THE ROLE OF SECURITIES REGULATION IN THE DEVELOPMENT OF THE THAI STOCK MARKET

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I. INTRODUCTION

Capital markets have the potential to be powerful engines of economic growth in developing nations. An efficient stock market provides the public with investment opportunities and mobilizes their savings, as well as international capital, for productive corporate financing. Market forces serve to discipline management and public ownership improves the accountability of the business sector. But developing a robust and efficient capital market is a difficult task for many emerging economies. One of the many challenges they encounter is creating an effective securities regulatory regime.

In a mature capital market, securities regulations form the framework within which the market operates. They are designed to protect the investor, prevent systemic crises and promote the market they govern. But in what capacity do securities regulations operate in smaller, developing capital markets? The purpose of this paper is to analyze the role of securities regulation in the development of the Thai stock market. The first half of this paper provides some basic background information on the Thai legal system, stock market and economy, and then offers an analysis of the role of securities regulations in the 1997 financial crisis and subsequent process of recovery. The second half addresses the future of securities regulation in Thailand. It begins with an examination of the obstacles that face effective oversight by securities regulators and the regulators' efforts to overcome these obstacles. The paper concludes with an evaluation of the current reform initiative and a proposal for an alternative strategy. In short, this paper seeks to analyze the role that securities regulation has played, will likely play and could play in the development of the Thai stock market.

II. BACKGROUND

A. The Legal System

In the year 1292, the legal system of the Kingdom of Sukhothai, a progenitor of the Thai state, was described in a royal inscription:[1]

> [I]f any commoner in the land has a grievance which sickens his belly and gripes his heart, and which he wants to make known to his ruler and lord, it is easy; he goes and strikes the bell which the King has hung there; King Ramkhamhaeng, the ruler of the kingdom, hears the call;

[1] DAVID K. WYATT, THAILAND: A SHORT HISTORY 54 (1984).

> he goes and questions the man, examines the case, and decides it justly for him.[2]

This characterization of the justice system in ancient Thailand, although undoubtedly idealized, bespeaks a tradition of highly personalized application of justice.[3] This characteristic of Thai law has proven durable despite enormous population and territorial growth of the Kingdom over the years, which necessarily served to encourage a more impersonal, rule-based legal system. The personalized element of Thai law was preserved in the Law of Civil Hierarchy, promulgated by King Borommatrailokanat (1448-88), which instituted an extremely complex system of points based upon one's station in life.[4] Royalty had 100,000 points, slaves had 5, and everyone else was somewhere in between.[5] Crimes against one's superiors were viewed as far more serious than those committed against one's inferiors, and thus the justice system reinforced the societal pecking order while simultaneously keeping the peace.[6] Critics of the current Thai legal system believe that this naked bias favoring the elite classes remains to this day, undermining the principles of equality embodied in the current Constitution.[7]

By the latter half of the 19th century, Thailand had come under enormous pressure from Western powers to open economic and diplomatic contact, but inequitable treaty provisions left the country at a great disadvantage. The need to legalistically counter these treaties, modernize local laws to keep up with European powers, and assuage European merchants and dignitaries in Thailand—who feared the arbitrary and cruel Thai legal system—provided the impetus for reform.[8] King Rama V was instrumental in instituting legal reforms to centralize the court system, abolish trial by ordeal, and create the first legal codes of Thailand, based upon an amalgamation of European legal models.[9] The Thai legal system is thus a civil law system, although it does incorporate some elements of common law due to British and American influences, as we shall see below.[10] In 1932, the members of a successful coup persuaded King Rama VII to become a Constitutional monarch and bolster democracy in Thailand. Unfortunately, Thai democracy has not

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[2] *Id., citing* Griswold & Prasert, *The Inscription of King Rama Gamhen of Sukhodaya (1292 A.D.): Epigraphic and Historical Studies no. 9*, JSS 59, pt. 2, at 205-208 (July 1971).
[3] *Id.* at 186.
[4] *Id.* at 73.
[5] *Id.*
[6] *Id.*
[7] *See* Edward McBride, *A New Order*, THE ECONOMIST (Feb. 28, 2002).
[8] THE THAI BAR ASSOCIATION, THE LEGAL SYSTEM OF THAILAND 23 (Aug. 1981).
[9] *Id.*
[10] Interview with Prof. Thongtong Chandarangsu, Vice Dean, Chulalongkorn University Faculty of Law (Mar. 28, 1999).

proved stable. Between 1932 and 1999, there have been 16 Constitutions and 17 coups or attempted coups.[11]

B. *The Stock Exchange of Thailand and Securities Regulation*

This instability, however, has had relatively little effect on either the Stock Exchange of Thailand or its attendant regulatory apparatus due to their short histories. Another aspect that sets these apart from other economic and legal institutions in Thailand is their distinctly American flavor. While the political system and civil code were largely borrowed from Europe, the Stock Exchange of Thailand and Thai securities regulations were based largely upon a model from the United States.

In 1963, a private company called the Bangkok Stock Exchange Co. (BSE) began to trade shares in Thai stocks. This first attempt to create a stock market in Thailand proved abortive, however, as it was largely ignored by the unenthusiastic Thai government as well as by a public that seemed both ignorant of and uninterested in equity investing.[12] After the failure of the BSE, the Thai government began to explore options for forming a stock exchange as a quasi-governmental agency. With the assistance of the World Bank and Professor Sidney M. Robbins of Columbia University, who had been Chief Economist at the U.S. Securities and Exchange Commission, the Thai government passed a law in 1974 which created the Securities Exchange of Thailand (SET, later renamed the Stock Exchange of Thailand).[13] Trading began the following year. In addition to being the sole exchange, the SET was also the main regulator of securities markets until legislation introduced in 1992 created a separate regulatory body.

The Securities and Exchange Act of 1992 (the '92 Act) centralized responsibility for securities regulation in a new entity, the Thai Securities and Exchange Commission (SEC), and charged it with promoting and developing the Thai securities markets.[14] Two American legal scholars, John Fiorenz and John O'Brien, assisted a team of Thai regulators, including current SET Senior Vice President Suthichai

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[11] Interview with Dr. Borwornsak Uwanno, Secretary General, King Prajadhipok's Institute (Mar. 29, 1999). *See also* Reuter and NI World Guide 2001/2002 *at* http://www.alertnet.org/thefacts/countryprofiles.

[12] Stock Exchange of Thailand website: History of the SET *at* http://www.set.or.th/en/about/set/history_p1.html.

[13] *Id.*

[14] Summary of Analysis on the Draft Amendment to the Securities and Exchange Act (Unofficial Translation) *at* http://www.sec.or.th/secen1/legal/secact/newact.shtml.

Chitvanich, in drafting the '92 Act.[15] Predictably, the resulting legislation owed much to the U.S. securities regulatory system. Specifically, it clarified the role of the SET as the regulator of the secondary market and formed the SEC to oversee securities offerings, IPOs, investment companies, takeovers and tender offers, as well as to prevent market manipulation and insider trading.[16] However, there remained three significant differences between the U.S. and Thai systems. First, the primary mode of securities regulation employed by the SEC was qualitative in nature, as opposed to the more strictly disclosure-based U.S. system.[17] In other words, the Thai SEC would evaluate disclosures by companies and use its discretion in choosing which firms posed acceptable risks for investors. A typical analysis would cover such things as debt to equity ratio, operational track record and business sector trends.[18] Those meeting the criteria applied by the SEC were allowed to issue shares into the market. This was fundamentally different from the disclosure-based model of the U.S. where the responsibility for evaluating companies and investment risk is left to the investors (i.e. left to the market) after an acceptable level of information has been made available to them by the issuer. In this system, the SEC oversees the level and quality of information instead of making discretionary judgements based upon that information. Second, the makeup of the board of governors of the SEC and SET was unlike that found in the American model. The Thai system allowed these institutions less independence from the government than their U.S. counterparts.

> The SEC is comprised of 1) ex-officio commission members who are representatives from government agencies, namely, Governor of the Bank of Thailand, Permanent Secretary of the Ministry of Finance, Permanent Secretary of the Ministry of Commerce, and 2) not fewer than four and not more than six experts appointed by the Cabinet upon the recommendation of the Minister of Finance, among whom there shall be at least one legal expert, one accounting expert and one financial expert. The Minister of Finance is the Chairman of the SEC. Commission members do not work full-time for the SEC. The Secretary-General of the Office [of the SEC] is

[15] Interview with Mr. Suthichai Chitvanich, Senior Vice President, the Stock Exchange of Thailand (Sept. 26, 2001).
[16] *Id.*
[17] Shawn W. Crispin & Mark Mitchell, *Market Free For All*, FAR EASTERN ECONOMIC REVIEW (June 1, 2000).
[18] Matthew Montagu-Pollock, *Thai Stock Market Cleans Up Its Act*, ASIAMONEY (May 2000).

> appointed by the Cabinet upon the recommendation of the Minister of Finance, and serves as the chief executive officer of the Office, a commission member and the secretary of the SEC.[19]
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> The SET Board of Governors is comprised of a maximum of eleven people, five of whom are appointed by the SEC, and five who are elected by SET members. The SET President, appointed by the Board, is an ex-officio member of the Board. The Board is also responsible for formulating the SET policies, and supervising the Exchange's operations; however, certain rules and regulations prescribed by the Board must also be approved by the SEC.[20]

Third, the SEC's enforcement options for violations of securities rules and regulations in Thailand were limited to criminal and administrative sanctions. In the U.S. model, civil cases brought by the SEC are a very common form of securities law enforcement. The ramifications of these three main differences will be discussed in further detail below. The SEC Act of 1992 created the securities regulatory framework within which the Thai capital markets experienced one of the greatest booms and most shocking busts in history.

C. Thailand's Boom and Bust

The story of Thailand's economic rise and fall is familiar to many, so I will only offer a brief review. Thailand posted a real annual average GDP growth rate of 8.4% from 1985 to 1995, making it the fastest growing economy in the world over that decade.[21] Apparently in response to the '92 Act, portfolio investment in the SET from overseas jumped to more than ten times the average rate over the previous five years.[22] Between 1991 and its peak in 1994, the SET rose from 600 to 1750.[23] The Economist magazine estimated that, at the rate it was going, Thailand would become the eighth richest country in the world by 2020.[24]

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[19] Summary of Analysis on the Draft Amendment to the Securities and Exchange Act *supra* note 14. The "Cabinet," previously known as the Council of Ministers, is the Prime Minister's executive body, responsible for the administration of the various ministries. For a more complete description of the Cabinet and its place in Thai government, see http://www.mahidol.ac.th/Thailand/governm-politic/politics.html.

[20] See SET website, *supra* note 12.

[21] PASUK PHONGPAICHIT & CHRIS BAKER, THAILAND'S BOOM AND BUST 1 (1998), *citing* WORLD DEVELOPMENT REPORT 1997 (Washington: IBRD, 1997), Table 1 [hereinafter PHONGPAICHIT].

[22] *Id.* at 42.

[23] *Id.* at 101.

[24] *Id.* at 5.

It was not to be. By 1997, export growth had collapsed and the SET had plummeted by over 65% as investors scrambled to sell their holdings. Speculators, including George Soros, began to short-sell the baht in anticipation of a devaluation, which finally took place in late June after a strenuous and costly defense by the Bank of Thailand.[25] As of this writing, more than five years after the fact, Thailand has not come close to a full recovery from this economic disaster. Uncompleted buildings still loom over Bangkok, shaky banks are unable to lend due to the burden of non-performing loans[26] and the SET now is hovering around 400[27]. There has been some recent improvement but Thailand's economy seems to be a shadow of what it once was.

III. SECURITIES REGULATION AND THE THAI FINANCIAL CRISIS

A. Asian Values to Crony Capitalism

Theories on the roots of the Thai financial crisis abound. The IMF, which took responsibility for the bailout and rescue of Thailand, identified a lack of transparency as one of the primary causes. Washington-based institutions such as the IMF and the World Bank, as well as the U.S. government, generally agreed on this point, as did many commentators. But these ex-post facto criticisms stood in contrast to the prevailing wisdom inside these institutions during the years of Asia's decade-long financial winning streak.[28]

The meteoric rise of the East and Southeast Asian economies through the 1980's and most of the 1990's created many believers in the power of so-called Asian values as an engine of economic growth. This system of Asian business ethics was centered on a supposedly Confucian concept of rigid hierarchy, emphasizing loyalty to the company, to the company's chairman and officers and to one's fellow workers.[29] The importance of hard work and success, from school to corporation, (in other words, the building up on one's human capital) were also brought

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[25] WALDEN BELLO, SHEA CUNNINGHAM & LI KHEANG POH,, A SIAMESE TRAGEDY: DEVELOPMENT & DISINTEGRATION IN MODERN THAILAND 33-36 (1998) [hereinafter BELLO]

[26] Edward McBride, *A Load on Its Mind*, THE ECONOMIST (Feb. 28, 2002).

