



Programme international de recherches

Working Paper AED-EAL-2007-7

Nanterre, le 4 avril 2007

## Review of Legal and Economic Development in Thailand

Jakkrit KUANPOTH<sup>1</sup>

Lecturer

University of Wollongong - Australia

---

<sup>1</sup> The findings, interpretations, and conclusions expressed here are those of the author and do not necessarily reflect the views of the “Attractivité économique du Droit- Economic Attractiveness of Law” program, or his partners.

## CONTENT

1	Thailand and Its Legal System.....	3
1.1.	Legal History .....	3
1.2.	Legal System.....	6
1.3.	Legal reforms.....	7
(a)	1932 Revolution.....	7
(b)	New Constitution .....	7
(c)	1997 Economic Crisis .....	9
(d)	World Trade Organisation .....	10
(e)	Bilateral pressure .....	12
2	Law on Foreign Direct Investment .....	14
2.1.	The Investment Promotion Act B.E. 2520.....	15
2.2.	The Foreign Business Act B.E. 2542.....	17
2.3.	The Industrial Estate Authority of Thailand Act B.E. 2522.....	19
3	Intellectual Property Law .....	20
3.1.	Historical development of intellectual property law in Thailand .....	20
3.2.	Patent law and its effects on Thailand .....	23
4	Legal System and Economic Development.....	24

# A Review of Legal and Economic Development in Thailand

Jakkrit Kuanpoth\*

## 1 Thailand and Its Legal System

### 1.1. Legal History

The Thai legal history can be traced back to the Sukhothai era (1238 - 1350) when the king was the 'Fountain of Justice' who himself adjudicated the disputes between citizens. The ancient legal system of Thailand came from the Hindu Code of Manu, which was called 'Dharmasatra' and 'Rajsatra'. The decisions of kings of Siam<sup>2</sup> were influenced heavily by the law of Dharmasatra and Rajsatra, and the substantive law was firmly rooted in this legal tradition. The concept of royal justice administered during the Sukhothai period was also carried through the Aydhya era. The two laws disappeared after the Burmese invasion of Aydhya in 1767. When King Rama I (1782-1806) established Bangkok as the capital of Thailand, the Thai law was revised and developed as the 'Law of Three Seals', which contained both Dharmasatra and Rajsatra. The Law of Three Seals was used and remained in force until 1908 when King Rama V initiated an open door policy of trading with foreign nations and reformed Thai law and judicial administration. The law reform modernized the law and brought the legal system of Thailand in line with Western-style legal system.

Unlike many other developing countries, Thailand has never endured colonial rule, and its law did not evolve from colonial influences. The modernization of

---

\* Faculty of Law, University of Wollongong

<sup>2</sup> Thailand was previously called Siam. The country's history of Siam began in 1238 when the kingdom of Sukhothai was founded. The larger kingdom of Aydhya was established in 1351 which was ruled by thirty-four kings (1351-1767) belonging to three different dynasties. Aydhya was destroyed by Burmese and the new Siamese capital was established and located on the island of Rattanakosin, which soon became known as Bangkok.

the country's legal system in the early 20<sup>th</sup> century resulted from Thailand's attempt to maintain its sovereignty from Western colonial powers. The trade that grew between Siam and Western nations led to the signing of a number of bilateral treaties which later on became a major factor in the reform of Thai law and judicial system. The most important treaty was the Bowring Treaty B.E. 2398, which Siam signed with Great Britain in 1855.

The Treaty forced Siam to reduce import duties to 3 percent, and to cancel the monopoly of the Royal Treasury. The most important point of the Treaty was that it marked the beginning of the system of extraterritoriality in Thailand. The Treaty exempted British subjects from the jurisdiction of the Siamese courts under the Law of Three Seals.<sup>3</sup> Any British subjects suspected for the crimes committed in Thailand must be handed over to the British Consul to be tried and if found guilty to be punished under British law. The extraterritorial provisions were demanded by Britain because it viewed criminal law and criminal procedure under the old Thai law obsolete, uncivilized and barbaric. For example, the Law of Three Seals contained a number of severe punishments such as death penalty, cutting off of limbs, hands and feet, tattooing a mark on the face indicating a criminal offence, etc.

After the Bowring Treaty was signed, similar extraterritorial privileges were demanded by other countries, which led to twelve other treaties being signed by Siam and Western countries, including those with the United States and France in 1856, Denmark in 1858, Portugal in 1859, the Netherlands in 1860, Germany in 1862, Sweden, Norway, Belgium, and Italy in 1868, and Austria-Hungary in 1869, and Spain in 1870.

---

<sup>3</sup> Sayre, F.B. "The Passing of Extraterritoriality in Siam", *American Journal of International Law*, 1929, p.71. See also Tilleke & Gibbins, *Thailand Legal Basics*, Tilleke & Gibbins Law office, Bangkok, 2003, available at [http://www.tillekeandgibbins.com/Publications/thailand\\_legal\\_basics/thai\\_legal\\_sytem.pdf](http://www.tillekeandgibbins.com/Publications/thailand_legal_basics/thai_legal_sytem.pdf)

The Bowring Treaty was the beginning of the great changes in Thailand's social and economic structure. It opened up the market to foreign trade and investment, and linked the country to international markets. It led to social and economic reform including the reform of legal system, educational system, public welfare, monetary policy, and many others.

Colonialism was a huge threat in the South-East Asian region in the late 19th century. Thailand's sovereignty was threatened by two colonial powers: Great Britain and France, but the country managed to maintain its independence by westernizing and modernizing all aspects of Thai society, including its legal and judicial systems. The Penal Code was promulgated in 1908 as the first law code of Thailand. The drafting of the Civil and Commercial Code was completed and the Code was promulgated in 1925 during the reign of King Rama VII. The Civil Procedure Code and the Criminal Procedure Code subsequently entered into force in 1933 and 1935 respectively. The laws of Western countries such as France, Germany, Switzerland, England, Italy, and Japan were used as a model for drafting the four codes of Thailand.

