Is the OECD's Framework Good for Practice? A Critique of the World Bank's Corporate Governance Country Assessment of Thailand

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The corporate governance of Thailand has been benchmarked against OECD's framework by the assessment team of World Bank. In this paper, the report is evaluated in term of objectivity, relevance, and practicality. The Trimiti Theory of corporate governance is also outlined in an effort to scrutinize the assessment's examination of balance of power in Thai listed firms, a factor recently proved necessary for corporate governance. Several pitfalls are identified. The quest for timely legal reform and stronger enforcement, which constitutes the core of the report content, is found to provide a quite limited contribution to the country.

1. Introduction

When the World Bank talks, everybody listens. High expectations always accompany comments from the prestigious World Bank. This assessment is no exception though things might not always turn out as hoped. The conclusion of the report does not seem able to impress the audiences. Though the report excels in detailing the indiscretions of corporate governance in Thailand, its lack of the big-picture view point limits its merit and the possible benefits to the social welfare of the country given present political constraints.

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In light of the recent financial crisis in South and Southeast Asia, the corporate governance principles of Organization for Economic Cooperation and Development Corporate Governance (OECD, 1999) were immediately introduced and put into work without much review. The concern that the so called serious lack of corporate governance might infect and precipitate economies of other regions into chaos prompted all world supervisory agencies to accept these principles and urge all countries to comply. After being attacked by ravenous hedge funds, the Thai economy plunged into the worst chaos in her modern economic history. In need of a bail-out from the International Monetary Fund (IMF) in 1998, the Thai government expressed its intention to implement a voluntary improvement of corporate governance (Metzger, 2004). The crisis and subsequent criticism of Thai business practices made the quick adoption of the principle inevitable.

In 2002, the Thai economy took another blow when the influential institutional investor, CalPERS (California Public Employee's Retirement System), which relies on an idiosyncratic set of investment criteria, declared the withdrawal of its investment from Thailand. The event triggered off a serious review of all investment conditions, including corporate governance, by the Thai government and local supervisory agencies. In wake of the beginning of its recovery from the crisis, Thai agencies chose to take drastic action to restore investor confidence in Thai listed firms. The series of events did not leave Thailand any choices for doing otherwise for a lengthy period of time. In 2005, the Poverty Reduction and Economic management Unit of the World Bank reviewed corporate governance in Thailand and distributed a report of the progress, which mainly called for better legal enforcement and faster reform of public company limited act and security act (World Bank, 2005).

These actions have been misguided. It is high time for Thailand to take a closer look into what she has been told to do for all these years. While there is no single standard of critique, the critique in this article is substantially based on the sustainability and reliability dimensions (Gregory and Martin, 1994; Pitelis, 2004; Elkington, 2006; Lo and Sheu, 2007). These dimensions require much consideration of the economic framework in terms of its long-term profitability, social welfare and the practicality. The overall methodology and reasoning process and findings of the assessment are reviewed in Section 2 along these lines.

The weaknesses of the assessment are detailed in Section 3. In this section, the reliability of the World Bank's assessment needs much deeper analysis in terms of its relevance (Hjørland and Christensen, 2002; McFarlin and Chelle, 2005). Though endorsed by several world agencies, the OECD principles used as a benchmark in this assessment and assessments of another 34 countries have not received much support for their legitimacy from scholars. The principles are heavily associated with the shareholder value approach, which has severe theoretical weaknesses itself, and it has invited much criticism for lacking strong theoretical support (Schleifer and Vishny, 1997; Tirole, 2001; Grandori, 2004), and relying on a false assumption (Blair, 1995; Nagel, 1963; Kay, 2005). Given this criticism, a new theory of corporate governance, called Trimiti was developed, and it is deployed later to evaluate the overall merit of the World Bank's assessment in Section 4. The conclusion is then provided in Section 5.

2. Summary of the assessment report

The Corporate Governance Country Assessment report consists of three main parts - the overview of Thai capital market, the detailed principal-by-principal review of 6 sections, and the Annex, which shows the recognition of the role of Thai Institute of Directors Association (IOD) in promoting corporate governance in Thailand. The first part serves as the conclusion of the report, which covers Thai market profile, key issues, recommendations and summary of observance of OECD Corporate Governance Principles in Thailand. The second part represents the main body of the report, which supposedly provides supporting evidence found and logical ground for reaching conclusion for all 32 requirement items categorized under 6 sections though several issues and aspects are found not well documented. All 6 sections consists of:

I. Ensuring the basis for an effective corporate governance framework

II. The right of shareholders and key ownership functions

III. Equitable treatment of shareholders

IV. Role of stakeholders in corporate governance

V. Disclosure and transparency

VI. Responsibility of the board

It is evidenced that some conclusion shown in part 1 cannot be traced back to adequate supporting arguments in part 2. Most critiques in this paper intend to focus on such logic reasoning processes, instead of the conclusion itself.