[27] BANGKOK POST (May 17, 2002). By mid-June 2002, the SET has reached 415.

[28] BELLO, *supra* n. 25, at 45, *quoting* economist Jeffrey Sachs: "the IMF arrived in Thailand in July with ostentatious declarations that all was wrong and that fundamental surgery was needed when, in fact, the ink was not even dry on the IMF's 1997 annual report, which gave Thailand and its neighbors high marks on economic management." *See also* PHONGPAICHIT, *supra* note 21, at 318.

[29] AMARTYA SEN, DEVELOPMENT AS FREEDOM 235 (1999).

under the rubric of Asian values.[30] Perhaps the most outspoken champion of this Asian values thesis was Lee Kuan Yew, whose authoritarian style of "Confucianism" steered Singapore to prosperity throughout the 1980's and 1990's.[31]

During Asia's boom, many Western businessmen and academics lauded the Asian business model, and it was certainly difficult to argue with the results, until the Asian financial crisis. Already, Japan had been experiencing a prolonged economic slump and had endured periodic recessions since its bubble economy burst in 1989. Now, with the rest of Asia melting down before the world's eyes, the erstwhile champions of Asian values fell silent as the critics found their voices. The Asian business model, now tarred as "crony capitalism," came under heavy fire.[32] No longer did one hear about the educational standards of Asian nations or the strong work ethic of the employees. The focus had shifted to the lack of transparency in business dealings, the abuse of minority shareholders, the sloppy or even fraudulent accounting and disclosure practices, the cozy relationship between business and government that coddled fundamentally uncompetitive businesses, the prevalence of nepotism, and the lax enforcement standards of the Asian judiciary. All of these factors, it was claimed, contributed to widespread misallocation of resources and unproductive investments that proved to be a fatal drag upon economic expansion.[33] Furthermore, the collusion and opacity engendered by the Asian business model naturally favored a small group of elites and the fruits of the economic boom disproportionately fell to them.[34] The boom also failed to translate into a proportionate rise in the stock of human capital due to lack of emphasis on education and training.[35] As a result, worker productivity stagnated and the labor needs of the newly high-tech economy were not met.[36] The Washington Consensus claimed that the Asian business model might have spurred massive economic growth, but that it contained fatal flaws that made its success unsustainable in the long term. The IMF, World Bank and other

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[30] *See* PHONGPAICHIT , *supra* note 21, at 311.
[31] *See* SEN, *supra* note 29, at 15.
[32] BELLO, *supra* note 25, at 52.
[33] *See* McBride, *supra* note 26. *See also* PHONGPAICHIT, *supra* note 21, at 100-3. *See also* BELLO, *supra* note 25, at 33, *citing* HG Asia, *Communique Thailand* (1996) ("Thailand worth a nibble perhaps but not a bite").
[34] PHONGPAICHIT, *supra* note 21, at.281, *citing* Yukio Ikemoto, "Income Distribution and Malnutrition in Thailand," Chulalongkorn Journal of Economics, 5, no.2 (1993). *See also* BELLO, *supra* note 25, at pp.37-8 *citing* World Bank, World Development Indicators 1998 (World Bank, Washington DC, 1998) Table 2.8, p.70.
[35] BELLO, *supra* note 25, at 56-7.
[36] *Id.*

Washington-based institutions were called upon to assist Thailand's policymakers in finding a solution.

B. Enter the Washington Consensus

Part of these groups' prescription for recovery was for Thailand to reform its laws and institutions governing the securities market to conform to what they deemed international best-practice standards, which are based primarily on the U.S. financial regulatory system. This set of standards championed by the IMF, World Bank and the U.S. has come to be known as the Washington Consensus. The Washington Consensus, like U.S. securities and financial regulation, is built on a belief in the efficiency of the free market. The investors themselves, out of self-interest, will invest their money where they believe it will produce the maximum value. Free market advocates hold that this is the most effective method of allocating resources and disciplining corporate management. However, it requires that information be provided to the market players so that they may make rational decisions on where and where not to invest. Thus, in the area of securities regulation, the Washington Consensus favors disclosure-based regulation. For a set of disclosure-based regulations to function in Thailand, the quality of accounting and disclosure had to be improved through tighter regulation and better oversight by regulators, independent company directors and auditors. In short, with disclosure and transparency standards heightened and enforced, the markets would have a better institutional framework within which to stage a sustainable economic recovery.

Although it is rarely claimed even in Washington that the free market is perfectly efficient, the Washington Consensus views the market, imperfect as it is, as being able to achieve greater efficiency than a government regulator who is charged with deciding in which firms it is appropriate to invest. This latter type of regulation where the government regulator acts as a gatekeeper to the markets, only allowing firms that display some indicia of stability and good quality to issue securities to the investing public, is known as merit-based securities regulation. As mentioned in Section II, above, this was the style of regulation employed by the Thai SEC throughout the boom and bust.

C. The Role of Thai Securities Regulation in the Financial Crisis

Was the Washington Consensus correct in identifying substandard transparency in securities markets as among the areas in need of reform

after the Thai economic crisis? Securities regulation standards are designed to protect shareholders, prevent systemic crises, and promote the markets. In the case of Thailand, they failed to achieve these goals as shareholders suffered substantial losses without any viable legal recourse, and the securities markets collapsed under the weight of investor panic and mistrust. But the fact that this catastrophe was not prevented by these laws does not prove their culpability in spawning the crisis. It does not even necessarily prove that they were inadequate laws. Although they may be designed to protect investors and the securities market, one can expect that even reasonably effective securities and corporate legal regimes will periodically fail to do so in the face of extreme circumstances. This is true because, aside from the fact that perfection is sadly unattainable in all human endeavors, legal systems that attempt to reduce risk to the very minimum will often prove too restrictive and costly. Even good laws cannot hope to reduce wrongdoing to insignificance. The securities regulatory system of the U.S., which is highly sophisticated, still did not prevent Enron and many other companies, such as WorldCom, from engaging in fraudulent behavior.

Furthermore, it is widely known that many of the primary causes of financial crises exist primarily beyond the boundaries covered by corporate governance and securities regulation. Examples include widespread bank failures due to imprudent lending practices, such as in Japan[37], and reckless macroeconomic policies by the government, which could be observed in Argentina prior to its collapse[38]. Indeed lax prudential standards in bank lending were certainly a factor in the Thai economic meltdown as the weight of non-performing loans on banks' balance sheets is proving a drag on the economy even five years later.[39] Since Thailand's main source of corporate funding is bank lending, it follows that lack of oversight in that area would have played a far greater role in Thailand's meltdown than weak securities regulations. And perhaps, as one financial advisor in Bangkok has suggested, the real cause of the Thai financial meltdown was simply bad business, not bad law.[40] It is impossible to regulate away poor decision-making, lax investment research and greed.

Perhaps, then, it is too ambitious to claim that poor securities regulation was a main cause of the Thai financial meltdown. However,

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[37] *See* Adam S. Posen, The Looming Japanese Crisis (May 2002) (policy brief, Institute for International Economics).

[38] *See* Michael Mussa, Argentina and the Fund: From Triumph to Tragedy (Mar. 2002) (policy brief, Institute for International Economics)

[39] *See* McBride, *supra* note 26.

[40] Interview with Doug Barnett, President, Quest Capital Co., LTD (Dec. 12, 2001).

there seems to be evidence to support the view that there was sub-optimal performance of these laws. First, the quality of disclosure received by investors in Thailand had been poor, as attested to by the fact that so many investors were taken completely by surprise by the meltdown. Had disclosure standards worked properly, with a viable threat of enforcement, perhaps investors would have been better able to assess the risks in the Thai market and the asset bubble that proved so destructive to the economy would not have materialized. Second, there is also substantial anecdotal evidence of insider trading and even outright fraud by managers during the boom years.[41] Well functioning securities laws ought to have served to significantly deter this behavior, preventing it from becoming a systemic flaw, but it appears that this did not occur. Finally, and most convincingly, there were no successful prosecutions for securities fraud or insider trading after the meltdown and investors had no viable legal recourse to seek compensation.[42] An effective securities regulatory regime needs a threat of prosecution in order to perform its deterrence function and to push for compliance with its rules. Furthermore, where deterrence fails, securities laws must provide some means of compensating investors who have been damaged by the wrongdoing. Where there is widespread belief, if not the actual fact, of misuse of corporate funds, insider dealing and creative accounting, a well working securities regulatory regime would necessarily yield a robust effort to punish wrongdoers and compensate their victims. This was not the case in Thailand after the crisis. In sum, it is difficult to believe that Thai securities regulations in any way served to discourage or punish the kind of corporate behavior that contributed to the financial crisis. It must be noted, however, that the positive role they could have played would likely have been marginal in terms of mitigating the severity of the overall crisis.

IV. SECURITIES REGULATIONS AND THE POST-CRISIS ECONOMY

A. One Way or Many?

The securities regulation reform effort in Thailand can be viewed in the context of the larger debate over how best to create effective legal institutions in a developing country. The most simplistic view of this

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[41] *Id.*

[42] Interview with Rapee Sucharitakul, Assistant Secretary General, Securities and Exchange Commission (Sept. 24, 2001).

debate asks the question "one way or many?"[43] "One way" refers to the single best-practice system of regulation offered by the Washington Consensus. The basic thesis espoused by the Washington Consensus is that "good law is good law."[44] If it works in the U.S., it will operate wherever it is implemented—perhaps not as well as where it originated, but comparatively better than any other system that a nation might come up with on its own. Taken at face value, this thesis would seem to suggest that developing nations should scrap their efforts at legal reform and simply cut and paste U.S. laws onto their books. In certain cases, that is exactly what has been suggested. In his paper entitled "Selective Incorporation of Foreign Legal Systems to Promote Nepal as an International Financial Services Centre," Harvard Law School Professor Howell Jackson concludes that it would be advantageous for Nepal to wholly incorporate laws from other, more developed, jurisdictions to govern international financial transactions conducted within its borders.[45] But Professor Jackson concedes that considerations of politics and sovereignty render such a case of outright adoption as a highly unusual.[46] The Washington Consensus posits that emerging markets should institute laws that are in conformity with the principles of free market efficiency they espouse but recognizes that practical considerations will require something less than wholesale adoption of U.S. laws.

The alternatives to the Washington Consensus are swept under the broad rubric "many." While far from distinct, "many" can be characterized as a system of local experimentation with legal forms, ideally through a democratic process, through which a legal system

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[43] This is the title of a course at Harvard Law School. An excerpt from the course description states: Is the world gradually converging toward the same set of economic practices and institutions, following the lead of the North Atlantic industrial democracies? Or can democratic market economies take institutional forms radically different from those now established in the United States and Western Europe? In recent years, an influential set of ideas in political economy, sometimes labeled "neoliberalism" or "the Washington consensus," has provided a focus for passionate controversy and conflict throughout the world. Debate about the existence of alternative paths for the developing countries and the postcommunist societies finds parallels in the discussion within the prosperous industrial democracies about how best to reconcile American-style economic flexibility with European-style social protection. International financial instability has lent new urgency to the controversy over alternatives. The course considers these themes by exploring their variations in major postcommunist or developing societies, as well as in the North Atlantic countries.

[44] Interview with Dr. Tithiphan Chuerboonchai, Dean, Chulalongkorn University Faculty of Law (Dec. 2, 2001).

[45] Howell E. Jackson, *Selective Incorporation of Foreign Legal Systems to Promote Nepal as an International Financial Services Centre*, *in* REGULATION AND DEREGULATION: POLICY AND PRACTICE IN THE UTILITIES AND FINANCIAL SERVICES INDUSTRIES (Christopher McCrudden, ed., 1999).

[46] *See id.* at 367-8, 408. *Also* this point was clarified by Professor Jeffrey Sachs in a lecture for the Harvard Law School course "One Way or Many" in Spring 2000 (see note 43).

emerges which is responsive to the unique local conditions and values.[47] Clearly, this nebulous concept of "many" is too vague to be much use to legal development consultants and policymakers. In the second half of this paper, I will analyze Thailand's efforts to identify what "many" might mean for their country.