After the adoption of the four major law codes, Thailand also proceeded to reform its social organizations, and judicial system to match the western system. A number of legal institutions based on the Western-style system were established, including courts, prosecutor offices, and the council of state. The first law school was established under the Ministry of Justice. The modernization and reform of the legal and judicial system helped Thailand to do away with the extraterritoriality it conceded to foreign powers. Thailand regained complete judicial sovereignty from the Western countries in 1925 during the reign of King Rama VI.

## 1.2. Legal System

It might not be correct to say that the Thai legal system belongs to the legal system of continental Europe or that of the Anglo-American. In fact it is a hybrid of these two systems. While in principle the roots of the modern Thai judicial and legal system come from the Roman civil law, the common law traditions have strong influence on Thai law in many areas.

In Thailand, the statutory law is adopted by parliament and applied and interpreted by the court. In major areas of procedural and substantive laws, a number of codified laws were adopted consisted of multiple chapters of subject-matter. Unlike the law of many other countries, Thai law does not provide for the jury system. Although the philosophy behind juries reasonably attempts to uphold democratic values, the system is viewed inappropriate for Thailand as it does not provide ways to conduct justice in an efficient and cost-effective manner.

Thailand adopts an independent judiciary, which the court decisions must not be influenced by political considerations. Thai court decides a case based on an interpretation of the statutory provisions. The court decisions are made by the judges who hear and try cases. The judges listen to the evidence and the legal argument, and prepare a written decision based on the facts of the case and the application of law to those facts. Unlike a common law court, the decisions of Thai court do not develop a body of law, except the decisions of the Supreme Court. While reversal of precedent based on decisions is in principle permissible, the court normally adheres to precedent established by the Supreme Court in deciding the subsequent cases with similar issues and situation.

### 1.3. Legal reforms

The modernized law of Thailand has been reformed several times. There were five major factors that had important effect on the Thai legal and judiciary system during the post-colonial era. The incidents that brought about legal reforms in Thailand are now highlighted.

#### (a) 1932 Revolution

First was the Revolution of 1932 in which a group of military officers and civil servants seized power. The 1932 revolution ended 800 years of Thailand's absolute monarchy and formed a constitutional monarchy. The constitution vested the judiciary power with the courts. Judges perform their duties in the name of the king and are assured of independence in adjudicating cases according to the law.

#### (b) New Constitution

The legal system of Thailand took a very significant turn in 1997 when the new constitution, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), was adopted. The constitution was introduced due to the political turmoil in 1992 when middle-class demonstrations were suppressed by a military strongman who wanted to install himself as prime minister. The incident led to a vigorous campaign for political reform and drafting a new constitution.

The 1997 constitution was called the "people constitution" as it was the first to be written by the assembly that was elected by popular vote. The constitution aimed to promote and guarantee civil rights, freedom, and liberty of the Thai people, but it, at the same time, reflected a strong mistrust of those in authority by

incorporating a series of checks and balances in order to prevent abuse of political power.<sup>4</sup> The constitution had substantial impact on the reorganization of political, legal and judicial systems in Thailand. It established the Constitution Court and the Administrative Court, which work in parallel with the Court of Justice. A series of independent watchdog bodies were also established, including the Election Commission, the Human Rights Commission, and the National Counter-Corruption Commission. The constitution also reformed parliamentary and electoral systems, and structurally changes the cabinet, the bureaucracy, local administration, education, healthcare, welfare, state-owned enterprises, telecommunications, etc. It also recognized and guaranteed the right of persons and enforced the rule of law. A large number of human rights principles were enshrined in the constitution as guaranteed to all Thais, including free education up to high school, free quality healthcare, access to a clean environment and public information, right of local communities to uphold their own traditional cultures and knowledge, etc.

However, a military coup d'Etat was staged on 19 September 2006 against the government of Thaksin Shinawatra after the political confrontation between pro- and anti-Thaksin forces became indefinitely deadlocked. The coup abolished the 1997 charter alleging the flaws in the constitution that allowed Thaksin to give himself near-dictatorial powers. The Thaksin government was accused of corruption, conflicts of interests, and weakening the judiciaries and the independent institutions. It was also found to assault on constitutional institutions and principles and carry out irrational policing, widespread extrajudicial killing, and forced disappearance. The coup leaders have installed an interim prime minister, have appointed the general assembly to write a new constitution, and have promised to stage a general election in one year.

---

<sup>4</sup> The Economist "All things considered" 28 February 2002.

### (c) 1997 Economic Crisis

The economic collapse in the late 1990s and the adoption of International Monetary Fund (IMF) reform programmes had led Thailand to revise its law in many areas, particularly in the fields of finance and economic law. The economic crisis in Thailand started when the government decided to deregulate the exchange controls. From 1990 to 1994, the Thai government accepted the obligations of Article VIII of Agreement of the International Monetary Fund, which demands the complete deregulation of the current account transactions and removal of restrictions on payments and transfers of capital. It also adopted a series of further liberalization measures, which result in less controls over the flows of foreign currencies into and out of the country.

