1890 Tilleke & Gibbins lawyers

AN OVERVIEW OF THAILAND'S ANTI-CORRUPTION LEGISLATION

By

Karsta Straub (2004)

Updated August 2009 by

Titirat Wattanachewanopakorn

and

Clemence Gautier

Under the supervision of
David Lyman, Chairman & Chief Values Officer
Tilleke & Gibbins International Ltd.

With the assistance of

Ms. Uruphan Benjarurawong, who translated numerous provisions
and helped interpret unclear translations
and
Dr. Piyawat Sivaraks, who provided information on the Civil Service Act for correctness

Bangkok
Supalai Grand Tower, 26th Floor
1011 Rama 3 Road
Chongnonsi, Yannawa
Bangkok 10120, Thailand

Tel: +66 2653 5555
Fax: +66 2653 5678
E-mail: bangkok@tillekeandgibbins.com
Website: www.tillekeandgibbins.com

Table of Contents

		Page
I.	**ANTI-CORRUPTION LEGISLATION – GENERAL**	**1**
II.	**DEFINITION**	**2**
III.	**ANTI-CORRUPTION LEGISLATION IN THAILAND**	**2**
	A. Penal Code	**3**
	B. Constitution of Thailand B.E. 2550 (A.D. 2007)	**6**
	National Anti-Corruption Commission Concept of “Unusual Wealth” Declaration of Assets and Liabilities Impeachment and Criminal Prosecution Other Constitutional Measures to Fight Corruption	
	C. Organic Act on Counter Corruption B.E. 2542 (A.D. 1999), as amended by No. 2 B.E. 2550 (A.D. 2007)	**8**
	D. Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (A.D. 1999), as amended by No. 2 B.E. 2550 (A.D. 2007)	**9**
	E. Management of Partnership Stakes and Shares of Ministers Act B.E. 2543 (A.D. 2000)	**9**
	F. Organic Act on the Election Commission B.E. 2550 (A.D. 2007) and Organic Act on the Election of Members of the House of Representatives and the Selection of Senators B.E. 2550 (A.D. 2007)	**10**
	G. Civil Service Act B.E. 2551 (A.D. 2008)	**13**
	H. Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (A.D. 1996)	**14**
	I. Additional Regulations and Directives Governing the Conduct of Government Employees	**15**
	Regulations of the Office of the Civil Service Commission on Ethics of Civil Servants B.E. 2537 (A.D. 1994)	

© 2009 Tilleke & Gibbins International Ltd.

Regulations of the Office of the Prime Minister on Soliciting Donations by Government Agency B.E. 2544 (A.D. 2001), as amended by No. 2 B.E. 2549 (A.D. 2006)

Regulations of the Office of the Prime Minister on the Giving or Accepting of Gifts by Government Officers B.E. 2544 (A.D. 2001)

Regulations of the Office of the Prime Minister on Ethical Code of Political Officials B.E. 2551 (A.D. 2008)

J. Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992), as amended up to No. 7 B.E. 2552 (A.D. 2009) **15**

K. Act on Offenses Relating to the Submission of Bids to State Agencies B.E. 2542 (A.D. 1999) **18**

L. Official Information Act B.E. 2540 (A.D. 1997) **19**

M. Whistleblower Protection Bill **19**

N. Money Laundering Prevention and Suppression Act B.E. 2542 (A.D. 1999), as amended up to No. 3 B.E. 2552 (A.D. 2009) **19**

O. Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (A.D. 1999), as amended up to No. 5 B.E. 2551 (2008) **21**

P. The 30th Announcement of the Council for National Security: Examination of Conduct Causing Damages to the State B.E. 2549 (A.D. 2006), as amended by No. 2 B.E. 2550 (A.D. 2007) **21**

IV. CORPORATE GOVERNANCE **25**

Public Limited Companies Act B.E. 2535 (A.D. 1992), as amended up to No. 3 B.E. 2551 (A.D. 2008)

Securities and Exchange Act B.E. 2535 (A.D. 1992), as amended up to No 4 B.E. 2551 (A.D. 2008)

Civil and Commercial Code

V. FOREIGN CONVENTIONS **25**

VI. ANTI-CORRUPTION LEGISLATION IN THAILAND – IMPLICATIONS **27**

VII. INSTITUTIONS **28**

© 2009 Tilleke & Gibbins International Ltd.

AN OVERVIEW OF THAILAND'S ANTI-CORRUPTION LEGISLATION

The purpose of this paper is to provide basic information on the anti-corruption legislation in Thailand. We would like this paper to be viewed and used as a living document, open to corrections and suggestions.

We hope that it can serve as a framework for different groups which are interested in the field of anti-corruption and that it will be amended accordingly by different professions to serve varying purposes.

In that context, we would like to stress that a number of anti-corruption laws and institutions have been fairly newly established. They are going through the phase of first-time applications, and it would be premature to comment on their implications or speculate about the interpretation of certain provisions.

Please note that only regulations concerning corrupt practices as such will be discussed. For questions relating to good governance and corporate governance, please refer to information that specifically deals with the responsibilities of directors and other company officers.

I. ANTI-CORRUPTION LEGISLATION – GENERAL

When talking about laws to fight corruption, we do not concentrate only on the criminal law and the laws of evidence, although they are without a doubt important. But focusing on these elements alone ignores a wide array of necessary laws. These include legislation that covers, for example, access to information, conflict of interest, public procurement, freedom of expression and the press, protection of whistleblowers and complainants, gifts and hospitality, judicial review of the legality of administrative actions, and others.

There are a number of laws in Thailand that contain anti-corruption measures. Not all of them deal explicitly with corruption, but rather include regulations that indirectly aim at the prevention of corrupt practices.

Interestingly, the laws dealing with corruption reflect, to some extent, the character of each of the previously short-lived administrations. As a consequence of different priorities of

© 2009 Tilleke & Gibbins International Ltd.

respective governments, the Thai anti-corruption legislation as a whole may not seem totally homogeneous and fails to reflect an unequivocal national approach with regard to curbing corruption. In particular, some administrations allowed for more discretion than others in the determination of corrupt practices by making extensive use of unclear language in the legislation. Often, the law includes vaguely defined exceptions that open up the opportunity to undermine its effectiveness.

However, it should be noted that Thailand, in comparison to a large number of other countries, has enacted an impressive number of laws dealing with corruption and ethical standards.

II. DEFINITION

Controversy over corruption begins with its definition. The term "corruption" has been used to refer to a wide range of illicit or illegal activities. Although there is no universal or comprehensive definition of what constitutes corrupt behavior, the most prominent definitions emphasize the abuse of public power or public position for personal benefit. These definitions—placing the public sector at the center of the phenomenon—do not cover private-to-private corruption. No doubt, this is because the discussion of the detrimental impacts of corruption in the private sector is only a recent development.

The definition contained in the Thai Organic Act on Counter Corruption follows these general guidelines but also includes fraud.

In addition, when discussing the parties involved in corruption, the terms "active" and "passive" corruption are commonly used. In this context, "active" refers to the offering of a bribe (the supply side), while the action of receiving a bribe (demand side) is described as "passive" corruption.

III. ANTI-CORRUPTION LEGISLATION IN THAILAND

From 1932 to 1975, corruption and bribery were regulated through the respective Criminal Codes only. In 1975, Professor Sanya Dhamasakti (the Prime Minister), Pol. Maj. Gen. Atthasit Sitthisunthorn (the Minister of Interior), and some members of Parliament who perceived the need for special legislation to combat corruption in Thailand successfully pushed for the promulgation of the Counter Corruption Act and established the Office of the National Anti-Corruption Commission (ONAC) to deal with the problem in the public sector. However, the

© 2009 Tilleke & Gibbins International Ltd.

