

**THE RULE OF LAW IN THAILAND:
ARE THAILAND AND THE UNITED STATES READY
FOR A FREE TRADE AGREEMENT?**

Testimony of Dr. Jeffrey Race before the Trade Policy Staff Committee
of the Office of the United States Trade Representative
Washington DC March 30, 2004

Madame Chairman, distinguished committee members, friends:

Thank you for the opportunity to speak about Thailand, a special country where I have been privileged to travel for 35 years as military officer, academic, consultant to government and industry, and entrepreneur.

I am a fluent Thai speaker with extensive experience in business in Southeast Asia and in the Thai law enforcement system. I have appeared in Thai courts hundreds of times in a variety of capacities and proceedings.

For numerous happy reasons Americans and Thais get on very well together. As our economies are complementary, many investments and trade relationships succeed brilliantly. But some do not, due to chronic law-enforcement issues.

A foreigner is usually treated with courtesy in the Thai law enforcement system, understood to include police, prosecutors, and courts. In litigation with a nobody he may expect justice; if with a state body or with the well-connected, that prospect recedes. Many find that complaints of even grave abuses are cheerfully ignored.

Your FTA with Thailand must innovate by guaranteeing American citizens and firms a rule of law which is now absent there.

For the facts on which I base these conclusions, please refer to the four case studies integral to this presentation, available on the World Wide Web at <<http://pws.prserv.net/studies/>>. They summarize court records and official correspondence and detail what really happens in the bowels of the permanent bureaucracy, in the courts and in state-controlled enterprises.

They recount the experiences of three families, a mix of Thais and Americans, in a real estate investment and some related family matters. They spotlight issues jeopardizing all potential beneficiaries of the agreement you hope to realize.

Between 1984 and 2002 these parties litigated extensively over \$8 million of assets in which the foreign parties had joint ownership. One Thai party, in league with Thai officials and employees of a government-controlled bank, has succeeded in blocking the foreign parties from access to these assets for 20 years, meanwhile laundering into the mists almost their entire corpus. So doing entailed numerous incidents of grave official misconduct and *prima facie* criminal acts by those working under government supervision.

I lead the team seeking restitution to the victims. When it became clear that our opponents were above the law, we sought help from our Department of State, which

directed our Ambassador to transmit to the Thai Foreign Minister a diplomatic note essentially saying "Please tell us none of the allegations in the hundreds of pages of attachments is true, but should any be true kindly tell us your plan to remedy the injury to the affected American citizens".

I myself contacted the following who share responsibility to right the misconduct:

- * The Secretary to the Cabinet
- * The Senior Policy Advisor to the Prime Minister
- * The Permanent Secretary of the Ministry of Finance
- * The Executive Chairman of the state-controlled bank
- * The Attorney General
- * The Minister of Justice
- * The Legal Ethics Committee of the Law Society of Thailand.

Sadly I must tell you that nothing good has happened.

- * We won a Supreme Court judgment to liquidate the remnant of unlaundered assets but were informed the title deeds have disappeared from the locked court storeroom. We still cannot execute the judgment.
- * The Law Society refused to discipline the attorney who rigged a sham auction to launder part of our assets, not because there is no evidence (we have his confession in open court) but because this is deemed a legitimate legal tactic in Thailand.
- * The public prosecutor refused to act against blatant asset laundering. We then conducted a private prosecution (permitted in Thailand) and gained a conviction. Later we found that a key prosecution staffer had a monetary interest in the laundering transaction.
- * Upon my complaint the Attorney General investigated; I was deposed for three days and submitted irrefutable evidence of criminal acts. He subsequently denied all the allegations and exonerated his subordinate. More evidence appeared and was submitted to the Prime Minister and a new investigation conducted. The PM's office refuses to allow us to see the report, even though it is our right.
- * Yesterday was a year to the day since the Thai Foreign Minister received our diplomatic note. We eagerly await the honor of his reply.
- * To this day every official involved in the misconduct remains at liberty to victimize other Americans.

In short, with one humourous exception every agency contacted has ignored, failed to act upon, or actively rebuffed our attempts to make Thai law enforcement work.

Thailand is, as it advertises itself, a land of refinement. No one burst in with guns drawn shouting "Get out! We're taking over!" But legally refined trickery, coverups by the powerful, and indifference at the Cabinet level had the same effect: depriving American victims of their rights and of their property.

Of the eight agencies approached to remedy the misconduct, only one evinced interest, so far without result. From this sample we may conclude that seven of eight at the top won't lift a finger for the rule of law. They do not oppose it; they are just serenely indifferent.

What might these facts imply for you? I respectfully suggest:

First, Thailand is special. Earlier FTAs are no template for enforcement. I can offer specific suggestions to boost adherence to the rule of law.

Second, is an FTA now possible?

- * The facts I have documented clearly void the usual presumption of good faith in the specific subject matter of enforcement of a possible U.S.-Thailand FTA. Top Thai authorities decline to enforce their laws to protect American citizens and decline to reply to gracious diplomatic correspondence from a valued ally.

Instead they silently conspire to cover up criminal acts in their midst. Cabinet Ministers know this.

Can an American official legally sign an agreement when he *knows* the counterparty is signing in bad faith? Ask your lawyers.

- * As a legal fiction, a Thai representative can bind his government to an FTA, but he cannot commit undisciplined state organs to implement it. That would entail a rule of law now absent from the kingdom. Today the Thai government lacks practical capacity to contract with us.

Third, two litmus tests easily confirm whether these legal obstacles persist.

- * Looking back, does the Thai government cure its bad faith by compensating the victims, then respect international practice by answering its diplomatic mail? If not, how can one entertain a new agreement imposing even more obligations, when high officials choose not to perform those already before them?
- * Looking forward, will Thai authorities agree to quality controls which work independently of their intention to uphold the rule of law? Later I can offer specifics. Now I simply suggest that stringent public review procedures within the agreement are the only valid index of Thai willingness to *execute*, not just to sign, it.

Fourth, be sensitive to symbolism. From press reports Thai authorities are known to have defaulted on their obligation to uphold the rule of law in these cases going back 20 years, and known to have declined to answer their diplomatic mail about them. Signing an FTA now would undercut the credibility of our Ambassador in Bangkok and expose our diplomatic service to ridicule everywhere. Many would infer that America would endure any depth of humiliation and contemptuous treatment in order to sign an FTA. From that inference they might act with impunity against our firms and citizens elsewhere.

To some extent these problems stem from the charming Thai preference for public harmony over open conflict. The systemic disorders I have documented victimize *any* nobody, not just foreigners. Many Thai officials regret this but cannot act. They have told me that we can ease their clean-up job by polite insistence upon the rule of law. With our help they surely can adapt the special charm of their culture to the legal demands of world commerce.

These negotiations provide you a splendid opportunity to help them, while advancing the values that have made our nation a light onto the world.

Thank you again for this opportunity to speak. I wish you all success.

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