The government loosened restrictions on capital flows, but it poorly regulated and mismanaged the financial sector. The country's institutions were not developed enough to fully understand and cope with any possible consequences of the liberalization. The government allowed the financial market to rapidly grow without control, which brought more money into the economy. However, the money was unscrupulously and wrongly spent such as on property speculation or on the projects that lacked justifiable investment opportunities like constructions of the already over-supplied real estates. This affected the capacity to compete and to do business of Thai corporate sector.<sup>5</sup> In 1997, the Bank of Thailand attempted to defend the value of the baht by spending huge sums of money to prop up an overvalued currency. By doing this, it committed almost all its foreign reserves. The Thai government eventually decided to devalue the baht, which made the currency lost half its value and doubled the cost of foreign debt, pushing many banks and businesses under financial pressure. More than

---

<sup>5</sup> Siamwalla, A., Y. Vajragupta, and P. Vichyanond, *Foreign Capital Flows to Thailand: Determinants and Impact*, Thailand Development Research Institute, Bangkok, 1999.

half of the foreign loans turned non-performing, and 56 bankrupt finance companies were closed as a result. All these led to the collapse of Thailand's economy in 1997, which subsequently stretched to other countries and became the Asian economic crisis.<sup>6</sup>

The economic crisis forced Thailand to seek a SDR 2.9 billion (about US\$ 4 billion) rescue package from IMF. IMF's Stand-by Arrangement programme demanded Thailand to cut spending and reform its financial and legal systems. Thailand must upgrade its accounting and auditing standards to comply with Bank of International Settlements (BIS) capitalisation standards, as well as improve its regulatory requirements for financial sectors, listed companies, a deposit insurance scheme, etc.

In order to restore a competitive climate for foreign investment and stimulate investment flows, Thailand was required to establish a new bankruptcy court, and reform bankruptcy and foreclosure procedures. It must amend the Land Code, the Condominium Act and the Property Leasing Act to remove restrictions on foreign property ownership. A reform of foreign investment law was demanded by IMF that led Thailand to replace the then Alien Business Law (ABL) of 1972 (National Executive Council Announcement No. 281) with a new legislation. The IMF conditionality demanded Thailand to open additional sectors to foreign investment and to increase total foreign equity investment of up to 49 percent in certain sectors.

#### (d) World Trade Organisation

---

<sup>6</sup> Laird, J., Money Politics, Globalisation, and Crisis: The Case of Thailand, Graham Brash, Singapore, 2000.

Thailand is one of 148 countries that are members of the World Trade Organisation (WTO). In order to comply with its WTO commitments, Thailand must reform its laws and regulations in several areas. It has to reduce the tariff rates on certain industrial and agricultural products, and convert non-tariff measures (e.g. quotas and other quantitative restrictions) to tariffs on certain agricultural products such as rice, corn, soybean, sugar, garlic, etc. In the area of foreign investment, Agreement on Trade-Related Investment Measures (TRIMS) provides that Thailand may apply certain investment measures such as performance requirements and local content requirements, but such measures must not become barriers to trade or distort trade. WTO Agreement on Trade in Services (GATS) does not oblige member states to liberalise their service market but to enter into negotiations with a view to liberalise service trade under the principle of progressive liberalisation. Since Thailand had made commitments with respect to financial services, banking and insurance, it had no obligation to amend any existing laws relating to services at least for the time being.

WTO Agreement on Implementation of Article VI of the GATT and Agreement on Subsidies and Countervailing Measures require member states to adopt rules dealing with dumping and subsidy. Thailand enacted the Anti-dumping and Countervailing Act B.E. 2542 which entered into force in 1999. The Act provides a legal basis for anti-dumping and countervailing measures in regards to details of procedure, timeframe, and appeal process in compliance with WTO agreements.

WTO obligations that require significant reform of law are those under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement requires Thailand to substantially eliminate intellectual property (IP) infringements and to bring the country's IP laws up to the TRIPS standards. This includes amending patent, trademark and copyright laws and adopting new laws to protect geographical indications, trade secret and layout-

designs of integrated circuit. Thailand introduced a major overhaul of its IP systems due to the obligations under the TRIPS Agreement and due to bilateral pressure that the United States was exerting on Thailand.

(e) Bilateral pressure

Although the rapid development in the IP law of Thailand may partly come from domestic demand, it was in fact the external pressures that had significant influence that led to rapid development of law in this area. The most controversial area of IP law is patents. A patent system was initially adopted as part of the economic policy of the Thai government and was a result of Thailand's attempt to accelerate industrial production and trade expansion. However, the policy of Thailand on patents has been under great influence from external pressures particularly those exerted by the United States government.

Since the late 1980s, Thai exports have experienced rapid and sustained expansion. The performance of Thai products in international markets is highly successful. And so, Thailand enjoys the distinction of being one of the world's fastest growing economies. Its major trading partners are the United States, Japan, the European Union, and the countries of the Association of Southeast Asian Nations (ASEAN). Among these countries, the United States is Thailand's most significant trading partner. In 2004, for example, the total value of trade between Thailand and the United States accounted for US\$ 22 billion, equivalent to more than 20 percent of Thailand's total international sales.<sup>7</sup>

Since 1985, Thailand has succeeded in transforming a visible trade deficit with the United States into a substantial trade surplus, and gained a favourable balance of trade with the United States. The value of United States trade deficit

---

<sup>7</sup> Source: Department of Foreign Trade, Ministry of Commerce, Bangkok, 2005.

with Thailand increased gradually. For example, in 1981 the total United States goods in Thailand amounted to 29,291 million baht (US\$ 782 million), while its balance of trade with Thailand in the same year enjoyed a surplus of 9,494 million baht (US\$ 254 million). In 1985 the amount of United States exports to Thailand declined to 28,434 million baht (US\$ 760 million), and its trade balance with Thailand was in deficit to the tune of 9,582 million baht (US\$ 256 million).<sup>8</sup>

Because of the growing trade deficit, the United States Administration decided to use trade leverage against Thailand because of alleged inadequate protection for copyrights on computer software and pharmaceutical patents. In 1989 and 1991 the United States removed Generalised System of Preferences (GSP) privileges from some export products of Thailand. It also threatened Thailand with trade sanction under Special 301 of its Omnibus Trade and Competitiveness Act of 1988. In the case of patents, the failure of Thailand to provide patent protection for pharmaceutical products had, it was claimed, severely affected United States drug producers. As estimated by Mossinghoff, patent infringements in Thailand added up to huge losses of trade and income, almost US\$ 2,000 million, for ten United States pharmaceutical companies.<sup>9</sup>

After being named as a priority foreign country subject to trade retaliation by the United States, attempts were made by the Thai government to meet United States demands in the hope of avoiding trade retaliation because it was realised that the United States market is an essential part of Thailand's recent economic success. Thailand decided to modify its copyright, trademark and patent laws, in order to protect some particular products such as pharmaceuticals, computer software, some forms of living organisms, etc. It also extended the term of patent protection from 15 years to 20 years and copyright term to 50 years after the

---

<sup>8</sup> Source: Customs Department, Ministry of Finance, Bangkok, 2006.