ONAC remained a “paper tiger” mainly due to its lack of investigative powers. In 1992, the Civil Service Act was drafted to prescribe the conduct of government employees in office.

In October 1997, Thailand promulgated its fifteenth constitution in 65 years. This charter, for the first time in Thai history, established a constitutional mechanism to attempt to secure accountability of politicians and bureaucrats. Under the 1997 Constitution, Thailand sought to curb corruption through a system of declaration of assets and liabilities and through the creation of an independent counter-corruption agency. Subsequently, a number of laws were enacted to give substance to the provisions in the charter.

Because of the coup on September 19, 2006, the 1997 Constitution was abrogated. This led to a period in which the royally endorsed junta ruled the country by martial law and executive decree for several weeks until it promulgated an interim constitution on October 1, 2006. The interim constitution allowed the junta to appoint a Prime Minister, legislature, and drafting committee for a permanent constitution. The need for an updated and more appropriate anti-corruption policy was acknowledged by the Constitutional Drafting Committee. In August 2007, Thailand finally promulgated its sixteenth constitution which was generally similar to the previous one, with the exception of certain provisions relating to corruption.

A. Penal Code

Effective criminal laws should account for the six basic offenses: (1) bribery of public servants; (2) solicitation or acceptance of gifts by public servants; (3) abuse of political positions for personal advantage; (4) possession of unexplained wealth by a public servant; (5) secret commissions made by agents or employees in the case of private sector corruption; and (6) cases of bribes and gifts to voters. These offenses, with the exception of private sector corruption, are dealt with in a variety of Thai laws.

The Thai Penal Code deals with different types of corruption, including bribery. However, the regulations are limited to public corruption or other types of abuse of public office for personal gain. Still, the law distinguishes between a number of scenarios by including active (offering) as well as passive (accepting) bribery and even penalizes the promise to bestow a benefit.

Title II in Book II of the Penal Code entitled “Offenses Relating to Public Administration” contains several regulations that deal with bribery of officials, members of the State

Legislative Assembly, members of the Changwad Assembly (at the provincial level), or members of a Municipal Assembly.

The relevant regulations are contained in Sections 143, 144 (“Offenses Against Officials”), 148, 149, and 150 (“Malfeasance in Office”).

Section 143’s English translation may sound somewhat unclear with regard to who is subject to penalty. Based on the Thai version of the provision, we understand that Section 143 attempts to cover cases in which an *intermediary* accepts a benefit in compensation for influencing a public official, or a member of any of the Assemblies named above, to perform or omit any of his or her functions resulting in an advantage or disadvantage. The intermediary must act unlawfully or dishonestly. Also, the mere demand of or agreement to accept a benefit is penalized. However, it is certainly noteworthy that there is no regulation in the Penal Code that proscribes the giving of a benefit to a broker, thus allowing a person who makes use of a middleman to go penalty-free. *(Penalty: imprisonment not exceeding 5 years, fine not exceeding Thai Baht [THB] 10,000, or both)*

Section 144 punishes the bribing of a public official or Assembly member to incite him or her to undertake, avoid, or delay an act. The law requires that the desired act must be contradictory to the functions of the official, with the result that the act of bribing with the intention to induce an official to act in accordance with his or her functions goes penalty-free. It is unclear whether this result was intended by the legislature. Again, the sheer offer or agreement to give a benefit is punishable under Section 144, regardless of whether an advantage or disadvantage was established. *(Penalty: imprisonment not exceeding 5 years, fine not exceeding THB 10,000, or both)*

The following sections concern “Malfeasance in Office.”

Section 148 punishes the abuse of public power through coercion or inducing in order to procure a benefit. The members of the different Assemblies are not included in this section. *(Penalty: imprisonment of 5 to 20 years or imprisonment for life and fine of THB 2,000 to THB 40,000, or death)*

Section 149 prohibits public officials and Assembly members from accepting a benefit as a compensation for their exercising or avoiding any of their functions. Again, the demanding or agreeing to accept a benefit is treated equally by the law. It is not of importance if such act or the avoidance of it is wrongful, nor is it necessary that an advantage or disadvantage shall result from the official’s behavior. *(Penalty: imprisonment of 5 to 20 years or imprisonment for life and fine of THB 2,000 to THB 40,000, or death)*

Section 150 extends penalty to a situation where an official exercises or avoids any of his or her duties in return for a benefit that he or she accepted, demanded, or agreed to accept prior to his or her appointment as an official. *(Penalty: imprisonment of 5 to 20 years or imprisonment for life and fine of THB 2,000 to THB 40,000)*

Sections 151 through 154 address other abuses of authority for personal gain.

Title III in Book II of the Penal Code deals with "Offenses Relating to the Justice."

"Offenses Against Judicial Officials" are stipulated in Sections 167 to 199. Judicial officials, for the purpose of this law, are persons holding a judicial post, public prosecutors, officials conducting official cases, or inquiry officials.

Section 167 imposes a penalty on anyone who gives or agrees to give a benefit to a judicial official in order to induce him or her wrongfully to do, or not do, or delay an act. Again, the question arises whether such action is penalty-free if the benefit or property is given with the intention to ensure the exercising of a rightful act (e.g., paying a bribe to induce a judge to pass a judgment that is in accordance with the facts and the law). *(Penalty: imprisonment not exceeding 7 years and fine not exceeding THB 14,000)*

"Malfeasance in Judicial Office" is penalized in Sections 200 to 205.

Section 201 provides for the punishment of any officials holding judicial posts who wrongfully demand, accept, or agree to accept a benefit for themselves or other persons in order to exercise or not exercise any of their functions. It is not important whether the performance or nonperformance of such act is wrongful. The simple fact that an official accepts benefits for exercising his or her duty is considered punishable. *(Penalty: imprisonment of 5 to 20 years or imprisonment for life and fine of THB 2,000 to THB 40,000, or death)*

Despite heavy sentences that include the death penalty, the Penal Code remains a rather ineffective tool against corruption. This is because the direct evidence necessary to prosecute under the Criminal Procedure Code, which requires a paper trail (invoices and receipts), is difficult to collect. Therefore, not many cases were prosecuted in the past. Also, those offenders who were tried before the criminal court were often confronted with penalties that were out of proportion to the damage incurred. Consequently, the impression emerged that the criminal law has been applied on a very ad hoc basis.

Furthermore, if corrupt practices are defined in the Penal Code, it is impossible to prosecute new, innovative methods of corruption without incorporating them into the Penal Code or other legislation. The Penal Code only deals with the offering, acceptance, or demand of

© 2009 Tilleke & Gibbins International Ltd.

property and/or other benefits—in short, bribery only. It therefore doesn't penalize other methods of corruption. As a practical result, the Penal Code often fails to cover the large-scale, more sophisticated types of corruption. In order to overcome such obstacles as in the Criminal Procedure Code, Thailand has adopted the concept of "unusual wealth" in its Constitution. In simple terms, under this premise, if an official displays an "unusual increase" in cash or assets, the official will be obliged to demonstrate the origin of his or her assets. If sufficient evidence for the legal acquisition cannot be brought forward, the law allows for the assumption that the "unusual wealth" was procured through corrupt practices.