The assessment relied heavily on the framework of OECD (1999). This approach obviously is a two-sided coin. On the bright side, it provides a consistent standard for comparison across countries and previous records. In a rush to have an international standard of corporate governance and with the lack of well accepted principles, this could be acceptable for temporary needs. Each of Thailand's levels of compliance with the various standards is benchmarked against the ROSC average (Report on the Observance of Standard and Codes) of other countries (World Bank, 2006).

The assessment covers all of 32 requirement items to see if the relevant regulations in practice place sufficient pressure and give sufficient encouragement to ensure compliance. These are probably the strengths and the greatest contribution of the assessment. The assessment on the item level appears to be objective. Practices are evaluated and loopholes are reported and discussed further with local agencies to eliminate possible misunderstanding and to fetch unrealized evidences. The assessment for each item was then rated as partially observed or largely observed[1]. The score of each item is summarized, compared to ROSC average, and shown in part 1 of the report (World Bank, 205, p. viii). Thailand appears to have 16 higher and 5 lower scores than ROSC averages with 1 draw and 8 non-applicable comparisons (n.a.). Since ROSC average is made mostly up from scores of developing countries having sought assessment, the comparison does not give much hint of Thailand's standing compared to more advanced economies, which do not care enough to set good examples. The report does not provide total score. It just leaves the readers to figure out how the scores of each requirement item are related to the whole picture in the summary. However, given the limitations of the OECD's framework, the assessment gives the readers a rough picture of corporate governance in Thailand and some points that need serious attentions are made for the benefit of local agencies.

3. Weaknesses of the assessment

The report is concise and reasonably clear. Each issue is separately elaborated, and so the content in general is easy to understand. The content of the report generally shows coherence – except for a few significant points - implicitly comparing itself to the model of corporate governance that the assessment team leader has in mind. The assessment team does quite well with details of regulations and their implications, but the OECD's framework does not seem to fit well with conditions of less developed economies including Thailand. Since the team does not show its willingness to adjust the framework, the relevance of assessment results can be occasionally questioned in this paper.

However, there is a case where there is one obviously missing link between the research findings listed at the end of the report and the recommendation given at the beginning. The readers have to figure out by themselves the causal relations which, more often than not are, inadequately established. Some arguments, especially about the research findings of the board responsibilities

(World Bank, 2005) are relatively arbitrary. It says that Principle VIA of OECD requires that "Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders." It follows with the detailed requirements under Thai Public Company Act (PCA) and SEC's regulation on the matter. The issue is then rated "Partially Observed" without pinpointing the exact discrepancies or what are missed from the OECD Principle (pp. 16 - 17). The assessment team intentionally left the discrepancies and what needs to be improved for us and Thai authorities to figure out by ourselves. It is difficult to guess what the assessment team leader has in mind when he decided to put "Partially Observed" for the issue. It may be the U.S. model in his mind but he hesitated to clearly indicate so. Whereas independent director majority are typically found in the U.S., only 3 independent directors are required by Thai SEC. It is also possible that the assessment team leader had some doubt about the independent quality of Thai independent directors. Other shortcomings of the assessment as following can be noticed.

a. Preoccupation with the U.S. model

The report recommends that "Recent improvement in enforcement need to be reinforced....More severe sanctions on insiders for false and misleading disclosure should be introduced.... Although criminal enforcement is improving, the process is still lengthy and involves a high standard of proof. The authorities should, therefore, consider the introduction of civil penalties and administrative sanctions as a more efficient alternative to impose on violators" (World Bank, 2005, p. vii). Based on this recommendation, it is obviously clear that the assessment team believe that legal enforcement can be strengthened without limit. It goes without saying that the assessment limited its scope to the listed companies in the Stock Exchange of Thailand (SET). This limited scope was likely based on the assumption that this was where the investors' interest resided and it could probably alleviate the burden for the assessment work of the World Bank team and probably for the SET and the SEC as well. However, simplicity does not guarantee a satisfactory result. The narrow scope of assessment was found to leave a few major influential factors untouched. The size of the Thai capital market as of June 2005 was equivalent to 65% of the country's GDP representing roughly only one third of the total financial market, comparatively small in comparison with the Anglo-American economies (World Bank, 2005, p. ii). This figure could argue for itself that there are a large number of firms out there that remain convinced that sources of financing other than the stock market were relatively more efficient. Though stringent legal policies may bring down the agency cost, there always are unfavorable and unintended consequences. The recent study on the impact of the Sarbanes-Oxley Act (SOX) indicates that the U.S. equity markets have indeed suffered from the implementation of SOX. In addition, the study found a palpable increase in non-domestic capital raised in locations such as London and Hong Kong. U.S. capital markets no longer dominate the foreign IPO arena. Regional exchanges have grown in market capitalization and reduced the importance of the U.S. markets (Leon, 2006).

