal matters with the UK, the US, France, Canada, Norway, China, Korea, Peru, Poland, India and Sri Lanka. In Thailand, the Attorney General's Office is the entity responsible for coordinating requests for assistance. The Anti-Money Laundering Office (AMLO) has also signed separate memoranda of understanding with more than 30 countries for the exchange of financial information related to money laundering. The AMLO is a valuable investigative source and tool for combating corruption and seeking recovery of the fruits of illicit activity.

Countries that have not signed bilateral agreements with Thailand for mutual legal assistance may seek such assistance through diplomatic channels.

Enforcement of bribery laws

The NACC, the Public Sector Anti-Corruption Commission (PACC), the AMLO and the Office of the Attorney General of Thailand (OAG) are key players in anti-corruption investigation, regulation and enforcement.

The government agency primarily responsible for enforcing bribery laws is the NACC. The NACC was established under the 1997 Constitution and the Anti-Corruption Act in order to prevent and investigate corruption crimes. The NACC has broad powers of investigation but lacks actual authority to prosecute a crime, and must refer the case to the public prosecutor for prosecution (although the 2011 amendment seems to have provided for the eventual establishment of a prosecuting division within the NACC). The 2016 amendment to the Organic Act on Counter Corruption further broadened the NACC's investigating power by allowing the investigating official to gather evidence prior to and in conducting fact inquiry. At the same time, the NACC can send a report to the Senate to determine whether to impeach the offending official.

The NACC cooperates with foreign government agencies on corruption cases. If foreign bribery laws are enacted, the NACC will likely play an important role in the enforcement of anti-corruption laws.

The PACC was established in 2008 to focus particularly on corruption by certain categories of public officials. Its jurisdiction thus forms part of the broader jurisdiction of the NACC, and within that area, the NACC will generally refer cases to the PACC.

The AMLO has primary responsibility for implementation of the anti-money laundering law and suppression of terrorist-financing. It collects and analyses reports from financial institutions and other sources to identify subjects for investigation, and it is responsible for conducting investigations leading to the seizure and forfeiture of assets acquired with the proceeds of offences under the relevant laws. The OAG has primary responsibility for auditing state agencies.

The Criminal Court for Corruption Cases (the Corruption Court) was established in 2016 to expedite court procedures and convictions for state officials and people in the private sector who are accused of corruption. Despite the criminal nature of the cases, an inquisitorial procedure instead of the adversarial system is used in the Court. Further, the Corruption Court Act prescribes that the period of time when the suspects evade trial will not be counted towards the statute of limitation. The Act addresses the loopholes in existing law, such as the problem when suspects escape prosecution by fleeing until the expiration of statute of limitation.

Obligations to whistleblow

The Anti-Money Laundering Act imposes a duty on a prescribed list of persons (in general, certain financial institutions and advisers, and certain categories of traders) to report to the AMLO in respect of suspicious transactions, cash transactions exceeding 2 million baht and other transactions exceeding 5 million baht in asset value, with certain categories of transactions being exempted. The penalty for failure to report is a fine not exceeding 500,000 baht and an additional amount not exceeding 5,000 baht for each day that the violation is not corrected.

There is no general 'whistleblower' obligation, but draft whistleblower legislation has been prepared. Although there is currently no specific law dealing with whistleblowers, protection can be derived from the Witness Protection in Criminal Cases Act of BE 2546, although its use is rare.

Impact of overseas anti-corruption laws in the US and UK

The US Foreign Corrupt Practices Act (FCPA) prohibits the bribery of foreign officials. It is extraterritorial in effect and impacts all US companies and persons, as well as foreign companies and persons if they issue securities on a US exchange or otherwise engage in activities in furtherance of a bribe in US territory. Importantly, in pursuing potentially unlawful acts under the FCPA, the US Department of Justice has adopted an expansive definition of what it means to commit an act of bribery in the US and has interpreted it to catch the transfer of money through US bank accounts including, potentially, all US-dollar transactions that are cleared through bank accounts in the United States.

The FCPA also contains a books and records provision requiring issuers to make and keep accurate books, records and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. In addition, the FCPA's internal controls provision requires issuers to devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. These provisions apply to all companies, both US and non-US, that have their securities issued on a US exchange. They are expansive provisions and have been used to prosecute companies in cases where bribes have been paid to private individuals.