B. Constitution of Thailand B.E. 2550 (A.D. 2007)

As mentioned above, Thailand tries to control corruption through a system for the declaration of assets and liabilities and through the creation of an independent counter-corruption agency with considerable powers. The 2007 Constitution, which was adopted in August 2007, remains generally similar to the 1997 Constitution, with notable differences pertaining to corruption matters and in particular the rules governing the Election Commission.

National Anti-Corruption Commission

The 1997 Charter sought to remedy problems encountered in the past through the establishment of a new National Counter Corruption Commission (NCCC), and this institution was maintained under the 2007 Constitution (Chapter 11, Articles 246–251). Since July 2008, the NCCC has been referred to as the National Anti-Corruption Commission (NACC) in order to comply with the broadly used term "anti-corruption." The NACC is an agency independent of the government with broad powers of investigation. Having been provided with the authority to overrule the Attorney General, the Commission is in a position to independently initiate prosecution.

There were debates between government agencies about how to define "independence of constitutional bodies." The former Prime Minister suggested that these bodies should enjoy autonomy rather than independence, defending his interpretation by citing the interdependence of government agencies as well as the need for unity for the sake of national interests.

In addition to the NACC, the Constitution also established other independent agencies to ensure a transparent and corrupt-free government, including among others the Office of the Ombudsman, the Constitutional Court, the Election Commission (see III.F.), and the Human Rights Commission.

© 2009 Tilleke & Gibbins International Ltd.

Concept of “Unusual Wealth”

The Organic Act on Counter Corruption defines “unusual wealth” as “having an unusually large quantity of assets, having an unusual increase of assets, having an unusual decrease of liabilities or having illegitimate acquisition of assets in a consequence of the performance of duties or the exercise of power in office or in the course of duty.”

Under the 2007 Charter, the NACC can conduct investigations on its own initiative without receiving any complaints (Article 250 [3] and [4]). The Commission is also provided with the mandate to examine the assets of politicians or state officials in cases where an individual is suspected to have accumulated wealth in an unusual manner. The law is based on the presumption that a significant expansion in assets is the result of corruption. With this shift in the burden of proof, the suspect has to document that he obtained the property legally.

If the NACC arrives at the conclusion that wealth has been accumulated unusually (illegally), the Commission is obliged to forward the case to the president of the Senate to initiate impeachment, and to the Attorney General to institute proceedings in the Supreme Court’s Criminal Division for Persons Holding Political Positions (Article 262).

Declaration of Assets and Liabilities

To support this process, specific members of the national and local governments, as well as their families, are required to file a declaration of assets and liabilities within 30 days after taking and again after leaving office (Article 259). The NACC must review all submissions. If an individual fails to submit proper and complete statements, the NACC is obliged to file a report with the Constitutional Court (as happened in the case of former Prime Minister Thaksin). The same applies if the declaration contains false information.

Impeachment and Criminal Prosecution

The Constitution provides for different penalties, including the removal of officials from office, for corrupt actions or malfeasance as well as for criminal prosecution. The proceedings are regulated in Chapter 10 of the Constitution, Part 3 (Removal from Office) and Part 4 (Criminal Proceedings Against Persons Holding Political Positions). The new Charter features one significant change over its 1997 predecessor, as the same chapter includes a section relating to “Action Amounting to a Conflict of Interests.” This part was included in order to avoid any acts detrimental to the public interest and more specifically to avoid the designation of a nominee by a Senator or a member of the House of Representatives to replace him or her in another political function, or to receive any contributions from a state agency or other agencies.

© 2009 Tilleke & Gibbins International Ltd.

Other Constitutional Measures to Fight Corruption

Article 302 requires that the following key pieces of legislation, among others, shall continue to be in force: the Organic Act on Ombudsmen B.E. 2542 (A.D. 1999); the Organic Act on Counter Corruption B.E. 2542 (A.D. 1999), as amended by No. 2 B.E. 2550 (A.D. 2007); and the Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (A.D. 1999), as amended by No. 2 B.E. 2550 (A.D. 2007).

C. Organic Act on Counter Corruption B.E. 2542 (A.D. 1999), as amended by No. 2 B.E. 2550 (A.D. 2007)

The Organic Act on Counter Corruption, sometimes also referred to as the Act Supplementing the Constitution relating to Prevention and Suppression of Corruption, has been clarified by the following notifications:

1. Notification of the National Counter Corruption Commission concerning the income-based determination of local government organizations to enhance political titles for the local administrators and members of local administration council No. 2 B.E. 2543 (A.D. 2000)

2. Notification of the National Counter Corruption Commission concerning the determination of the positions of state officials who must submit a list of assets and liabilities B.E. 2543 (A.D. 2000)

3. Notification of the National Counter Corruption Commission concerning the provisions of the acceptance of property or any other benefit on an ethical basis by state officials B.E. 2543 (A.D. 2000)

4. Notification of the National Counter Corruption Commission concerning the determination of the positions of state officials prohibited from carrying out the activities under Section 100 of the Organic Act on Counter Corruption B.E. 2542 (A.D. 1999), B.E. 2544 (A.D. 2001)

The Organic Act on Counter Corruption establishes the National Anti-Corruption Commission (Chapter I) and regulates the powers and duties of its members (Chapter II). Seven divisions have been established within the NACC: Prevention; Suppression; Inspection of Assets and Liabilities; Research; Legal Affairs; International Affairs; and Human Resource Development. Among its powers, the NACC is entitled to overrule the Attorney General and has the right to examine the assets of politicians or state officials in case of suspicion of unusual wealth, thus

providing this Commission with broad powers. The inspection of assets and liabilities of different position holders is dealt with in Chapter III. Part I of Chapter III defines the procedures that apply to the declaration of assets and liabilities of persons holding political office, while Part II is concerned with state officials. Chapter IV of the Act regulates fact inquiries. Chapters V to VIII discuss different types of proceedings (e.g., removal from office, criminal proceedings against politicians, transfer of property to the state, and inspection of state officials). Chapter IX defines the notion of "conflict of interest," a concept that has only recently been introduced in Thailand. Administrative questions relating to the operation of the NACC are dealt with in Chapter X. Finally, a number of penalties in cases of noncompliance with NACC orders and other failures to conform to the Act are set out in Chapter XI.

D. Organic Act on Criminal Procedures for Persons Holding Political Positions B.E. 2542 (A.D. 1999), as amended by No. 2 B.E. 2550 (A.D. 2007)

The Organic Act on Criminal Procedures for Persons Holding Political Positions describes the procedures for cases that are subject to a follow-up before a special commission of the Criminal Court. The cases can be brought by the NACC or the Attorney General. The Supreme Court of Justice will be in charge of the cases concerning the persons holding political positions and who are deemed to have gained unusual wealth due to corruption.

E. Management of Partnership Stakes and Shares of Ministers Act B.E. 2543 (A.D. 2000)

In accordance with Articles 268 and 269 of the Constitution, the Management of Partnership Stakes and Shares of Ministers Act prohibits ministers from holding any profitable position or being an employee in partnerships, companies, or other organizations. In addition, a minister is not allowed to be a partner or shareholder in any type of profit-making organization. If occupying one of these positions at the time of appointment, the minister is legally obliged to transfer his or her shares to a juristic person to manage the property for the benefit of other people.

Up to now, the enforcement of these provisions has proven to be difficult, particularly since most ministers in Thailand also have business interests in one way or another. Oftentimes, holdings or positions were transferred to close relatives in anticipation of the appointment.

Lobbyists are pressing the legislature to extend the regulations to cover the minister's spouse, children, and siblings.