B. Post-Crisis Reforms

In the years that followed the Asian financial crisis, Thai government officials pursued a strategy of legal reform that was consistent with the Washington Consensus prescriptions (i.e. "one way").[48] In the realm of securities regulation, the most significant step occurred in 1999 when the SEC and SET moved from a qualitative to a more disclosure-based system of regulation.[49] Their new role was "less that of a judge, more that of a policeman."[50] This has the advantage of being a more efficient deployment of the regulators' resources, as investors themselves will have to take responsibility for the conclusions based upon the information.[51] Also, the previous merit-based system was often mistaken by investors to be a government guarantee of good stock performance.[52] The SEC has been striving vigorously to see that it fulfills its new role. In its first year of heightened disclosure scrutiny, it required 38 listed firms to revise their financial statements, penalized 79 companies for late or faulty disclosure and fined 14 securities companies a total of 15.5 million baht.[53] Since that time, the SEC has routinely fined securities companies and issuers found in violation of its administrative rules.[54] The SET has followed suit, refusing to accept financial statements that do not comply with Thailand's general accounting standards.[55] The SEC also required listed companies to form independent audit committees by the beginning of 2000 to scrutinize company disclosures and accounting procedures, and pushed firms to appoint at least two independent directors to their boards.[56] In order to ensure that

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[47] This summary paraphrases Professor Roberto Unger of Harvard Law School in a lecture for the course "One Way or Many," Spring 2000 (see note 43).
[48] *See* BELLO, *supra* note 25 at p.52.
[49] Crispin, *supra* note 17.
[50] Montagu-Pollock, *supra* note 18.
[51] Interview with Rapee Sucharitakul, *supra* note 42.
[52] *Id.*
[53] Montagu-Pollock, *supra* note 18.
[54] The SEC website at http://www.sec.or.th provides a list of the numerous fines levied monthly since the beginning of 1999.
[55] Montagu-Pollock, *supra* note 18.
[56] *See* Durana Chudasri, *Retail Investors Need to Take Care to Protect Benefits*, BANGKOK POST (Nov. 19, 1999).

Thai directors are getting the message about the heightened expectations for their performance in the post-crisis era, the SET, SEC and Bank of Thailand have established the Thai Institute of Directors (IOD). This body organizes a curriculum for directors regarding their duties, the principles of good corporate governance, transparency and their responsibilities to their shareholders, while stressing that good governance is good business.[57] The IOD also holds classes for independent directors and audit committee members so that they better understand their roles and responsibilities.[58] So far, this program has proved quite popular with directors, independent directs, and audit committee members, boasting 70-80 director attendees at its forums and numerous graduates.[59]

C. *The More Things Change...*

Clearly much has been done in Thailand to institute the best-practice standards of securities regulation and transparency in accordance with the Washington Consensus. This in itself is an impressive display of political will and bears witness to the enormous efforts of Thai legislators and regulators in attempting to develop their legal institutions. But how effective have these reforms been so far? It is important to note that these efforts are ongoing, and their more recent initiatives will be covered in Section VII, below. A final consideration while evaluating the role that these reforms have played in the post-crisis laws is the short time that they have had to operate. The most significant of these reforms, the move to a more disclosure-based system of shareholder protection, was only put in place in 1999. Thus, it may be difficult at this stage to gauge the true effect these reforms have had on the quality of issuer disclosures and shareholder protection.

To begin our evaluation process, we must first briefly outline what sort of economic development there has been since the inception of these reforms. Since dropping 10.78% in 1998, the real GDP per annum has grown by a respectable 4.23% and 4.3% in 1999 and 2000[60], with 2% growth estimated for 2001,[61] 3.3% for 2002 and 4.1% for 2003.[62] The SET has been climbing as well, with the SET index going from 269.19 in

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[57] Interview with Pornkanok, Director, The Thai Institute of Directors (IOD), (Oct. 3, 2002).
[58] *Id.*
[59] *Id.*
[60] "Thailand Economic Indicators," THE ECONOMIST website, *at* http://www.economist.com/countries/Thailand/.
[61] "Thailand Update," World Bank website, *at* http://lnweb18.worldbank.org/eap/eap.nsf/7a4109e5442319dc852567c9007162e0/dfc257dce375d674852567c900719142?OpenDocument.
[62] *The Economist Poll of Forecasters*, THE ECONOMIST 110, (Apri. 27, 2002).

2000 to 303.85 in 2001.[63] As of August 17, 2002, the SET had posted 29% growth (in dollar terms) since the start of the year, making it the second best performing bourse among Asia's developing nations, after Indonesia.[64] One may point to the rather encouraging performance of the economy and stock market as evidence that, at worst, the new laws cannot be a great hindrance to economic growth and at best they have helped investors regain their confidence in the soundness of the Thai markets. Further evidence of investor confidence is the enormously successful initial public offering of the Petroleum Authority of Thailand (PTT), which "ranks as the most successful in history, with 220 million shares placed with retail investors in just 85 seconds."[65] How could such positive developments occur if there exists significant uncertainty over whether Thai law would be able to meaningfully protect shareholder interests in the case of fraud, insider trading or the like (this uncertainty will hereinafter be referred to as "legal risk")?

The most likely answer is that legal risk is, consciously or intuitively, priced into every decision to purchase shares, but will not necessarily be large enough to preclude every purchase. Thus, despite the fact that there may be significant legal risk due to poor transparency and ineffective securities regulation, a share still may be worth its price. Perhaps some of these investors are in agreement with Rapee Sucharitakul, the Assistant Secretary-General of the SEC who is of the opinion that the great majority of businesspeople in Thailand are honest and run their businesses in accordance with diligence and prudence.[66] But even if the legal risk from such things as fraud or misappropriation of shareholder value by management is not high enough to deter every investor, even in the face of sub-optimal regulation, it will deter those with a lower appetite for risk. Also, because assessing the value of this legal risk is extremely subjective and information is highly imperfect, two investors with identical appetites for risk may arrive at different values for this legal risk, leading one to buy and one to abstain. Inevitably, however, some investors who would otherwise participate will be priced out of the market by this legal risk if it is at all significant. In assessing the role of the new standards in Thai securities regulation in economic development, we must look for evidence of how investors are pricing this legal risk.

Despite growth of the economy and stock market, there seems to be evidence that pricing-out of investors due to legal risk continued

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[63] SET website *at* http://www.set.or.th/static/market/market_u13.html.
[64] *Emerging Market Indicators*, THE ECONOMIST 78 (Aug. 17, 2002).
[65] *Securities Watchdog Sees Nothing Dodgy*, BANGKOK POST (Feb. 7, 2002).
[66] Interview with Rapee Sucharitakul, *supra* note 42.

throughout this period, to the detriment of the Thai markets. First, the general public is wary of the equity market and prefers, overwhelmingly, to leave its money in the banks. This low participation may be due in part to the public perception that the SET is an entity that far too closely resembles the capital-market-as-casino, which Keynes described in his General Theory of Employment, Interest, and Money, and that the legal system does not adequately protect the rights of shareholders. Of the retail investors who do participate, relatively few are long-term investors.[67]

Second, there are very few institutional investors, international or otherwise. 85.3% of SET investors are local retail investors, whereas the Hong Kong Stock Exchange has 77.08% institutional investors.[68] Institutional investors in general tend to care more about shareholder rights, to take far larger positions and to be far better informed about the market and its risks than retail investors. Very often, they will also have a greater capacity and willingness than retail investors to venture away from their "home" bourse in search of higher profits. After all, profit is their raison d'être. Thus, when the ambivalence of institutional investors toward Thailand is placed against the backdrop of more than 20% gains in the SET in 2002, the resulting inconsistency seems show that there is significant risk that is serving to price them out of this market.

Surely part of this risk is the volatility of the SET, but also significant appears to be the legal risk. In February 2002, at a time when the SET was surging upward, Calpers, the enormous California public employee pension fund, pulled their money out.[69] Although the Calpers managers did not specifically state the reasons for their exit from Thailand or any of the other emerging markets they divested, they did publicize their new risk matrix, along with the scores that led them to their decision. On a scale of one to three, with one being the worst and three the best, Thailand was rated as a one in the categories of transparency, legal systems and investor protection, as well as market liquidity, volatility and transaction costs.[70] Had it scored a combined five points in the categories of transparency and market regulations instead of the combined two points, it appears that Thailand would have come in above the cut-off score and Calpers would not have withdrawn its money from the SET. Thai government officials and SET officers came out in force in the media to play down the negative consequences of the Calpers

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[67] Interview with Doug Barnett, *supra* note 40.
[68] Sarah McBride, *Retail Investors Trickle Back Into Asia's Markets*, THE ASIAN WALL STREET JOURNAL M1 (Feb. 8-10, 2002).
[69] *SET Slips on Pull-Out*, BANGKOK POST (Feb. 22, 2002).
[70] *Id.*

decision on the Thai markets but the SET promptly dropped almost 4%.[71] The officials were vindicated when the downturn did not prove lengthy and the SET once again moved upward, although its pace had slowed from earlier in the year.[72] Despite the studied indifference of the Thai officials and the buoyancy of the SET, the Calpers episode clearly illustrates the pricing-out effect of high legal risk. And Calpers is not alone. Mark Mobius, the emerging markets investment guru and director of the Templeton Strategic Emerging Markets Fund has said that transparency and shareholder rights are routinely ignored in Asia[73] and that Templeton, for one, seeks deep discounts on stocks of firms with bad corporate governance[74]. An investment banker at Merrill Lynch in Bangkok confirms that such views are the norm among his institutional investor clients, and that they are concerned about the lack of shareholder protection in Thailand.[75] Finally, a survey by McKinsey of pension funds, money managers, banks, and private equity managers has concluded that international investors would pay an average of 26% more for shares of Thai companies that are transparent, protect shareholder rights and in general follow principles of good corporate governance.[76] Presumably, then, those surveyed would agree with Mr. Mobius that they would only purchase shares in corporations with poor corporate governance at a significant discount.

The above evidence tends to support the proposition that the perceived failure of securities laws to adequately protect investors in Thailand is costing the SET some valuable business. In addition, the difficulties with securities regulation appear to be reducing the quality of the business the SET already has. Retail investors, feeling that they are unable to rely upon the law for protection, or for compensation if they are swindled, have to guard their interests in other ways. The most common strategy they employ is to invest little, buy and sell in a very short space of time and not waste precious resources on fundamental analysis of stocks. This damages liquidity and leads to a shallow and volatile market that rises and falls more on rumors and trends than sound stock evaluation.

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[71] *Id.*

[72] *Regional Briefings: Bangkok SET*, THE ASIAN WALL STREET JOURNAL M2 (June 25, 2002).

[73] Ubels, Helen, *Asian Firms Work to Tighten Boards*, THE ASIAN WALL STREET JOURNAL M8 (Apr. 23, 2002).

[74] *Wanted: Good Corporate Governance: Top Stock Picker Warns Companies to Shape Up*, ASIAWEEK (June 4, 1999), available at http://www.asiaweek.com/asiaweek/99/0604/biz3.html.

[75] Interview with Boonchai Sriprachaya-anunt, Senior Vice President, Investment Banking, Merrill Lynch Phatra Securities (Jan. 11, 2002).

[76] Prescott, Reginald, *Power to the Shareholders*, THE BANGKOK POST (May 20, 2001).

Perhaps the institutional and retail investors are wrong and securities regulations, and compliance therewith, have improved without them fully realizing it. After all, it is difficult to gauge the progress of a broad, evolutionary reform process like this one. In the absence of any clearer indicators, it is reasonable to look to the number and success rate of securities cases in the courts. In recent years, as before, there have been no successful prosecutions for violations of the securities laws prohibiting fraud and insider trading.[77] Obviously this could be taken as evidence that there are no cases with any merit in this area, or the wrongdoing has gone undetected, but the experiences of regulators and market practitioners do not support this view. One fund manager stated that fraudulent practices are common knowledge to minority shareholders who attend annual shareholders' meetings or who bother to inform themselves of a company's activities.[78] And many Thai regulators I spoke with were keen to discuss the recent cases of shareholder abuse that have gone unpunished. A recent case that has caught the public attention and upset the SEC was the dropping of a case against foreign-run boiler room operations within Thailand used to swindle overseas investors.[79] Prosecutors cited a lack of evidence, but the SEC has requested an official account of their reasoning.

Even PTT's shining moment of IPO glory was sullied by allegations of unfair allocation of shares to well-connected parties through fraudulent sales procedures.[80] Although the SEC has found no wrongdoing, this scandal did nothing to help the perception that fairness and transparency are now the standards in securities dealings in Thailand.[81]

The lack of prosecutions tends to show that the new laws did little to force those corporations that disregard securities laws and shareholder rights into compliance. But laws can have a role beyond frightening potential wrongdoers to toe the line by the threat of prosecution. To refer back to the quote of Mr. Rapee of the SEC, most Thai businesspeople are honest and want to remain in conformity with laws. So if a country improves its disclosure standards but does nothing to enforce them, this point of view suggests that many will conform with the law anyway. Their motivation would be some combination of desire to be law-abiding, belief in the value of proper governance of their company, and regard for

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[77] Interview with Rapee Sucharitakul, *supra* note 42.

[78] Interview with the manager of a Bangkok-based investment fund (Dec. 2001). This individual agreed to the interview on condition that his name not be printed here.

