

# Summary of the Constitutional Court Ruling No. 50/2542

Dated 4<sup>th</sup> November B.E. 2542 (1999)\*

**Re : The President of the House of Representatives referred the opinion of members of the House of Representatives that the State Enterprise Corporatisation Bill, B.E. .... contained provisions contrary to or inconsistent with or was unduly enacted under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to the Constitutional Court for a ruling.**

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## 1. Background and summarized facts

The President of the House of Representatives referred the opinion of 114 members of the House of Representatives that the State Enterprise Corporatisation Bill, B.E. ...., which had been approved by the National Assembly, contained provisions which were contrary to or inconsistent with or was unduly enacted under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to the Constitutional Court for a ruling under section 262 (1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

## 2. The issues considered by the Constitutional Court

The Constitutional Court considered the application and its supporting documents, the statements of relevant persons and relevant documents and held that the issues which required consideration were as follows.

(1) Firstly, the Constitutional Court considered whether or not section 27 paragraph one (subsequently renumbered to section 28 paragraph one) of the State Enterprise Corporatisation Bill, B.E. ...., which stated that “in the case of a resolution of the Council of Ministers to dissolve any State enterprise, the law establishing such a State enterprise shall be repealed pursuant to the time condition prescribed in the Royal Decree enacted for such a purpose,” was a provision contrary to or inconsistent with the process for the enactment of an Act under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), a provision contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and a provision which was the essential substance of such a Bill.

(2) Secondly, the Constitutional Court considered whether or not section 24 paragraph two of the State Enterprise Corporatisation Bill, B.E. ...., which stated that “in the case where

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a transfer of debt to a company under paragraph one was a debt guaranteed by the Ministry of Finance, the Ministry of Finance shall continue to guarantee such debt and may charge a fee for the guarantee...,” was a provision inconsistent with section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

(3) Thirdly, the Constitutional Court considered whether or not the State Enterprise Corporatisation Bill, B.E. ...., which empowered the Minister to select any State enterprise for corporatisation under section 12, section 15 and section 18 (subsequently renumbered to section 13, section 16 and section 19), was a Bill which did not contain measures to protect the interest of the country on which section 87 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided that the State should give special consideration.

The Constitutional Court held the following opinion:

On the first issue, the Constitutional Court held that under the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the enactment of an Act had been provided in Chapter VI on the National Assembly, as stipulated in various sections such as section 92 to section 94, section 169 to section 180 and section 190 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). In the case of the State Enterprise Corporatisation Bill, B.E. ...., the Bill had gone through the process of enacting an Act under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Council of Ministers had presented the State Enterprise Corporatisation Bill, B.E. .... to the House of Representatives. Once the House of Representatives had given their approval of the Bill, the Bill was submitted to the Senate. The Senate considered the Bill and reached a resolution to amend the Bill before the amended Bill was returned to the House of Representatives. The House of Representatives approved of the amendments. Hence, the process of enacting the State Enterprise Corporatisation Bill, B.E. .... was in accordance with the process of enacting a law provided by the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

As regards whether or not the provision in section 28 paragraph one of the State Enterprise Corporatisation Bill, B.E. .... was contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitutional Court held that the provision in section 28 of the State Enterprise Corporatisation Bill, B.E. .... on the repeal of the law establishing a State enterprise in the case of a resolution of the Council of Ministers to dissolve such a State enterprise did not mean that the law establishing the State enterprise was repealed by the resolution of the Council of Ministers. The resolution of the Council of Ministers to dissolve a State enterprise only constituted a condition for the repeal. The actual repeal of the law establishing the State enterprise would be in accordance with the time prescribed in the Royal Decree enacted for such purposes, being a time condition. When the condition and time condition had been completely satisfied, the law establishing the State enterprise would be repealed. When the drafting of the State enterprise corporatisation law, which was an Act, Royal Decree or Announcement of the National Executive Council, which proceeded under the State Enterprise Corporatisation Bill, B.E. .... was finally enacted as law, repeal of the laws would be effected by a law of the same hierarchy. Therefore, the

Constitutional Court held that section 28 paragraph one of the State Enterprise Corporatisation Bill, B.E. .... was neither contrary to nor inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

As the Constitutional Court had already held that the provision in section 28 paragraph one of the State Enterprise Corporatisation Bill, B.E. .... was neither contrary to nor inconsistent with the process of enacting an Act under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and that there was no provision contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the case did not necessitate a ruling on whether or not such a provision constituted the essential substance of such a Bill.

On the second issue, the Constitutional Court held that once a State enterprise had converted its capital into the form of shares in a company, section 22 paragraph three of the State Enterprise Corporatisation Bill, B.E. .... provided that the Ministry of Finance would hold all such shares. The company would still retain its status as a State enterprise in the form of a company carrying out the State's activities. Section 24 of the State Enterprise Corporatisation Bill, B.E. .... provided that the debts of the original State enterprise would be transferred to the new company. As such debts had been guaranteed by the Ministry of Finance, the Ministry of Finance would continue to provide the guarantees. Such provisions resulted in a variation of debts by a change in the debtor from the original State enterprise to the new company formed. Section 24's stipulation that the Ministry of Finance would continue to guarantee the debts in the new company was an act in accordance with the existing guarantee obligations because the newly formed company continued to carry out the previous activities of the original State enterprise, and the ownership also still remained with the State. The guarantee was a guarantee of the State's debts, not the debts of a private company. The case was therefore not a grant of special privileges to a private company and not an unjust discrimination contrary to or inconsistent with section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

On the third issue, the Constitutional Court held that section 87 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was a provision in Chapter V on "directive principles of fundamental State policies," whose contents provided guidelines for the enactment of laws and the determination of policies for the administration of State affairs. Numerous duties of the State which had to be performed or abstained were stated, e.g. the State should not engage in an activity in competition with the private sector or the State should only provide public utilities. Thus, where necessary for the purpose of maintaining the security of the State, preserving the common interest, or providing public utilities, the State could engage in an enterprise in competition with the private sector, which was an exception from the general principle that the State should not engage in an enterprise in competition with the private sector.

Section 13, section 16 and section 19 of the State Enterprise Corporatisation Bill, B.E. .... provided that the Council of Ministers had the power to select any State Enterprise

for corporatisation. In other words, the Council of Ministers, which was an organ of the State, possessed the power to consider carrying out the transfer of the State's enterprises to the private sector. However, this was not an empowerment of the Council of Ministers to establish a State agency to engage in an enterprise in competition with the private sector under section 87 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Therefore, the public interests relating to the maintenance of the security of the State, preservation of the common interest, or provision of public utilities did not have any relevance to the selection of a State enterprise for corporatisation. Section 13, section 16 and section 19 of the State Enterprise Corporatisation Bill, B.E. .... were therefore neither contrary to nor inconsistent with section 87 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

### **3. Ruling of the Constitutional Court**

By virtue of the reasons stated above, the Constitutional Court held the following opinion:

(1) section 28 paragraph one of the State Enterprise Corporatisation Bill, B.E. .... was neither contrary to nor inconsistent with the process for enactment of an Act under the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and did not contain any provision contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997);

(2) the provision in section 24 paragraph two of the State Enterprise Corporatisation Bill, B.E. .... was neither contrary to nor inconsistent with section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997); and

(3) the provisions in section 13, section 16 and section 19 of the State Enterprise Corporatisation Bill, B.E. .... were neither contrary to nor inconsistent with section 87 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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