F. Organic Act on the Election Commission B.E. 2550 (A.D. 2007) and Organic Act on the Election of Members of the House of Representatives and the Selection of Senators B.E. 2550 (A.D. 2007)

The 1997 Constitution required the implementation of a statute that would diminish the influence of politicians. The Constitution, in conjunction with this previous legislation, stipulated that national elections would fall under the authority of the Election Commission (EC), an independent agency that was established under the 1997 Charter.

The regulators tried to design a legal framework that would help prevent electoral fraud and irregularities. Corrupt election practices, having their roots in the Thai election culture, are extremely widespread. They include vote-buying, promising of donations, and providing of various favors (including such simple "courtesies" as the serving of alcohol on the eve of election day).

Vote-buying in Thailand is much more complex than the simple exchange of money for votes because of the complicated structures and responsibilities within the patronage system that still exists in many parts of rural Thailand. The penalizing of what is often simply viewed as an old habit or a custom, rather than a crime, has not resulted in prosecutions, let alone convictions.

After more recent scandals regarding the election of legislators and the coup of 2006, new statutes regulating elections and the governmental system have been enacted: (1) the Organic Act on the Election Commission B.E. 2550 (A.D. 2007); (2) the Organic Act on the Election of Members of the House of Representatives and the Selection of Senators B.E. 2550 (A.D. 2007); (3) the Organic Act on Political Parties B.E. 2550 (A.D. 2007); and (4) the Organic Act on Referendum and the Law on the Election of Members of Local Assemblies or Local Administrators B.E. 2550 (A.D. 2007).

The key pieces of legislation are the Organic Act on the Election Commission and the Organic Act on the Election of Members of the House of Representatives and the Selection of Senators. These laws contain certain provisions relating to the restriction of a person's rights and liberties guaranteed under the 2007 Constitution, as permissible by virtue of law.

© 2009 Tilleke & Gibbins International Ltd.

Organic Act on the Election Commission B.E. 2550 (A.D. 2007)

The Organic Act on the Election Commission sets forth the duties of the EC, which include organizing elections and exercising certain legislative powers. Importantly, the EC is also empowered to conduct investigation and inquiry for fact-finding and to adjudicate and make decisions on problems or disputes that may arise with respect to the implementation of legislation falling within its purview, such as the Organic Act on the Election of Members of the House of Representatives and the Selection of Senators.

The EC also has authority to ask to the Anti-Money Laundering Office to notify the EC of the reports of transactions of political parties, persons holding positions in a political party, or candidates in an election when there appears to be reasonable evidence that an offense has been committed or that there has been a violation of the related laws.

Organic Act on the Election of Members of the House of Representatives and the Selection of Senators B.E. 2550 (A.D. 2007)

The Organic Act on the Election of Members of the House of Representatives and the Selection of Senators attempts to prevent electoral fraud and corruption by designing a legal setting that provides for a speedy and transparent electoral process (Chapter 1, Part 6).

Part 10 of Chapter 1 of the Act deals with election fraud in a manner that is broader than its 1998 predecessor. Section 103 states that prior to the announcement of the result of elections, the EC can conduct an investigation and inquiry on a candidate if it deems (i) that the candidate violated or facilitated other persons to infringe the law, or knew about this action but did not inform anyone; and (ii) that this act is likely to cause the election to be dishonest and unfair. In this case, the EC can revoke the election right of a candidate for a period of one year effective from the date of the EC order.

The Act further states that if the leader of a political party or a member of the Executive Committee of a political party commits any legal offense in regard to elections (connivance in the act, or knowledge of and failure to prevent such act), the political party will be liable and will be deemed to have committed an act to obtain power to rule the country by unconstitutional means. The EC shall file a motion with the Constitutional Court in order to dissolve the party. If the Constitutional Court orders the dissolution of the political party, the leader and members of the Executive Committee of such political party will not be eligible to run for office for a period of five years effective from the order of dissolution.

Section 103 has already been applied as the basis for dissolving two political parties—Chart Thai and Phak Matchima Thippathai—for vote-buying by executive members. These two

parties were dissolved on December 2, 2008, along with the People's Power Party for having violated the electoral laws for the Thai general elections of 2007. The nonexecutive members were given a delay for defecting to new or existing political parties.

After having been deemed to be benefitting from an illegal action, a candidate or a political party is granted a certain period of time to prove that they did not connive in such illegal act. If the candidate or the political party fails to prove—with "reasonable grounds"—why the action was committed, the EC will presume that the candidate was a supporter of such act or that the political party connived in such act. In the 1998 Act, no explanation or guidelines were given regarding the meaning of "reasonable grounds" taken into consideration for the liability. The 2008 Act still remains unclear on how a candidate or a political party can defend their position.

Once an election right of a candidate has been withdrawn by the EC, the candidate shall be subject to criminal proceedings.

If the EC is made aware that any person has acted in favor of a candidate or a political party in a manner that would undermine the integrity of the election, the commission is authorized to order such person to stop or correct his or her actions (Section 106). Again, the law does not define what behavior is considered to undermine the integrity of an election. Furthermore, neither the Organic Act on the Election of Members of the House of Representatives and the Selection of Senators nor the Criminal Procedure Code is explicit about what is to be regarded as "convincing evidence."

Interestingly, if such a case is reported directly to the police rather than the EC, the police are entitled to arrest such a person and proceed in accordance with the relevant laws. Section 107 also provides the EC with the option to seize cash and property if, convincing evidence provided, they find a person to have given, offered to give, or promised to give money or properties or prepared money or properties for the benefit of inducing a voter to vote for a candidate or political party or refraining from voting for a candidate or political party.

Sections 103 to 110 contain a number of other interesting provisions that give the EC the option to revoke election right, cancel the balloting, or void the results. Section 112 equips the EC or an appointed commissioner with the power to examine, search, seize, or attach documents, assets, or evidence in houses and premises of a suspect without a warrant if convincing evidence of a violation of the Organic Act is available. However, a warrant is necessary if the EC chooses to authorize EC members or other state officials to conduct such a seizure.

© 2009 Tilleke & Gibbins International Ltd.

In addition, the EC was given another powerful tool in Section 112 (2). It can request the Anti-Money Laundering Office to provide a financial transaction record of any person who was involved in the conduct of an election. It appears that the law does not require the presence of evidence that points to a violation of the election law when making such a request.

The Act further attempts to establish legal barriers for corrupting the election process by the electorate.

Other parts of the Organic Act (e.g., regulations on polling, counting of votes, electors, and electoral roles) try to minimize the opportunities for corrupt practices in similar ways.

Part 6 of the Act regulates questions relating to electoral expenditure and means of campaigning. The rules concerning electoral expenditure are aimed at providing for transparency and accountability of political parties and individual candidates, thereby limiting the opportunities for corrupt practices.

G. Civil Service Act B.E. 2551 (A.D. 2008)

As the name suggests, the Civil Service Act regulates the conduct of government employees in office. The implementation of the law is supervised by the Office of the Civil Service Commission (OCSC). The Act provides for the follow-up of corrupt practices in the public sector through disciplinary actions.

Section 83 of the Act defines the types of actions that are prohibited for civil servants. These actions include failure to perform the official functions in a manner amounting to bypassing the superior official, except if the civil servant was ordered to do so; failure to commit required acts; and commission of an act amounting to an abuse, oppression, or intimidation of others in the performance of official functions. Section 85 focuses on what can be understood as gross breaches of discipline, such as wrongfully performing or refraining from performing official duties in order to cause severe detriment to any person, or malfeasantly performing or refraining from performing official duties. Once the supervising official of the civil servant becomes aware of possible corruption in his or her department through any source, this official is required to quickly report to the supervising official in charge of appointment. The supervising official in charge of appointment can expedite proceedings or initiate a preliminary investigation into these accusations. The goal of such an informal inquiry is to establish reasonable grounds for further proceedings (Section 91).