The quality of legal enforcement should not thus be mistaken for the prosperity of the stock market in Thailand. Like it or not, the present policies of SET and SEC are under pressure, torn by two apparently contrasting thrusts of being attractive for listing and investing. There can be no gains for one end without losses for the other. The selected courses of the supervisory agencies were evidently based on the balance of the two directions (Fagan, 2003, p. 326). It remains unclear if the market has reached its optimal potential yet. The recent study indicates the positive impacts of several countervailing power mechanisms on firms' performance. This implies that additional imposition of checks and balances will likely bring more good than harm to the firms and the country. However, the psychological reaction indicates the clear strength of the reaction against the recently imposed codes of best practices. In the recent study, 50.2% of executives and board members of Thai listed firms reported the disadvantages to non-listed firms in terms of disclosure requirements and other related costs. Since the samples were disproportionately represented by managerial shareholders and non-independent directors in comparison with independent directors, the opinion is believed to well reflect the general disfavor of Thai firms (Chaithanakij, 2006a, p. 181).

The cultural norms of family business apparently remain too strong for such measures to succeed (Chaithanakij, 2006c). The argument is supported by the disproportionately limited numbers of large firms applying for listing (World Bank, 2005, p. 1). This however should never be mistaken as merely an idiosyncrasy of Thai family firms. All family firms around the globe share their long lasting family values (Bertrand and Schaor, 2006). The issue requires a wider scope of consideration than the righteous corporate governance model of listed firms. The preoccupation with the U.S. model appears to preclude the World Bank's staff from serious attention to the differences (Gilson, 2000, p. 4). As long as the business community and non-listed big businesses have not been convinced of the merit of governance, the road to improve the governance of the listed firms will be undoubtedly rougher than the past. Fulfilling all requests in the report may therefore not be the wise choice.

b. Blindness to institutional complexity

Along with the assessment report, the amendments to the Public Limited Company Act and Securities and Exchange Act have been much mentioned and have induced high expectations (World Bank, 2005, p. iv, vii). However, the search for better legal measures may not be realistic for Thailand right now or even at the time when the assessment took place when all obstacles are taken into consideration. If the country could not embark on the reform during the financial crisis when resistance was abnormally low, it would be unrealistically optimistic to expect the quickly realized reform years later. The ambitious improvement will require the restructure of legal process and additional legal sanctions. This usually takes long and possibly endless debate. For an exemplary illustration, the use of the class action law suit, one of the most craved for by the SEC, was proposed to the deposed Taksin's government for the stronger protection of individual investors. The government delivered the bill proposal to the Office of the Council of State for consideration of details and drafting, but now with the instruction to cover much wider types of group plaintiffs, including stockholders, consumers, labor and others, the proposal has become more complicated. That move however guarantees a lengthy tug of war and little possibility for the bill to be passed when the additional myriad vested interest groups are included in the legislation process. There are likely to be strong reactions from the large group of majority shareholders as well as big business firms involved if the proposed bill ever really survives the approval of the legislative assembly. Legal reform in Thailand has never been easy especially when involved with vested interested groups (Poapongsakorn, 2002; Nikomborirak, 2006).

c. Lack of new critical perspectives

The way the assessment team of World Bank presents the report reveals how easily the analysts fall into the old but still dominant paradigm of legal enforcement. The relatively poor legal enforcement of Thailand has been known for years, if not decades (Siamwalla, 1980; Nikomborirak, 2006). It is a shame that this country has been so slow in strengthening the legal framework. But it should have been understood for a long time that there are likely to be some embedded obstacles that have hindered the effort for changes. The assessment team should have come up with more practical advice of alternative solutions with some impact for some improvement in the short and medium term, rather than simply insisting on such an old legal reform, which cannot be expected to be seen in the near future. At least the SEC has unveiled a new disciplinary mechanism, the Director Registration System that gives some hope and deserves at least some serious consideration. Unfortunately a thorough analysis, which would reveal its feasibility and related risks involved, had been totally ignored. The report contains messages simply mentioning the system as a new and potentially quite effective administrative sanction for the breach of fiduciary duty and as a director removal mechanism. As it is put, "The introduction of the SEC Director Registry has added a new and potentially quite effective administrative sanction for directors of listed companies who breach their fiduciary obligations. The latter are to be eliminated from (or blacklisted) the Director Registry and therefore ineligible to serve as a director of listed company" (World Bank, 2005, p. 4).