The UK Bribery Act 2010 (Bribery Act) covers bribery of private persons as well as public officials. It also has extraterritorial application. For example, the Bribery Act prohibits offering or accepting a bribe outside the UK provided that the offender has a close connection with the UK. Persons with a 'close connection' include British citizens and organisations incorporated in any part of the UK. Similarly, the Bribery Act's corporate offence – which occurs when an organisation fails to prevent those performing services on its behalf from paying bribes – applies not only to organisations incorporated under UK law, but also to any other company carrying on a business, or part of a business, in the UK, regardless of where the act of bribery takes place.

The fact that conduct may not constitute an offence under local law does not necessarily mean it is permitted under the FCPA or the Bribery Act. Companies doing business in Thailand are advised not only to comply with domestic legislation, but also to be fully aware of the far-reaching extraterritorial effect of not only the FCPA and the Bribery Act, but relevant anti-corruption laws from other foreign jurisdictions.

Conclusion

Although the Thai government is viewed as relatively less bureaucratic when compared to other South East Asian countries, paying bribes to expedite licences, permits, provision of facilities and public utilities, and to receive government contracts is not uncommon. Police corruption in Thailand remains an issue. Further, judicial corruption, while uncommon, may appear in the form of decisions influenced by personal relationships.

Anti-corruption laws in Thailand are increasingly robust, with certain extreme acts of corruption by officials, including foreign officials, even punishable by death. Further, recent amendments to anti-corruption laws have expanded liability to the private sector and to corrupt acts involving foreign officials. In addition, 2016 saw the establishment of a specific Corruption Court, with nearly 800 policemen and Interior Ministry officials having faced lawsuits since October 2016.

With an increasing scope of anti-corruption liability and enforcement, business operators, compliance officers and legal counsel must act affirmatively to assess potential liabilities, both domestic and foreign, and design and implement compliance programmes to educate and encourage lawful behaviour that is also culturally acceptable.

Notes

- 1 www.bangkokpost.com/business/finance/397862/time-to-rethink-the-misguided-anti-corruption-strategies-in-thailand.
- 2 www.transparency.org/country/THA.



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Michael Ramirez is a senior member of the firm's dispute resolution group, where he has assisted major international clients in a wide range of domestic and international disputes, including product liability, employment, customs and excise, and transportation and logistics disputes. Michael also serves as a client adviser on the strategic aspects of claims management for international litigation, cross-jurisdictional disputes, and compliance with international anti-corruption laws, including the Foreign Corrupt Practices Act (FCPA).

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Established in 1890, Tilleke & Gibbins is a leading South East Asian regional law firm with over 150 lawyers and consultants practising in Bangkok, Hanoi, Ho Chi Minh City, Jakarta, Phnom Penh, Vientiane and Yangon.

Our firm represents the top investors and the high-growth companies that drive economic expansion in Asia in the key areas of commercial transactions and M&A, dispute resolution and litigation, and intellectual property.

Tilleke & Gibbins advises clients on anti-corruption matters in South East Asia. Many countries we work in are attractive destinations for foreign investment. They are also high-risk environments for corruption, asset concealment, fraud and other forms of economic crime. The US government has made prosecutions under the Foreign Corrupt Practices Act (FCPA) a national priority, and more cases under the UK Bribery Act are expected. In addition, ASEAN governments are increasing their own anti-corruption efforts. Failing to curb or prevent corruption can have devastating economic, legal and reputational consequences.

Through our multi-jurisdictional presence, we assist clients seamlessly across borders. Our attorneys and consultants are deeply knowledgeable about local business practices and cultures, which allows us to provide a unique blend of legal and practical advice in this complex field. Our anti-corruption services include:

- Advising clients on local anti-corruption laws, regulatory regimes and business culture.
- Designing, advising and implementing compliance programmes.
- Advising clients on the FCPA and the UK Bribery Act.
- Conducting anti-corruption due diligence on agents, partners and M&A targets.
- Performing anti-corruption risk assessments.
- Overseeing internal corporate investigations.
- Defending and prosecuting corruption-related allegations.
- Assisting with asset recovery and protection.

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ISBN 978-1-78915-108-4