If the results of the examination result in the conclusion that a gross breach of regulations was committed, the supervising official in charge of appointment is required to appoint a

© 2009 Tilleke & Gibbins International Ltd.

commission of inquiry to conduct a formal investigation into the allegations. This formal procedure is regulated in Sections 93, 94, and 95. In cases of minor infringement, the supervising official is entitled to proceed in a way he or she personally deems appropriate. With the exception of the examples of gross breaches of discipline listed in Section 85, there are no guidelines concerning the determination of the seriousness of a breach, and the decision of how to evaluate the action in question is left to the discretion of the supervising official in charge of appointment.

If, as a result of the formal investigation, a gross breach of discipline can be verified, the matter must be referred to the Province Civil Service Sub-Commission (CSSC), Department CSSC, or Ministry CSSC, to which the civil servant is attached, for consideration. A subcommittee consists of representatives of the OCSC who are permanently posted at all government entities. The civil servant can be punished by dismissal or expulsion, depending on the severity of the case.

An officer found guilty of a breach can lodge a complaint with the Merit System Protection Commission (MSPC) in order to appeal against the verdict. The MSPC can carry out the appeal consideration or may appoint an appeals commission to examine the appeal. The supervising official in charge of appointment shall follow the decision of the MSPC. If the civil servant disagrees with the ruling, a complaint has to be filed at the Supreme Administrative Court, which will render the final decision.

In addition, an officer found guilty can be held personally liable for incurred damages under civil law regulations.

The law also contains several provisions (e.g., Sections 36 and 83) with regard to conflict of interest.

H. Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 (A.D. 1996)

The Act Governing Liability for Wrongful Acts of Competent Officers establishes the concept of “corporate” responsibility of government entities. Government work units can be held responsible for “wrongful acts” committed by so-called competent officers in the course of their duty. We understand that corrupt practices are deemed wrongful acts for the purpose of this law.

The translation of the Act is not quite clear with regard to a mandatory liability of the work unit. However, we understand that according to Section 5 of the Act, the injured party can

choose to file a compensation suit against the respective government unit instead of claiming remedies from the officer directly under the Civil and Commercial Code. However, the work unit may still decide to call the officer as a party to the case.

The law gives plenty of room for discretion as to the question of liability, the amount of compensation, and the right to enforce payment of such compensation.

The Act also provides for the government to claim damages from an officer if a wrongful act against the government work unit was committed.

It is notable that the Prime Minister himself is the minister in charge and control of the execution of this Act.

I. Additional Ministerial Regulations and Directives Governing the Conduct of Government Employees

There are a number of additional Ministerial Regulations and Directives in place that attempt not only to govern the conduct of government employees with regard to corrupt practices, but also to promote ethical standards. They include Regulations of the Office of the Civil Service Commission on Ethics of Civil Servants B.E. 2537 (A.D. 1994), which are currently under revision; Regulations of the Office of the Prime Minister on Soliciting Donations by Government Agency B.E. 2544 (A.D. 2001), as amended by No. 2 B.E. 2549 (A.D. 2006); Regulations of the Office of the Prime Minister on the Giving or Accepting of Gifts by Government Officers B.E. 2544 (A.D. 2001); and Regulations of the Office of the Prime Minister on Ethical Code of Political Officials B.E. 2551 (A.D. 2008).

Other rules are contained in regulations dealing with the army personnel and the police forces, such as the Royal Thai Police Act B.E. 2547 (A.D. 2004).

J. Regulations of the Office of the Prime Minister on Procurement B.E. 2535 (A.D. 1992), as amended up to No. 7 B.E. 2552 (A.D. 2009)

Few activities create greater temptations or offer more opportunities for corruption than public sector procurement. Every level of government and every kind of governmental organization purchases goods and services from domestic as well as international suppliers, often in quantities and monetary amounts that defy comprehension. Similarly difficult to comprehend are the bribes paid by businesses in order to be awarded these large contracts. In Thailand, the going rate for kickbacks to government officials is reported to have increased

from 25 to 40 percent of the value of the contract. It has been alleged by insiders that THB 45 billion of the THB 150 billion spent on the Suvarnabhumi Airport was paid out as corruption money.

To the nonspecialist, the procurement procedures appear complicated. Often they are, and so they may be manipulated in a variety of ways without great risk of casual detection. The same applies to the way corruption is practiced. When talking about procurement and corruption, most outsiders simply imagine the payment of kickbacks. However, there are many other ways to corrupt the procurement process at any stage.

Before contracts are awarded, the purchaser can tailor specifications to favor particular suppliers, restrict information about contracting opportunities, claim urgency as an excuse to award to a single contractor without competition, breach the confidentiality of suppliers' offers, disqualify potential suppliers through improper prequalifications, and take bribes. At the same time, suppliers can collude to fix prices, promote discriminatory technical standards, create improper interference in evaluators' work, and of course, offer bribes. The most common approach is to try to engage in direct negotiations without any competition.

For the purpose of this document, we will only touch upon the regulations that directly deal with unethical behavior on either side of the contract and leave aside regulations that indirectly try to provide for a transparent procurement process.

It is important to note that the procurement regulations do not explicitly prohibit bribery, nor do they explicitly bar the offering or the acceptance of benefits.

Clause 15 (*bis*) of Part 1 of Chapter 2 requires an open and transparent process that allows for fair competition by taking into account the qualifications and capabilities of the tenderers or bidders. However, the Clause further states that these principles shall not apply in specific cases constituting an exception under these regulations, thereby giving great latitude to the person in charge to sidestep the requirement for transparency and fair competition.

In order to provide for fair competition, the legislators also included the concept of the "jointly interested bidder" that constitutes a conflict of interest. A jointly interested bidder is defined in Chapter 1 Part 1 as a natural or juristic person who also has an interest, directly or indirectly, in the business of another natural or juristic person who tenders bids for work for the same project. An interest is assumed in cases of various management or capital relationships. In cases of capital relationships, a conflict is presumed if the person is a major shareholder in "the other" company bidding for the same work. A major shareholder is a party that holds more than 25 percent of the shares of that other business or, in exceptional

cases, at a ratio that is deemed appropriate by the procurement committee. Again, a vague provision such as this is prone to an abuse of discretion.

A jointly interested bidder is also assumed if the spouse or minor child of a tenderer holds a position (partner or shareholder) in another business which is tendering a bid at the same time.

Clause 15 (*ter*) provides that only one of the jointly interested bidders shall be entitled to tender a bid. Therefore, the officer in charge of the evaluation of bidders (evaluation officer) is required to examine the qualifications of each bidder with regard to any possible joint interest.

Clause 15 (*quinque*) requires the deletion of the name of such an apparent jointly interested bidder before the opening of the offer.

The Thai Procurement Regulations prohibit collusion amongst bidders. The "obstruction of fair price competition" is defined in Chapter 1 Part 1. In case of suspicion of collusion, Clause 15 (*sex*), Part 1 of Chapter 2, stipulates that the evaluating officer has to conduct an investigation. Should an examination confirm allegations or suspicions of collusion among bidders, the names of those applicants have to be removed from the list of competitors.