The system actually consists of two interactive parts: management qualifications and the consultative body called the Director Responsibility Group (DRG)[2] (World Bank, 2005: 11), which is comprised of prominent figures from the private sector. The qualification of directorship for IPO firms is totally subject to the SEC. SET, which is under supervision of SEC, automatically follows suit on the qualifications for directorship. Persons who face charge by any governmental agency on the grounds of involvements in any economic crime are immediately suspended from directorships. Those who are under investigation for their malicious acts or serious negligence incompatible with their fiduciary duty according to the principles provided in the Directors' Hand Book are also subject to being disqualified for directorship by the SEC with the concurrence of the DRG but the disqualified directors may file an appeal to the Appellate Committee (SEC, 1999) and Administrative Court respectively (SEC, 2005). The system has been put into effect for a few years. There are certainly some legal implications which remain unresolved. With such wide and deep experience in more than 35 countries (World Bank, 2006), the World Bank is expected to do more than merely bask in the appreciation of the system. More caveats of possible loopholes could have been given had the World Bank's assessment team decides to acquire additional legal expertise in the judicial trial on the cases of fiduciary duties. Having failed to recognize the resemblance of the DRG's operation to the judge and counsel, the assessment team just missed the opportunity to establish a basis for producing valuable advice on improving efficacy.

Though the functioning of the DRG gives much hope for improving the adherence of directors to their fiduciary duty, a few wrong moves may jeopardize the whole system, and subsequently the credentials of the SEC. In the past, directors of listed firms had a relatively free hand to discharge their duties at their own discretion. Similarly to what is found in advanced economies, a recent study indicated that substantial numbers of directors in Thai listed firms were content with fulfilling the minimum legal and regulatory requirements rather than fully embracing their fiduciary duty (Arcot and Bruno, 2005; Chaithanakij, 2006a, p. 182). The causal analysis reveals that this factor prevents the Thai listed firms from achieving good corporate governance (Chaithanakij, 2006a, p. 195). Thus their understanding of the fiduciary duty could be the key to the improvement of governance in Thai listed firms. With this evidence, the Director Registration System might be the key supportive mechanism for engendering the appreciation of their directorship urged by the World Bank (2005, p. vi).

However the efficacy of the registry system remains doubtful. To prove shortcomings in fulfilling one's fiduciary duty may be much harder than proving general felonies. For example, should the accountability of the board members be assessed individually or collectively if some directors complied with their fiduciary duties but others did not? (Ibrahim, 2006). Meanwhile, detailed regulation does not always bring satisfactory results amidst the weak institutions of developing economies (Ballas et al., 1998). A lengthy handbook may not always substitute for strong institutions. In addition, there is always more than one policy implication that a regulatory agency like SEC has to heed when contemplating a ruling (Hamermesh, 2006). Though its supervisory status may literally absolve SEC from direct responsibility of capital market performance, there always are political pressures on the SEC in most countries for such issues.

The list of obstacles does not end there. What may pose more of a concern is the legal liability involved. Since all members of the DRG are appointed by the SEC, their impartiality can always be questioned. The Securities and Exchange Act B.E. 2535 (1992) allows the SEC to set the *ex ante* requirements of directorships deemed necessary. In 2004, the SEC reconsidered directorship requirements and in early 2005, the SEC pronounced an expansive requirement prohibiting any *ex post* apparently intended abuse of the fiduciary duty. The conduct establishes a sufficient ground for SEC to *ex post* censure the directors or eventually suspend their directorships for years (SEC, 2005). Those declared disqualified for directorship may appeal against the rulings of the SEC and DRG. The SEC was established as an administrative agency, which normally lack the protection of the judicial immunity available for judges and counsel (Waddoups, 1990; Cogan, 1994, p. 723). However such a judgmental requisite has never been challenged and apparently effective for the time being. Holding strong evidence for further investigation and more serious legal prosecution have discouraged all possible challenges from wrongdoers so far though that has not technically absolved the officials of the SEC from liability for any illegality (Chorus, 2006: 439). Whereas illegality has been the plainest excuse for public agencies around the globe for refusing to deliver services known for several decades (Wyman, 1910), the SEC of Thailand chooses the road less traveled. However, the altruist efforts to strengthen fiduciary duties of the directors do not come without price. They apparently burden the senior staff of SEC and DRG members with additional personal risks. If the assessment team were true believers in the legal approach, a recommendation for the SEC to seek immunity protection for SEC's judgmental ruling on the cases involved with fiduciary duty should also be included.

To empower the SEC with such judicial authority, however, raises another problematic issue for consideration. The financial crisis of Thailand in 1997 sufficiently evidenced how public interest could be severely damaged when independent public organizations, such as the Bank of Thailand in the past, lacked good governance. The legal reform to empower the SEC requires certain conditions to ensure that the SEC's governance is in place and this requirement fails to appear in the assessment report.

d. Too rigid assessment framework and mistaken means for end

The assessment report argues that markets for corporate control in Thailand have not been sufficiently allowed to function in an efficient and transparent manner although the concentrated ownership environment of Thai listed firms is recognized in the report and there are no regulations reportedly barring the markets from proper functioning. In the description the assessment team:

> "Principle IIE: Market for corporate control should be allowed to function in an efficient and transparent manner...Currently, hostile takeovers are extremely difficult in Thailand due to the ownership structure. Consequently there are limited incentives for manager and owners to set up anti-takeover devices" (World Bank, 2005, p. 8).