<sup>9</sup> Mossinghoff, G.J., Drug Trade Seeks Leverage on Patents, 238 Chem. Marketing Report (IAC), Oct.1990, p.5.

death of the author. It also revised its IP laws in order to tighten penalties and eliminate provisions designed to prevent abuse of patent monopoly such as the price monitoring board for pharmaceutical products.<sup>10</sup> The Thai government also made a lot of efforts to enforce the IP laws more vigourously. A number of cases of copyright and trademark infringement were successfully prosecuted, and the average penalties for such illegal practices have substantially increased.

## 2 Law on Foreign Direct Investment

For a long time, multinational corporations have played a key role in foreign direct investment (FDI) and cross-border transactions. The unique nature of multinationals, that is the possession of economic resources, technology, and managerial skills, offers them unlimited opportunities to influence the process of socio-economic development in the countries in which they invest.<sup>11</sup> Thailand has had relatively a long experience with foreign investment. The basic attitude of the Thai government towards multinational corporations and their participation has always been positive. A significant factor accounting for this attitude is the country's independence from colonialism. Since Thailand started to become the host country for foreign companies during the modernisation period, rather than through the period of colonisation, its perspective on the role of multinational corporations is more positive and liberal than that of many other developing countries.<sup>12</sup>

---

<sup>10</sup> This price control mechanism was removed from the law in 1999 due to the demand and pressure from the United States.

<sup>11</sup> Miljan, T., *The Political Economy of North-South Relations*, Broadview Press Ltd., Peterborough, 1987, p.252.

<sup>12</sup> Panupong, C. "MNCs and the Role of the Thai Government", in Chaiseri, N. and C. Hongladarom (eds), *The Role of Multinational Corporations in Thailand*, Conference at Thammasat University, Bangkok, 1984, p.3.

The Thai government recognises the importance of foreign investment by maintaining an open, market-oriented economy and encourages FDI as a means of promoting economic development, employment and technology transfer.<sup>13</sup> The export promotion strategy and investment policy was adopted in the late 1970s. The government promulgated a number of laws and regulations to facilitate FDI. There are three important laws adopted to promote FDI in Thailand, including: (i) the Investment Promotion Act B.E. 2520, (ii) the Foreign Business Act B.E. 2542, and (iii) the Industrial Estate Authority of Thailand Act B.E. 2522.

## 2.1. The Investment Promotion Act B.E. 2520

The Investment Promotion Act B.E. 2520 was adopted in 1977. The Act has been revised several times in line with changes in the government economic policy. The main aim of the law is to promote FDI in Thailand. It provides for regulation of foreign investment promotion and protection. The Act establishes the Board of Investment (BOI) which has an equal status to a department under the Prime Minister's Office. BOI is envisaged to be a centre for planning, and drawing up of policy guidelines in relation to foreign investment. It also helps in the attraction of FDI into the country by direct promotion through overseas investment missions located in the countries of potential investors. In addition, the Board has a duty to provide foreign investors with assistance and promotional privileges in establishing business in Thailand.<sup>14</sup>

---

<sup>13</sup> Yuthasak, K. and S. Prasobsuk, *Foreign Direct Investment and Technology Transfer in Thailand*, Board of Investment and National Economic and Social Development Board, Bangkok, 2001.

<sup>14</sup> *Ibid.*, at p.6. See also BOI, *The Foreign Investment Regime: The Role of BOI*, Board of Investment, Bangkok, 1998.

The incentives and privileges provided by BOI include: (i) tax exemption or reduction in regards to imported machinery, materials, and components, (ii) exemption from corporate income tax for 3-8 years, and (iii) exemption from dividend tax during corporate income tax holidays. BOI provides maximum investment incentives to projects located in rural areas (i.e. investment promotion zone 3). Projects located in zone 3 which is far away from Bangkok are eligible to receive the highest tax incentives. This policy aims to disperse industrial development from central to rural areas. Companies under BOI promotion may bring in foreign technicians and experts to work on the promoted project, and are permitted to own land in connection with a promoted project for business offices and living residences.

A core component of the 1977 Act is provisions on investment protection and particularly protection against expropriation. For example, the law prohibits the State from expropriating the investment or undertaking an activity in competition with the promoted investment project.<sup>15</sup> The risk of direct expropriation of foreign investment in Thailand is therefore almost zero. The government is also prohibited from imposing price and export controls on products produced by companies under BOI promotion, except in cases of necessity to protect national security or for pursuing economic and social development objectives.<sup>16</sup> The Act also prohibits state agencies carrying out parallel import of the products produced under the promoted investment project as long as domestic demand for such products is fulfilled by local production.<sup>17</sup> BOI may adopt measure to safeguard the promoted project from competition. For example, it can impose import fees of not exceeding 5 percent on any

---

<sup>15</sup> Investment Promotion Act B.E. 2520, ss. 43 and 44.

<sup>16</sup> Ibid. ss.46-47.

<sup>17</sup> Ibid, s.48.

imported product that competes with those produced by the promoted investing firm or may impose an import ban on such product.<sup>18</sup>

The Thai government does not focus its investment promotion on any particular industry. The promotion is carried out in line with the international legal principle of the most-favoured nation (MFN) treatment enshrined under WTO TRIMS Agreement. Foreign investors from different countries are equally treated and can enjoy similar privileges provided under FDI promotion policy regardless of their nationality or the country of origin. Moreover, the investment policy is implemented in compliance with WTO national treatment (NT) principle. However, Thailand only provides a weak version of NT (i.e. foreign investors, once established would be treated the same as locally owned companies), rather than a strong NT (i.e. guaranteeing the right of establishment whereby foreigners would have the same right of establishment as locals). In other words, foreign and local investors are entitled to tax and non-tax privileges offered by BOI without discrimination, but the foreign investors shall not enjoy zero tariffs as the locals.