But again, Clause 15 (*sex*) provides for an exception from that undesired outcome. If the responsible evaluation officer determines that a bidder or tenderer has cooperated with the government in discovering or revealing the attempted obstruction (e.g., whistleblower), and in addition has not initiated the plot, the officer may decide to reward such cooperation by not deleting this bidder's or tenderer's name from the list.

With regard to misconduct of the government officers involved, Clause 10, Part 3 of Chapter 1, provides penal provisions for a willful or negligent infringement of the procurement regulations by the official in charge of the procurement process. Most importantly, Clause 10 punishes an official who assists a tenderer or bidder in an attempt to obstruct a fair price competition.

The imposed penalties are divided into three levels depending on the seriousness of the damage incurred and the intention of the government officer. The level of damage is not further defined, leaving it to the discretion of the person entrusted with the case to decide on the seriousness of the violation.

The provisions above can be considered the core measures to prevent corruption in procurement. For bidders, an infringement of them results in an exclusion from the bidding

© 2009 Tilleke & Gibbins International Ltd.

process. As mentioned above, there are numerous other provisions that are designed to serve as an impediment. However, since they mostly concern the actual bidding process and are, therefore, of a rather technical nature, they will not be further discussed in this paper.

Finally, the regulators certainly anticipated most of the ways in which the procurement process can be corrupted and tried to incorporate preventive measures (especially in the course of the fourth and fifth amendments). However, the preventive as well as the suppressive measures often provide, unfortunately, for very discretionary and only vaguely defined exceptions.

In a study conducted by the Center of Political Economics, three projects involving government procurement were scrutinized for suspected corruption. The researchers found that politicians, businessmen, and bureaucrats all colluded to take advantage of the projects in different ways and cashed in about 10 to 20 percent of the value of the projects. Ignoring the notion of conflicts of interest, the principle of the "jointly interested bidder" was often violated by high-ranking officials who held shares in the bidding companies. These construction companies bought their way through the bidding process by bribing the directors-general of the relevant departments or high-ranking officials at state enterprises.

The researchers further pointed out that government-drafted contracts, especially in the case of turnkey projects, invited corruption, despite the legislation in place. Politicians furthered the scope of corruption by approving more funds and changing the project sites without reference to feasibility studies or environmental impact assessments.

K. Act on Offenses Relating to the Submission of Bids to State Agencies B.E. 2542 (A.D. 1999)

The Act on Offenses Relating to the Submission of Bids to State Agencies defines the procedures in cases of allegations of infringement of the procurement regulations as well as applicable penalties. The term "bid" refers to submission of a proposal with the object of acquiring the right to enter into a contract with a state agency pertaining to purchase, hire, exchange, lease, asset disposal, concession, or receipt of other rights. The Act covers and punishes the actions of the bidder, the state officials who received the advantage, and any intermediaries. The main concept is that any bid which is not done fairly shall be punished accordingly.

L. Official Information Act B.E. 2540 (A.D. 1997)

The Official Information Act provides the public with the opportunity to peruse most official data and information. This is Thailand's Freedom of Information Act. However, as with so many other laws, in practice the public, especially journalists, have encountered great difficulty in enforcing their rights. Many government agencies simply refuse to cooperate or obey requests or orders to produce documents.

M. Whistleblower Protection Bill

A Whistleblower Protection Bill is currently being drafted. It will mandate the protection and the possibility of promotion for informants when it comes into effect. The Thai legislature intends to apply a carrot-and-stick approach, requiring civil servants to stand witness in fact-finding sessions and to submit relevant documents and offering promotions if the information provided proves useful. It remains to be seen, of course, whether the application of such an approach promotes the abuse of the bill for personal gain.

N. Money Laundering Prevention and Suppression Act B.E. 2542 (A.D. 1999), as amended up to No. 3 B.E. 2552 (A.D. 2009)

As part of the effort to combat corruption, Thailand enacted the Money Laundering Prevention and Suppression Act. This law originally aimed at combating not only the illicit drug trade but also corruption, public fraud, prostitution, and other specified predicate crimes.

Under the law, it is a crime to transfer, convert, or receive the transfer of funds or property arising from the above-specified criminal offenses for the purpose of hiding or concealing the source of the funds. Violators are punishable by imprisonment of up to 10 years plus a fine of up to THB 200,000. Violators are defined as persons who commit or attempt to commit a money laundering offense or aid another person in committing a money laundering offense.

Banking transactions are a primary activity subject to scrutiny under the anti-money laundering law, but other financial transactions are also covered. For example, an individual who secretly uses the money from a drug sale to purchase shares of publicly traded stocks on the Stock Exchange of Thailand could be prosecuted under the new law. Furthermore, a corrupt official who uses money obtained from a bribe to purchase land runs the risk of being exposed and having the land confiscated.

© 2009 Tilleke & Gibbins International Ltd.

Perhaps the most effective tool in combating crime is the ability of enforcement officials to seize, without a warrant, money or property connected with the commission of one of the seven specified crimes or a money laundering offense. The owner of the seized property must convincingly demonstrate that the property is not related to the commission of one of the enumerated crimes or a money laundering offense in order to recover the property. In addition, a key provision of the law requires banks and financial institutions to report all cash transactions over THB 2 million. Property transactions involving cash in excess of THB 5 million must also be reported.

In 2004, the Cabinet resolved to approve an amendment of the Money Laundering Prevention and Suppression Act.

Finally, on March 2, 2008, amendments to the Act became effective. These changes broaden the overall scope of the targeted offenses, increase the powers of enforcement officials to conduct investigation and seizures, and attack the controversial issue of dishonesty among government officials.

The Act was amended again in 2009, with the amendment becoming effective on November 19, 2009. The new amendment requires more control from financial institutions (especially regarding the control of first-time customers), the creation of policies on the acceptance of customers and management of risks, and the maintenance of such information for a period of five years from the date the account is closed or the relationship with the customer is terminated. The amended Act also more clearly identifies operators that are required to report suspicious transactions, such as traders in precious stones, jewelry, or gold; automobile dealers and providers of automobiles for hire-purchase; operators of real estate brokerage or agency services; and operators of electronic cards which are not financial institutions.

Finally, the punishment for not complying with the legal requirements has been strengthened. Instead of a fine up to THB 300,000 for the person convicted, the fine is now up to THB 500,000, plus THB 5,000 per day while the violation continues or until compliance begins.

The Act covers the transfer or conversion of funds or property obtained from the following activities:

1. Narcotics trafficking
2. Prostitution and other sexual offenses
3. Fraud against the public
4. Fraud involving financial institutions
5. Abuse of position by a government official
6. Extortion

© 2009 Tilleke & Gibbins International Ltd.

7. Trade in contraband
8. Offenses relating to terrorism under the Penal Code
9. Offenses in gambling under the gambling law, with particular emphasis on large-scale organization of gambling games

Certain provisions target government officials whose fines are doubled in case that they are principals or accomplices of any money laundering actions. This provision was implemented in order to curb corruption within Thai institutions.

O. Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (A.D. 1999), as amended up to No. 5 B.E. 2551 (2008)

The Administrative Court is a major institution for supervising the exercise of power by the administration agencies and state officials. The 1997 Constitution guaranteed the founding of the Court in an effort to make the bureaucracy accountable to the people, to safeguard the people's rights, and to lay down the standard of public administration. Therefore, the Court has been entrusted to try and adjudicate administrative cases of dispute between a private individual on one side and a state agency, government organization, state enterprise, and/or local government organization on the other side.