The efficacy of markets for corporate control has remained controversial for quite some time. There are equally strong arguments from both opposite sides (Bebchuk and Cohen, 2005; Daouk et al., 2006; Gillan, 2006; Agrawal and Jaffe, 2003; Glen and Singh, 2005; Goktan et al., 2006). Since the contribution of the markets for corporate control to corporate governance remains inconclusive, the legitimacy of supporting the markets remains questionable.

Moreover the assessment result for Thailand on this issue is reported "Partially Observed" or "improvement still needed" in plain English. It is quite strange that the Thai economy is reportedly disappointing on this issue because the firms with concentrated ownership are allowed for listing. But when the majority shareholders are unwilling to forgo their life-tied companies, then the SEC and the government are to blame for this. The elementary desideratum of the market for corporate control is dispersed ownership of listed companies that requires a return to the former listing requirement, which then leads us to another controversy. The concentrated ownership of family firms has proved more capable than widely held firms at least in certain environments (Bertrand and Schoar, 2006). There is empirical evidence supporting that the former tend to perform better (La Porta et al., 2000; Anderson, Mansi, and Reeb, 2003; Ben-Amar, and André 2006), although there is also some disputed evidence (Demsetz and Villalonga, 2001; Sundaramurthy et al., 2005; Bartholomeusz and Tanewski, 2006).

Also, the requirement of more dispersed ownership of the former Public Limited Company Act B.E. 2521 (1978) was removed from the Public Limited Company Act B.E. 2535 (1992) because it was considered an unfavorable condition for Thai family firms and there obviously were very small numbers of firms applying for listing under the requirement (Limpaphayom, 2001, p. 233). Provided that more diluted ownership is judged a necessary condition for better governance in Thai listed firms, then it deserves the merit of consideration. However, if the SEC insists on re-instating this requirement to ensure the functioning of the market for corporate control, the assessment team might end up ironically finding an extremely small capital market with few listed firms for assessing. Raising capital in the stock exchange should not be mistaken as the only way of corporate financing. Any unfavorable restriction on listing in the stock market will always push firms to their traditional way of bank-financing. Prima facie the assessment team has ignored the opportunity cost tradition that a chancy opportunity cannot be assigned a single value *ex ante*. Any uncertain prospect must be assigned an ordered pair of epitomizing comparative gain and loss (Littlechild, 2002). That is the assurance that the assessment would not *nolens volens* place Thailand in such a no-winning situation.

It is also interesting to find that the assessment embarked on earlier in 2003 on South Korea, which records very similar cases of take-overs to Thailand was reported "Largely Observed" since no anti-takeover devices were evidenced (World Bank, 2003, p. 7). In fact, the Thai SEC imposes more stringent tender-offer rules for the protection of minority shareholders than the South Korean supervisory agencies (World Bank, 2005, p. 8). It is quite difficult to explain the two different ratings under the similar market conditions of the two countries for the two-year time lag.

The rigidity of the OECD's framework evidently limited the assessment scope in both countries. No adequate and sufficient scrutiny for new institutional development was carried out. The new developments peculiar to the OECD's framework were either overly optimistically appraised in the case of the Thai Director Registry or totally left out despite its apparently significant influence on the evolution of corporate governance in the case of shareholder activism in the South Korea (Milhaupt, 2004). Similar reactions were found for the increasing role of the internal audit function (Spira and Page, 2002; Chaithanakij, 2006b; Prawitt et al., 2006), in which its potential was totally left out. Had a more flexible framework such as Trimiti been employed instead and all other influential institutions consequently been allowed to be taken into consideration, the corporate governance may have been more appropriately analyzed.

The assessment results and corresponding advice on the market for corporate control also indicates the confusion of the team over the means and ends of corporate governance. The argument for corporate control in the market is based on the belief that firms are forced to forgo their slack. Thus any obstacles to proper market functioning, if any, should have been eliminated. The market is always held as a supportive mechanism of corporate governance, but it cannot be considered the end condition of governance by itself, nor should its unproven efficacy be assumed. Any effort to create the unwarranted market for corporate control as seemingly recommended may bring unfavorably unintended consequences to the growth opportunity of this capital market. This kind of country assessment has never been easy. However it should be anything but the end in itself.

e. Multiple and vague assessment standards of practices

The different standards of practices seemingly evidenced are scattered across various topics of assessments. Though it is too troublesome to categorize all the reports for 35 countries (World Bank, 2006), the comparison between the assessment of Thailand and South Korean on the main topic of Disclosure and Transparency reveals certain inconsistencies of rating. The key issues of this topic mainly reside in the disclosure of ultimate beneficial owners and key risk factors of the companies. Whereas the Thai authorities require that listed firms disclose both kinds of information, the South Koreans do not. Nevertheless both countries were similarly rated "Largely Observed" for the different stringency standards (World Bank, 2003, p. 11; World Bank, 2005, pp. 13 - 14). Last but not least important, the reports in Section VI for both countries were poorly rationalized though this does not necessarily imply that the conclusions were false. The assessment ratings are hardly justified by the attached reasoning. How could boards that do not adequately perform key functions, including the oversight of accounting and financial reporting and others, still reportedly fulfill their responsibilities? The assessment team concludes:

"Principle VID: The board should fulfill certain key functions. Assessment: Partially observed" whereas Principle VIB: Where board decision may affect different shareholder groups differently, the board should treat all shareholders fairly. Assessment: Largely observed" (World Bank, 2005, p. 17).