## 2.2. The Foreign Business Act B.E. 2542

The Foreign Business Act B.E. 2542 was adopted in 1999 to replace the Alien Business Law (National Executive Council Announcement No. 281) of 1972. The amendment of foreign investment law was undertaken as part of the conditionalities imposed on Thailand under IMF's Stand-by Arrangement programme. The 1999 Act lays down conditions on which a foreign investor may conduct business in Thailand. The current law removes restrictions in some areas but still retain restrictions in areas considered important for Thailand.

---

<sup>18</sup> Ibid, ss.49-50.

Although Thailand has adopted a more welcoming attitude to FDI as a source of development capital, the Thai government still retains some restrictions on foreign investment. First are restrictions on the admission of foreign investors, which take various forms, such as restricting foreign investment in some sectors and screening and registration procedures. These admission restrictions are adopted as a result of sovereignty concerns. Business sectors that are restricted to foreign investment are strategic sectors such as media, publishing and films, and sectors involved in national defence and security.

The Foreign Business Act B.E. 2542 divides controlled business into three main categories, subjecting each category to different restrictions. Businesses listed in Category 1 are reserved for Thais. Foreign entities are not permitted to conduct the businesses in Category 1 in Thailand. Category 2 covers businesses that have been in existence when the Foreign Business Act B.E. 2542 entered into force. The foreign investors may continue their business in Thailand but need to apply for a foreign business licence. However, foreign investors may not start a new business in Category 2 after the law was passed unless a special permission from the Ministry of Commerce is granted. Category 3 provides a list of businesses that Thailand lacks competitiveness and thus, are vulnerable to foreign competition. The businesses falling within this category are mining, salt farming, forestry, fishery, professional services, etc. A foreign company may conduct a business in this category only when it secures approval from the Director General of the Department of Business Promotion, the Ministry of Commerce, and the Foreign Business Committee set up under the law. In order to obtain a licence, the foreign applicant has to prove that the local companies are not capable of conducting the said investment project.

The 1999 Act opens a large number of manufacturing sectors to foreign investment. 21 out of 63 sectors which were restricted under the previous law are

now liberalised, including pharmaceuticals, cement production and animal farming. Some business sectors are still reserved for local manufacturers, including telecommunications, rice farming, animal husbandry, local art, culture, handicrafts, and business related to natural resource and environment. Foreign investment is also prohibited in service sectors such as construction, broker businesses, real estates, etc. The Foreign Business Act B.E. 2542 also removes restrictions on the nationality shareholders and board of directors. Under the old law, the majority of the directors and shareholders must be Thai for the company to qualify as a local juristic entity, but this is no longer required under the current law.

Although the Act has removed restrictions on foreign ownership in some sectors, it still maintains conditions for foreign entities conducting business in Thailand. For example, the minimum capital required for conducting businesses listed in Annex 1 of the Act is set at 2 million baht, and 3 million baht is required for those in Annexes 2 and 3.

### 2.3. The Industrial Estate Authority of Thailand Act B.E. 2522

The Industrial Estate Authority of Thailand Act B.E. 2522 was adopted in 1979 to provide investment incentives to businesses located in industrial estates which the government established in certain regional areas. There are two kinds of industrial estates under the Act: the general industrial zone, and the export-processing zone.

Incentives provided to foreign investors under the Industrial Estate Authority of Thailand Act are mainly the same as those offered by BOI. But the privileges under the 1979 Act are available to investment projects that are located in the industrial estates. The financial and non-financial privileges provided under the

Industrial Estate Authority of Thailand Act include the right to own land in the industrial estate, right to bring in foreign personnel, and the right to remit dividend abroad. The Act also provides additional financial privileges to businesses operating in an export-processing zone, including exemptions from special fees, duty, value-added tax, and excise tax. The promoted projects may import machinery, equipment, and tools to be used in the manufacture of goods and in the construction of the project.

### 3 Intellectual Property Law

In addition to the financial and non-financial privileges, Thailand also adopted IP laws as incentives for the inducement of foreign investment. For example, the patent system was adopted in 1979 to promote FDI in Thailand. It is expected that the strong regime of patent protection that guarantees satisfactory returns on investment plus other privileges provided by BOI will create a favourable climate for foreign investment and will encourage foreign corporations to establish manufacturing activities in Thailand.

Currently there are seven legislations protecting IP rights in Thailand, including the Patent Act B.E. 2522, the Copyright Act B.E. 2537, the Trademarks Act B.E. 2534, the Plant Variety Protection Act B.E. 2542, and the Protection of Layout-Designs of Integrated Circuits Act B.E. 2543, the Trade Secret Act B.E. 2545, and the Protection of Geographical Indications Act B.E. 2546.

#### 3.1 Historical development of intellectual property law in Thailand

Unlike Western countries, Thailand has not had a long period of legal development in the field of IP. The first law to protect IP was copyright law, which can be traced back to 1892. Copyright was first protected in Thailand

under the Royal Proclamation of Vachirayan Library for the Protection Literary Works R.S. 111. Subsequently, the Copyright Act 1901 was adopted to extend protection to all published materials upon registration. The Copyright Act 1901 was then replaced by the Protection of Literary and Artistic Works Act 1931 which was adopted in order to bring Thailand's copyright up to the international standards after it ratified the Berlin Act 1908 of the Berne Convention. The Copyright Act B.E. 2537, which is the current law, came into force on 21 March 1995. It was adopted during a period of intensive external pressure demanding a complete overhaul of the country's IP law. The Act was considerably influenced by the United States that pressurised Thailand to protect computer program as a literary work.<sup>19</sup>

As for patents, although an idea for the establishment of a patent system emerged at first in 1913, there was no legal protection for inventions in the country until 1979. Rights over inventive ideas had never been recognised under Thai law. It was held by the Supreme Court in 1964 that 'rights over inventions' or 'patents' were not recognised as legal rights and were not enforceable in the court of law. After a long debate over the need for a patent system in the country, the first patent law was adopted, called the Patent Act B.E. 2522, and entered into force in 1979.