[79] See the Afterword for a further discussion of this case and its ramifications.

[80] *Securities Watchdog Sees Nothing Dodgy*, *supra* note 65.

[81] *Id.*

the democratic process that put the law in place. Similarly, a law may place too high a requirement on people at a certain stage, but provides them with a standard to aspire to. This aspirational role may be another way for an unenforced law to still be an engine for positive change. But the hortatory and aspirational roles of law, however, can only come into play when people are aware of what the law is. Unfortunately, as I shall discuss in greater specificity below, ignorance and confusion over the securities laws are widespread in both the Thai business and investment communities. The extent to which Thai businesspeople behaved ethically toward their minority shareholders, as I believe most did and continue to do, is most likely attributable to a general sense of fairness and good business sense as opposed to the threat of prosecution, the wish to be law abiding, or other such primarily legal justifications. The hortatory and aspirational effects of the reformed securities laws are marginal and unpredictable, making them of little value to the investor.

The reformed securities regulatory regime of Thailand represents a positive step toward the creation of an efficient equities market. It appears, however, that this regime still has a way to go before it can meet its goals of effectively protecting the investor and promoting the use of the SET. As a result, it appears that pricing-out of potential investors has continued, as has the high rate of short-term speculation among retail investors.

V. SECURITIES REGULATION IN EMERGING CAPITAL MARKETS: LESSONS FROM THAILAND

A. Nice but Not Necessary?

Lest one become discouraged by the above appraisal of the performance of the securities regulations in Thailand, it bears repeating that the SET has been performing quite well (as mentioned above, in 2002 it had posted 29% growth in dollar terms as of August 17). The first lesson, therefore, is that possessing an effective regime of securities law is not a precondition to market growth. If there is enough money to be made, fewer investors will be priced out by this legal risk, although some, like Templeton and Calpers, will remain on the sidelines. Also, as discussed above, people will price the legal uncertainty from poorly enforced securities regulations differently, and when the market is looking more robust, investors may be tempted to place a lower price on

this risk. According to Mr. Mobius, "as the markets recover the problem will be ignored."[82]

Mr. Mobius believes that without good investor protection, which he places under the more general heading of "good corporate governance," the overall quality of economic growth is suspect.[83] A market recovery built without a framework of effective securities laws in an environment of insider dealing, weak disclosure and even fraud is a dangerous one for the investor, and may contain the seeds of a systemic crisis like the one observed in 1997. Whether or not the recovery will be unsustainable due to the inadequacies in the rule of law is unclear, but there is little doubt that it would be more stable, and to some extent more robust, if the laws were functioning effectively. But ultimately, the case of Thailand clearly illustrates that economic development can happen without practicable securities regulation. Thus, policymakers must take care to ensure that the cost and priority of securities regulatory reforms be commensurate with the reasonably perceived benefits the economy can derive therefrom.

B. Beyond the Washington Consensus

The second lesson that can be drawn from the case of Thailand is that, whatever other strengths it possesses, the Washington Consensus is short on ideas of how to make its free-market laws work in practice in the developing world. This is not an indictment of the soundness of its principles, nor of the ability of its sponsors, like the World Bank, who plainly acknowledge that writing the laws is the easy step compared with actually operationalizing them.[84] The Washington Consensus simply states that its standards are superior to whichever system you may invent to replace them. This is based in a belief in the free-market, which, in its view, has proved itself to be the most effective engine of economic growth that the world has ever known. I suppose in the case of Thailand they might contend that Thailand is better off with a good set of laws that doesn't work right than a bad set of laws that doesn't work right either. The Washington Consensus view is that once the state reaches the stage where they are able to properly enforce these laws, they will have the best legal regime available.

The real question, then, is when and how will a state be able to attain the ability to truly operationalize these laws? A study

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[82] Ubels, *supra* note 73.
[83] *Id.*
[84] *See* " Law and Development Movement, World Bank website, *at* http://www1.worldbank.org/publicsector/legal/ldmovement.htm.

commissioned by the Asian Development Bank in 1998 concluded that market-oriented economic laws in Asia were successfully implemented when they were "embedded in the culture" and "in the overall economic policy framework."[85] The authors describe market-based legal and market-driven economic development as being mutually supportive, steered by the economic policy of the government.[86] After the free market economic policy is set by the government, the market begins to develop and laws are reformed.[87] Then, as the market grows, so does demand for effective regulation. With support from the government, market regulations are operationalized, and in turn stimulate more growth by reducing risk to investors.[88] The cycle leads to tandem economic and legal development. But does this mean that legal reformers and market regulators must accept a passive role and wait until the government has come to fully support market-based securities regulation and the level of market development has reached a stage where there is significant demand for enforcement?

The third lesson from Thailand is that legal policymakers and regulators in emerging markets can take some pro-active interim steps that may facilitate the functioning of the free-market securities regulations, with the goal of full operationalization of the laws in the future. Thailand's regulators have not regarded the free-market prescriptions of the Washington Consensus as an on-off switch. An investigation into the ongoing reforms in Thailand has revealed the attitude of Thai regulators toward securities regulation and corporate governance to be one of long-term evolution. Their efforts combine a commitment to free-market ideologies with a pragmatic strategy to overcome factors in their legal, political and social spheres that currently obstruct the effective regulation of Thai securities markets. Out of perceived necessity, Thailand has moved beyond the narrow boundaries of the Washington Consensus prescriptions, while staying committed to its central tenet of market-based regulation. It is this third lesson that will be analyzed in more depth through the rest of this paper. I will begin by laying out some of the challenges that Thai regulators have encountered, and then will detail the measures that they are undertaking to meet these challenges. Next, I will offer my analysis of these new reform measures and discuss how the majority of them will serve to greatly enhance the effectiveness of securities regulations in Thailand. Finally, I will argue

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[85] PHILIP A. WELLONS & KATHARINA PISTOR, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995 19 (1999).
[86] *Id.* at 63, diagram 4.1.
[87] *Id.*
[88] *Id.*

that a realignment of the government's reform initiative priorities may result in more effective operationalization of the securities regulatory regime.

VI. OBSTACLES TO EFFECTIVE SECURITIES REGULATION IN THAILAND

Thailand has clearly had limited success in implementing an effective market-driven, disclosure-based system of securities regulation. But why? Thanks to a hard-won culture of free expression, policymakers, regulators, market players and academics have been able to be candid in their assessments of the difficulties facing Thai securities regulators. I have attempted to present these challenges as discrete factors despite the fact that there is not only some overlap, but also causal relationships between some of them. The challenges have been placed into four broad categories: institutional, enforcement and governance and market forces.

A. Institutional

1. Jurisdictional Confusion

There has long been some confusion in the securities community over the jurisdictional boundaries between the SEC and SET.[89] This problem stems from the relatively recent founding of the SEC and the resulting split in regulatory responsibility between the two entities. The SEC is the central regulator, charged with overseeing the primary market and the issuing companies, as well as market manipulation and insider trading.[90] Whereas the SEC carries out the regulations of the Securities Act of 1992 and the 1997 amendments, the SET employs its listing criteria and trading rules to police the secondary market.[91] However, the SET still retains full regulatory control over the firms that listed with it between the time it was founded in 1974 and 1992 when the SEC was established, unless these firms have issued new shares after 1992.[92] This regulatory overlap not only causes confusion among the business community over which regulator they must answer to, but also requires redundancy in the regulatory capabilities of the SET and SEC. Although

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[89] Interview with Supan Poshyananda, Director, Legal Department, Securities and Exchange Commission (Sept. 24, 2001).
[90] *Id.*
[91] Interview with Thidarat Aruninta, Assistant Vice President, Legal Department, The Stock Exchange of Thailand, (Sept. 26, 2001).
[92] *Id.*

there is a Memo of Understanding seeking to clarify the jurisdictional boundaries, some measure of confusion and inefficiency engendered by this situation remains.[93]

2. Politicization

The structure of regulatory institutions in Thailand has resulted in their lack of independence from political pressures. The primary factor in this politicization has been the structure of the Cabinet of the SEC and the relation of the SEC to the SET, as detailed in Section II, above. The Minister of Finance is the Chairman of the SEC, and as such, wields significant power in appointing other members of the Office of the SEC. Furthermore, all proposed legislation drafted by the staff of the SEC must pass committee in the Ministry of Finance before being voted on at Parliament.[94] The SEC also appoints five of the ten members of the board of the SET, which then appoints the SET president. When the SEC proposes legislation, drafts must be sent to the Ministry of Finance for approval, which is an extremely lengthy process. Clearly, the Ministry of Finance holds a dominant position over the SEC and SET, rendering them less than independent from Thailand's turbulent politics.[95]

Politicization can be an impediment to effective securities regulation because of its distortion of regulatory priorities.[96] The regulators' dilemma of regulation versus promotion is always a fine line to walk even for a fully independent body. Securities regulators cannot be so zealous as to destroy their own markets, as that would be even more harmful to shareholders than not regulating at all. In emerging markets like Thailand, where corporations and markets are not as robust as in more developed countries, the balance may have to be skewed somewhat toward promotion, particularly during downturns.[97] But when there is the added pressure from the politicians to push for promotion over regulation, the risk that securities enforcement will be rendered sub-optimal is increased.

There is evidence that politics in Thailand have exerted such pressure on regulators. Some of the regulators I spoke with complained

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[93] Interview with Supan Poshyananda *supra* note 89.
[94] Interview with Rapee Sucharitakul, *supra* note 42.
[95] *See* Philip Wellons, *Prototypes of Securities Regulation for Africa: Key Issues*, Harvard Institute for International Development (Aug. 1999), at 26. "National politics may cripple the finance ministry's efforts to regulate securities markets much more than it would undermine an independent... agency."
[96] *Id.*
[97] Interview with Waratchya Srimachand, Deputy Director, Corporate Finance Department, Securities and Exchange Commission (Oct. 4, 2001).

that there is, politically, no good time to begin enforcing securities regulations on wayward companies.[98] If the economy is in a downturn, a great cry goes up among the business community that they are suffering terribly already and that higher legal costs will drive them into bankruptcy. If the economy is in an upswing, the business community will argue that the laws must be doing their job if the economy is humming so why fix what isn't broken? As in most other countries, the business community wields a great deal of political power in Thailand. Furthermore, there is a great deal of overlap between the Thai business and political communities, with no better example than the current Prime Minister, Thaksin Shinawatra, who is the head of the family-owned telecommunications conglomerate and the richest man in Thailand. It is not surprising, therefore, that the current administration has, from the outset, emphasized promotion and deepening of the securities market over improving securities regulation.[99] I do not claim that the current administration has succumbed to a conflict of interest due to its business entanglements but merely that it has manifestly pro-business tendencies. Only after Calpers pulled its money out of Thailand did the administration come out in force to support the push toward greater transparency and shareholder protection in Thailand.[100] Instead, the administration has focused heavily on its initiative to deepen the Thai securities market by wooing investors, adding tax incentives to list and beginning to privatize a long list of state industries. Prime Minister Thaksin's stated goal has been to increase the size of the SET to 700 billion baht, an increase of 50%, over the next three years. The administration's reticence on the subject of improved transparency and regulation has been in sharp contrast to the great attention paid to this issue by investment professionals, SEC and SET officials and institutional investors. I believe that their lack of independence from this pro-business political climate has made the Thai securities regulators' task of walking the line between regulation and promotion more difficult.

B. Enforcement

1. Criminal Prosecutions

The current system of securities enforcement in Thailand is primarily criminal in nature. The SEC has the power to bring criminal cases against those responsible for fraud, market manipulation and insider

[98] *Id. See also* interview with Suthichai Chitvanich, *supra* note 15.
[99] Interview with Waratchya Srimachand, *supra* note 97.
[100] *See PM Urges Transparency*, BANGKOK POST (Mar. 15, 2002).

trading under Sections 238-244 of the Securities and Exchange Act (the '92 Act). However, as of yet, there have been no successful prosecutions for any of these crimes despite efforts by the SEC to bring cases. Why have criminal penalties for violations of securities laws been so difficult to enforce in Thailand?

One primary reason is that their criminal justice system has acted as a barrier to effective securities enforcement. In Thailand's civil law system, criminal cases, like those for fraud and market manipulation outlined in the '92 Act, must be assembled through police investigation and then brought by public prosecutors. Most securities cases never make it past the investigation phase since most police investigators are unfamiliar with securities, not to mention the laws governing them.[101] As one regulator put it, "First we have to explain to them what a stock is."[102] Prosecutors tend to be similarly unversed in equities and the crimes involving them. Given the limited resources available to the police force and the prosecutors, it stands to reason that they would be hesitant to spend the time and effort required to investigate a crime whose elements they may not fully understand.