By the same token, there are other contradictions between the assessment results. How could board members who incompletely fulfill the key functions including oversights of accounting and financial reporting system and other critical transactions can access accurate, relevant, and timely information and ensure adequate disclosure? The report gives ratings: "Principle VID: The board should fulfill certain key functions including oversight of accounting and financial systems. Assessment: Partially observed" whereas "Principle VIF: In order to fulfill their responsibilities, board members should have access to accurate, relevant and timely information. Assessment: Largely observed" and "Principle VA: Disclosure should include, but not limited to, material information. Assessment: Largely observed" (World Bank, 2003, p. 13, 17, 19).

f. Inequitable assessment

The assessment team apparently let themselves fall under the U.S. paradigm where the foreign institutional investors play a constructive role in local corporate governance. The legal rights of foreign institutional investors have been deeply scrutinized. The report indicates:

"A foreign shareholder is entitled to the same rights as local shareholders, including the right to attend and vote at general meetings of shareholders in person or by proxy... The PCA currently does not provide extra time to deal with cross border proxy...However the proposed amendment to the Securities and Exchange Act authorize that the SEC determine the type or details of the notice..." (World Bank, 2005, p. 10).

The protections for local individual investors were totally ignored in the report. There is no single sentence in the report saying anything about individual investors. The assessment team probably has to be reminded in a similar way that Thai authorities are reminded of the right of foreign investors: World Bank should show the same concern for all investors regardless of the depth of pockets.

There are a few circumstances where the interests of local individual investors are not well aligned with foreign institutional investors. That scenario seems likely mistaken in this case. Whereas the role of institutional investors in governance has been much flattered, their dark side has received much less attention. Ironically, the foreign funds were recently accused by the Bank of Thailand of repeated manipulation of Thai currency resulting in the unrealistically high value of the Baht and SET index in late 2006. The pattern seemed to follow the same suit of the manipulation happened in 1994 when foreign hot short-termed money pushed the SET index to an all-time record high and led it to a sharp drop in the same year. Thai capital market suffered for several years before gradually recovering. The incident marked the worst experience for local investors and still remains vivid in the memory of local investors. Though the role of institutional investors deserves support, the caveat for their dark side should never be totally ignored.

Unequal access to information between the two types of investors marks another misalignment of the two types of investors but it has not received due attention from the assessment team as well. Needless to say all Thai listed firms prefer to have the names of World investors, such as CalPERS and others, lining up on their shareholder lists to enhance the credential of the companies. The management of the listed firms would be motivated to verbally leak publicly undisclosed information to representatives of any prestigious investors during the private meetings, which may be easily disguised under the name of "managerial consultation", in an attempt to improve the performance of listed companies. Though the SET has imposed an additional disclosure rule to ensure equal access to information (SET, 2002), the mutual benefits for both parties keep their unlawful acts beyond possibility of proof. If equity among investors remains one of the principles that World Bank pleads for, the issue should not have been overlooked.

4. The assessment under the Trimiti Theory of Corporate Governance

a. The need for a new prolific approach

There are some missing links left open in the assessment report for criticism. In an attempt to avoid the controversial weighting criteria for each requirement item, the total score of the country is just left out. This could be ascribed to the poor foundations of the OECD's framework. It is maybe an easy way-out but that decision did not adequately create the creditability of the assessment summary. Under the limitation of the OECD's framework, the assessment hardly brings anything more than the request for legal reform or stronger legal enforcement for investor protection as the main point shown in the executive summary. Though the merit of the request may be not totally denied, a lukewarm reaction to the request should not be surprising due to its gross simplification and out-of-datedness. Such a request can hardly be considered a new insight for the local agencies and scholars in this country. The assessment team of the World Bank was not and can not be so omnipotent that they may come up with panacea for better governance in Thailand. Nevertheless, it should at least give a hint to the local agencies for viable improvement under present political and economic constraints in addition to the repeated calls for better legal enforcement. Otherwise it is not difficult to foresee few changes in the next assessment, say five year from now.

Like the capital market in most countries, the Thai stock market is characterized by family firms and managerial ownerships (Limpaphayom, 2001; Fagan, 2003). Where the one-share-one vote is a normal practice, the managerial entrenchment of majority shareholders is undoubtedly witnessed. The unequal bargaining power consequently poses the risks of expropriation, which are normal phenomena under the "tyranny of majority". The likelihood of expropriation, though unlikely to be amongst the initial concerns of majority shareholders when applying for listing, has been a major issue of constitutional economics (Rajan and Zingales, 2000; Mueller, 2002). Originated in Anglo-American environments where complementary institutions are already in place, the OECD's framework does not seem equipped to deal with the other types of balance-of-power systems that do not substantially rely on market efficiency.