In 1992 and 1999, Thailand, under pressure from the United States, decided to revise the Patent Act in order to avoid trade sanctions. The amendments significantly increased the level of patent protection, including an expansion of the scope of patentable subject-matters, an extension of the term of patent rights, the protection of petty patents, laying down conditions for the application of compulsory licensing, amending the exclusive rights and their limitations, etc.

---

<sup>19</sup> Subhapholsiri, D., Copyright Law, Niththam Publishing House, Bangkok, 1996 (in Thai).

The first law protecting trademarks in Thailand was the Trademarks and Brand Names Act 1914. The law for the first time set up a system for the registration of trademarks. In 1931, a new trademarks law was adopted to replace the 1914 Act. The Trademarks Act 1931 had been in effect for 60 years before it was replaced by a new law, the Trademarks Act B.E. 2534. The new trademark law, which is still in force up till now, was amended in 2000. The amendment of the law was done in order to facilitate the trademarks registration process and to make Thai law complying with TRIPS standards.

Thailand also adopted other IP legislations. Like the current trademark law, other IP breeders in order to foster the development of a required technological base, and to assist the acquisition of foreign technologies. In addition, the enactment of the IP laws in Thailand would create a favourable climate for foreign investment as mentioned earlier.<sup>20</sup>

The Patent Act B.E. 2522, as amended in 1992 and 1999, provides patent protection for inventions in almost all fields of technology for up to 20 years from the date of filing of the application in Thailand. The duration of petty patents is six years for a petty patents and ten years for a design patent. The term of a petty patent may be renewed twice, two years each. Patent protection in Thailand can be obtained either as a product or a process patent. The holder of a product patent has an exclusive right to make, use, sell, stock for sale, offer for sale and import the patented product. Patent law has a very strong form of monopoly rights. The patent holder may file a criminal or a civil lawsuit, or both,

---

<sup>20</sup> The arguments in favour of the patent system in this respect are found in Sell, A. and M. Mundkowski "Patent Protection and Economic Development - Some Results of an Empirical Analysis in the Pharmaceutical Industry in Latin America", 10 IIC 566 (1979); Mangalo, N., "Patent Protection and Technology Transfer in the North-South Conflict", 9 IIC 109 (1978).

It is even argued that weak patent protection will push foreign investments out of the country. See Behrman, J. and A. Deolakikar "Of the Fittest?, Duration of Survival of Manufacturing Establishments in a Developing Country", Journal of Industrial Economics, Vol.38, 1989, p.215.

against those who commit an infringement of his patent rights. An intentional infringer subjects himself to imprisonment up to 2 years and a fine up to 400,000 baht or both.

A functioning system of IP administration in Thailand is still far short of the level in advanced nations. Thailand does not have a coherent administrative system to implement the law. In the wake of the economic crisis, the Thai Patent Office is underfunded. Since salary level is not so high, it is hard to recruit, prepare and maintain a group of competent examiners in each field of technology. These problems make the country dependent on the patent office of the developed countries for administration of its patent system (i.e. the prior search and examination as to the validity of patent applications). The patent office's laxity in issuing patents results in invalid patents being granted, like in the case of ddI patent where an invalid patent being issued for ddI (an anti-retroviral) drug, and where Thai NGOs and AIDS patients engaged in a long legal battle with a multinational pharmaceutical company fighting to cancel the patent over ddI.<sup>21</sup> Laws such as the Plant Variety Protection Act B.E. 2542, and the Protection of Layout-Designs of Integrated Circuits Act B.E. 2543, the Trade Secret Act B.E. 2545, and the Protection of Geographical Indications Act B.E. 2546 were enacted to fulfill Thailand's obligations under WTO TRIPS Agreement with less pressure and influence from Western countries.

### 3.2. Patent law and its effects on Thailand

The laws on patents, copyright, layout-design of integrated circuits, plant varieties, trade secret and geographical indications have a common aim. That is to provide a temporary monopoly for inventors, creators, designers and plant

---

<sup>21</sup> Kuanpoth, J. "Patents and Access to Medicines in Thailand – The ddI case and beyond", *Intellectual Property Quarterly*, Issue 2, 2006, pp.149-159.

The strengthening of IP protection in developed countries has been taken place in the context of legal systems with a solid tradition in the area of competition law and consumer protection.<sup>22</sup> In Thailand, as in other developing countries, the laws protecting consumers and regulating competition in the market are weak. As a result, the right holders can increase the price of the products protected by IP rights as they wish. This will unnecessarily place an additional burden and deprive the people of access to essential products as has happened in Thailand.<sup>23</sup>

#### 4 Legal System and Economic Development

Thailand recently became one of the fastest-growing economies. The average annual growth rate between 1952 and 2000 is 6.6 percent. The Thai economic growth rate reached a remarkable figure of 11 per cent in 1988 and 1989. Despite the recent economic crisis the country faced, Thailand's GDP growth in recent years is still high (i.e. 6.1 and 5.6 percent in 2004 and 2005 respective).<sup>24</sup> The factors contributing to the high rate of economic growth are the boom in exports of both goods and services, inflow of foreign investment, and growth in agricultural and industrial sector.<sup>25</sup>

In early years, Thai industry emerged from, small and medium sized family companies, producing mainly traditional products for domestic consumption. Since 1932 when Thailand changed its system of government from absolute to constitutional monarchy, increased industrial investment and development has

---

<sup>22</sup> Correa, C.M., Intellectual Property Rights and the Use of Compulsory Licences: Option for Developing Countries, Working Paper No.5, South Centre, 1999, p.1.