Even if the cases do come to trial, in a civil law country such as Thailand, the standard of proof required for criminal convictions is extremely rigorous.[103] There must be proof beyond a reasonable doubt of all elements, including scienter, and, barring confession by one of the parties, hard evidence is difficult to come by in securities fraud, insider trading and market manipulation cases.[104] Also, unlike their common law counterparts in the U.S. and England, Thai judges are proscribed by civil law procedure from basing their rulings on past decisions or applying their personal knowledge and discretion to a case.[105] Considering these facts, it is unsurprising that there have been no successful criminal prosecutions for fraud, market manipulation or insider trading.

Another, less direct impediment to enforcement of criminal sanctions is the lack of demand for enforcement. This will be discussed in greater length below in Section VI.B.4, Public Demand for Enforcement.

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[101] This point was mentioned by all of the Thai securities regulators with whom I spoke.
[102] Interview with Suthichai Chitvanich, *supra* note 15.
[103] Interview with Thidarat Aruninta *supra* note 91. *See also* interview with Waratchya Srimachand, *supra* note 97.
[104] Interview with Waratchya Srimachand, *supra* note 97.
[105] Interview with Tithiphan Chuerboonchai, *supra* note 44.

2. Civil Cases and Class Actions

Unlike its U.S. counterpart, the Thai SEC does not possess the right to engage in civil litigation on its own behalf against violators of its regulations.[106] Private citizens may bring a civil suit against a company or an individual for securities violations, but the plaintiff is required to be in possession of the relevant securities at the time she brings the case in order to have standing.[107] Derivative suits are an option, although, like in the U.S., any winnings accrue to the company, not the shareholder and the shareholder must reimburse the company for legal expenses if he does not win the case. Currently, class actions are not available in securities law cases.[108] A final consideration is the extremely long time a plaintiff in a Thai court can expect to wait before the verdict is handed down. Obviously, a civil suit by an investor will entail fairly high costs. Given this fact, it is easy to see why many investors opt to simply vote with their feet (i.e. sell the shares) and cut their losses instead of attempting to seek legal relief.[109] Below, in Section VI.B.4, Public Demand for Enforcement, I will explore further reasons why civil suits may be so rare.

3. Administrative Actions

The SEC is empowered by the '92 Act to levy fines against issuers and broker-dealers for administrative violations. For issuers, these violations include late or incomplete disclosures and for broker-dealers, improper trading supervision and license problems. These fines are typically not very large, and cannot be levied for the criminal violations of insider trading, fraud and market manipulation. In short, the administrative actions available to the SEC are not significant deterrents to the more serious violations of the '92 Act.

The administrative actions available to the SET contain somewhat more bite. These include suspension of the trading, fines and delisting and can be for any violation, including potentially criminal acts such as insider trading and fraud. The SET will suspend trading of a stock if officials suspect wrongdoing, but such remedies are very rarely invoked because, according to one SET official, the sanctions tend to hurt the shareholders more than the violators.[110] This unfortunate result is

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[106] Interview with Rapee Sucharitakul, *supra* note 42. *See also* Summary of Analysis on the Draft Amendment to the Securities and Exchange Act *supra* note 14.

[107] Summary of Analysis on the Draft Amendment to the Securities and Exchange Act *supra* note 14. *See also* Interview with Rapee Sucharitakul, *supra* note 42.

[108] *Id.*

[109] Interview with Doug Barnett, *supra* note 40.

[110] Interview with Thidarat Aruninta, *supra* note 91.

attributable to the fact that civil remedies that would be available to compensate shareholders in a well-working regulatory system are not a viable option in Thailand. Furthermore, I believe that political pressure to emphasize promotion over regulation has discouraged zealous application by the SET of its administrative enforcement options.

4. Public Demand for Enforcement

According to the study commissioned by the Asian Development Bank, referred to in Section V.B. above, public demand for enforcement of a law has been a driving force in legal institutional development in Asia.[111] Public demand for enforcement signals that social practice is in line with the law, and encourages politicians, regulators and the judiciary to properly implement it.[112] In the case of securities regulation, this demand would come from activist investors bringing civil suits or militating for more criminal prosecutions. With 600,000 investors, it is reasonable to assume that Thailand's markets contain the potential for significant demand for enforcement of securities regulations.[113] But as of yet, little such investor activism has been in evidence. The pressure that has been applied has come primarily from Western institutional investors such as Calpers and the Templeton Funds, who carry less weight than the local retail investors, who hold over 80% of the stocks on the SET. These Thai retail investors have not taken an activist stance toward shareholder rights and have not militated for more prosecutions the way one might expect in the wake of the Thai financial meltdown. One could argue that Thai investors are simply unaware of their rights and the nature of securities violations. Although this is certainly true, Thai investors do not seem particularly interested in learning about their rights. When the SET and SEC sponsored a fair designed to teach about shareholder rights and empower the investors, the turnout was below what they had expected.[114] In other markets, such as Hong Kong, Malaysia and Singapore, investors have formed their own activist NGOs.[115] No such group has appeared in Thailand.

The problems with civil remedies detailed above clearly discourage some investors from pursuing their rights in court, but that does not explain why so few of them have shown any interest in getting

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[111] *Id.*
[112] *Id.*
[113] Interview with Trakarn Nopmuang, Director and Prakid Punyashthiti, Deputy Director, Market Intermediaries Supervision Department, Securities and Exchange Commission (Sept. 24, 2001).
[114] *2001 SET Midyear Report*, BANGKOK POST
[115] Justin Doebele, *Off With Their Perks!*, FORBES GLOBAL (May 14, 2001).

these problems fixed. Investors' attitude toward ineffective criminal and administrative remedies appears similarly apathetic. Clearly there is more to the problem than imperfect laws and sub-optimal enforcement. Some claim that there is a bias rooted in Thai culture against relying on the legal system for protection and compensation.[116] One oft cited example is the Thai saying that "it is better to eat dog shit than to go to court."[117] This general anti-litigious saying is Chinese in origin. The underlying sentiment is that resorting to judicial proceedings evidences a shameful failure to work out a dispute through the more honorable route of personal negotiations, compromise or even sacrifice. Conflict and confrontation are to be avoided at almost any cost. Most of the people I spoke with dismissed this as nonsense and believe that, if a viable legal option exists, Thais would readily resort to it. Given the presence of activist shareholder groups in Hong Kong, Taiwan and Singapore, it seems unlikely that a Chinese cultural legacy is the root of the problem.

Another possible explanation is that Thais simply have no faith in their justice system. Sadly, they seem to have a point. There has been a traditional reluctance in Thailand to prosecute elite members of society, such as business or political leaders, for any crimes whatsoever, let alone a crime so difficult to prove as securities fraud.[118] This is supposedly a legacy of the highly personalized legal system of ancient Thailand described in Section II, above. A widely cited example of this bias was the acquittal of now Prime Minister Thaksin Shinawatra by the Constitutional Court from charges of misstating his assets on required electoral disclosures.[119] Another example is the case of a powerful politician's son who has been accused of committing a murder in a nightclub filled with witnesses late last year. Despite the highly public circumstances of the crime, almost no one seems to believe that he will be convicted of the murder. The existence of this pro-elite bias in the courts is certainly debatable, but what is certain is the strong belief among the general public that the courts are unwilling to give them justice over a business leader or a member of an elite class.

It is likely that the lack of demand for securities law enforcement results from a combination of perceived inequity in the legal system and high costs to potential plaintiffs. The result is an unfortunate cycle where investors don't rely on the securities laws because they won't be

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[116] Interview with Tithiphan Chuerboonchai, *supra* note 44. *See also* interview with Kittipong Kittayarak, Director General, Department of Probation, Ministry of Justice (Dec. 12, 2001).

[117] Interview with Patraporn Milindasuta, Vice President, CICG Counsel, Office of General Counsel, Merrill Lynch Phatra Securities Company (Feb. 12, 2002).

[118] McBride, *supra* note 7. *See also* interview with Patraporn Milindasuta *supra* note 117.

[119] *See* Edward McBride, *All Things Considered*, THE ECONOMIST (Feb. 28, 2002).

enforced, and they remain unenforceable because investors do not rely on them. This appears to be a very difficult cycle to break.

C. *Corporate Governance Difficulties*

The economy of Thailand has been primarily agrarian for all but the most recent stages of its history.[120] Traditionally, Thais worked the land or were government administrators and Chinese immigrants comprised the bulk of the merchant class.[121] As in other countries in Southeast Asia, the merchant Chinese immigrants tended to structure their businesses around one dominant family group, with the patriarch having near total control of the decisions of the company and its subsidiaries. This so-called Confucian business culture has proved quite durable throughout Thailand's history despite the relatively successful assimilation of the ethnic Chinese into Thai society. The result is that business in Thailand is still dominated by ethnic Chinese family-owned businesses. A study by Andersen Consulting in September 2000 found that despite comprising 14% of the population, Chinese businesses command 81% of the market capitalization in Thailand.[122]

The concept of shareholder ownership of the company is not widely accepted. Thai companies, therefore, have a tendency to operate as a vehicle to secure profits for the family and its insiders often at the expense of minority shareholders.[123] Minority shareholders are commonly considered to be little more than a distraction and are not trusted to have any say in the running of the company.[124] Predictably, insider trading and poor disclosure are the unfortunate by-products of this insular corporate culture. Surely in the great majority of cases there is no willful defrauding of investors, but standard operating procedure has always been to take care of one's own.

It seems odd to say that an obstacle to the proper enforcement of a law is that few people follow it. Forcing people to comply is what laws are supposed to do. But in reality, it is not that simple. Jerome Cohen, a noted scholar in the area of legal development, has stated that "governance can't improve faster than legislation, but legislation can't

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[120] WYATT, *supra* note 1, at 292-3.
[121] *Id.* at 67, 292-3.
[122] Voranai Vanijaka, *Family Firms Feel the Heat*, BANGKOK POST (Sept. 11, 2000), *citing* the Andersen Consulting study. *See also* Andreas Kluth, *Empires Without Umpires, in A Survey of Asian Business*, THE ECONOMIST (Apr. 7, 2001), *citing* the Economist Intelligence Unit in diagram 2.
[123] *See* Kluth, *supra*. This view was supported by anecdotal evidence supplied by my interviewees.
[124] *Id.*

move faster than social practice."[125] While this is may be a bit of an overstatement, it is certain that conformity with social mores is an important source of a law's moral force. Having support in social practice is particularly important in the case in securities regulation where regulators are forced to walk a fine line between regulation and promotion. If non-conformity is widespread, zealous enforcement may seriously weaken investor confidence and do more damage to the market than the behavior it seeks to punish. This sort of argument against over-regulation has been made in the current case of Arthur Andersen, where some allege that Justice Department's aggressive legal tactics have served to effectively ruin a firm of 85,000 mostly blameless employees worldwide.[126] In an emerging economy, where investors are more jittery and firms are less robust, the risk of disrupting the market would be even higher.

This insular business culture has survived the latest round of reforms. Independent directors have often proven to be somewhat less independent than required for them to make disinterested judgments. It is often the case that independent directors in Thailand are in fact close associates of majority shareholders, or are unclear as to what their role should be, or both.[127] Audit committees are another means by which directors and majority shareholders are supposed to be held accountable. But similar to the case of independent directors, they are often influenced by the dominant family in the company or are uncertain about what their proper function should be.[128] Some companies that were traditionally family-run have been hiring professional management but this trend is not yet widespread. Despite the best efforts of the Thai IOD, traditional, insular Thai business culture remains the norm.

D. Lack of Market Forces

The foregoing obstacles to effective securities regulation in Thailand combine to cause this fourth obstacle: lack of market forces in the SET. A market-based set of regulations must, by definition, rely on the market to police the players in the vast majority of cases. Certainly litigation can stand in the gap when there is a market failure, such as fraud, but such cases should be relatively rare in a well-working market.

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[125] Andreas Kluth, *Of Laws and Men, in A Survey of Asian Business*, THE ECONOMIST (Apr. 7, 2001).

[126] *See DOJ to Andersen: Drop Dead*, Dobbs Report (Mar. 27, 2002), CNNMoney website, *at* http://money.cnn.com/2002/03/27/commentary/dobbs/dobbsreport/hr~index.htm.

[127] Interview with Pornkanok *supra* note 57.

[128] *Id.*

But in Thailand, as we have seen above, the law provides little protection for investors and they do not expect it to. As noted in Section IV, above, investors in the SET typically find other ways to manage their risks, namely putting little money in and buying only to sell very quickly thereafter. When you are a retail investor taking small positions in stocks and getting out fast, it is not worth performing any fundamental analysis of the companies you are buying. Thus, Thai investors are unfamiliar with financial analysis for much the same reason they are ignorant of securities law: they believe it is of no use to them. The institutional investors, for whom fundamental analysis is worth doing and worth doing well, are too concerned with the lack of securities regulation to return to the SET in significant numbers.