Any framework, including the OECD's, which cannot appropriately recognize such institutional shortcomings, is likely to provide very limited contribution at best and to mislead at worst. The narrow scope of the OECD's framework naturally limits its relevancy. As the result its objectivity is never fully established, let alone its practicality. Since the right form is neglected, the true nature of the matter can hardly be grasped.

b. Trimiti theory of corporate governance

Trimiti theory is constructed with sufficient justification epistemology (Albert, 2002: 53). It is based on theories of organizational economics and several others (Rajan and Zingales, 1998; Chaithanakij, 2006a, 2006b) where the balance of power is believed to be a necessary precondition of corporate governance. Inspired by earlier three-pillared theoretical inquiries, the theory proposes that corporate governance is the result of the interaction of three power types (Sabel, 1997; Schlicht, 1998; Grandori and Soda, 2004, p. 69). Firstly, "Authoritative capability", relying on hierarchical structure, is purposed to develop and deploy the capability to generate quasi-rent. Secondly, "Control power" is needed to keep the "Authoritative Capability" in check to ensure minimum risks taken. Thirdly, "Cultural consensus" among parties involved comes into play to dictate the interaction between the agents representing Authoritative capability and Control power and shapes the different features of the balance-of-power systems around the globe (Whitley, 1999; Pagano and Volpin, 2000; Roe, 2004). The theoretical framework of Trimiti has been elaborated and put forward for recent tests with satisfactory results in explaining the shortcomings of corporate governance in the samples of 124 non-financial Thai listed firms (out of about 400 listed firms) (Chaithanakij, 2006a, 2006b, 2006c).

c. Thai corporate governance under Trimiti Theory

Though the report content has not been prepared with sufficient logic to undisputedly establish its recommendations for legal improvement of the country, its detailed findings do provide sufficient background for such a warrant in general. Legal institutions matter and are undoubtedly a corner stone of corporate governance (La Porta et al., 2000). Necessary as it be, legal effectiveness alone is never a self sufficient determinant of corporate governance. However, the report does implicitly convey the meaning that if Thailand had better laws and stronger enforcement, her capital market may flourish. Though the weak legal enforcement and ineffective law in Thailand are well recognized, their specific de facto impacts if they have ever been improved are largely uncharted. Certain changes of the laws and enforcement, especially on the protection of minority shareholder rights as raised in the report, are obviously needed. The impact on the capital market in the large picture is not equally heeded in the report. Since efficient access to financial resources remains only one of several contributing factors of business performance, this never establishes a whole or continuing main criterion for business judgments. The efficacy of legal institutions may not exist regardless of other complementary institutions and comparative opportunity costs. As long as there is an opt-out choice other than complying with the new legal obligations, the balance of power in Thai listed firms is undermined and may hardly be reached. This condition poses a serious constraint on the implementation of policies. The dynamic balance-of-power framework requires a serious consideration into the national as well as international economic constraints as a whole well beyond the condition of existing stock market.

d. Assessing improvement with Trimiti theory

The flexibility of Trimiti theory allows more adjustment for assessment without losing the main objectives of enhancing fairness, sustainability and long-term profitability of listed firms. Each country should be allowed to design her own code of corporate governance with sufficient supporting evidence how it should create a balance of power and reasonably prevent all risks involved on one hand and buoy the long-term profitability on the other hand. In case of Thailand, the main governance risk is involved with the abuse of power by majority shareholders3. Listed firms with majority shareholders should be required to show how the risk is controlled – i.e. by separation of Chairperson and CEO, more disclosure, and giving full authority of internal audit function to audit committee, which consists of truly independent directors.

As the scandals of Enron and Worldcom hardly dies from our memories, a new financial crisis emerges in the U.S. Subprime loan crisis that recently emerges in the U.S. has reiterated the weakness of the American Business Model (ABM) (Kay, 2005, p. 322; Singh and Zammit, 2006), which spare no firm regardless of how prestigious it is (Demyanyk and van Hemert, 2007; Mason 2007). In this incidence, investors have suffered a heavy loss partly due to the U.S. Business Model although the model is completely compatible with OECD's framework. The ABM focuses short-term profit and from time to time invites frauds caused by on-going internal imbalance of power. Strategic risk caused by the imbalance of power becomes more real than ever and OECD's framework appears losing grip with the risk. Most large firms should also be encouraged to set up strategic committee, which is mostly comprised of independent directors to help review firm's major strategic decisions. It is once more proved that rather than form, it is substance that really matters. Neither forms of the ABM or OECD's framework can protect investors. Countries' corporate governance should be assessed based on the substance, not the simply literal compliance with OECD's testament. Neither should the country's governance be poorly regarded for their different characteristics from more developed economies. Certain characteristics may look unfamiliar or even considered helpless shortcomings – i.e. inactive market for corporate control – for foreign investors as long as other controls are well in place and their embedded risks have been effectively managed. Trimiti theory, which has the internal balance of power as a key tenet, deserves a more serious consideration for future attempt in corporate governance assessment.