In short, members of the public can sue state agencies or individual officials for corruption, negligence, abuse of power, or any other wrongdoing in their performance of their duties.

Since the political culture of Thailand encourages strong state power, it was a very important step—also with regard to curbing corruption—that the Administrative Court was established. Since its establishment, the Court has demonstrated that it is determined to defend the rights, liberties, and equality of ordinary citizens. However, no citizen has yet taken a public official to the Administrative Court for corruption.

P. The 30th Announcement of the Council for National Security: Examination of Conduct Causing Damages to the State B.E. 2549 (A.D. 2006), as amended by No. 2 B.E. 2550 (A.D. 2007)

On September 19, 2006, Army Chief General Sonthi Boonyaratglin, together with his counterparts from the Thai Navy, Air Force, and Police, staged a classic Thai bloodless coup against the former Prime Minister, Thaksin Shinawatra. Once the situation was under control, the coup leaders established the Council for National Security (CNS) and a series of CNS announcements were released.

© 2009 Tilleke & Gibbins International Ltd.

The main objective of the 30th Announcement of the CNS is to give greater authority to the Assets Examination Committee (AEC) to examine misconduct that could cause damage to the country. In particular, the AEC's primary focus was to scrutinize the allegations of corruption being levied against the ousted Prime Minister. The relevant provisions with respect to policies of the state on anti-corruption issues are outlined below.

Clause 5 of this Announcement states that the AEC shall have the power to examine the following activities:

1. All performances and projects as approved or consented by any person in the Council of Ministers or by the Council of Ministers vacating office as a result of the Democratic Reform under Constitutional Monarchy may be examined where there are reasonable grounds to believe that any performance or project has been carried out dishonestly or corruptly.

2. Agreements, concessions, or procurements owned by the government services, state enterprises, or other government agencies may be examined where there are reasonable grounds to believe that any wrongful act has been facilitated to a private individual, or any act has been carried out illegally, dishonestly, or corruptly.

3. Any governmental practice done by any government official or agency may be examined where there are reasonable grounds to believe that it has been carried out illegally, dishonestly, or corruptly.

4. Any service done by any individual may be examined where it is suspected of being contrary to the law or evasion of the tax law which causes damage to the state.

If there are reasonable grounds to believe that any performance of the inspection has been carried out dishonestly or corruptly and there is a circumstance that any person is related to such dishonesty or corruption or involves circumstances of unusual wealth or an unusual increase of his or her assets, the AEC shall have the power to seize or attach all related assets of such person, spouse, and child who has not become *sui juris* of such person.

For the execution of duties under this Announcement, the AEC shall, in addition to the powers under paragraph 1, also have the powers under the following laws:

1. Under the Money Laundering Prevention and Suppression Act, the AEC shall be entitled to execute the power of the Anti-Money Laundering Commission and the Transaction Commission.

2. Under the Organic Act on Counter Corruption, the AEC shall be entitled to execute the power of the National Anti-Corruption Commission.

3. Under the Revenue Code, the AEC shall be entitled to execute the power of the Director of the Revenue Department, particularly to the seizure, attachment, and auction of assets.

For the execution under paragraph 1, paragraph 2, and paragraph 3, the AEC shall have the power to consider any matter deemed to be examined, requested with some evidence, or subjected to the consideration of any other agency, and shall have the power to summon a file or a matter subjected to the consideration of the government agency, or summon any inspection or examination file of the Office of the Auditor General of the State, if any, for its consideration and for use as its inspection file, whether or not the inspection is supplementary. In the case where its inspection is subjected to the consideration of the National Anti-Corruption Commission, Anti-Money Laundering Commission, or Transaction Commission, appropriate cooperation shall be established among them.

According to Clause 6, the AEC shall notify the names of the persons examined under Clause 5 to the financial institutions, Office of the Securities and Exchange Commission, Land Department, Revenue Department, other related agencies, and any person who possesses assets or documents or evidence related to the assets of such person so as to make them provide information related to such assets and tax payment information as well as information on any transactions on related assets of the person under Clause 5, spouse, and child who has not become *sui juris* of such person to the Inspection Commission within the period of time and in accordance with the procedures as determined by the AEC.

In the performance of duties under paragraph 1, the Office of the Securities and Exchange Commission shall have the power to order the securities company to provide information and documents to the Office of the Securities and Exchange Commission so as to submit to the AEC. However, the provisions of laws which prohibit the disclosure of information related to the execution under paragraph 1 and paragraph 2 shall not apply to the notification of information under paragraph 1.

Clause 7 rules that in the case where the person whose assets are seized or attached under Clause 5 fails to provide information under Clause 6, or fails to deliver assets seized, or moves, sells, disposes of, or transfers the assets under attachment, it shall be deemed that such assets were acquired illegally and are related to unusual wealth or an unusual increase of assets resulting from committing offenses under the anti-money laundering law. If the

agency or person under Clause 6 fails to comply with the determination of the AEC under Clause 6, such agency or person shall be responsible for the damage incurred.

However, if the owner of the assets is able to provide proof to the Inspection Commission within the period as specified by the AEC, Clause 8 states that if such person is the real owner of such assets and they were not acquired illegally and are not related to unusual wealth or an unusual increase of assets and are not related to committing offenses under the anti-money laundering law, the AEC shall have the power to revoke the seizure or attachment of such assets.

Under Clause 9, in the case where the AEC has resolved that a person holding a political position has committed malfeasance in office or has performed his or her duties dishonestly or has become unusually wealthy, it shall submit a report, documents, and evidence together with its opinion to the Attorney General for further proceeding under the Organic Act on Counter Corruption and the Organic Act on Criminal Procedures for Persons Holding Political Positions. In this case, the resolution of the AEC is deemed to be the resolution of the National Anti-Corruption Commission. In the case where the Attorney General has a different opinion but the AEC confirms its opinion, the AEC shall have the power to file a petition to the Supreme (Dika) Court for a person holding political position or to the court with potential jurisdiction as the case may be.

Finally, when it is deemed that there are reasonable circumstances to suspect—or any person injured makes an accusation—that any person holding a political position is unusually rich, performs his or her duties unjustifiably, commits an offense against his or her official position under the Penal Code, or commits an offense against his or her position, the Organic Act on Counter Corruption and the Organic Act on Criminal Procedures for Persons Holding Political Positions shall apply *mutatis mutandis* to these persons. The clause states that the AEC shall review the case, but if the AEC cannot complete its investigation, the NACC or the Anti-Money Laundering Commission would be in charge.

In the case where the AEC has resolved that a person has committed offenses which are not subject to the Organic Act on Counter Corruption, the AEC shall forward the matter to the agency concerned for further legal proceeding under its responsibility, provided that the results of the examination made by the AEC shall be deemed an inspection under the law.

On June 30, 2008, the AEC was disbanded after the end of its term because it had completed its examination of the assets of former Prime Minister Thaksin. Nevertheless, the 30th Announcement and the rules resulting from this Announcement remain in place, with the NACC and the Office of the Attorney General taking over the cases handled by the AEC.

IV. CORPORATE GOVERNANCE

Company laws in Thailand include the Public Limited Companies Act B.E. 2535 (A.D. 1992), as amended up to No. 3 B.E. 2551 (A.D. 2008); the Securities and Exchange Act B.E. 2535 (A.D. 1992), as amended up to No. 4 B.E. 2551 (A.D. 2008); and respective regulations in the Thai Civil and Commercial Code.