So the knowledgeable investors that are at the heart of an efficient market are scarce in Thailand.[129] As a result, the market mechanism that should be encouraging compliance with securities and other financial regulations is not operating. The Far Eastern Economic Review reported that, on average, Asia's best-governed companies (i.e. those with good transparency, respect for shareholder rights, etc.) all outperformed their country indexes in 2001, except in Thailand, where they underperformed by 15%.[130] The market is simply not rewarding good governance. While good governance does not necessarily equal good management, and hence, good profits, "it usually reflects management quality and acts as a vital check against abuses to deter mismanagement."[131] This is undoubtedly true in Thailand as well, but as the Assistant Secretary General of the Thai SEC put it, "this is a market with no market force... no discipline."[132] The failure of enforcement discussed above is a serious problem, but its effects are confined to those relatively rare cases of wrongdoing. The resulting lack of market force, however, affects the workings of the entire market. Good actors are not rewarded and bad actors are not sanctioned. Securities violations do not result in legal difficulties, nor are they even bad for business. This lack of market force is perhaps the greatest challenge to effective market-based securities regulation in Thailand.

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[129] *See* Krissana Parnsoonthorn, *SEC Wants to Boost Quality of Investors*, BANGKOK POST.
[130] Tom Holland, *The Search for Quality*, FAR EASTERN ECONOMIC REVIEW 43 (Apr. 18, 2002).
[131] *Id.*
[132] Interview with Rapee Sucharitakul, *supra* note 42.

VII. A MIDDLE PASSAGE: THAILAND'S JOURNEY TOWARD BEST-PRACTICE SECURITIES REGULATION

The case of Thailand demonstrates the extent to which the character of a nation's legal institutions, capital markets, government and culture can affect the functioning of its laws, and thus, "good law" in one country may not be viable when transplanted to another. But the regulators and policymakers in Thailand understand that the factors impeding their goal of effective market-based securities regulation are not immutable. As mentioned above, they clearly view their move from merit-based to disclosure- or market-based securities regulation as a work in progress and have been energetically pursuing reforms to bring them further toward their goal. I will list these reforms below under the headings Institutional, Legal and Market-Supportive. This second round of reforms is mostly laid out in a draft of proposed amendments to the '92 Act. This draft is currently in committee at the Ministry of Finance, where it has been since 2000. Despite the delay, the SEC and SET are optimistic that the amendments will be accepted and the Ministry has said that it will finish its review by September 2002. I have also included in this list certain reform measures and initiatives that have not officially been submitted for approval at the Ministry of Finance but that regulators are working on and are generally agreed to be on the reform agenda.

A. Institutional

1. SET and SEC Jurisdiction

The SEC and the SET are set to propose legislation which will confer upon the SEC full regulatory responsibility for those companies that listed on the SET previous to the inception of the SEC.[133] Furthermore, the proposed amendments to the '92 Act contain a provision which will allow the SEC to abrogate its regulatory responsibility in cases where the offenders have already been punished adequately by the SET, thereby eliminating duplicative enforcement.[134]

2. SEC and SET Independence

The draft amendment to the '92 Act lists as one of its main objectives the greater independence of the SEC and SET. To this end, it

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[133] Interview with Thidarat Aruninta, *supra* note 91.

[134] Summary of Analysis on the Draft Amendment to the Securities and Exchange Act, *supra* note 14.

removes ultimate authority over the SEC from the Minister of Finance and places it with the Office of the SEC. The Office has the power to issue rules and regulations, obviating the need for review in the Ministry of Finance. The amendment also eliminates the ex-officio members of the SEC, namely the Permanent Secretaries of the Ministries of Finance and Commerce and the Governor of the Bank of Thailand. Commission members are still appointed by the Cabinet, but they must be approved by Parliament and cannot be members of any political party. The majority of these commission members will work full-time for the commission, unlike in the past when membership was only a part-time assignment, and are charged with making rules and regulations to deal with market developments.

Under the draft amendment, the SEC no longer has the power to appoint any members of the board of the SET. SET members will elect each member of the board, and two-fifths of the board must be persons not affiliated with a broker-dealer. There must be at least one director representing issuing companies listed on the SET and one director representing investors. The manager of the SET must be independent. The SET is empowered to make and enforce its own rules. However, the SEC is entitled to ensure that such rules enforce at least a minimum standard of conduct and may elect to review SET disciplinary actions.

B. Legal

1. Disclosure

Higher standards for disclosure and wider application of anti-fraud provisions are the main goals of reform in this area. To this end, the draft amendment extends liability for misstatements and omissions to statements made and documents produced after the original offering. It also allows the SEC to appoint independent auditors to inspect a company's disclosures if the company's board is unable to choose an auditor themselves. Finally, the draft requires that companies exempt from the registration requirements of the '92 Act provide minimal disclosures, which are subject to the same anti-fraud rules as the disclosures of non-exempt companies.

2. Civil Actions

Thai regulators have proposed a number of measures to facilitate the pursuit of civil remedies in securities cases. The draft amendment contains two of these measures. First, it confers joint liability with the

issuing company upon directors and others, including experts, responsible for misleading statements or omissions in securities disclosures. Second, it also gives subsequent buyers of securities the standing to sue the original issuer. Although not contained in the draft amendment, regulators are committed to pushing through legislation that would allow class actions for securities cases, thereby greatly reducing the legal costs to an individual investor-plaintiff. They envision either the SEC or an investor's advocacy group as being the class representative in these cases. This investor advocacy group is to be formed by the SEC and SET. Its mission, aside from possibly representing a class of investors in a civil suit, would be to purchase shares of each listed company, analyze them, and advise investors on their legal options in cases of fraud, insider trading, or market manipulation.

3. Criminal Enforcement

The draft amendment includes a variety of sections designed to help enable successful criminal prosecutions. First, it defines more clearly what constitutes insider trading, stressing that not only corporate insiders but also those with non-public insider information can be guilty of this offense. Second, it alters the burden of proof for market manipulation by holding that the judge may presume intent from a defendant's conduct, such as making "wash sales" or "match orders." Next, the standard for criminal misstatements and omissions is clarified as those that "may affect investment decisions or proxy voting." This anti-fraud prohibition includes statements made in public as well as in documentation such as the prospectus and registration statement. The scope of liability is held to include those who make or prepare the statements, including experts, as well as the managers of the company.

The problem of police and public prosecutors' lack of expertise in securities cases is addressed in the draft amendment as well. The draft requires that a number of "inquiry officials" and prosecutors be attached to the SEC so that they familiarize themselves with the technical aspects of investigation and prosecution of securities violations. Also, it stipulates that the prosecutor assigned to the SEC will supervise investigations by the police into securities matters and that the inquiry official assigned to the SEC will be in charge of each investigation.

4. Evidence

To promote the gathering of evidence in securities trials, the draft exempts auditors who tip off the SEC to securities law violations from

prosecution for disclosure of confidential information under the Penal Code. It also offers an unspecified cash reward to those who agree to supply evidence in securities cases.

5. Administrative Remedies

The draft also extends the statute of limitations for levying fines in an administrative action to five years from commission of the violation, or one year from discovery by an SEC official.

C. Market-Supportive

While the other categories of reform are self-explanatory, this section appears to be somewhat of a catchall. Although they seem disparate, educating investors, deepening the market, and publishing corporate governance quality rankings are all designed to enhance the market force that is supposed to be disciplining the issuers. This, according to the Assistant Secretary General of the SEC, is the top priority in the reform strategy; his view was echoed by many of the regulators I spoke with.[135] The rationale behind this is that enforcement of civil and criminal penalties is only necessary in the relatively rare cases where you have true criminals operating in the market. The average Thai businessman, on a day-to-day basis, must be disciplined through market force (i.e. the purchasing decisions of informed investors), not legal sanction.

1. Educating Investors

To improve market discipline, the SEC is focussed on raising the quality of investors in the SET. To this end, it has begun holding seminars to teach investors the basics of company analysis, the value of corporate governance and their rights as investors and shareholders. As mentioned above, it also plans to create an investor advocacy group to encourage investors to invest well and to sue for their rights when they are victimized.

2. Governance Rankings

In cooperation with the IOD, the SET and the SEC will begin to offer rankings of firms depending on their commitment to the principles

[135] Interview with Rapee Sucharitakul, *supra* note 42.

of good corporate governance. The criteria include the number of directors, independent directors, and audit committee members who have taken the IOD courses; how many independent directors there are; the level of transparency; and the use of respected independent auditors. Those scoring seven out of ten will receive fee reductions from the SET and fast-track registration procedures for new offerings. The rankings will be publicized throughout the investment community by the SET and the investor advocacy group. The other side of the coin is a blacklist created for the individual managers who are the worst violators of corporate governance standards, and this also would be publicized to the investment community. This system is designed to stand in for the fundamental company analysis that retail investors are unable or unwilling to engage in.

3. Deepening the Market

As mentioned above, the Thaksin Administration has repeatedly expressed its intention of deepening Thailand's stock market, with a goal of reaching market capitalization of 700 billion baht—an increase of 50%—over the next three years.[136] This will be accomplished through a joint strategy of privatizing state-owned enterprises (SOEs) and encouraging greater domestic investment.[137] The theory behind this strategy is that a larger market will naturally contain greater market forces to discipline management. Furthermore, SOEs headed for privatization are being instructed by the Ministry of Finance in better governance procedures and are supposed to set a good example in the market.

Initially, the administration had been cool at best toward foreign investors. Their suspicion stemmed from a belief that foreign influences had exacerbated the Thai financial crisis and that now foreigners would stream back into Thailand to buy up its crown jewels at fire-sale prices. Recently, however, the administration has distanced itself from this earlier stance and has been more actively courting foreign investors, even performing roadshows for PTT's IPO in the U.S. and Europe. But the commitment to expand the domestic investor base has retained its primacy in the eyes of the administration.[138]

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[136] Parnsoonthorn, *supra* note 129.
[137] *Id.*
[138] *Id.*

VIII. EVALUATING THE "MIDDLE PASSAGE" REFORMS

Although not all of these "middle passage" reforms will necessarily be implemented, even at this nascent stage they represent a sincere and diligent effort on the part of Thai regulators and policymakers, and are a testament to the strength of their commitment to effective securities regulation. I will not attempt to foretell which will or will not be accepted by the Ministry of Finance and passed by the Parliament; instead, my evaluation will focus on how well the reforms and initiatives address the challenges listed in Section IV, above. In general, they do much to overcome the obstacles and move the Thai securities regulatory regime toward more optimal performance. However, I believe that a realignment of the priorities assigned to these reform initiatives could improve the speed and efficiency with which the new securities regulatory regime, and the SET itself, develops.

A. Institutional Challenges

Among the recent securities law reforms initiated by the Thai regulators, redefining the jurisdictional boundaries between the SEC and the SET is perhaps the least fundamental, but as such, it is relatively uncomplicated. It requires a minor adjustment in procedures at the regulatory level and no action whatsoever by the business community. As long as the change is made known to the listed companies affected, this reform ought to eliminate any future confusion and duplication of efforts.

The more important of the institutional changes is the move to greater independence of the SEC and SET from the Finance Ministry and the political parties. This will allow them to be far more flexible and responsive, as well as free them to a great extent from political pressures to favor promotion over regulation. Although these institutions will likely remain dependent upon the government to some extent for funding, these reforms will do much to eliminate the inefficiency and politicization that has hampered securities regulation.

B. Enforcement

As mentioned above, Thai regulators and policymakers see deepening and enhancing the market as their top priority. This is not to say that they have overlooked the need to take steps to facilitate enforcement of criminal, civil and administrative penalties in the case of wrongdoing. In fact, their reform efforts in the area of enforcement are

comprehensive. The draft amendments, as seen above, clarify the laws and extend liability to individuals and situations not previously thought covered. More important, though, are the measures designed to encourage the pursuance of cases, both civil and criminal. On the criminal side, attaching an investigator and a public prosecutor to the SEC will greatly expedite the investigation and prosecution of securities cases. Class actions are a key step in making civil remedies viable for retail investors. Finally, the measures designed to encourage evidence gathering and whistle blowing will help to build cases that will stand up in court.

Aside from lengthening their statute of limitations, the draft amendment proposes no direct initiatives to augment for administrative remedies. But the difficulty with administrative penalties, as noted above, is that without a viable recourse to civil law, investors in the affected company would be the ones most hurt by them. Furthermore, the politicization of the SEC and SET has discouraged their optimal use. By improving private investors' options for legal recourse and making the regulatory institutions more independent, the draft amendments have addressed the main obstacles facing proper use of administrative remedies.