Table 1 provides the comparison between OECD's Framework and Trimiti Theory. There are some differences that warrant attention. OECD's Framework tends to rely on external mechanisms to maximize shareholder value, which supports any effort to achieve such goal, even putting stakeholders at risk. Personal legal liability is probably only true countervailing balance that keeps management from crossing legal line. Often it fails as evidenced in the case of Enron, Worldcom and several banks involved with subprime loan crisis. Its allowance for increasing role of internal mechanisms makes Trimiti more practical framework than OECD's for less developed countries, of which institutions are relatively weak.

Table 1 Comparison between OECD's Framework and Trimiti Theory

Issues of Comparison	OECD's Framework	Trimiti Theory
1. Nature	Rule-based	Substance-based
2. Governance orientation	Goal	Means
3. Type of theoretical foundation	No clear conceptual origin, but likely agency theory and neoclassic economics	Firm theories and institutional economics
4. Underpinning purpose of the firms	Shareholder value	Sustainability and long-term profitability
5. Purpose for corporate social responsibility, if any	Instrumental	Can be either intrinsic or instrumental
6. Main mechanism normally sought	External (legal and market)	External and internal (voluntary)
7. Disclosure requirement	Strong always	Moderate and flexible
8. Flexibility for firm's and country's self adjustment for deployment	No	Yes
9. Emphasis on firm capability	No	Yes
10. Strategic risk coverage	Uncovered	Covered
11. Compatible with quantitatively assessment	Very	Possible
12. Results of empirical test of concepts on firm performance	Inconclusive	Positive (but still limited evidence)

Note: Created by the author to compare the OECD's framework and Trimiti theory.

From the above table, Trimiti theory requires a substantially different way of assessment from OECD's framework. Trimiti theory can be distinguished for its emphasis on firm capability and internal balance of power to ensure sustainability.

As a means-based theory, Trimiti theory can accept the combination of shareholder value and stakeholder approach in contrast to OECD's framework that consistently holds shareholder value approach. It allows firms to focus on long-term profitability. Though many neoclassic economists claim that shareholder value approach also allows long-termism, research results tend to give opposite arguments (Heiser, 2000: 71; Bratton, 2005: 7; Krippner, 2005).

5. Conclusion

Preoccupied with the weak legal enforcement of Thai economies known for decades, the World Bank assessment team was caught off guard for new developments and hesitated to adjust the assessment plan accordingly. The team missed an opportunity to actively evaluate any other possibility of alternative ways to improve corporate governance in Thailand. Under the balance-of-power approach of Trimiti theory, a few corporate governance mechanisms may partially substitute for each other (Morck et al., 1989; Bushman et al., 2000; Chaithanakij, 2006a). While legal reform tends to take a much longer time and makes the stock market an unattractive financial source for local firms, certain reforms, such as the strengthening of the internal audit function, which has been proved for its efficacy (Chaithanakij, 2006b; Prawitt et al., 2006). Shareholder activism has been successful utilized in South Korea. The SEC of Thailand has already taken an initiative on this. The effort deserved more attention. The lack of initiative for bringing necessary expertise to the assessment substantially limits the contribution.

What appears in the report tends to support the claim that the assessment team carelessly tried to make the Thai economy fit into the ideal model they have in mind regardless of the institutional discrepancies. In this case the U.S. model, supported by strong legal enforcement coupled with an efficient stock market, seems to be the ambitious goal that they have in mind. Unfortunately the World Bank's assessment team seemed to overlook the missing institutional foundation for the effectiveness of U.S. model.

The major contributions the assessment makes obviously are limited to the myriad of scattered weaknesses of the legal protections in this society. If the assessment were ever to provide more practical recommendations at least in the present vicinity, the World Bank's team would have had to accept the differences in social and economic environments and the assessment team heeded the possibility of alternative mechanisms, which are readily available and far more welcome for improving the corporate governance for the time being in this country. As James Buchanan (1962) once indicated, the relevant comparison is between realized and not idealized institutional alternatives.

Note

1. Meaning of all 5 types of rating are provided but no other types ratings than "Partially Observed" and "Largely Observed" were witnessed in the report for Thailand (World Bank, 2005, p. 1).

2. The counseling unit is alternatively called Working Group on Accounting and Corporate Governance in the report.

3. The Stock Exchange of Thailand recently issued the Principles of Good Corporate Governance for Listed Companies 2006. The Principles for the first mentions one of its attempts in creating the balance of power by requiring that Chairman of the board and CEO are different persons and the Chairman is an independent director (p. 36).

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