Financial authorities have started to restructure Thailand's corporate legal framework in a bid to boost good governance. The national Good Governance Committee suggested tightening regulations regarding company directors, particularly their financial transactions, and also eliminating loopholes that stand in the way of accountability. The Committee, furthermore, recommended designing regulations that provide for punishment of fraud and other wrongdoing to be more "flexible" to allow legal channels to claim compensation under civil law instead of having to resort to criminal proceedings.

Also, it was suggested to include provisions that give shareholders the right to initiate a class action against the management if individual directors fail to fulfill their obligations.

V. FOREIGN CONVENTIONS

There are numerous international agreements in place that aim at reducing corruption. Thailand is not a party to (i.e., may have signed but has not ratified) any such international agreement.

The purpose of these conventions is to establish a common criminal policy aimed at the protection of society against corruption, including the adoption of appropriate legislation. Once ratified and implemented, each convention usually requires its State Parties to implement a broad range of anti-corruption measures in their domestic laws.

The most important conventions are listed below:

- Inter-American Convention Against Corruption—adopted by The Third Plenary Session on March 29, 1996 (Organization of American States [OAS] Convention)
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions—adopted by the Negotiating Conference on November 21, 1997 (Organization for Economic Co-operation and Development [OECD] Convention)
- Civil Law Convention on Corruption—adopted on November 4, 1999 (Council of Europe [COE] Convention)

© 2009 Tilleke & Gibbins International Ltd.

- Criminal Law Convention on Corruption—adopted on January 27, 1999 (Council of Europe [COE] Convention)

- United Nations Convention Against Corruption (UNCAC)—adopted by Conference of the States Parties to the United Nations Convention Against Corruption, Resolution 58/4 on October 31, 2003 (United Nations Office on Drugs and Crime [UNODC] Conference)

The main purposes of these Conventions are to build a collaborative network and increase the effectiveness in investigation and prosecution of bribery of foreign officials or transnational corruption offenses. These conventions are similar in content. The differences lie mainly in the scope of application and the types of bribery covered. For example, State Parties to both the OECD Convention and the COE Conventions are required to criminalize the active and passive bribery of domestic and foreign government officials.

While the bribery of domestic public officials is prohibited in most countries, the prohibition against the bribery of other state officials is a new development in many jurisdictions. To the extent that national anti-corruption laws are nonexistent, inconsistent, or are inconsistently enforced, the creation of international treaty obligations is an important means of preventing and reducing cross-border corruption.

Thailand signed the UNODC Convention in 2003. However, as Thailand has not fully ratified the Convention, the country has no obligation to criminalize bribery committed by Thai nationals abroad. The practical implication is that Thailand will not hold its nationals liable for bribery committed outside of Thailand. If they are not held responsible in the country where the act was committed, they go penalty-free.

The situation may be different for foreigners whose countries punish bribery or other corrupt practices perpetrated outside of their home country. Therefore, even though certain actions might not be considered criminal in Thailand or the regulations regarding bribery may not be enforced, foreign nationals could still be liable under their own domestic legislation.

Additionally, the U.S. federal law on corruption, the Foreign Corrupt Practices Act, which entered into force in 1977, has recently been applied to many foreign companies that do not necessarily have direct assets in the United States.

More information regarding the content and status of the above conventions is available at:

OECD Convention: www.oecd.org/daf
COE Conventions: http://conventions.coe.int/

© 2009 Tilleke & Gibbins International Ltd.

VI. ANTI-CORRUPTION LEGISLATION IN THAILAND – IMPLICATIONS

A study by the Thai Development Research Institute, "Politics and Business Interests under the 1997 Constitution," revealed that corruption practices have changed, adjusting to the legal environment since the promulgation of the 1997 Charter. Whereas in the past, politicians simply demanded kickbacks from the business sector, the current politicians in power lay down rules, regulations, and policies that work in their favor, leading to a "lawful" corruption.

The methods of corruption have become much more sophisticated since some wealthy businessmen with strong commercial interests have come to power, leading to the problem of conflicts of interest.

Articles 265, 268, and 269 of the 2007 Constitution, replacing Articles 110, 208, and 209 of the 1997 Constitution, have been designed to prevent this kind of "hidden" abuse of power by requiring Cabinet members to transfer their shares in companies to legal entities not related to them. However, such transfers in effect never take place because organic laws allow the transfer of interests to immediate relatives. There are several channels for political appointees to abuse their position to the advantage of their own businesses. The government has the power to appoint members of supervisory panels for certain industries and administrators of state enterprises, which provides them with the opportunity to favor their own businesses. Furthermore, politicians in power have strong influence over government committees, including the power to allocate the budgets, resources, and quotas.

Although the 30th Announcement of the Council for National Security allows for the inspection of the assets not only of politicians but also of their wives and children and other close relatives if there are reasonable grounds, the investigation and evidence-gathering process still seem difficult.

Since most of the anti-corruption legislation in Thailand specifically deals with bribery only, thereby easing the way for other means of dishonesty, Thailand's anti-corruption legislation has yet to catch up with some of the recent innovations in the area of corruption. However, as we have seen, the drafters of the Constitution anticipated the abuse of power for business interests and designed preventive regulations. The problem now lies in the enforcement of these laws.

VII. INSTITUTIONS

The following institutions can be contacted for further information concerning Thai anti-corruption legislation or other anti-corruption measures:

- **Anti-Money Laundering Office (AMLO)**
  422 Phayathai Road
  Wangmai, Pathumwan
  Bangkok 10330
  Tel: +66 2219 3600
  Fax: +66 2219 3700
  Web site: www.amlo.go.th

- **Department of Special Investigation (DSI)**
  128 Chaeng Wattana Road
  Thung Song Hong, Laksi
  Bangkok 10210
  Tel: +66 2831 9888
  Fax: +66 2831 9888
  Web site: www.dsi.go.th

- **Election Commission of Thailand**
  Government Complex (Building B)
  120 Chaeng Wattana Road
  Thung Song Hong, Laksi
  Bangkok 10210
  Tel: +66 2141 8888
  Web site: www.ect.go.th

- **The National Anti-Corruption Commission (NACC)**
  165/1 Phitsanuloke Road
  Dusit, Bangkok 10330
  Tel: +66 2282 3161-5
  Fax: +66 2280 0144
  Web site: www.nccc.thaigov.net

© 2009 Tilleke & Gibbins International Ltd.

- **Office of Civil Service Commission**
  59 Pitsanuloke Road
  Chitlada, Dusit
  Bangkok 10300
  Tel: +66 2281 3333
  Fax: +66 2281 4973
  Web site: www.ocsc.go.th

- **Office of the Council of State**
  (responsible for the interpretation of legislation)
  1 Thanon Phra Athit
  Pranakorn Bangkok 10200
  Tel: + 66 2222 0206-9
  Fax: +66 2226 6201
  Web site: www.krisdika.go.th

- **Thailand Development Research Institute (TDRI)**
  565 Soi Ramkhamhaeng 39
  Ramkhamhaeng Road, Wangthonglang
  Bangkok 10310
  Tel: +66 2718 5460
  Fax: +66 2718 5461-2
  Web site: www.tdri.or.th

- **Transparency Thailand**
  (NGO with the mandate to combat corruption in Thailand)
  c/o The Center for Philanthropy and Civil Society
  118 Seri Thai Road, Bangkapi
  Bangkok 10240
  Tel: +66 2377 7206
  Fax: +66 2377 7399
  Web site: www.transparency-thailand.org

© 2009 Tilleke & Gibbins International Ltd.