There is much to applaud in these reforms and little to criticize. However, I feel that three possible initiatives are conspicuous in their absence. First, I expected the draft amendment to eliminate the requirement that a plaintiff be in possession of the shares of the company over which she is suing. Although the draft allows subsequent purchasers standing to sue, this may not be enough, particularly considering the very brief time that the average Thai retail investor holds her shares. This holding requirement undoubtedly serves to curtail the number of suits brought. Second, the SEC remains without the ability to bring civil suits on its own behalf. If it can be the class representative in class actions, there should be no reason why it cannot also initiate and pursue litigation on its own. It seems that a leading role by the SEC in bringing cases would be the most effective way to add some discipline to the market, familiarize the judiciary with securities cases, and show investors that the law offers them real protection. Third, this reform initiative addresses the need to have experienced investigators and prosecutors who are comfortable with the technical aspects of securities cases, but overlooks a similar need in the case of judges. Nothing so extreme as attaching a judge to the SEC or creating a special court for securities cases is required. Simply offering education and training seminars for judges on issues in securities law would be a worthwhile step. Such seminars have taken place in Egypt over the last few years and have proved popular

among their judiciary.[139] In Thailand, such seminars would be particularly important given the number of recent changes in the securities laws and the infrequency with which judges have encountered securities cases in court.

While not insignificant, the above criticisms are somewhat cosmetic. They are issues of degree, not of fundamental reform strategy. Furthermore, if the existing reform measures are passed as is, the more independent SEC will have much greater ability to promulgate such new rules, if the need becomes evident. But while these reforms set the stage for greatly improved enforcement of securities regulations, they only take us so far. As discussed above, supply of effective laws must be matched with demand for their use if they are to be operationalized. I will discuss this issue of demand for enforcement in Section VIII.D, below.

C. Corporate Governance

In order to improve the culture of corporate governance, the draft amendment requires more disclosure and ensures that potential liability is extended to the managers themselves in the cases of material misstatements or omissions. Initiatives in the draft to facilitate enforcement complement this effort, by increasing the threat of litigation or even criminal charges to encourage compliance. Behind all this, the IOD continues its management training exercises and regulators and politicians sing the praises of good corporate governance in the media. But ultimately, Thai regulators and policymakers realize that it is the market that must be the driving force in encouraging good corporate governance and good disclosure, while at the same time discouraging misbehavior. The market-supportive initiatives listed above are designed to stimulate market forces to discipline managers. The most creative of these initiatives is the corporate governance rankings that the SEC and SET will publicize, which I will discuss further in the following section.

D. Lack of Market Forces

To reiterate, the top priority of Thailand's "middle passage" reform strategy is deepening the market and providing investors with the information, including good governance rankings, that they need to make rational investment decisions. This is designed to provide the SET with the market discipline it has so long been lacking. Because, in a

[139] Discussion with Professor Philip Wellons of Harvard Law School, who established this program in Egypt.

disclosure-based securities regulatory system, it is the market—not the regulator—that is primarily responsible for policing corporate behavior, this seems like a reasonable approach. Enforcement capabilities are still lacking, but the cases of fraud, insider trading and market manipulation that they cover are not the norm and will become even rarer as firms realize that investors reward good governance. In time, enforcement capabilities will be developed, particularly as the newly empowered investors begin to militate for their rights. After all, demand for enforcement has been shown by the Asian Development Bank to be a vital element of legal development. It seems that all the pieces of the puzzle fall into place. In short, Thai regulators and policymakers acknowledge that corporate governance and securities enforcement is weak in Thailand, but that knowledgeable, rational retail investors will exert the market force required to improve it.

My argument is that corporate governance and securities enforcement is weak in Thailand *and therefore* knowledgeable, rational retail investors cannot exert the market force to improve it. I disagree with the notion that Thai retail investors are acting irrationally when they speculate on the market, and that if they were more sophisticated they would instead invest in well-governed companies. Thai retail investors are already making rational investment decisions, given their limited resources, the nature of the market, and the lack of securities enforcement. For a Thai retail investor, speculation with little fundamental analysis is the way to maximize the potential value of their securities transactions on the SET. Because there is little market discipline and no practical legal recourse if they are defrauded, they must reduce their risk by putting little money in and getting out quickly. This behavior renders the cost of fundamental analysis well above its benefit, even if they knew how to do it, which most certainly do not.

Thai regulators argue that the investors themselves, once they are more sophisticated, will supply the market discipline through their own investment choices that will in turn serve to protect them. Once their collective market force has raised the standards of transparency and governance, the rational investors will be buying and holding shares of well-run companies (i.e. investing instead of speculating). The poorly run companies that take advantage of investors by flouting securities regulations will be shunned by the market and see their share prices plummet. The problem with this strategy lies in moving from a state of rampant speculation to a state of widespread fundamental analysis and investing. As a sidekick said to Indiana Jones in the movie *Raiders of the Lost Ark*, "very dangerous... you go first." Although humorous, this quotation raises a serious issue: achieving equilibrium in a state where

retail investors are protected by the market forces they engender requires their coordinated movement away from speculation to fundamental analysis. Without a critical mass of retail investors doing fundamental analysis and investing in well-governed companies, their market force will not be strong enough to afford them protection. Having insufficient protection by market forces, long-term investors will face unacceptable levels of risk. Thus, they will once again turn to speculating to manage their risks and the equilibrium state will revert back to one of widespread speculation. How can a Thai retail investor count on her fellow retail investors to move with her away from the safety of speculating?

The plight of this Thai retail investor is not unlike the famous prisoner's dilemma, in which two prisoners, A and B, are interrogated separately for committing a crime. If A and B were free to choose an outcome together, and could trust each other not to take advantage, they would agree to both keep silent. However, if A implicates B, and B remains silent, this is the best outcome for A and the worst outcome for B. If they both implicate each other, this is not as good an outcome as if they had both kept silent, but B has avoided the worst outcome (i.e. remaining silent while being implicated A). Similarly, if all (or even the majority) of the Thai retail investors could get together and agree, they would choose to all perform company analyses and only buy stocks of companies with good corporate governance. This would be the best outcome for them, collectively, because they would be protected by the market force created by their purchasing decisions. However, if not enough of the investors are doing sound analysis, their combined market force, which pushes for good corporate governance, is diminished. Therefore, market discipline, which should be protecting the investor, begins to break down. In a market with little discipline and no viable legal enforcement to act as a safety net (i.e. the SET as it stands today), short-term speculation is the best way for retail investors to reduce the risk of losing their investment. So, as a retail investor, if most everyone else is speculating and you are engaging in fundamental analysis and buying and holding, you are taking an unreasonable risk and your expected outcome is the poorest. In short, no one will want to be the first retail investor on the SET to stop speculating and begin investing. Because retail investors wish to avoid the poorest outcome, and cannot rely on each other to only buy shares of well-governed companies, the rational retail investors in the SET will remain speculators. Although none of these stock speculators will think of this situation in terms of the prisoner's dilemma, they will instinctively be wary of a buy and hold strategy and will probably opt to wait and see if it works out for other people first.

They should be wary. Newcomers to the SET, however, may not be quite as cognizant of the risks involved. As mentioned above, deepening the market has been the administration's top priority among securities reform initiatives. To this end, the government has held seminars around the country trying to drum up enthusiasm for equity investing.[140] Although there is an educational component to these seminars dealing with the risks of investing, it is questionable whether a truly frank discussion of risk would be compatible with the administration's stated goal of promotion. At this stage, I believe that expanding the domestic retail investor base in the SET will, at best, result in an increase of speculators in the market, adding little market discipline. At worst, it could result in substantial economic loss to some ordinary Thai people who were unprepared to manage the risk of investing in the SET. This worst case would damage public confidence in the stock market at this critical juncture in its development.

The system of good corporate governance rankings is designed to steer retail investors toward the better-run companies and prime the pump of market discipline through various administrative incentives for good governance. If this works properly, it may be a solution to the collective action difficulties for retail investors mentioned above. But like a merit-based securities regulatory regime, this ranking involves qualitative judgements by a central regulator. The SEC opted to move away from merit-based securities regulation in part because the public mistook it for a government guarantee that the company was safe to invest in.[141] It seems that the good corporate governance rankings have a high potential of causing the same difficulty. Another reason the SEC moved away from making qualitative judgements about companies was because they had difficulty with the close cases and felt that such decisions are better left to the investor.[142] Again, it seems like one could say the same about corporate governance rankings. Some market professionals I spoke with are also skeptical about their usefulness as an inducement to improve the quality of governance. Although high marks mean some discounts on fees and fast-track procedures, these advantages may be too small to amount to any real incentive.[143]

In sum, the "middle passage" reform strategy successfully addresses the majority of challenges facing the current system and thereby will create a securities regulatory regime that is far more capable of fulfilling its mandate of shareholder protection, systemic stabilization

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[140] Parnsoonthorn, *supra* note 129.
[141] Interview with Rapee Sucharitakul, *supra* note 42.
[142] *Id.*
[143] Interview with Boonchai Sriprachaya-anunt, *supra* note 75.

and market promotion. However, I believe that the problem of weak market forces may continue to bedevil the Thai reformers even after these reforms are in place. Educating investors and deepening the market clearly must be part of any effective program to develop the equities market in Thailand, but considering the problems outlined above, they may not be effective as the primary engine for the development of market forces at this stage. In the following section, I will argue that the regulators' top priority should shift to enforcement while still maintaining the important investor education programs and delaying market-deepening initiatives until a cycle of market development has more firmly taken hold.

IX. THE NEED FOR ENFORCEMENT

The prevailing attitude of Thai regulators seems to be that striving for some successful securities cases or prosecutions is "trying to run before we can walk."[144] This implies that it is easier to build up a measure of general market discipline first, so that the market will police the typical Thai manager, who wishes to run his company honestly. Later, when the market is more sophisticated, the law will begin to catch up with the relatively few violators of securities regulations. I believe that this theory underestimates the potential for enforcement to act as a catalyst for developing general market discipline.

First, the "middle passage" reform strategy envisions the development of market force on the SET as independent from securities enforcement. The recipe it espouses for the creation of market force calls for education of investors and managers, deepening the market and bolstering the incentive to good corporate governance with a ranking and rewards system. As discussed above, this may not be effective because the behavior of retail investors, which is the key ingredient, might not change significantly. How might their behavior be changed from speculation to deeper company analysis and long-term investing? As discussed above, speculation is a response to a high-risk investing environment. If viable legal recourse were available for Thai investors whose investments were wrongly expropriated, this would lower investment risk and encourage a move away from speculation. But Thai investors, as we know, are highly skeptical of the ability of the legal system to provide them with justice. They are also well aware of the lack of good corporate governance principles in Thai business culture. In my opinion, Thai retail investors will believe that the risk is lower only when

[144] Interview with Rapee Sucharitakul, *supra* note 42.

they see some genuine prosecutions of wrongdoers and successful civil cases against managers. Until then, they will continue to speculate and thus "not need protection of the laws."[145] But one of the problems of legal development is that it does not happen in a vacuum and requires some support in social practice and demand for enforcement. This leads us to a Catch-22, where investors will not demand enforcement until they see some successful prosecutions and there will be no successful prosecutions until there is a demand for enforcement. Obviously another approach is needed.

The key to injecting market force into the SET is the presence of institutional investors. They are not caught in the prisoner's dilemma described above because they embody so much more market force than the individual Thai retail investor and therefore have no collective action problem. In other words, Thai retail investors can only protect themselves if a large number of them act in concert but institutional investors are powerful enough to go it alone. They command a large amount of capital, engage in detailed analyses of the companies they invest with, interact with management, are more likely to vote their shares at meetings, and care more about corporate governance. In cases of wrongdoing, they are far more likely to demand enforcement and militate for their rights. By doing this, they spur legal development, engender greater market discipline and work to change management practices to embrace transparency and other principles of good governance.

If they exert such a healthy influence on the market, why are there so few of them in the SET? First, in many quarters, Western financial institutions are viewed as the villains in the 1997 financial meltdown in Thailand. This view, predictably, proved quite popular in Thailand and the current ruling party, Thais Love Thais, won the greatest ever majority in the history of Thai democracy on the back of their baldly populist stance. As Thailand turned inward to find the solutions to its economic problems, foreign institutional investors, still viewed with suspicion, were not encouraged to return. Although the administration has recently initiated efforts to woo the institutional investors back, its bias toward increasing domestic retail investors remains.

Second, and more importantly, institutional investors care about good corporate governance and protection of shareholder rights. Like Calpers and Templeton, most institutional investors want to see a commitment to these principles before they enter a market, and therefore they are currently wary of the SET.[146] So this appears to be the same

[145] Interview with Doug Barnett, *supra* note 40.
[146] Interview with Boonchai Sriprachaya-anunt, *supra* note 75.

Catch-22 observed with regard to retail investors above. However, with institutional investors, I believe, the threshold for acceptable enforcement is much lower than it is for retail investors. This is because institutional investors are better able to protect themselves independent of any securities enforcement—through their market clout, relationships with management and investment diversification—and as such are able to shoulder much more risk.