<sup>23</sup> Kuanpoth, J. "TRIPS-Plus Intellectual Property Rules: Impact on Thailand's Public Health", Journal of World Intellectual Property, Vol.9, No.5, 2006, pp.573-591.

<sup>24</sup> Source: Bank of Thailand; National Economic and Social Development Board, 2006. See Cuyvers, L., P. de Lombaerde, B. Dewulf, and D. Bulcke, "Export Strategies and Policies in Thailand until 1995," CAS Discussion Paper No 10, Centre for International Management and Development, Antwerp, 1997.

<sup>25</sup> Siamwalla, A. "The Thai Economy: Fifty Years of Expansion," in A. Siamwala (ed.), Thailand's Boom and Bust, Thailand Development Research Institute, Bangkok, 1997.

become one of the main economic objectives of the Thai government. Industrialisation during the 1960s-1970s was primarily aimed at substituting imports. Because of an investment promotion policy adopted by the government since the 1960s, a great number of industries, most of which were joint ventures between Thai and foreign companies, were established. This led to the rapid growth of Thai industrial production, since foreign partners contributed capital, modern technology, and efficient management. In the 1980s, a strong emphasis was placed on export promotion for foreign exchange earning. Thai exports have gradually expanded since the late 1980s. The recent and current performances of Thai products in international markets are highly successful. Thailand's major trading partners are the United States, Japan, the European Union, and the countries of the Association of Southeast Asian Nations (ASEAN). Among these countries, the United States is Thailand's most significant trading partner.

Foreign companies are widely regarded as major driving forces behind the rapid development of Thai economy. For a developing country like Thailand, the participation of global firms in the national economy is essential for the country to survive in today's hostile commercial environment. The contribution of foreign companies could make to national development of Thailand if the role and responsibility of these companies are well defined and their management techniques that can lead to negative effects are properly and adequately controlled. In an attempt to attract the interests of multinationals, Thailand realises that it is necessary to establish a suitable 'investment climate'. Nevertheless, this climate cannot be created solely by the mere promulgation of investment promotion policy and various incentives. The creation of such a climate needs to be matched with the availability of several interrelated factors, including economic, political and legal conditions in the host country.<sup>26</sup>

---

<sup>26</sup> Anderfelt, U., *International Patent-legislation and Developing Countries*, Martinus Nijhoff, The Hague, 1971, pp.139-141.

Anderfelt points out that, among the three factors, economic and political conditions within the host country are more influential on the investor's decision to invest in a particular country than the legal conditions. He observes that:

“... only in the case in which neither economic nor political conditions pose any significant non-business risks for the venture would the legal conditions be of primary importance.”<sup>27</sup>

The politico-economic factors, such as local market size, low-waged labour force, available raw materials, advantages for export-oriented production, political stability, etc., are far more important than the legal framework like investment promotion law or IP law. There are a number of evidences suggesting that the availability of a sound legal system alone does not guarantee the inflow of FDI. According to Bangs, the majority of the firms in his survey felt that legal protection of industrial property was not a decisive factor in their decision to undertake foreign investment.<sup>28</sup> This view is shared by Carlos Correa who contends that there are several factors affecting relationship between FDI and the legal system. Those factors include investment climate, political situation, human resources, and degree of industrial and technological development of the country in question.<sup>29</sup>

### Figure 1

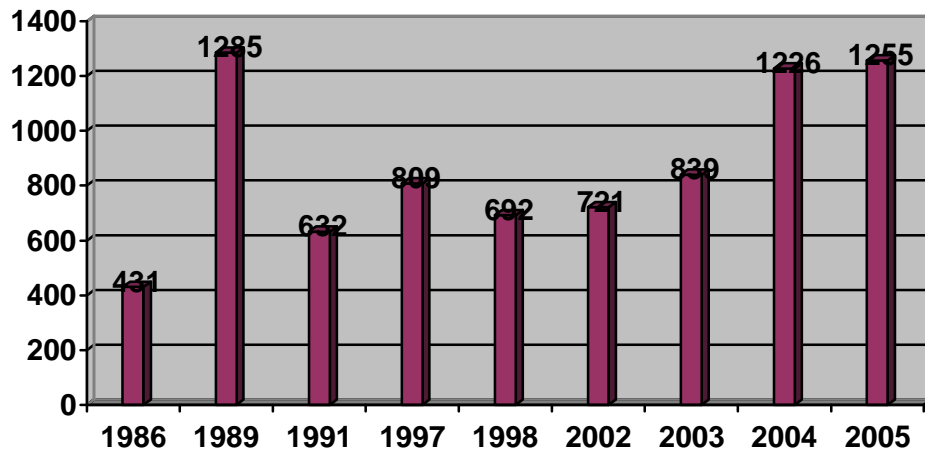
#### Number of Applications for BOI Promotion

---

<sup>27</sup> Ibid. See also Maskus, K.E., Encouraging International Technology Transfer, UNCTAD-ICTAD Project on IPRs and Sustainable Development, Issue Paper No.7, 2004, pp.18-20.

<sup>28</sup> Bangs, R.B. “Use of Industrial Property in Foreign Countries: A Further Report”, IDEA - The Journal of Law and Technology, vol.13, 1969-70, p.557.

<sup>29</sup> Correa, C.M. “Intellectual Property Rights and Foreign Direct Investment”, International Journal of Technology Management, Vol.10, 1995, pp.173-199.



Source: Board of Investment, Bangkok, 2006

The experience of Thailand has shown that economic and political conditions in the country are significant factors for foreign investors to relocate manufacturing operations to Thailand. The statistics in Figure 1 reveal that the level of foreign investment increased significantly during the late 1980s (i.e. from 431 to 1,285 BOI applications between 1986 and 1989). The growth mainly came from both external and internal factors, such as the favourable world economic situation such as the weak oil price, and the government's foreign exchange policy of maintaining the value of the baht at an appropriate level. Thailand's attractiveness also comes from a proactive government and the country's stable political and social environment which provides the opportunity for foreign companies to improve market access and business inputs.