The level of enforcement that will demonstrate to institutional investors an acceptable commitment to securities regulation is indeterminate. So Thailand's regulators must simply do what is possible. As we have seen from such episodes as the failure of the boiler room prosecutions, successful securities cases, either criminal or civil, are unlikely to occur in the near future. Thus, the option that is left is administrative sanction. The SET in particular has a plethora of potentially powerful enforcement options, including suspending trading, forcibly de-listing companies, banning individuals from securities activities and levying fines. These are available and have been used, but not to great effect as of yet. This is not because the SET was derelict in its duties but because of the difficult regulatory environment they were in. With the economy in crisis and politically powerful businessmen asking the government for assistance, the SET, exposed to the political winds, could not maintain a stringent regulatory agenda. Now that the SET is independent, the economy is improving, and the need for corporate governance is in the political spotlight, its officials may be even more zealous in applying its rules and regulations in order to police its members. Obviously they must walk a fine line between regulation and promotion, taking care to sanction, in a highly public manner, only the worst violators while encouraging the borderline cases to reform their behavior. I believe that this initiative would do much to convince institutional investors that Thai regulators are genuinely serious about securities enforcement and investor protection and is the best way to make the SET a more attractive investment option than some of its rival bourses in Southeast Asia. With the addition of more institutional investors, the virtuous cycle of market development can begin.

Why is enforcement so vital? If the majority of Thai managers are basically honest, as assumed by the "middle passage" reform strategy, all they need is a little market discipline and reasonable investor protection will be achieved. I believe this view misjudges the nature of transparency, disclosure and other aspects of good corporate governance necessary for investor protection. First, without enforcement, Thailand's corporate governance campaign has a credibility problem. It is often very difficult to gauge the quality of a company's governance standard because

it is so easy to talk the talk.[147] Walking the walk, however, is where there tends to be slippage. Thus, a robust securities regulatory regime to enforce the standards lends much needed credence to company's claims of good governance. This is particularly true in the case of countries like Thailand, where the business community is widely known for its traditional neglect of good governance practices.

Second, the deterrence effect of anti-fraud regulations is a vital complement to market discipline in enforcing investor protection. The elements of good corporate governance, like full and proper disclosure in offering documents, are not black and white but rather shades of gray. The standard for fraud in Thailand is a misstatement or omission that would affect one's decision to purchase a security.[148] The rule's strength lies in its vague nature: because managers are not sure where the line is, it is safer for them to err on the side of extra disclosure when there is a credible threat of enforcement. Absent such a threat, even honest managers would likely allow the "fudge factor" in their disclosures to increase. Though likely not amounting to fraud in most cases, this would cause governance standards to suffer and increase risk to investors. Furthermore, it is the nature of many securities violations to not seem "wrong," particularly to a manager in his sixties who, for example, has been engaging in insider trading as standard operating procedure since the SET opened. These people are not dishonest, just set in their ways and the idea of "good corporate governance" is completely new to them. Because of the traditional business culture in Thailand and the highly subjective nature of investor protection principles, enforcement plays a key role in ensuring reasonable compliance with securities regulations.

The "middle passage" reform initiative represents a tremendous effort on the part of Thai regulators and policymakers and does much to set the stage for the development of an effective market-based securities regulatory regime. I conclude, however, that it overestimates the potential for an enlarged and educated group of retail investors to be the catalyst to set this development in motion. The top priority, instead, should be achieving the highest degree possible of securities regulation enforcement. Due to limitations in the court system, administrative sanctions need to be applied to show true commitment to investor protection in the SET. This will have two results. First, it will encourage

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[147] *See* Nuntawun Polkuamdee, Krissana Parnsoonthorn, & Chiratas Nivatpumin, *Good Governance Easier Said than Applied*, BANGKOK POST (Jan. 31, 2002). *See also* Ubels, Helen, *Asian Firms Work to Tighten Boards*, THE ASIAN WALL STREET JOURNAL M8 (Apr. 23, 2002), *quoting* Hong Kong shareholder activist David Webb: "change [in corporate governance standards] is being held back with people putting form over substance."

[148] Summary of Analysis on the Draft Amendment to the Securities and Exchange Act *supra* note 14.

greater participation by international institutional investors and second, it will provide an economic incentive for corporations to improve disclosure, transparency and other governance standards while deterring violations with a credible threat of sanctions. Market discipline will increase as the institutional investors buy into companies that they feel are governed well. These institutional investors will also begin to demand enforcement of their rights in the courts when such cases become necessary. All this will make the market safer for retail investors who will begin to come out from behind the protection of their short-term speculation and follow the lead of the institutional investors in searching out well-governed companies to buy into. The ongoing educational efforts sponsored by the SEC and SET will assist them in doing so. As demand for enforcement naturally increases, and market forces move social practice into conformity with good governance principles, the legal system will respond by yielding proper verdicts in civil and criminal securities cases.

X. CONCLUSION

The case of Thailand is not an indictment of the effectiveness of the market- and disclosure-based securities regulations that are championed by the Washington Consensus. It simply illustrates the need to focus on what is possible in terms of implementation and enforcement given the prevailing conditions in law, business, politics and society. What this requires is a multi-faceted approach to reform that can address the unique obstacles faced by regulators in the developing country while at the same time preserving a long-term commitment to Washington Consensus principles. In other words, the case of Thailand suggests that the answer to the question "one way or many?" is "one way by many paths." Furthermore, as underlined by the revelations regarding fraud and abuse of shareholders in corporate America, it is clear that no one country has a monopoly on good ideas for policing its markets. Developed and developing countries alike have the opportunity to learn from each other's successes and failures.

There are many reasons to feel optimistic about the stock exchange of Thailand and its role in the nation's economic recovery, not the least of which is the energetic and inventive program of reforms discussed in this paper. Ironically, however, the greatest threat to development of the securities regulatory regime in Thailand, and many developing nations, may be a strong recovery by the stock market, which would remove the most powerful impetus for following through with important reforms. One can only hope that the commitment to

developing an effective securities regulatory regime will survive an economic rebound that would otherwise be such a boon to the people of Thailand.

AFTERWORD

At the time this article was originally completed, the shortcomings of the Thai securities law enforcement were being placed squarely in public view due to the high-profile collapse of the Brinton Group boiler-room prosecution, mentioned briefly in Section IV.C, above.[149] Seven executives from the company were on trial for criminal securities fraud, allegedly selling phony stocks to overseas buyers and scamming them out of 6.9 billion baht.[150] Public prosecutors had dropped the charges against the Brinton executives citing lack of evidence despite the SEC's strenuous protests and demand that prosecutors justify their actions.[151] Although much of the resulting criticism was aimed at the SEC, ultimately this debacle provided them with the weight of public opinion and international pressure, particularly from Australia where most of the victims resided, to press their agenda for greater authority to prosecute violations of the Securities Act. In other words, public demand, a vital ingredient for change and development of the law, was on the side of the SEC, and the regulators did not let the opportunity pass.

Prior to the Brinton case collapse, Thai regulators were fully aware of the obstacles they faced in their efforts at effective securities law enforcement. However, effective reform in this area was correctly understood to entail fundamental changes in the prosecutorial system and significant diversion of resources and personnel to investigation and prosecution of securities crimes. The more modest reforms detailed above had been, and even now remain, stalled in the legislative process since 2000, so the probability of success of these enforcement reforms was deemed so low as to remove them from the reform agenda altogether. My response was to call for greater use of administrative sanction, particularly by the SET, which could use its powers to suspend trading of a stock or even to delist where the company is engaging in securities fraud. But the public outcry and national embarrassment over the Brinton

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[149] *See* Nuntawun Polkuamdee, *Fraud Case Dropped by Prosecutors*, BANGKOK POST (Dec. 13, 2002). *See also* Nuntawun Polkuamdee & Krissana Parnsoonthorn, *Thais Risk 'Corruption Hub' Status Over Brinton*, BANGKOK POST (Jul. 24, 2002).

[150] Nuntawun Polkuamdee, *Australians 'Shocked' by Outcome*, BANGKOK POST (Jul. 6, 2002).

[151] *See Announcement on the Decision of the Public Prosecutor Not to Bring Criminal Charge on the Count of Fraud Against Seven Members of the Brinton Group*, SEC NEWS (Jul. 2, 2002).

matter was so strong as to move enforcement reform from the SEC's wish list to the top of the political agenda.

Immediately after the charges against the Brinton Group were dropped, the SEC began to publicly make its case for an overhaul of the securities law enforcement system.[152] Responding to allegations that it was a "paper tiger," SEC officials stated that they were hampered by inadequate laws and a lack of authority to pursue their claims.[153] Less than a week after the Brinton case was dropped, the Justice Ministry made public its plan to form a special unit comprised of economists and capital markets experts that would prosecute white-collar economic criminals.[154] Not to be outdone, the Finance Ministry announced two days later that it would review proposed legislation designed to allow the SEC to "directly punish market rulebreakers."[155] The next month saw the House Banking and Finance Committee calling for securities regulators to perform a further review of securities laws with a view to future amendment and called police, prosecutors and market regulators to testify before them regarding the failures of the Brinton case.[156] In a letter to the Bangkok Post, Dr. Suvarn Valaisathien, the Deputy Commerce Minister, detailed the importance of securities enforcement to protect shareholders and exhorted legislators to speed the approval of a law to allow class actions.[157] Most recently, officials from the Justice and Finance Ministries, the Bank of Thailand, the SEC and the SET, police investigators, and public prosecutors met to discuss challenges to the prosecution of economic crimes and possible ways to overcome those challenges.[158] The participants agreed that a lack of coordination between regulators, police, and prosecutors played a significant role in the failure of prosecutions under the Securities Act.[159] This acknowledgment seems to amount to an endorsement of proposed legislation that would create a combined unit of police, prosecutors, and SEC officials to prosecute cases of securities fraud.

Although the legislative reform process in Thailand has been prone to severe delays in the past, it has shown itself to be rather agile when public opinion is aligned properly. One can only hope that the

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[152] Nuntawun Polkuamdee & Krissana Parnsoonthorn; *Legal Weaknesses to Blame for Ineffective Role, SEC Insists*. BANGKOK POST (Jul. 4, 2002).
[153] *Id.*
[154] Nuntawun Polkuamdee, *Market Experts to Help New Unit Hunt Economic Crim*inals, BANGKOK POST (Jul. 11, 2002).
[155] Nuntawun Polkuamdee, *Amendment Would Give SEC Teeth*, BANGKOK POST (Jul. 13, 2002).
[156] *Brinton Case Sparks Call to Review Laws*, BANGKOK POST (Aug. 1, 2002).
[157] Dr. Suvarn Valaisathien, *Class Action Law is Urgently Needed*. BANGKOK POST (Sept. 2, 2002).
[158] Nuntawun Polkuamdee, *Red Tape Impedes Convictions*, BANGKOK POST (Dec. 13, 2002).
[159] *Id.*

political impetus for securities law enforcement reform remains strong and results in a more efficient and effective prosecutorial process, which, as stated above, I believe is the key to developing a more robust stock exchange. But even to have such reform on the political agenda was practically inconceivable only six months ago, and so the fact it is being debated at all represents a significant step forward.

Another encouraging sign is the announcement by Prasarn Trairatvorakul, Secretary-General of the SEC, that the Commission's focus for 2003 will be increasing participation by institutional investors in the capital markets of Thailand.[160] Vigorous enforcement of securities regulations is a prerequisite to attracting major institutional investors, so it is certainly an opportune moment for the SEC to embark on this initiative. The SET has been performing enormously successful roadshows for institutional investors and fund managers in Europe and the U.S., and plans to engage in a similar marketing initiative in Asia in the coming months.[161] As I argue above, the complementary strategies of improving securities law enforcement and raising the level of participation of institutional investors in the Thai market will, if properly implemented, result in a virtuous cycle that will greatly strengthen market forces and truly operationalize the market-based securities regulatory regime.

The challenge now is proper implementation. If the reforms of the prosecutorial system are approved, as it appears they will be, the SEC, police, and prosecutors must follow through and produce convictions for securities fraud. This is a vital step toward creating a securities regulatory regime that serves to protect investors, promote the market and prevent systemic crises, and helps the stock exchange of Thailand to be a more effective engine of economic development. The high-profile failure of the Thai securities regulatory regime in the Brinton case has provided the Thai government and regulators with a unique opportunity. What the securities regulatory regime needs now are some high-profile successes.

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[160] *SEC Announces Plan to Increase Investor Participation in the Year 2003*, SEC NEWS (Dec. 24, 2002).

[161] *Finance Minister Announces Roadshow a Major Success for Listed Companies*, SET EXCHANGE NEWS (Jan. 24, 2003).