With a population of more than 60 million, Thailand provides investors with access to a growing domestic market and provides a cost-effective regional manufacturing and distribution hub. The government's policy stimulating trade along the borders with neighbouring countries (i.e. Cambodia, Laos and

Myanmar), as well as its geographical location, makes Thailand attractive for companies to use a base in Thailand as a springboard into Indo-China which is home to a combined population of over 125 million people.<sup>30</sup>

It may be noted that the types of foreign investment in Thailand are usually related to national economic circumstances and resources available in the country. For instance, Thailand's abundant natural resources have attracted potential investment in the exploration of oil and gas and mineral development (e.g. tin mining). Competitive advantages of Thailand, such as low-cost material inputs and abundance of cheap labour, have induced FDI in the area of manufacturing. Other conditions such as a growing domestic demand and high trade barriers on import also lead to the establishment of manufacturing activity.

After the high success in attracting foreign investment in the late 1980s, the flow of FDI declined in the 1990s (Figure 1). The drop in FDI was attributed to several factors, including the Gulf war in the early 1990s. It was also attributed to Thailand's domestic situation, such as the military coup in February 1991, a saturation of investment in some manufacturing sectors, the high cost of land, infrastructure inadequacies and shortages in skilled personnel. FDI in Thailand dropped in 1998 due to the economic slump occurred in the previous year. However, the number of FDI in Thailand increased again from 2002 to 2005, after its economy had recovered from the economic crisis (Figure 1). The surge of FDI means Thailand still retains its attractiveness to foreign investors despite the economic crisis.

Thailand's economic performance depends largely on exports and FDI. It seems Thailand is no longer a cheap place to do business compared to its neighbouring ASEAN countries like Vietnam, Indonesia and the Philippines. With the

---

<sup>30</sup> Bangkok Post: Economic Review "Spins Ahead despite Hurdles", 30 December 1989, p.18.

emergence of China as an attractive location for a low-cost manufacturing base, Thailand has been losing its low-cost labour advantage. The cost of labour in Thailand may not be the cheapest in the region, but labour in fact forms a small part of the cost of most products. In the early 2000, two automotive companies (i.e. Toyota and Isuzu) invested more than US\$ 500 million and chose Thailand as their worldwide production bases for one-ton pickup trucks. The reasons for automotive companies to invest in Thailand despite the higher labour cost were the country's tax incentives, open markets and strong local car-parts industry. All these factors outweigh any disadvantage in labour costs. In addition, Thailand has many other advantages, including being a member of ASEAN, a free trade area that currently applies a small tariff of 5 percent on most products coming from its members. ASEAN has total population of over 500 millions, which is larger than Latin America, and its income per head is at US\$ 1,120, which is 40 percent higher than China's.<sup>31</sup>

While many countries may have been affected by the FDI rush to China, applications for investment promotion privileges in Thailand increased significantly between 2002 and 2005 (Figure 1). Major investments are proceeding generally as planned in Thailand. Although Thailand may lose its comparative advantage in labour-intensive businesses like textile (particularly when the current quota are phased out by WTO rules), it is still doing well in other sectors like agriculture, food processing, energy, and telecommunications. Thailand also has huge potential in the petrochemical and automotive industry sectors.

The foregoing reveals that growth and decline in FDI in Thailand depend on a number of positive and negative conditions. The legal system is not the major

---

<sup>31</sup> The Economist "Give it a chance", 28 February 2002.

determinative factor that can influence and promote foreign investment. This can be seen when Thailand amended its copyright law in 1994 to protect computer programs or when its patent law was amended in 1992 to protect pharmaceutical products, the expansion of IP protection did not make Thailand more attractive to software or pharmaceutical companies. So far, multinational software and pharmaceutical companies have not established a full-range operation in Thailand. The investments of the multinationals are still limited to the certain stage of production depending on the conditions in the country. For example, the world's second largest computer chip manufacturer like Seagate was attracted to produce computer parts and integrated circuits in Thailand because of the country's low-cost domestic inputs and other business factors. Likewise, the pharmaceutical companies have never carried out drug production in Thailand, but supply the Thai market by importing products from overseas plants, regardless of the level of IP protection in the country.

#### Final Remarks

Attempts have been made in this study to explore the role of legal system as it relates to economic development with special reference to the situation in Thailand. So far Thailand has adopted an open door policy as regards to foreign investment, but it is still cautious in liberalising its investment regime. Thailand still imposes a number of restrictions and maintains government's ability to regulate the economy and protect the public interest such as through FDI entry-screening measures.

For developing countries like Thailand, the tension between modernising their economies through the admission of FDI and the desire to retain control over strategic economic sectors is a contrast one. Thailand and other developing

countries generally view foreign investment, which is a means of long-term ownership of national assets and resources, much more politically sensitive than export trade. Given the negative effects of reckless liberalisation as reflected in the case of the Thai financial sector, developing countries are well advised to take cautious approach when it comes to any kind of economic liberalisation. The legal system particularly law on foreign investment and IP must be designed to suit the needs of the country and the national economic structure. Law should serve as an economic tool to expand production capabilities of local manufacturers and to achieve technological modernisation. It must also safeguard domestic enterprises from competition, as long as it does not violate the country's international obligation.

The fear of losing the largest export market was the main factor that moved the attitude of the Thai government to acceptance of reforms in law that generates no benefit to the country. So far, Thai exports have heavily relied on the United States market. Even though the significance of large markets with high purchasing power, like the United States, still remains, the enlargement of an export market beyond that market to encompass other trading areas is strategically important. Thailand and other developing countries should lessen its dependence on any particular market and attempt to diversify markets away from intense protectionism.